

**SPONSORSHIP**

**APPEALS**

---

**Legal Services  
Immigration and Refugee Board  
July 1, 2002**

# TABLE OF CONTENTS

<b>I. INTRODUCTION</b> .....	<b>I-1</b>
<b>I.1. WHO MAY SPONSOR</b> .....	<b>I-1</b>
<b>I.2. WHO MAY BE SPONSORED</b> .....	<b>I-2</b>
<b>I.3. JURISDICTION OF IMMIGRATION APPEAL DIVISION IN SPONSORSHIP APPEALS</b> .....	<b>I-3</b>

## CHAPTER 1

<b>1. FINANCIAL REFUSALS</b> .....	<b>1-1</b>
<b>1.1. BACKGROUND TO CHANGES IN THE IMMIGRATION REGULATIONS</b> .....	<b>1-1</b>
<b>1.2. “OLD REGULATIONS”</b> .....	<b>1-2</b>
1.2.1. Introduction .....	1-2
1.2.2. Exemptions From Undertaking .....	1-3
1.2.3. Undertaking Requirements And Relevant Factors To Be Considered In The Determination .....	1-3
1.2.4. What Income May Be Considered For Comparison Against The LICO .....	1-5
1.2.4.1. General .....	1-5
1.2.4.2. Unemployment/Employment Insurance Benefits.....	1-7
1.2.5. Whose Income Can Be Included .....	1-8
1.2.5.1. Meeting the LICO .....	1-8
1.2.5.2. Meeting the Undertaking Generally .....	1-10
1.2.6. Size Of The Family Unit .....	1-11
1.2.7. Area Of Residence .....	1-13
<b>1.3. “NEW REGULATIONS”</b> .....	<b>1-14</b>
1.3.1. Introduction .....	1-14
1.3.2. Income And Financial Obligations.....	1-15
1.3.3. Exemptions.....	1-16
1.3.4. Sponsorship Requirements .....	1-16
1.3.4.1. Introduction.....	1-16
1.3.4.2. Section 5(2)(f) of the Regulations .....	1-17
1.3.4.2.1. How the LICO is determined .....	1-18
1.3.4.2.1.1.size of the family unit .....	1-18
1.3.4.2.1.2.area of residence .....	1-18
1.3.4.2.2. Whose income can be included .....	1-18
1.3.4.2.3. Visa officer’s recalculation.....	1-19
1.3.5. Process In Abeyance.....	1-19
<b>1.4. SECTION 19(1)(B) OF THE ACT</b> .....	<b>1-19</b>
<b>1.5. DEFAULT AND BREACH OF UNDERTAKING</b> .....	<b>1-23</b>

<b>1.6. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS</b> .....	<b>1-24</b>
1.6.1. "Old Regulations" .....	1-24
1.6.2. "New Regulations" .....	1-25
1.6.2.1. Current Financial Circumstances .....	1-25
1.6.2.1.1. LICO not met .....	1-26
1.6.2.1.2. LICO met .....	1-26
1.6.2.1.2.1. additional positive factors .....	1-28
1.6.2.1.2.2. absence of negative factors .....	1-29
1.6.2.2. <i>Johl</i> Factors .....	1-29

## CHAPTER 2

<b>2. CRIMINAL REFUSALS</b> .....	<b>2-1</b>
2.1. INTRODUCTION .....	2-1
2.2. JURISDICTION .....	2-2
2.3. STANDARD OF PROOF .....	2-3
2.4. EQUIVALENCY .....	2-4
2.5. EXCEPTIONS IN SECTIONS 19(1)(c.1) AND 19(2)(a.1) .....	2-10
2.6. CONVICTION .....	2-12
2.7. SECTION 19(1)(e) and (f) .....	2-13
2.8. SECTION 19(1)(i) .....	2-13
2.9. SECTION 19(2)(b) .....	2-14
2.10. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS .....	2-16

## CHAPTER 3

<b>3. MEDICAL REFUSALS</b> .....	<b>3-1</b>
3.1. MEDICAL EXAMINATION REQUIRED .....	3-1
3.2. MEDICAL INADMISSIBILITY .....	3-2
3.3. LEGAL VALIDITY OF THE REFUSAL .....	3-2
3.3.1. Technical Defects .....	3-2
3.3.1.1. Defective Refusal Letter .....	3-3

3.3.1.2.	Medical Notification Form-----	3-4
3.3.1.3.	Duty of fairness owed by Visa and Medical Officers-----	3-5
3.3.2.	Substantive Challenges-----	3-8
3.3.2.1.	The Diagnosis and Prognosis-----	3-8
3.3.2.2.	Medical Officers' Opinion-----	3-9
3.3.2.3.	Excessive Demands-----	3-12
3.3.2.4.	Mental Retardation Cases-----	3-17
3.3.2.5.	Section 22 of the <i>Immigration Regulations, 1978</i> -----	3-18
3.3.2.6.	Timing-----	3-19
<b>3.4.</b>	<b>COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS-----</b>	<b>3-20</b>

## CHAPTER 4

<b>4.</b>	<b>ADOPTIONS-----</b>	<b>4-1</b>
<b>4.1.</b>	<b>DEFINITIONS-----</b>	<b>4-1</b>
4.1.1.	<i>Convention on Protection of Children and Co-operation in respect of Intercountry Adoption</i> -----	4-2
<b>4.2.</b>	<b>INTERPRETATION OF THE REGULATIONS REGARDING ADOPTIONS-----</b>	<b>4-3</b>
4.2.1.	Introduction-----	4-3
4.2.2.	Genuine Parent and Child Relationship and Immigration Purpose-----	4-4
<b>4.3.</b>	<b>TRANSITIONAL PROVISIONS-----</b>	<b>4-8</b>
<b>4.4.</b>	<b>CHILD TO BE ADOPTED-----</b>	<b>4-9</b>
<b>4.5.</b>	<b>SPLITTING AND DELETING OF APPLICATIONS-----</b>	<b>4-12</b>
<b>4.6.</b>	<b>DETERMINING THE LEGAL VALIDITY OF THE ADOPTION-----</b>	<b>4-13</b>
4.6.1.	Foreign Law-----	4-14
4.6.1.1.	Glossary of Terms-----	4-14
4.6.1.2.	Proof of Foreign Law-----	4-14
4.6.1.3.	Declaratory Judgments and Deeds-----	4-17
4.6.1.4.	Presumption of Validity under Foreign Law-----	4-19
4.6.1.5.	Parent and Child Relationship Created by Operation of Law-----	4-21
<b>4.7.</b>	<b>POWER OF ATTORNEY-----</b>	<b>4-21</b>
<b>4.8.</b>	<b>REVOCAION OF ADOPTION-----</b>	<b>4-22</b>
<b>4.9.</b>	<b>PUBLIC POLICY-----</b>	<b>4-24</b>
<b>4.10.</b>	<b><i>CANADIAN CHARTER OF RIGHTS AND FREEDOMS</i>-----</b>	<b>4-25</b>
<b>4.11.</b>	<b>REPEAT APPEALS-----</b>	<b>4-26</b>

## CHAPTER 5

<b>5. FOREIGN MARRIAGES</b>	<b>5-1</b>
5.1. GENERALLY	5-1
5.2. DEFINITIONS	5-1
5.3. INTERPRETATION	5-1
5.3.1. Formal Validity	5-1
5.3.2. Registration	5-2
5.3.3. Declaratory judgments	5-3
5.3.4. Essential Validity	5-3
5.4. EXEMPTION FROM STRICT COMPLIANCE WITH LAW	5-4
5.5. TIMING	5-5

## CHAPTER 6

<b>6. MARRIAGES AND ENGAGEMENTS FOR IMMIGRATION PURPOSES</b>	<b>6-1</b>
6.1. THE LEGISLATIVE FRAMEWORK	6-1
6.1.1. Marriages for immigration purposes	6-1
6.1.2. Engagements for immigration purposes	6-1
6.2. THE JURISPRUDENCE	6-1
6.2.1. The tests	6-1
6.2.2. Marriages for immigration purposes	6-1
6.2.3. Engagements for immigration purposes	6-3
6.3. ASCERTAINING PURPOSE AND INTENTION: THE CRITERIA	6-3
6.3.1. Inconsistent or contradictory statements	6-4
6.3.2. Previous attempts by applicant to gain admission to Canada	6-4
6.3.3. Previous marriages	6-4
6.3.4. Arranged marriages	6-5
6.3.5. Mutual Interest	6-5
6.3.5.1. Knowledge about the other	6-5
6.3.5.2. Contact between the couple	6-5
6.3.5.3. Family ties	6-6
6.3.5.4. Financial support and exchange of gifts	6-6
6.3.5.5. Delay in submission of sponsorship application	6-6
6.3.5.6. Persistence in pursuing appeal	6-6
6.3.6. "Compatibility"	6-6
6.3.7. Summary	6-8
6.4. ASCERTAINING PURPOSE AND INTENTION: TIMING	6-8

<b>6.5. DISCRETIONARY JURISDICTION</b>	<b>6-9</b>
6.5.1. Marriages for immigration purposes	6-9
6.5.2. Engagements for immigration purposes	6-10
<b>6.6. CHANGE IN MARITAL STATUS</b>	<b>6-10</b>
6.6.1. Marriage after filing of undertaking of assistance, but before filing of application for permanent residence	6-10
6.6.2. Marriage after filing of undertaking of assistance and application for permanent residence, but before refusal of application	6-10
6.6.3. Marriage after refusal, but before hearing of appeal	6-11
6.6.4. Marriage after commencement, but before completion of hearing of appeal	6-11
6.6.5. Summary of change in status	6-11
6.6.6. Legal impediment to proposed marriage in Canada	6-11
6.6.7. Converting spousal application to fiancé(e) application	6-12
<b>6.7. REPEAT APPEALS</b>	<b>6-12</b>
6.7.1. Introduction	6-12
6.7.2. Doctrine of <i>Res Judicata</i>	6-12
6.7.3. Abuse of Process	6-14
6.7.4. Special Circumstances Exception to <i>Res Judicata</i> and Abuse of Process	6-15
6.7.5. Are there Special Circumstances? Procedure for Assessment of Evidence in Repeat Claims	6-15
6.7.6. Using <i>Res Judicata</i> and Abuse of Process	6-16
6.7.7. Evidentiary framework for the application of either <i>res judicata</i> or abuse of process: Examination of Decisive New Evidence	6-18
6.7.8. Summary	6-20

## CHAPTER 7

<b>7. RELATIONSHIP</b>	<b>7-1</b>
7.1. GENERALLY	7-1
7.2. NOT A MEMBER OF THE FAMILY CLASS	7-3
7.2.1. The Definition	7-3
7.2.2. Jurisdiction	7-5
7.3. TIMING	7-7
7.3.1. History of the Relevant Provisions of the <i>Immigration Regulations, 1978</i>	7-8
7.3.2. Determining the Relevant Provision to Apply	7-9
7.3.2.1. <i>Kahlon</i>	7-9
7.3.2.1.1. Exceptions	7-10
7.3.2.2. <i>Lidder</i>	7-10
7.3.2.3. <i>Lidder, Kahlon</i> and section 11 of SOR/92-101	7-10
7.3.2.4. Other Caselaw	7-11
7.4. SPECIFIC RELATIONSHIPS	7-12
7.4.1. “Unmarried Son” and “Unmarried Daughter”	7-12
7.4.2. “Dependent Daughter” and “Dependent Son”	7-12
7.4.2.1. Definitions	7-12
7.4.2.2. Timing	7-14
7.4.2.3. Student status	7-16

7.4.2.3.1. Requirement to be “continuously enrolled and in attendance” -----	7-18
7.4.2.3.1.1. When does the program of studies end and the period of interruption begin? -----	7-20
7.4.2.3.1.2. How is “an aggregate period not exceeding one year” calculated? -----	7-24
7.4.2.3.2. The Educational Institution -----	7-26
7.4.2.4. Physical or Mental Disability -----	7-27
7.4.3. “Spouse” -----	7-28
7.4.3.1. “Timing” -----	7-28
7.4.4. “Fiancé” -----	7-28
7.4.5. “Dependant” -----	7-29

## CHAPTER 8

<b>8. “NOT AN IMMIGRANT” -----</b>	<b>8-1</b>
<b>8.1. DEFINITIONS -----</b>	<b>8-1</b>
<b>8.2. INTENTION -----</b>	<b>8-1</b>
8.2.1. Meaning of “permanently” -----	8-2
8.2.2. Motivation -----	8-4
8.2.3. Timing -----	8-4
<b>8.3. JURISDICTION -----</b>	<b>8-5</b>
<b>8.4. FAIRNESS -----</b>	<b>8-6</b>

## CHAPTER 9

<b>9. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS -----</b>	<b>9-1</b>
<b>9.1. GENERALLY -----</b>	<b>9-1</b>
9.1.1. Definition -----	9-1
9.1.2. Exercise Of Discretionary Jurisdiction -----	9-2
9.1.3. Who May Benefit From Special Relief -----	9-6
9.1.3.1. « Splitting and Deleting » -----	9-6
9.1.4. Effect Of A Favourable Decision On Compassionate Or Humanitarian Grounds -----	9-7
<b>9.2. EVIDENCE -----</b>	<b>9-7</b>
9.2.1. Burden Of Proof -----	9-7
9.2.2. Evidence Existing At The Time Of The Appeal -----	9-8
<b>9.3. GENERAL PRINCIPLES -----</b>	<b>9-8</b>
<b>9.4. CONSIDERATIONS FOR SPECIAL RELIEF -----</b>	<b>9-12</b>
9.4.1. Generally Applicable -----	9-12
9.4.2. Medical Inadmissibility -----	9-13
9.4.3. Criminal Inadmissibility -----	9-14
9.4.4. Financial Refusals -----	9-14

## CHAPTER 10

### 10.VISA OFFICERS AND THE DUTY OF FAIRNESS -----10-1

10.1.	INTRODUCTION-----	10-1
10.2.	CONTENT OF THE DUTY OF FAIRNESS -----	10-1
10.2.1.	Generally -----	10-1
10.2.2.	Conflicting Statements at the Interview -----	10-2
10.2.3.	Use of Extrinsic Evidence-----	10-2
10.2.4.	Providing Opportunity to Demonstrate Rehabilitation -----	10-3
10.2.5.	Delay, Legitimate Expectations, Estoppel -----	10-4
10.2.6.	Bias-----	10-5
10.2.7.	He Who Decides Must Hear -----	10-6
10.2.8.	Knowing Case to be Met and Opportunity to Respond-----	10-7
10.2.9.	Interpretation at the Interview -----	10-9
10.2.10.	Other Procedural Matters -----	10-9
10.2.11.	Jurisdictional Questions-----	10-11
10.2.12.	Options -----	10-11

## CHAPTER 11

### 11. CONSENT OF MINISTER TO RETURN -----11-1

11.1.	GENERALLY-----	11-1
11.2.	STATUTORY PROVISIONS-----	11-1
11.3.	APPEAL RIGHTS -----	11-1
11.4.	LEGAL VALIDITY -----	11-1
11.5.	DISCRETIONARY JURISDICTION-----	11-2



## FOREWORD

The chapters of this Paper address the significant areas within the jurisdiction of the Immigration Appeal Division of the Immigration and Refugee Board in sponsorship appeals. The Paper does not purport to be an exhaustive treatment of the subjects addressed.

The following short forms and abbreviations are used throughout the Paper:

Short Forms and Abbreviations	
<i>Act</i>	<i>Immigration Act or Immigration and Refugee Protection Act,</i>
IAB	Immigration Appeal Board (predecessor to Immigration and Refugee Board)
IAD	Immigration Appeal Division of the Immigration and Refugee Board/Appeal Division
<i>IAD Rules</i>	<i>Immigration Appeal Division Rules</i>
IRB/Board	Immigration and Refugee Board
Minister	Minister of Citizenship and Immigration
<i>Regulations</i>	<i>Immigration Regulations, 1978 or Immigration Regulations, 2001</i>
<i>IRPA</i>	<i>Immigration and Refugee Protection Act</i>

\*\*\*\*\*

**Explanatory Note:** The Paper contains some references to the Immigration Manuals and Operations Memoranda of the Department of Citizenship and Immigration. These policy instruments do not bind the Immigration Appeal Division. Their inclusion is solely for the purpose of providing background on the immigration process. They are not evidence of the process actually followed in a particular case.

\*\*\*\*\*

### **NOTICE:**

Where the chapter consists of two parts, the first part deals with *Immigration Act* and its Regulations, the second part deals with *Immigration and Refugee Protection Act* and its Regulations.

### **Disclaimer**

The views expressed in this Paper are those of the individual contributors of the Legal Services Branch Immigration and Refugee Board. These views do not necessarily reflect the

**legal interpretation or policy of the Board nor are they necessarily shared by the Board or by its members.**

# SPONSORSHIP APPEALS

## Table of Contents

<b>I. INTRODUCTION</b>	<b>I-1</b>
<b>I.1. WHO MAY SPONSOR</b>	<b>I-1</b>
<b>I.2. WHO MAY BE SPONSORED</b>	<b>I-2</b>
<b>I.3. JURISDICTION OF IMMIGRATION APPEAL DIVISION IN SPONSORSHIP APPEALS</b>	<b>I-3</b>

## FOREWORD

The chapters of this Paper address the significant areas within the jurisdiction of the Immigration Appeal Division of the Immigration and Refugee Board in sponsorship appeals. The Paper does not purport to be an exhaustive treatment of the subjects addressed.

The following short forms and abbreviations are used throughout the Paper:

Short Forms and Abbreviations	
<i>Act</i>	<i>Immigration Act or Immigration and Refugee Protection Act,</i>
IAB	Immigration Appeal Board (predecessor to Immigration and Refugee Board)
IAD	Immigration Appeal Division of the Immigration and Refugee Board/Appeal Division
<i>IAD Rules</i>	<i>Immigration Appeal Division Rules</i>
IRB/Board	Immigration and Refugee Board
Minister	Minister of Citizenship and Immigration
<i>Regulations</i>	<i>Immigration Regulations, 1978 or Immigration Regulations, 2001</i>
<i>IRPA</i>	<i>Immigration and Refugee Protection Act</i>

\*\*\*\*\*

**Explanatory Note:** The Paper contains some references to the Immigration Manuals and Operations Memoranda of the Department of Citizenship and Immigration. These policy instruments do not bind the Immigration Appeal Division. Their inclusion is solely for the purpose of providing background on the immigration process. They are not evidence of the process actually followed in a particular case.

\*\*\*\*\*

### **NOTICE:**

Where the chapter consists of two parts, the first part deals with *Immigration Act* and its Regulations, the second part deals with *Immigration and Refugee Protection Act* and its Regulations.

### **Disclaimer**

The views expressed in this Paper are those of the individual contributors of the Legal Services Branch Immigration and Refugee Board. These views do not necessarily reflect the

**legal interpretation or policy of the Board nor are they necessarily shared by the Board or by its members.**

# SPONSORSHIP APPEALS

## I. INTRODUCTION

### I.1. WHO MAY SPONSOR

The definition of “sponsor” which came into force on April 1, 1997,<sup>1</sup> stipulates two separate categories of sponsors, either

- a Canadian citizen or permanent resident at least 19 years of age and residing in Canada exclusively and without interruption<sup>2</sup> from the date of giving the undertaking until the sponsored relative is granted landing; or
- a Canadian citizen at least 19 years of age<sup>3</sup> who is sponsoring a specified relative<sup>4</sup> and who resided exclusively outside Canada at the time of giving the undertaking and will reside in Canada when the sponsored relative is granted landing.<sup>5</sup>

A sponsor must give an undertaking to the Minister on behalf of a sponsored relative (member of the family class).<sup>6</sup> A sponsor must meet certain requirements<sup>7</sup> to be authorized to

---

<sup>1</sup> Changes brought about by *Regulations Amending the Immigration Regulations, 1978*, SOR/97-145. Refer to the definition of “sponsor” in the Regulations for the precise definition.

<sup>2</sup> The expression “exclusively and without interruption” does not change the meaning of “reside” as interpreted in earlier case-law of the Appeal Division but does mean a sponsor should reside only in Canada and must not break the continuity of residence: *Deng, Gang-Yi v. M.C.I.* (IAD T99-08174), Kelley, May 31, 2001. A brief physical absence does not constitute interruption: *Malik, Inayatullah v. M.C.I.* (IAD T98-02560), Sangmuah, September 2, 1999, but a two-year absence abroad does: *Nallathamby, Manohari v. M.C.I.* (IAD T98-00717), Whist, Muzzi, Aterman, October 15, 1999.

<sup>3</sup> The Appeal Division had no jurisdiction where the sponsor was 18 years old when she filed an application to sponsor her husband: *Osmani, Mimoza v. M.C.I.* (IAD T99-13944), Hoare, March 14, 2001.

<sup>4</sup> A member of the family class referred to in section 6(3) of the Regulations.

<sup>5</sup> The former definition of “sponsor” read as follows:

“sponsor” means a Canadian citizen or permanent resident who is at least 19 years of age, who resides in Canada and who sponsors an application for landing.

The new definition of “sponsor” may apply even if the undertaking or application for landing was filed before April 1, 1997: *Lau, Hong Nam v. M.C.I.* (IAD T97-06338), Kalvin, February 5, 1999 (new definition was not detrimental to sponsor, therefore new definition was applied). See also *Ramesh, Vivekanandarajah v. M.C.I.* (IAD T98-03815), Whist, Boire, Sangmuah, March 18, 1999 (undertaking signed March 10, 1997 and new definition was applied); *Vijayasegar, Vijayaratnam Starley v. M.C.I.* (IAD T98-06854), Whist, June 29, 1999 (sponsor given option of proceeding under new or old definition); and *Nallathamby, supra*, footnote 2 (both new and old definitions were considered).

<sup>6</sup> Members of the family class are discussed in greater detail in chapter 7, “Relationship.”

<sup>7</sup> See chapter 1, “Financial Refusals,” for a more detailed discussion.

sponsor an application for landing of a member of the family class. If the sponsor does not meet the requirements of the Regulations for sponsoring, the application for landing may be refused.<sup>8</sup>

Under the former regulatory scheme, where both a sponsor and the sponsor's spouse had signed the undertaking,<sup>9</sup> the spouse was able to pursue an appeal from the refusal of an application for landing if the sponsor died or withdrew the sponsorship, or the parties divorced, provided the applicant was a member of the family class in relation to the spouse.<sup>10</sup> The same concept has been applied under the current Regulations.<sup>11</sup>

## I.2. WHO MAY BE SPONSORED

A member of the family class<sup>12</sup> may file a sponsored application for landing (also known as an application for permanent residence). An applicant must be a member of the family class at the time of the application for permanent residence – they cannot qualify retroactively.<sup>13</sup> They must also satisfy eligibility requirements at the date of the visa officer's decision.<sup>14</sup> The member of the family class may include dependants<sup>15</sup> in the application for landing. A member of the family class and accompanying dependants are eligible for immigrant visas provided the member

---

<sup>8</sup> By virtue of section 77(1)(a) of the *Immigration Act*. One of the requirements of the Regulations is that a sponsor meets the definition of “sponsor” (see section 5(2)(a)). If a sponsor is refused for not residing in Canada, the Appeal Division may consider the granting of discretionary relief to overcome the refusal: *Lau, supra*, footnote 5; *Vijayasegar, supra*, footnote 5. To the same effect, see *Hui, Jenkin Ching-Kim v. M.C.I.* (IAD V92-01452), Ho, March 30, 1995, relying on *M.E.I. v. Myers*, [1980] 2 F.C. 232 (C.A.); *Athwal, Ajaib Singh v. M.C.I.* (IAD V96-02897), Clark, January 5, 1998; and *Kazi, Mohshina v. M.C.I.* (IAD T96-05541), Townshend, March 6, 1998; *Sampson, Yvonne Phulo v. M.C.I.* (IAD T99-09723), Sangmuah, February 26, 2001.

<sup>9</sup> In *Woo, John v. M.C.I.* (IAD V95-01738), Boscaroli, July 18, 1997, the sponsor's wife had not co-signed the undertaking therefore could not be considered a co-sponsor.

<sup>10</sup> *Braich, Nirmal Singh (deceased) and Braich, Mohinder Kaur v. M.E.I.* (IAD V89-00893), Wlodyka, August 11, 1993; *Sidhu, Jagjit Singh (deceased) and Sidhu, Surjit Kaur v. M.E.I.* (IAD V92-00644), Clark, Verma, Ho, May 11, 1994. In both cases, the applicant was the spouse's adopted son and thus a member of the family class in relation to the spouse. See also *Takhtar, Manjit Kaur v. M.C.I.* (IAD V93-01116), Verma, December 14, 1994 (original sponsor, the husband, left Canada and his wife as co-sponsor was able to appeal her son's refusal). There is no reason why there cannot be joint sponsorship of a husband and wife in regard to their sponsored child: *Sandhu, Gurcharan Singh v. M.E.I.* (I.A.B. 87-9066), Eglington, Teitelbaum, Sherman, November 13, 1987, but this is not to suggest spouses have a right to pursue sponsorships entirely independent of one another: *Berar, Komal Singh v. M.C.I.* (IAD V95-01106), Bartley, July 23, 1997.

<sup>11</sup> *Khammouny, Souvath v. M.C.I.* (IAD VA0-00481), Cochran, October 18, 2000.

<sup>12</sup> Section 2(1) of the Regulations defines “member of the family class.”

<sup>13</sup> *M.C.I. v. Subala, Josephine* (F.C.T.D., no. IMM-3164-96), Rothstein, July 22, 1997; *Akyeampong, Mercy Gyan Mans v. M.C.I.* (IAD T98-04409), D'Ignazio, May 26, 1999; *Gu, Wenyan v. M.C.I.* (IAD V94-01149), Dossa, June 11, 1997 (adoption during processing cannot validate applicant's status); *Boateng, Manu v. M.C.I.* (IAD T98-02002), Buchanan, March 9, 1999 (must be fiancé at time of application). But see *Siddiqui, Badar Ul Haq v. M.C.I.* (IAD TA0-00050), D'Ignazio, June 4, 2001, where the validity of the marriage was determined at the time of the hearing.

<sup>14</sup> *Mahmood, Zia v. M.C.I.* (F.C.T.D., no. IMM-4616-99), Evans, August 23, 2000 (person ceased to qualify as member of family class under regulation 2(1)(h)).

<sup>15</sup> As defined in section 2(1) of the Regulations.

of the family class and all dependants, whether accompanying or not, are admissible and otherwise meet the requirements of the *Immigration Act* and Regulations.<sup>16</sup> A visa officer may refuse an application for landing if members of the family class or dependants are inadmissible.

### **I.3. JURISDICTION OF IMMIGRATION APPEAL DIVISION IN SPONSORSHIP APPEALS**

In the event of a refusal<sup>17</sup> of a sponsored application for landing, the sponsor must be informed of the reasons for the refusal.<sup>18</sup> There is a right of appeal to the Appeal Division from a refusal of a sponsored application for landing made by a member of the family class.<sup>19</sup> Section 77(3) of the *Immigration Act* sets out the grounds of appeal as

- any ground that involves a question of law, fact, or mixed law and fact; and
- the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.<sup>20</sup>

The Appeal Division is a quasi-judicial tribunal and a court of record with the powers of a superior court as regards the matters set out in section 69.4(3) of the *Immigration Act*.<sup>21</sup> It has sole and exclusive jurisdiction to hear and determine all questions of law and fact

---

<sup>16</sup> See section 6(1)(a) of the Regulations. These provisions are within the regulation-making authority of the Governor in Council: *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. See also *Lim, Le Shan v. M.C.I.* (F.C.T.D., no IMM-6691-98), MacKay, September 3, 1999.

<sup>17</sup> A letter that a visa office cannot continue processing an application in its present form does not constitute a refusal: *Dosanjh, Sarbjit Kaur v. M.C.I.* (IAD V96-00240), Clark, November 24, 1997. But an outright cancellation may constitute a refusal giving rise to an appeal: *Kundan, Harjinder Singh v. M.E.I.* (IAB 79-6219), Howard, Campbell, Hlady, December 9, 1980. See also *M.C.I. v. Brooks, Virginia* (IAD T98-01992), Aterman, D'Ignazio, Buchanan, June 10, 1999; *M.C.I. v. Ruiloba Pena, Guillermo Patricio* (IAD M98-06731), Lamarche, January 6, 1999 (a refusal of Ministerial exemption is not a refusal of an application for permanent residence and there are no legitimate expectations of a right of appeal: *Chou, Huei Ying v. M.C.I.* (IAD V99-02454), Clark, June 16, 2000); *Hassam, Nehaz v. M.C.I.* (IAD T96-01366), D'Ignazio, May 26, 1999 (after Federal Court sets aside a refusal on judicial review of visa officer's decision, there is no refusal to appeal to the IAD).

<sup>18</sup> See section 77(1) of the Act and the exception in section 77(2).

<sup>19</sup> See section 77(3) of the Act. There are some exceptions, however, set out in sections 77(3.01) and (3.1) of the Act. There is no appeal from a visa officer's deletion of a dependant from an application for landing or from a refusal of a dependant unless the dependant is also a member of the family class in his or her own right in relation to the sponsor: *Bailon, Leonila Catillo v. M.E.I.* (F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986; *Chow, Sau Fa v. M.C.I.* (F.C.T.D., no. IMM-5200-97), Reed, July 29, 1998. It matters not that the remaining applicants accepted visas and came to Canada or declined visas while their sponsor launched an appeal, the Appeal Division lacks jurisdiction to entertain the appeal in respect of the dependant: *Dosanjh, supra*, footnote 17. See also the discussion in chapter 7, "Relationship," section 7.4.5., "Dependant."

<sup>20</sup> Also referred to as "so-called equitable relief," or "h & c." This is the discretionary jurisdiction of the Appeal Division.

<sup>21</sup> For example, the Appeal Division may order the Minister to produce the sponsorship appeal record in the event of delay, but it has no power to award costs: *Wong, Siu-Man v. M.C.I.* (IAD T95-05924), Bartley, November 20, 1995.



arising in relation to refusals of sponsored applications for landing,<sup>22</sup> including questions concerning its jurisdiction.<sup>23</sup> In its discretion, the Appeal Division may conduct hearings by videoconference, if it is a suitable medium in the circumstances.<sup>24</sup>

On an appeal to the Appeal Division, a ground of refusal which challenges an applicant's ability to satisfy the relevant definition of "member of the family class" is a "jurisdictional ground." On the other hand, a "non-jurisdictional ground" concerns an applicant's admissibility under section 19(1) of the Act or another provision of the Act or Regulations. If a jurisdictional ground of refusal is upheld by the Appeal Division, the Appeal Division cannot exercise its compassionate or humanitarian jurisdiction to grant special relief. To do so would expand the family class beyond its defined limits.<sup>25</sup> A valid non-jurisdictional ground, however, may be overcome with the granting of special relief<sup>26</sup>.

A sponsorship appeal to the Appeal Division is a hearing *de novo* in a broad sense.<sup>27</sup> It is open to the Appeal Division to consider issues which were not before the visa officer.<sup>28</sup> The 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.<sup>29</sup> As a general rule, the appeal is decided on the facts as they exist at the time of the hearing.<sup>30</sup> The Appeal Division errs if it neglects to explain why it prefers a sponsor's evidence to the conflicting evidence of a visa officer.<sup>31</sup>

---

<sup>22</sup> A visa officer's decision may also be challenged by way of judicial review to the Trial Division of the Federal Court. In this regard, see section 82.1(2) of the Act and *Khakoo, Gulshan M. v. M.C.I.* (F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995. The applicant for landing has the right to seek judicial review.

<sup>23</sup> *Sheriff, Sithi Zehra v. M.E.I.* (F.C.A., no. A-152-93), Strayer, Linden, McDonald, November 2, 1995. Reported: *Sheriff v. Canada (Minister of Employment and Immigration)* (1995), 31 Imm. L.R. (2d) 246 (F.C.A.).

<sup>24</sup> *M.C.I. v. King, David Daniel* (IAD T98-07875), Aterman, May 27, 1999.

<sup>25</sup> *Garcia, Elsa v. M.E.I.* (I.A.B. 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979. The Appeal Division should decide jurisdiction before considering whether there has been a denial of natural justice by a visa officer: *M.C.I. v. Petrea, Marian* (F.C.T.D., no. IMM-4395-00), Blanchard, December 13, 2001.

<sup>26</sup> If a non-accompanying dependant who has been deleted from the application for landing of the remaining applicants is inadmissible, it is open to the Appeal Division to grant special relief in respect of the remaining applicants: *Singh, Nirbhe v. M.C.I.* (IAD V96-00985), Jackson, December 15, 1997.

<sup>27</sup> *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 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.

<sup>28</sup> *Pabla, Dial v. M.C.I.* (F.C.T.D., no. IMM-1210-00), Blais, December 12, 2000.

<sup>29</sup> See section 69.4 (3)(c) of the Act.

<sup>30</sup> *Kahlon, supra*, footnote 27; the main exception being medical refusals. In this respect, see chapter 3, "Medical Refusals."

<sup>31</sup> *M.C.I. v. Shi, Kai Hang* (F.C.T.D., no. IMM-3603-96), Pinard, May 16, 1997; *M.C.I. v. White, Robert Edward* (F.C.T.D., no. IMM-3933-97), Pinard, May 25, 1998. It may be expected that applicants being interviewed would have a clearer memory of what occurred at the interview than the visa officer conducting the interview: *Parihar, Mohinder Kaur v. M.E.I.* (F.C.T.D., no. T-1987-91), Reed, September 16, 1991.

The 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.<sup>32</sup>

The Appeal Division may allow or dismiss a sponsorship appeal. It may allow in law or by granting special relief, or both. The Appeal Division must give reasons for its decision.<sup>33</sup> If the Appeal Division allows an appeal, the matter goes back for further processing and an assessment of whether the requirements of the *Immigration Act* and Regulations, other than those requirements upon which the decision of the Appeal Division has been given, are met.<sup>34</sup> If the Appeal Division dismisses an appeal and a new application for landing is filed, refused on the same ground and appealed again, if no new evidence is adduced at the second appeal, the appeal may be dismissed as an abuse of process;<sup>35</sup> if new evidence is adduced, the second appeal may be dismissed using the doctrine of *res judicata* unless special circumstances apply.<sup>36</sup> A decision allowing 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<sup>37</sup> unless new material facts come to the attention of the visa officer.<sup>38</sup>

---

<sup>32</sup> *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.

<sup>33</sup> See section 77(4) of the Act.

<sup>34</sup> See section 77(5) of the Act. 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.* (F.C.A., no. A-229-01), Malone, Rothstein, Noël, January 14, 2002; 2002 FCA 8

<sup>35</sup> *Kaloti, Yaspal Singh v. M.C.I.* (F.C.A., no. A-526-98), Décary, Sexton, Evans, March 13, 2000. 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 Appeal Division erred in finding abuse of process.

<sup>36</sup> 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, supra*, footnote 16 (*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 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.

<sup>37</sup> *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. See the

The Appeal Division has no jurisdiction to reopen a sponsorship appeal for receipt of additional evidence.<sup>39</sup>

A decision of the Appeal Division may be challenged by way of judicial review to the Trial Division of the Federal Court with leave of the Court.<sup>40</sup>

---

discussion in chapter 9, “Compassionate or Humanitarian Considerations,” section 9.1.4., “Effect of a Favourable Decision on Compassionate or Humanitarian Grounds.”

<sup>38</sup> *Au, supra*, footnote 34.

<sup>39</sup> *Parmar, Satkar Kaur v. M.C.I.* (IAD V94-01466), Clark, March 18, 1999; *Gill, Harjit Singh v. M.C.I.* (IAD T96-03876), Aterman, May 29, 2000.

<sup>40</sup> See section 82.1(1) of the Act. The appropriate standard of review is correctness when the Appeal Division is dealing with a question of law, reasonableness simpliciter for mixed fact and law, and findings of fact should not be overturned unless they are clearly wrong: *Khangura, Rishpal Singh v. M.C.I.* (F.C.T.D., no. IMM-3401-99), O’Keefe, June 8, 2000.

## TABLE OF CASES: INTRODUCTION

### CASES

<i>Akyeampong, Mercy Gyan Mans v. M.C.I.</i> (IAD T98-04409), D’Ignazio, May 26, 1999.....	I-2
<i>Athwal, Ajaib Singh v. M.C.I.</i> (IAD V96-02897), Clark, January 5, 1998.....	I-2
<i>Au, Shu Foo v. M.C.I.</i> (F.C.A., no. A-229-01), Malone, Rothstein, Noël, January 14, 2002; 2002 FCA 8.....	I-5
<i>Bailon, Leonila Catillo v. M.E.I.</i> (F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986.....	I-3
<i>Bath, Ragbir Singh v. M.C.I.</i> (IAD V95-01993), Lam, December 8, 1997.....	I-5
<i>Berar, Komal Singh v. M.C.I.</i> (IAD V95-01106), Bartley, July 23, 1997.....	I-2
<i>Boateng, Manu v. M.C.I.</i> (IAD T98-02002), Buchanan, March 9, 1999.....	I-2
<i>Braich, Nirmal Singh (deceased) and Braich, Mohinder Kaur v. M.E.I.</i> (IAD V89-00893), Wlodyka, August 11, 1993.....	I-2
<i>Brooks: M.C.I. v. Brooks, Virginia</i> (IAD T98-01992), Aterman, D’Ignazio, Buchanan, June 10, 1999.....	I-3
<i>Chou, Hwei Ying v. M.C.I.</i> (IAD V99-02454), Clark, June 16, 2000).....	I-3
<i>Chow, Sau Fa v. M.C.I.</i> (F.C.T.D., no. IMM-5200-97), Reed, July 29, 1998.....	I-3
<i>Dang: M.C.I. v. Dang, Thi Kim Anh</i> (F.C.T.D., no. IMM-3113-99), Dawson, July 20, 2000.....	I-5
<i>Deng, Gang-Yi v. M.C.I.</i> (IAD T99-08174), Kelly, May 31, 2001.....	I-1
<i>Dhaliwal, Baljit Kaur v. M.C.I.</i> (F.C.T.D., no. IMM-1760-01), Campbell, December 21, 2001.....	I-5
<i>Dosanjh, Sarbjit Kaur v. M.C.I.</i> (IAD V96-00240), Clark, November 24, 1997.....	I-3
<i>Garcia, Elsa v. M.E.I.</i> (I.A.B. 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979.....	I-4
<i>Gill, Harjit Singh v. M.C.I.</i> (IAD T96-03876), Aterman, May 29, 2000.....	I-6
<i>Gu, Wenyan v. M.C.I.</i> (IAD V94-01149), Dossa, June 11, 1997.....	I-2
<i>Hassam, Nehaz v. M.C.I.</i> (IAD T96-01366), D’Ignazio, May 26, 1999.....	I-3
<i>Hui, Jenkin Ching-Kim v. M.C.I.</i> (IAD V92-01452), Ho, March 30, 1995.....	I-2
<i>Jhammat, Harjinder Kaur v. M.E.I.</i> (F.C.T.D., no. T-1669-88), Muldoon, October 13, 1988.....	I-5
<i>Kahlon, Darshan Singh v. M.E.I.</i> (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: <i>Kahlon v. Canada (Minister of Employment and Immigration)</i> (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).....	I-4
<i>Kaloti, Yaspal Singh v. M.C.I.</i> (F.C.A., no. A-526-98), Décary, Sexton, Evans, March 13, 2000.....	I-5
<i>Kaloti, Yaspal Singh v. M.C.I.</i> (F.C.T.D., no. IMM-4932-97), Dubé, September 8, 1998.....	I-5
<i>Kazi, Mohshina v. M.C.I.</i> (IAD T96-05541), Townshend, March 6, 1998.....	I-2
<i>Khakoo, Gulshan M. v. M.C.I.</i> (F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995.....	I-4
<i>Khammountry, Souvath v. M.C.I.</i> (IAD VA0-00481), Cochran, October 18, 2000.....	I-2
<i>Khangura, Rishpal Singh v. M.C.I.</i> (F.C.T.D., no. IMM-3401-99), O’Keefe, June 8, 2000.....	I-6
<i>King: M.C.I. v. King, David Daniel</i> (IAD T98-07875), Aterman, May 27, 1999.....	I-4
<i>Kular, Jasmal v. M.C. I.</i> (F.C.T.D., no., IMM-4990-99), Nadon, August 30, 2000.....	I-5
<i>Kundan, Harjinder Singh v. M.E.I.</i> (IAB 79-6219), Howard, Campbell, Hlady, December 9, 1980.....	I-3

<i>Lau, Hong Nam v. M.C.I.</i> (IAD T97-06338), Calvin, February 5, 1999.....	I-1, I-2
<i>Lim, Le Shan v. M.C.I.</i> (F.C.T.D., no IMM-6691-98), MacKay, September 3, 1999 .....	I-3
<i>Mahmood, Zia v. M.C.I.</i> (F.C.T.D., no. IMM-4616-99), Evans, August 23, 2000 .....	I-2
<i>Malik, Inayatullah v. M.C.I.</i> (IAD T98-02560), Sangmuah, September 2, 1999 .....	I-1
<i>Mangat, Parminder Singh v. M.E.I.</i> (F.C.T.D., no. T-153-85), Strayer, February 25, 1985.....	I-5
<i>Meyers: M.E.I. v. Myers</i> , [1980] 2 F.C. 232 (C.A.) .....	I-2
<i>Nallathamby, Manohari v. M.C.I.</i> (IAD T98-00717), Whist, Muzzi, Aterman, October 15, 1999.....	I-1
<i>Osmani, MIMOZA v. M.C.I.</i> (IAD T99-13944), Hoare, March 14, 2001 .....	I-1
<i>Pabla, Dial v. M.C.I.</i> (F.C.T.D., no. IMM-1210-00), Blais, December 12, 2000.....	I-4
<i>Parihar, Mohinder Kaur v. M.E.I.</i> (F.C.T.D., no. T-1987-91), Reed, September 16, 1991.....	I-4
<i>Parmar, Satkar Kaur v. M.C.I.</i> (IAD V94-01466), Clark, March 18, 1999.....	I-6
<i>Petrea: M.C.I. v. Petrea, Marian</i> (F.C.T.D., no. IMM-4395-00), Blanchard, December 13, 2001 .....	I-4
<i>Ramesh, Vivekanandarajah v. M.C.I.</i> (IAD T98-03815), Whist, Boire, Sangmuah, March 18, 1999 .....	I-1
<i>Ruiloba Pena: M.C.I. v. Ruiloba Pena, Guillermo Patricio</i> (IAD M98-06731), Lamarche, January 6, 1999.....	I-3
<i>Sampson, Yvonne Phulo v. M.C.I.</i> (IAD T99-09723), Sangmuah, February 26, 2001.....	I-2
<i>Sandhu, Gurcharan Singh v. M.E.I.</i> (I.A.B. 87-9066), Eglinton, Teitelbaum, Sherman, November 13, 1987.....	I-2
<i>Sekhon, Amrik Singh v. M.C.I.</i> (F.C.T.D., no. IMM-1982-01), McKeown, December 10, 2001.....	I-5
<i>Sheriff, Sithi Zehra v. M.E.I.</i> (F.C.A., no. A-152-93), Strayer, Linden, McDonald, November 2, 1995. Reported: <i>Sheriff v. Canada (Minister of Employment and Immigration)</i> (1995), 31 Imm. L.R. (2d) 246 (F.C.A.).....	I-4
<i>Shi: M.C.I. v. Shi, Kai Hang</i> (F.C.T.D., no. IMM-3603-96), Pinard, May 16, 1997 .....	I-4
<i>Siddiqui, Badar Ul Haq v. M.C.I.</i> (IAD TA0-00050), D'Ignazio, June 4, 2001 .....	I-2
<i>Sidhu, Jagjit Singh (deceased) and Sidhu, Surjit Kaur v. M.E.I.</i> (IAD V92-00644), Clark, Verma, Ho, May 11, 1994.....	I-2
<i>Singh, Ahmar v. The Queen</i> (F.C.A., no. A-1014-96), Strayer, Isaac, Linden, November 5, 1998 .....	I-3
<i>Singh, Ahmar v. The Queen</i> (F.C.T.D., no. T-1495-95), Muldoon, December 2, 1996 .....	I-3
<i>Singh, Nirbhe v. M.C.I.</i> (IAD V96-00985), Jackson, December 15, 1997.....	I-4
<i>Subala: M.C.I. v. Subala, Josephine</i> (F.C.T.D., no. IMM-3164-96), Rothstein, July 22, 1997.....	I-2
<i>Takhtar, Manjit Kaur v. M.C.I.</i> (IAD V93-01116), Verma, December 14, 1994 .....	I-2
<i>Valdez, Enrico Villanueva v. M.C.I.</i> (F.C.T.D., no. IMM-5430-97), Reed, March 12, 1999.....	I-4
<i>Vijayasegar, Vijayaratnam Starley v. M.C.I.</i> (IAD T98-06854), Whist, June 29, 1999 .....	I-1
<i>White: M.C.I. v. White, Robert Edward</i> (F.C.T.D., no. IMM-3933-97), Pinard, May 25, 1998 .....	I-4
<i>Wong, Chun Fai v. M.E.I.</i> (F.C.T.D., no. T-2871-90), Jerome, February 26, 1991 .....	I-5
<i>Wong, Siu-Man v. M.C.I.</i> (IAD T95-05924), Bartley, November 20, 1995 .....	I-3
<i>Woo, John v. M.C.I.</i> (IAD V95-01738), Boscariol, July 18, 1997.....	I-2

# CHAPTER 1

## Table of Contents

<b>1. FINANCIAL REFUSALS</b>	<b>1-1</b>
<b>1.1. BACKGROUND TO CHANGES IN THE IMMIGRATION REGULATIONS</b>	<b>1-1</b>
<b>1.2. “OLD REGULATIONS”</b>	<b>1-2</b>
1.2.1. Introduction	1-2
1.2.2. Exemptions From Undertaking	1-3
1.2.3. Undertaking Requirements And Relevant Factors To Be Considered In The Determination	1-3
1.2.4. What Income May Be Considered For Comparison Against The LICO	1-5
1.2.4.1. General	1-5
1.2.4.2. Unemployment/Employment Insurance Benefits	1-7
1.2.5. Whose Income Can Be Included	1-8
1.2.5.1. Meeting the LICO	1-8
1.2.5.2. Meeting the Undertaking Generally	1-10
1.2.6. Size Of The Family Unit	1-11
1.2.7. Area Of Residence	1-13
<b>1.3. “NEW REGULATIONS”</b>	<b>1-14</b>
1.3.1. Introduction	1-14
1.3.2. Income And Financial Obligations	1-15
1.3.3. Exemptions	1-16
1.3.4. Sponsorship Requirements	1-16
1.3.4.1. Introduction	1-16
1.3.4.2. Section 5(2)(f) of the Regulations	1-17
1.3.4.2.1. How the LICO is determined	1-18
1.3.4.2.1.1. size of the family unit	1-18
1.3.4.2.1.2. area of residence	1-18
1.3.4.2.2. Whose income can be included	1-19
1.3.4.2.3. Visa officer’s recalculation	1-19
1.3.5. Process In Abeyance	1-19
<b>1.4. SECTION 19(1)(B) OF THE ACT</b>	<b>1-20</b>
<b>1.5. DEFAULT AND BREACH OF UNDERTAKING</b>	<b>1-23</b>
<b>1.6. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS</b>	<b>1-24</b>
1.6.1. “Old Regulations”	1-24
1.6.2. “New Regulations”	1-25
1.6.2.1. Current Financial Circumstances	1-25
1.6.2.1.1. LICO not met	1-26
1.6.2.1.2. LICO met	1-26
1.6.2.1.2.1. additional positive factors	1-28
1.6.2.1.2.2. absence of negative factors	1-29
1.6.2.2. <i>Johl</i> Factors	1-29

# CHAPTER 1

## 1. FINANCIAL REFUSALS

### 1.1. BACKGROUND TO CHANGES IN THE IMMIGRATION REGULATIONS

On April 1, 1997, changes to the Immigration Regulations came into force in respect of all sponsorships filed after April 18, 1997. The effect of the changes is to impose new financial requirements both on sponsors and on the family members whom they sponsor.

Prior to the changes, the Regulations governing the financial ability of sponsors required that the sponsor

- give an undertaking,
- not be in default in respect of obligations assumed by him under previous undertakings and
- be, in the opinion of an immigration officer, able to fulfill his undertaking.<sup>1</sup>

In forming an opinion as to whether a sponsor would be able to fulfill an undertaking, an immigration officer was required to take into account the Low Income Cut-Off figures published by Statistics Canada.<sup>2</sup>

This open-ended statement of criteria permitted decision makers to consider not only whether the income of the appellant and co-signer met the Low Income Cut-Off, but also to consider a broad range of financial circumstances in assessing the ability of an appellant to fulfill the undertaking.<sup>3</sup> Further, where the financial requirements of the Regulations were met at the time of the appeal hearing, a decision maker, exercising the Appeal Division's *de novo* jurisdiction, would have allowed the appeal in law.

With the amendments, the open-ended language in the previous Regulations has been replaced by very detailed provisions. The amendments set out those elements which are to be included and excluded in the calculation of a sponsor's income and financial obligations.<sup>4</sup> Additional criteria have been introduced which have the effect of preventing sponsorship in certain circumstances.<sup>5</sup>

---

<sup>1</sup> For the full text of the Regulation, please refer to s.6(1)(b) of the Immigration Regulations, 1978.

<sup>2</sup> For the full text of the Regulation, please refer to s.6(2) of the Immigration Regulations, 1978.

<sup>3</sup> For a discussion of the factors to be taken into account when assessing the ability of a sponsor to fulfill the undertaking, please see Part 1.1.3 of this chapter.

<sup>4</sup> See the definitions of "gross Canadian income" and "payments made or due on account of financial obligations", s.2(1) of the Regulations.

<sup>5</sup> s.5(2), Regulations.

The assessment of a sponsor's ability to meet the financial requirements of sponsorship now depends upon a non-discretionary calculation of income and liabilities by an immigration officer as well as upon the existence of a written agreement between the sponsor and the person whom he or she seeks to sponsor.<sup>6</sup>

The statutory language of s.5(2)(f) also creates an exception to the principle of a *de novo* hearing by making admissibility a function of circumstances which are fixed in time: the current financial circumstances of an appellant are irrelevant to a determination of admissibility, as the financial circumstances of an appellant in the 12 month period preceding the filing of an undertaking determine the admissibility of applicants. The Appeal Division's analysis of the legal validity of a refusal is now limited to a review of the financial circumstances of an appellant in the 12 months preceding the filing of an undertaking.

This chapter deals with financial refusals under both the "Old Regulations" and the "New Regulations" (in force April 1, 1997) since the Appeal Division hears and decided appeals under both Regulations.

## 1.2. "OLD REGULATIONS"<sup>7</sup>

### 1.2.1. Introduction

An undertaking<sup>8</sup> is defined in section 2(1) of the *Immigration Regulations, 1978* as:

[...]

(ii)[...]an undertaking in writing given to the Minister to make provision for the lodging, care and support of a member of the family class and the member's dependants for a period not exceeding ten years, as determined by an immigration officer[...].<sup>9</sup>

Financial refusals may be founded on section 6(1)(b)(ii) or (iii)<sup>10</sup> of the *Immigration Regulations, 1978* or section 19(1)(b)<sup>11</sup> of the *Immigration Act*.

---

<sup>6</sup> ss. 5(2)(f) and 5(2)(h), Regulations.

<sup>7</sup> This part of the chapter covers the law prior to the amendments made to the *Immigration Regulations, 1978* in April 1997. This law continues to be relevant in appeals concerning applications that are governed by the old Regulations. For a discussion of the changes brought about by the amendments, see section 1.2., "New Regulations."

<sup>8</sup> Refer to chapter I, "Introduction," for a brief explanation of the sponsorship process.

<sup>9</sup> See subparagraph (a)(i) of the definition of "undertaking" for the applicable definition in the Province of Quebec.

<sup>10</sup> Section 6(1)(b) of the Regulations reads in part as follows:

6.(1) [...] a visa officer may issue an immigrant visa [...] if

[...]

(b) the sponsor

(i) has given an undertaking,



### 1.2.2. Exemptions From Undertaking

A sponsor is exempt from the requirement to fulfil an undertaking if the following persons are sponsored: (i) the sponsor's spouse who does not have any accompanying dependants with issue; (ii) an accompanying dependant of the sponsor's spouse who, at the time the sponsor gave the undertaking, was under 19 and without issue; or (iii) the sponsor's dependent son or dependent daughter who, at the time the sponsor gave the undertaking, was under 19 and without issue.<sup>12</sup>

For applicants who intend to reside in Quebec, separate rules apply. An immigration officer is not required to consider the question of default in a previous undertaking or of the ability to fulfil a present undertaking if the applicant intends to reside in Quebec. In addition, a visa officer shall not issue a visa to an applicant who intends to reside in Quebec except if the Minister of Cultural Communities and Immigration is of the opinion that the sponsor will be able to fulfil the undertaking, unless the applicant is a person described in (i), (ii) or (iii) of the above paragraph.<sup>13</sup>

### 1.2.3. Undertaking Requirements And Relevant Factors To Be Considered In The Determination

There are three requirements set out in section 6(1)(b) of the Regulations respecting a sponsor's undertaking, namely, that the sponsor

- has given an undertaking;
- is not in default in respect of any obligations assumed under any other undertaking; and
- will, in the opinion of an immigration officer, be able to fulfil the undertaking.

---

(ii) is not in default in respect of any obligations assumed by him under any other undertaking given by him with respect to any member of the family class or assisted relative, and

(iii) will, in the opinion of an immigration officer, be able to fulfil the undertaking referred to in subparagraph (i).

<sup>11</sup> Section 19(1)(b) of the *Immigration Act* reads:

19.(1) No person shall be granted admission who is a member of any of the following classes:

[...]

(b) persons who there are reasonable grounds to believe are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except persons who have satisfied an immigration officer that adequate arrangements, other than those that involve social assistance, have been made for their care and support.

<sup>12</sup> *Immigration Regulations, 1978*, section 6(3). The giving of the undertaking is the relevant time; thus, the sponsor's dependent daughter was within section 6(3)(c) although she had had three children since the filing of the undertaking: *Bernal, Liseth Polillo v. M.C.I.* (IAD T95-01230), Boire, June 30, 1998.

<sup>13</sup> *Immigration Regulations, 1978*, section 6(3.1), (3.2), (3.3).

Section 6(1)(b)(iii) requires a sponsor to be able, in an immigration officer's opinion, to fulfil his or her undertaking. In forming the opinion, the immigration officer must take into account the low income cut-off (LICO) figures published by Statistics Canada.<sup>14</sup> The duration of the undertaking is up to ten years.

The low income cut-off figures are a rough guide to the financial ability of sponsors. They are not, considered in isolation, determinative. A certain income level, whether it is above or below the low income cut-off figure, cannot fetter the immigration officer's discretion.<sup>15</sup>

The low income cut-off figure is not the sole consideration. Others factors to be taken into account when assessing the ability of a sponsor to fulfil the undertaking of assistance include:<sup>16</sup>

- home ownership and/or possession of other assets;
- the work history of the sponsor, stability of employment, prospects of advancement, seniority in an employing company;
- the ability of the applicants to establish themselves;
- the prospects for future employment for the applicants;
- the willingness of the sponsor and other close family members to assist the applicants;
- whether the sponsor's skills are in an area of expanding or declining demand;
- the sponsor's ability to obtain other employment in case of lay-off or loss of employment;
- the sponsor's ability to fulfil his or her financial commitments during the complete term of the undertaking; and
- other sources of income, for example, interest payments, rental income, interest income.

A sponsor may succeed on appeal although unable to meet the LICO because other factors may be taken into account in determining the sponsor's ability to fulfil the undertaking.<sup>17</sup>

---

<sup>14</sup> *Immigration Regulations, 1978*, section 6(2).

<sup>15</sup> *Mohammed, Sarwari Begum v. M.E.I.* (I.A.B. 84-6249), Anderson, Chambers, Howard, April 29, 1986.

<sup>16</sup> *Mohammed, supra*, footnote 15; *Johl, Baljinder Kaur v. M.E.I.* (I.A.B. 85-4006), Eglington, Arpin, Wright, January 26, 1987; *Randhawa, Jasbir Singh v. M.E.I.* (IAD V90-00554), Wlodyka, Chambers, Verma, November 30, 1990.

<sup>17</sup> Where, for example, as a retired person, the sponsor had no employment income, her overall assets with a value of \$400,000, comprised of her house, savings and investments, and her ability to provide the applicants with housing satisfied the Appeal Division that she would be able to fulfil her undertaking: *Cheung, Shiu Ming Anna v. M.C.I.* (IAD V97-01634), Carver, November 30, 1998. Regarding her assets, the panel did not believe in using an arithmetic formula to determine if the sponsor could meet the LICO over the length of the undertaking without their being entirely depleted. In *Lazaro, Lydia Niar v. M.C.I.* (IAD V98-02123), Clark,

Similarly, a sponsor may not succeed on appeal despite meeting the LICO if, having regard to other factors, the Appeal Division is not satisfied the undertaking will be fulfilled.<sup>18</sup>

An offer of low-cost accommodation by the sponsor's uncle and the guarantees of financial assistance by uncles, aunts and a common-law husband may be taken into account.<sup>19</sup> While accommodation for the immigrants is a consideration, lack of accommodation in itself should not be a criterion used to dismiss the appeal.<sup>20</sup>

The assessment is to be made on the evidence existing at the time of the Appeal Division hearing, since the hearing is a *de novo* hearing in the broad sense.<sup>21</sup> Thus, if the immigration officer erroneously considers only the LICO in concluding that the sponsor cannot fulfil the undertaking, the Appeal Division will hear other relevant evidence and come to its own conclusion rather than simply finding the refusal invalid in law because of the officer's error.<sup>22</sup>

The Appeal Division should look not only at the future projections of the sponsor's family income, but at the actual income over the past few years in assessing the ability to continue to meet the appropriate low income cut-off level.<sup>23</sup> The usual approach involves considering the sponsor's income on a calendar-year basis.<sup>24</sup> A drop in income is not necessarily fatal where there is an overall trend of employability and a reasonable explanation for the drop.<sup>25</sup>

## **1.2.4. What Income May Be Considered For Comparison Against The LICO**

### **1.2.4.1. General**

The form used to complete the sponsor's financial evaluation is the IMM 1283, Financial Evaluation. The debts (exceeding \$1080) are to be subtracted from family income on the Financial Evaluation to obtain the income figure to be applied against the LICO.<sup>26</sup>

---

July 26, 1999, the *Johl* factors were taken into account in concluding that the sponsor could satisfy the settlement arrangements despite being unable to meet the LICO.

<sup>18</sup> *Dhaliwal, Kulwant Singh v. M.C.I.* (IAD V95-02732), Jackson, Hoare, Nee, October 7, 1997; *Kandasamy, Gunabalan v. M.C.I.* (IAD T97-04453), D'Ignazio, January 27, 1999.

<sup>19</sup> *Ramos, Leticia Tecson v. M.E.I.* (I.A.B. 83-6512), Anderson, Chambers, Tisshaw, May 8, 1985.

<sup>20</sup> *Cadiz, Mamerto Frilles v. M.E.I.* (I.A.B. 84-4019), Petryshyn, Hlady, Voorhees, October 15, 1985.

<sup>21</sup> *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.).

<sup>22</sup> *Gosal, Jasvir Kaur v. M.E.I.* (IAD V93-02361), Ho, July 12, 1994.

<sup>23</sup> *Gill, Resham Singh v. M.E.I.* (IAD V93-02223), Clark, December 8, 1994.

<sup>24</sup> *Sekhon, Jaswinder Kaur v. M.C.I.* (IAD V93-01781), Ho, June 12, 1995.

<sup>25</sup> *Brar, Gurcharan Singh v. M.E.I.* (IAD V93-00593), Wlodyka, November 23, 1993.

<sup>26</sup> The following is an extract from *Processing Undertakings in Canada*, dated 08-95, published as Immigration Canada Manual Chapter IP 1, at 8:

The officer [...] must calculate the total income available from the information supplied by the client. If the client or spouse is self-employed or is receiving income from rental properties, the

Essentially, if the income is of a stable or continuing nature, it may be included as income.<sup>27</sup> It is gross salary that is considered.<sup>28</sup> However, it is the net rental income that is to be taken into account. Further, rental income may be considered although the sponsor will cease receiving the income once the applicants take up residence in the rented premises, as it is a positive factor in the family's settlement.<sup>29</sup> Bank savings are not to be considered in determining whether a sponsor's income meets the LICO; however, the estimated yearly interest on savings may be included.<sup>30</sup> Monthly remittances to sponsored family members abroad are not a debit factor as payments would cease if the family were allowed to come to Canada.<sup>31</sup> R.R.S.P. contributions are not to be deducted from income, whether for an employed or self-employed sponsor.<sup>32</sup>

There is some dispute as to whether or not Workers' Compensation Board payments should be included as income. In one case, because the source of income is not restricted by the legislation in any way, it was felt they should be included.<sup>33</sup> However, in another case, it was held that the payments were not taxable and were not stable or continuing and thus should not be included in the financial evaluation.<sup>34</sup>

Overtime income is not to be included where it is not stable or continuing. However, overtime has been considered, not specifically in relation to the ability to satisfy the LICO but in

---

net figure as opposed to the gross figure should be considered and must be supported by a financial statement prepared by an accountant or a notice of assessment. Overtime may be considered if a letter from the employer indicates it is of a constant duration or this income is supported by a T4. Tips are to be considered only when reported on the income tax return and supported by the notice of assessment. All income from Worker's Compensation (with the exception of payments for permanent disabilities), social assistance agencies, employment training programs and unemployment insurance are not to be considered.

[See the "Foreword" for a note about the Immigration Manuals.]

<sup>27</sup> *Waage, Oscar Barton v. M.E.I.* (I.A.B. 81-6369), Loiselle, Glogowski, Tremblay, February 8, 1983. A child tax credit is income: *Basra, Pinkjeet Kaur v. M.C.I.* (IAD V94-00508), Lam, October 17, 1996; *Brar (Dhaliwal), Dalvir Kaur v. M.C.I.* (IAD V97-00285), Baker, January 4, 1999. So are bonuses: *De Ocampo, Maria Theresa v. M.C.I.* (IAD V98-00090), Singh, October 21, 1998.

<sup>28</sup> *Beaubrun, Marie Lourdes v. M.E.I.* (I.A.B. 79-1114), Loiselle, Houle, Tremblay, March 17, 1980. But it is net business income after deduction of business expenses: *Moushikh, Haroot v. M.C.I.* (IAD T98-00314), Buchanan, March 30, 1999.

<sup>29</sup> *Kaur, Manjit v. M.E.I.* (I.A.B. 84-9064), D. Davey, Tisshaw, Suppa, December 13, 1985. The better approach may be to view it as a *Johl* factor, not as income for LICO purposes.

<sup>30</sup> *Nazir, Mohamed A. v. M.E.I.* (I.A.B. 84-9578), D. Davey, Suppa, Voorhees, March 25, 1986.

<sup>31</sup> *Abuan, Mary Ann Janet R. v. M.E.I.* (IAD V92-01508), Gillanders, May 21, 1993.

<sup>32</sup> *Rai, Sharanjit Kaur v. M.C.I.* (IAD V97-01565), Boscariol, July 15, 1998.

<sup>33</sup> *Mohammed, supra*, footnote 15.

<sup>34</sup> *Rajput, Sarwan Kumar v. M.E.I.* (I.A.B. 83-6694), Petryshyn, Hlady, Voorhees, September 16, 1985.

relation to the ability to fulfil the undertaking generally, where there was evidence that overtime would be available.<sup>35</sup>

Where seasonal employment is of a stable and continuing nature, it should be taken into account by the immigration officer in calculating the sponsor's income.<sup>36</sup>

Income not declared for taxation purposes has been considered for the purpose of assessing the ability of the sponsor to fulfil the undertaking when the evidence of that income is credible and has been corroborated.<sup>37</sup> However, where the sponsor did not report self-employed income, the explanation for his failure to report was unsatisfactory and there was no corroborative evidence on what the self-employed earnings were, the immigration officer's omission of this income was supported by the Appeal Division.<sup>38</sup> In another case,<sup>39</sup> income undeclared to Revenue Canada was excluded on public policy grounds.

Payments from federal sources for employment training which are not of a fixed or continuing nature are not included in family income.<sup>40</sup> Payments from provincial or municipal sources for welfare assistance, in this case, mother's allowance, are not to be considered part of family income.<sup>41</sup>

#### 1.2.4.2. Unemployment/Employment Insurance Benefits

Benefits received from unemployment/employment insurance (UI/EI) are to be included as income in the sponsor's financial evaluation. They are taxable benefits. They are not social or welfare benefits.<sup>42</sup>

In *Bath*,<sup>43</sup> the sponsor had collected more in UI benefits than she had contributed in premiums and income taxes. More importantly, the sponsor and her daughter had not established themselves successfully in Canada. They had both been unemployed for considerable periods of

---

<sup>35</sup> *Kler, Balbir Kaur v. M.E.I.* (I.A.B. 84-9534), Hlady, Benedetti, Teitelbaum, December 4, 1984; *Kaur, supra*, footnote 29.

<sup>36</sup> *Mann, Kusum L. v. M.E.I.* (I.A.B. 85-9258), Tisshaw, Townshend, Ariemma, October 15, 1986.

<sup>37</sup> *Heer, Sukhninder Kaur v. M.E.I.* (I.A.B. 87-6200), Gillanders, Mawani, MacLeod, August 3, 1988. Unreported income was also taken into account in *Taccaban, Rosario Miguel v. M.C.I.* (IAD V98-02017), Carver, April 1, 1999.

<sup>38</sup> *Dhaliwal, Jagdish Singh v. M.E.I.* (I.A.B. 86-6078), Wlodyka, June 10, 1987. See also *Dhillon, Balmeet Kaur v. M.C.I.* (IAD V95-02751), Lam, May 25, 1998, where only the income declared to Revenue Canada was used.

<sup>39</sup> *Madera, Nnette v. M.C.I.* (IAD V96-01369), Nee, March 25, 1998.

<sup>40</sup> *Peck, Lurline Rose v. M.E.I.* (I.A.B. 82-9436), Davey, Suppa, Tisshaw, April 25, 1984.

<sup>41</sup> *Usha, Ramadhar v. M.E.I.* (IAD T93-00078), Ahara, June 23, 1993.

<sup>42</sup> *Khosa, Manjit Kaur v. M.E.I.* (I.A.B. 82-6159), Loiselle, Falardeau-Ramsay, Tremblay, April 8, 1983; *Rai, Surjit Kaur v. M.E.I.* (I.A.B. 84-6192), Chambers, Tisshaw, Anderson (dissenting), September 17, 1986; *Samra, Balbir Kaur v. M.C.I.* (IAD V95-01531), Boscariol, Goodman, Dossa, February 24, 1997.

<sup>43</sup> *Bath, Satwant Kaur v. M.E.I.* (IAD V91-01006), Wlodyka, April 29, 1992.

time and had been a drain on the unemployment insurance pool for a period of five years. They were a burden on other UI contributors. It appeared that the applicants were destined for a similar future if they were allowed to immigrate. The Appeal Division dismissed the appeal.

However, in *Gosal*,<sup>44</sup> the Appeal Division stated as a general principle that one cannot reasonably conclude, without specific evidence on point, that a person who receives more in UI than he contributes in premiums and income taxes must necessarily be a drain on the UI system and a burden on other UI contributors. Since by its nature UI is an insurance scheme, UI premiums paid should be far less than benefits receivable. It is even less meaningful to compare the amount of UI received with the amount of income taxes paid. On the particular facts, the sponsor's husband had steady employment notwithstanding regular payment of UI to him, because his employer could not procure sufficient contracts to keep him working year round.

In another case, the Appeal Division did not believe in evaluating the merits of UI on the basis of whether an individual had contributed more in terms of income taxes or premiums. The Appeal Division held that the drawing of UI should not be viewed as a stigma when the individual has a steady work history and demonstrates a strong work ethic. The sponsor and her husband had a steady employment history and earned stable income and the panel was satisfied that the sponsor would be able to fulfil her undertaking. The earlier decision in *Bath*<sup>45</sup> was distinguished because the sponsor in *Bath* was unable to meet the LICO even though she had been receiving considerable UI.<sup>46</sup>

In *Gill*,<sup>47</sup> the panel held that while the prospect of long-term or frequent use of social assistance on the sponsor's part may indicate that a prospective immigrant could be expected to be a burden on Canada's social programs, the same does not hold true for UI income.

## **1.2.5. Whose Income Can Be Included**

### **1.2.5.1. Meeting the LICO**

Generally speaking, the Appeal Division has held that where an Undertaking form is co-signed by the sponsor and the sponsor's spouse, their joint family income may be considered. However, where the sincerity of the sponsor's husband's commitment to the applicants was in question, his income was not included.<sup>48</sup>

---

<sup>44</sup> *Gosal, supra*, footnote 22.

<sup>45</sup> *Bath, supra*, footnote 43.

<sup>46</sup> *Baring, Harwinder Kaur v. M.E.I.* (IAD V93-00614), Lam, Ho, Verma, August 10, 1994.

<sup>47</sup> *Gill, Resham Singh, supra*, footnote 23.

<sup>48</sup> *Campbell, Carmen v. M.E.I.* (IAD T91-02166), Bell, Chu, Ahara, February 3, 1992. See also *Brar (Dhaliwal), supra*, footnote 27, where the sponsor's spouse's income was not considered in circumstances which included the short duration of his work history; the fact that he had not co-signed the undertaking or produced any written evidence of support; and his separate living and working arrangements in a different community.

The Appeal Division has no jurisdiction to rule on the issue of whether or not the co-signing spouse is bound by the covenants in the undertaking.<sup>49</sup>

Where the sponsor and her sister had signed a financial guarantee (Evaluation of Guarantor's Financial Circumstances form IMM 1283), their combined income was considered in assessing the sponsor's ability to meet the LICO. The income of a third sister who had not signed this form was not considered under the LICO assessment, but was taken into account in considering the ability of the sponsor to meet the undertaking generally.<sup>50</sup> Other panels have also permitted co-sponsorships by siblings.<sup>51</sup>

Where the sponsor's brother filed a statutory declaration at the hearing to the effect that he undertook to assume full financial responsibility for the applicants (his parents and sister), the Appeal Division interpreted it as a broad statement of support and an offer of free lodging to the applicants. However, the Appeal Division could go no further because the sponsor had not presented detailed evidence to enable the panel to assess the brother's ability to assume financial responsibility for the applicants.<sup>52</sup>

The sponsor's uncles were held not legally entitled to co-sponsor the application of the sponsor's father, mother and siblings because they could not have sponsored the applicants in their own right.<sup>53</sup> Nor was a sponsor's grandson entitled to be a co-sponsor.<sup>54</sup> However, in another case, the Appeal Division considered the father, his son and daughter to be co-sponsors of the application of another son and daughter (although his son and daughter could not have sponsored the applicants in their own right). Total settlement arrangements of the three co-sponsors in this case enabled the father to meet the LICO.<sup>55</sup>

---

<sup>49</sup> *Sidhu, Jagjit Singh (deceased) and Sidhu, Surjit Kaur v. M.E.I.* (IAD V92-00644), Clark, Verma, Ho, May 11, 1994.

<sup>50</sup> *Abuan, supra*, footnote 31.

<sup>51</sup> See, for example, *Kainth, Rupinder Kaur v. M.C.I.* (IAD V95-01204), Lam, January 7, 1997.

<sup>52</sup> *Sekhon, supra*, footnote 24.

<sup>53</sup> *Brar, supra*, footnote 25.

<sup>54</sup> *Bath, supra*, footnote 43.

<sup>55</sup> *Natividad, Quintin Pandac v. M.E.I.* (IAD V92-01200), Verma, January 6, 1994. This decision appears to be contrary to the case-law. Note also that Immigration Canada Manual Chapter IP 1, *Processing Undertakings in Canada*, dated 08-95, describes the following under co-sponsorships, at 9:

The person who signs the undertaking is the only one legally responsible for it. However, the resources of a co-sponsor can be taken into consideration if he/she is eligible to sponsor the person in his/her own right.

Therefore, siblings in Canada can pool their resources to sponsor parents or grandparents. Co-sponsors should photocopy and complete the financial evaluation form (IMM 1283) and submit it with the sponsors [sic]. They should also provide a letter to the CPC [Case Processing Centre] advising of their intention to co-sponsor.

[See the "Foreword" for a note about the Immigration Manuals.]

In *Seepall*,<sup>56</sup> the sponsor's son, although ineligible to sponsor the applicant in his own right, had his income added to the sponsor's income in the calculation of the LICO. The Minister sought judicial review on this very issue. The Federal Court referred to the Appeal Division's reliance on *Johl*,<sup>57</sup> adding that it was open to the Appeal Division to take into account the son's willingness and ability to support the applicant. The Court continued thus:

The decision in *Johl* supports the Board's finding that the income of [the son] should be taken into account and regarded as a relevant factor in assessing whether or not [the sponsor] would be able to fulfil her undertaking of assistance.<sup>58</sup>

The Court did not distinguish between using the son's income to satisfy the LICO and using the son's income to assist the sponsor to fulfil the undertaking generally. The Court, however, did hold that the income should be taken into account in assessing the sponsor's ability to fulfill her undertaking. The Federal Court later made it clear, in *Maulion*,<sup>59</sup> that a relative of the sponsor, ineligible to sponsor the applicants in her own right, cannot have her income pooled with the sponsor's income to enable the sponsor to meet the LICO.

### 1.2.5.2. Meeting the Undertaking Generally

Where a sponsor can satisfy the Appeal Division that with the support of other members of the sponsor's family the undertaking will be met, the appeal may be allowed in law. The income of these other family members, however, is not added to the sponsor's income to assist the sponsor to meet the LICO,<sup>60</sup> unless they are eligible to sponsor the applicants in their own right.<sup>61</sup>

Although a sponsor's relatives may not be entitled to co-sponsor an undertaking, their offer of assistance can be a positive factor.<sup>62</sup> While their offers of support are probably not legally binding, they may constitute evidence of an extended family network of emotional and financial support for the applicants.<sup>63</sup>

---

<sup>56</sup> *Seepall, Mavis Roslyn v. M.C.I.* (IAD T93-06999), Channan, November 9, 1994.

<sup>57</sup> *Johl, supra*, footnote 16.

<sup>58</sup> *M.C.I. v. Seepall, Mavis Roslyn* (F.C.T.D., no. IMM-4926-94), Jerome, November 24, 1995, at 3. Reported: *Canada (Minister of Citizenship and Immigration) v. Seepall* (1995), 32 Imm. L.R. (2d) 31 (F.C.T.D.).

<sup>59</sup> *M.C.I. v. Maulion, Ma Cecilia* (F.C.T.D., no. IMM-1054-95), Jerome, May 9, 1996. Reported: *Canada (Minister of Citizenship and Immigration) v. Maulion* (1996), 33 Imm. L.R. (2d) 244 (F.C.T.D.).

<sup>60</sup> *Villadiego, Elizabeth Arriola v. M.E.I.* (I.A.B. 78-6173), Campbell, Weselak, Benedetti, March 30, 1979.

<sup>61</sup> See the preceding section 1.1.5.1., "Meeting the LICO."

<sup>62</sup> *Brar, supra*, footnote 25.

<sup>63</sup> *Gosal, supra*, footnote 22; *Randhawa, Gurmit Kaur v. M.C.I.* (IAD V93-02994), Ho, March 13, 1995; *Huynh, Minh Nhon v. M.C.I.* (IAD V95-00717), Clark, October 29, 1996.



The financial support of another family member may be compared against the LICO for a family unit comprising that family member, the family member's family, the sponsor and applicant(s) in order to determine the adequacy of the offer of support.<sup>64</sup>

In *Gandham*,<sup>65</sup> the sponsor argued that the Appeal Division must consider her brother's family as co-sponsors of their parents, in accordance with immigration policy. The Appeal Division did not accept the argument, first, because policy directives are not enforceable as law and second, because the brother and his family had not signed the undertaking as co-sponsors of the applicants. However, the financial contributions of the sponsor's brother and his family could be considered under the broader issue of whether the sponsor could fulfil the undertaking.

### 1.2.6. Size Of The Family Unit

The larger the family unit, the higher the LICO figure the sponsor is required to meet.

The members of the sponsor's immediate family and any persons in respect of whom a previous undertaking was given and is still in effect are to be included in determining the size of the family unit for the purpose of applying the relevant LICO figure.<sup>66</sup> Also included are dependants of the principal applicant, even if those dependants are not coming to Canada.<sup>67</sup>

A common-law spouse is not included in the family unit.<sup>68</sup>

---

<sup>64</sup> *Sidhu, supra*, footnote 49.

<sup>65</sup> *Gandham, Rehsam Kaur v. M.E.I.* (IAD V91-01666), MacLeod, Gillanders, Verma, March 3, 1993. Compare this approach with *Abuan, supra*, footnote 31, where a sister of the sponsor had completed an IMM 1283 (Financial Evaluation): although not a co-sponsor in the true sense because she had not given an undertaking, completion of the IMM 1283 allowed a pooling of her financial resources with the sponsor's to meet the LICO.

<sup>66</sup> *Macaraig, Evangelina Cruz v. M.E.I.* (I.A.B. 83-6415), Hlady, Petryshyn, Tremblay, December 18, 1984. The Immigration Canada Manual Chapter IP 1, *Processing Undertakings in Canada*, dated 08-95, includes the following members in calculating the size of the family unit for the purpose of applying the relevant low income cut-off figure, at 7-8:

- the sponsor;
- his/her spouse;
- the sponsor's dependent children;
- previously sponsored relatives who are still dependent on the sponsor;
- any other relatives dependent on the sponsor or spouse for support;
- relatives the sponsor is submitting the undertaking for; and
- other dependent children of the principal applicant who are not accompanying the applicant to Canada.

[See the "Foreword" for a note about the Immigration Manuals.]

<sup>67</sup> The definition of "undertaking" covers all dependants of the member of the family class. Prior to February 1, 1993, only accompanying dependants were covered. A sponsor may have accrued rights in respect of the earlier more favourable definition: see the brief discussion in chapter 7, "Relationship," section 7.3.2.1.1., "Exceptions."

<sup>68</sup> *Ramos, supra*, footnote 19.

In *Lall*,<sup>69</sup> a former spouse of the sponsor in respect of whom a prior subsisting undertaking had been given was included in the family unit, but not a current spouse without Canadian permanent resident status or the sponsor's sister who was residing with her. In *Dhaliwal*,<sup>70</sup> a former spouse was not included in the family unit although the subject of a prior subsisting undertaking. *Lall* was distinguished because the issue was consented to in *Lall* and because of the evidence in *Dhaliwal* that the former spouse was not dependent on the sponsor, making her inclusion in the family unit unfair. In *Gill*,<sup>71</sup> the panel disagreed with *Dhaliwal*, holding that nothing in the Act or Regulations provided for the dissolution of the sponsor's responsibility under an undertaking except the expiration of the period of support. A sponsor's continuing support of his separated spouse is relevant to the sponsor's overall ability to fulfil the undertaking.<sup>72</sup>

The exemption in section 6(5)(a)(ii) of the Regulations, whereby a visa officer is not required to determine a dependant's admissibility if the dependant is a son or daughter of the applicant whose spouse or former spouse has custody or guardianship, does not permit excluding the son or daughter from the family unit unless the sponsor does not support and will not be legally required to support the dependant during the period of the undertaking.<sup>73</sup>

Two of the sponsor's sons who resided with the sponsor were not included in the family unit because they were not dependent on the sponsor for support; their income was not added to the sponsor's in determining the sponsor's ability to meet the LICO.<sup>74</sup>

In determining the size of the family unit for the purposes of the LICO, the Appeal Division included the sponsor's husband, who had signed the undertaking, as well as persons in respect of whom there was an outstanding undertaking previously given by the husband.<sup>75</sup> Whether a sponsor's spouse should be included in the family unit is a question of fact to be determined according to the circumstances of each case. Where two spouses maintained a commuter marriage and shared their family income and expenses, the Appeal Division was of the view that one must include the other spouse's income and expenses in order to make an accurate

---

<sup>69</sup> *Lall, Khamahwattee v. M.E.I.* (I.A.B. 84-9622), D. Davey, Glogowski, Suppa, July 11, 1985.

<sup>70</sup> *Dhaliwal, Jagdish Singh, supra*, footnote 38.

<sup>71</sup> *Gill, Varinderjit (Badesha) v. M.C.I.* (IAD V98-01629), Borst, March 19, 1999.

<sup>72</sup> *Moushikh, supra*, footnote 28. The panel did not need to decide if the separated spouse was included in the family unit.

<sup>73</sup> *Del Valle, Alida Angelita v. M.C.I.* (IAD T94-03174), Goodman, March 6, 1997. See also *Shanmugeswaran, Gunasekaram v. M.C.I.* (IAD T98-04625), Whist, June 29, 1999, where the sponsor's children were included in the family unit. The sponsor's separated spouse had custody but the sponsor provided child support. Further, the panel did not accept the Minister's contention that the LICO figure should be calculated for two households rather than one.

<sup>74</sup> *Sangha, Parmjit Kaur v. M.E.I.* (I.A.B. 84-6016), Voorhees, Howard, Anderson (dissenting), October 16, 1985. See also *Samra, supra*, footnote 42 (sponsor's mother-in-law and son, aged 21, were not included in the family unit as they were self-supporting although both resided with the sponsor).

<sup>75</sup> *Mavi, Jaswinder Kaur v. M.E.I.* (I.A.B. 83-10054), Suppa, D. Davey, Glogowski, August 1, 1985. To the same effect, see *Del Valle, supra*, footnote 73.

assessment of the sponsor's financial resources. The spouse had signed the sponsor's undertaking and financial evaluation.<sup>76</sup>

The size of the family unit is determined at the time of the hearing. Where one of the applicants had a new baby at the time of the hearing, the baby was included in calculating the size

of the family unit;<sup>77</sup> however, an unborn child was not.<sup>78</sup>

### **1.2.7. Area Of Residence**

The LICO figure that a sponsor must meet depends on the population of the area of residence. A Citizenship and Immigration Canada Low Income Cut-off Table, which is part of the appeal record in financial refusal cases, sets out the income corresponding to the population of the area of residence. Larger population areas require a higher income.

Where the question was whether the City of Waterloo, Ontario should be considered a non-metropolitan city or a metropolitan area necessitating a higher income, the panel considered realty tax assessments indicating municipal and regional taxes were paid and concluded it was a metropolitan area.<sup>79</sup>

Where the sponsor and her husband resided in Surrey, B.C. (Column B in the LICO table) but the applicants would reside in Quesnel (Column D), the range between Column B and D was considered.<sup>80</sup> Where the sponsor resided in Clearbrook, B.C. (column B), but her sister, who was financially more stable and a co-sponsor, resided in Surrey where the applicants would also reside, the population of Surrey (Column A) was used.<sup>81</sup>

Delta, B.C., a suburb of Vancouver, has been held to be in the area of residence of the Greater Vancouver Regional District, with a population over 500,000<sup>82</sup> (Column A) but in another case, in the smaller area of residence of Delta with a population of 100,000-499,999.<sup>83</sup>

---

<sup>76</sup> *Sekhon, supra*, footnote 24.

<sup>77</sup> *Abuan, supra*, footnote 31.

<sup>78</sup> *Sharma, Anju v. M.C.I.* (IAD V95-02535), Boire, September 10, 1997.

<sup>79</sup> *Mavi, supra*, footnote 75.

<sup>80</sup> *Gosal, supra*, footnote 22.

<sup>81</sup> *Kainth, supra*, footnote 51.

<sup>82</sup> *Sharma, supra*, footnote 78. An immigration officer testified in this case, giving the rationale for Column A.

<sup>83</sup> *Atwal, Bhupinder Singh v. M.E.I.* (IAD V93-01460), Durand, June 30, 1994. This decision pre-dates the implementation of the CMA table.

Where the sponsor was living in Surrey, B.C., the population of Surrey, not Vancouver, was used.<sup>84</sup> However, since September 18, 1996, the Statistics Canada Census Metropolitan Area (CMA) table has been in use. In *Shoker*,<sup>85</sup> the panel relied on the CMA table to conclude that Surrey was in the Greater Vancouver Regional District, Column A of the LICO table.

In *Kandola*,<sup>86</sup> the Minister provided evidence of the association between the population of the CMA and the determination of the size of the area of residence in the LICO table. The CMA is defined as “a very large urban area, together with adjacent urban and rural areas which have a high degree of economic and social integration with that urban area.”<sup>87</sup> On that basis, the Appeal Division concluded that Richmond, B.C., was in the CMA of Vancouver.<sup>88</sup> In contrast, where the Minister provided no evidence as to what areas constituted the Greater Toronto Area, the panel decided that Orangeville, Ontario was in Column D.<sup>89</sup>

### 1.3. “NEW REGULATIONS”<sup>90</sup>

#### 1.3.1. Introduction

The *Regulations Amending the Immigration Regulations, 1978*<sup>91</sup> came into force on April 1, 1997,<sup>92</sup> bringing about significant changes to the sponsorship scheme.

An undertaking<sup>93</sup> is defined in section 2(1) of the *Immigration Regulations, 1978* as:

---

<sup>84</sup> *Kooner, Parmjeet Kaur v. M.E.I.* (IAD V93-00508), Singh, June 28, 1994. To the same effect, see *Sekhon, supra*, footnote 24, where the City of Surrey was chosen over the Greater Vancouver Regional District, Surrey being a distinct city and there being no evidence the two municipalities were associated for any reason related to the cost of living; *Samra, supra*, footnote 42; and *Basra, supra*, footnote 27.

<sup>85</sup> *Shoker, Sulinder Singh v. M.C.I.* (IAD V96-02983), Boscariol, April 24, 1998. To the same effect is *Gill, Varinderjit (Badasha), supra*, footnote 71.

<sup>86</sup> *Kandola, Sarabjit Kaur v. M.C.I.* (IAD V94-00903), McIsaac, September 4, 1997.

<sup>87</sup> *Ibid.*, at 7.

<sup>88</sup> To the same effect is *Randhawa, Parkash v. M.C.I.* (IAD V96-00057), Boire, September 17, 1997. The panel recognized the reality of smaller communities forming part of a larger metropolitan area whose benefits flow to all inhabitants and where the cost of living, home ownership excepted, is relatively the same. It is not definitive whether Mission, B.C. should be included in the CMA of Vancouver, but one panel expressed the view that it may well fall under the smaller population of Column C: *Tatla, Rajinder Singh v. M.C.I.* (IAD V98-02657), Carver, June 2, 1999.

<sup>89</sup> *Singh, Mangal v. M.C.I.* (IAD T96-00761), Townshend, December 10, 1998. The decision makes no reference to the CMA table, which would have placed Orangeville in Column A.

<sup>90</sup> This part of the chapter covers the law since the amendments made to the *Immigration Regulations, 1978* in April 1997. This law is relevant where a sponsor’s undertaking was provided on or after April 1, 1997. Sponsors had until April 18, 1997 to provide the Minister with the old Undertaking form 1344 in order to preserve their right to be governed by the former section 6 of the Regulations in the processing of the application.

<sup>91</sup> SOR/97-145.

<sup>92</sup> A transitional provision, section 2.02, provides that section 6 of the Regulations, as it read before April 1, 1997, shall continue to apply if a sponsor has provided the Minister with an undertaking on the version of form IMM 1344 as it read before April 1, 1997, by April 18, 1997.

[...]

(a)(ii)[...]an undertaking in writing given to the Minister by a person to provide for the essential needs of the member of the family class and the member's dependants for a period of 10 years and to ensure that the member and the member's dependants are not dependent on any payment of a prescribed nature referred to in Schedule VI.<sup>94</sup>

All undertakings are binding for 10 years (except in Quebec); there is no longer discretion to impose a shorter period. The revised Undertaking form lists in detail the obligations assumed by sponsors and the consequences of default.

Financial refusals may be founded on section 5(2)<sup>95</sup> of the *Immigration Regulations, 1978* or section 19(1)(b)<sup>96</sup> of the *Immigration Act*.

### 1.3.2. Income And Financial Obligations

For the first time, income is defined. The definition “gross Canadian<sup>97</sup> income” includes business and investment income but excludes, notably, employment insurance benefits, social assistance (welfare) and child tax benefits.<sup>98</sup>

Financial obligations are also defined.<sup>99</sup> The definition includes business and investment expenses that are deductible under the *Income Tax Act*, but excludes payments on a first

---

<sup>93</sup> Refer to chapter I, “Introduction,” for a brief explanation of the sponsorship process.

<sup>94</sup> See subparagraph (a)(i) of the definition of “undertaking “ for the applicable definition in the Province of Quebec.

<sup>95</sup> This provision is discussed in more detail later.

<sup>96</sup> Set out *supra*, footnote 11.

<sup>97</sup> According to Citizenship and Immigration Canada Operations Memorandum IP 97-12, OP 97-18e, dated April 18, 1997, “New Family Class Sponsorship Regulations,” only income of Canadian origin is taken into account, except where the sponsor, residing in Canada, commutes to work in the U.S.A. or has foreign income or investments, having paid Canadian income tax for the previous 12 months. [See the “Foreword” for a note about Operations Memoranda.]

<sup>98</sup> The definition of “gross Canadian income” reads as follows:

“gross Canadian income” [...] includes business and investment income, but does not include any provincial allowance paid for a program of instruction or training, any payment of a prescribed nature referred to in Schedule VI, any child tax benefit paid under the *Income Tax Act*, any monthly guaranteed income supplement paid under the *Old Age Security Act* or amounts paid under the *Employment Insurance Act* other than special benefits.

<sup>99</sup> The definition of “payments made or due on account of financial obligations” reads as follows:

“payments made or due on account of financial obligations”, for the purposes of section 5, includes business and investment expenses that are deductible under the *Income Tax Act*, but does not include payments on a first mortgage loan or hypothecary loan, or payments for rent in respect of a principal residence.

The \$1080 figure (see section 1.1.4.1., “General”) has been removed.

mortgage or rent in respect of a principal residence. Therefore, first mortgage or rent payments are not considered a financial obligation and are not subtracted from income. Child care expenses<sup>100</sup> are not financial obligations. A financial obligation has been found to include income tax payments on arrears.<sup>101</sup> Where car insurance has been held not to be a financial obligation,<sup>102</sup> other panels have included it in calculating the financial obligation.<sup>103</sup>

These two definitions are used to determine the final figure for comparison against the low income cut-off (LICO) figure.

### 1.3.3. Exemptions

A sponsor is exempt from the financial test if the following persons are sponsored: (i) the sponsor's spouse who does not have any dependent sons or daughters; (ii) the sponsor's spouse with dependent sons or daughters who, at the time the sponsor gave the undertaking, were less than 19, unmarried and without children; or (iii) the sponsor's dependent son or daughter who, at the time the sponsor gave the undertaking, was less than 19, unmarried and without children.<sup>104</sup> These exemptions do not differ significantly from the exemptions under the old Regulations.

For applicants who intend to reside in Quebec, separate rules apply. A visa officer shall not issue a visa to an applicant who intends to reside in Quebec except if the Minister responsible for immigration in the Province is of the opinion that the sponsor will be able to fulfil the undertaking, unless the applicant is a person described in (i), (ii) or (iii) of the above paragraph.<sup>105</sup>

### 1.3.4. Sponsorship Requirements

#### 1.3.4.1. Introduction

Section 5(2) of the Regulations sets out the requirements authorizing the sponsorship of an application for landing of a member of the family class. These include<sup>106</sup> that the sponsor

---

<sup>100</sup> *Luong, Van Cuong v. M.C.I.* (IAD T98-03247), Sangmuah, June 30, 1999. See too *Ebuna, Rosario Valderama v. M.C.I.* (IAD V99-02102), Baker, September 22, 2000 (reasons signed September 28, 2000).

<sup>101</sup> In *Kandawala, Aziz Ahmed v. M.C.I.* (IAD V99-01695), Baker, March 9, 2000, the panel found that a deduction of \$5,211.41 from the appellant's income for 1997 was not a bona fide deduction since it was not an amount in arrears, the amount owing having been paid before May 1, 1998. See too *Cheema, Jaspal Singh v. M.C.I.* (IAD TA0-02246), Néron, Bacon, Hoare, February 28, 2001.

<sup>102</sup> *Grewal, Harpreet Singh v. M.C.I.* (IAD V98-03979), Clark, July 8, 1999. However, in *Shanmugeswaran, supra*, footnote 73, the panel did not dispute the sponsor's identification of car insurance as one of his financial obligations (this case was decided under the old Regulations).

<sup>103</sup> *Sharma, Deepak Jiwanlal v. M.C.I.* (IAD T99-08360), Boire, January 29, 2001; *Chen, Zhu Ji v. M.C.I.* (IAD V99-02884), Workun, January 5, 2001; *Kadir, Nizam v. M.C.I.* (IAD T99-14672), Whist, December 6, 2000; *Dulay, Chamkor Singh v. M.C.I.* (IAD T99-06280), Hoare, August 23, 2000.

<sup>104</sup> *Immigration Regulations, 1978*, section 6(3).

<sup>105</sup> *Immigration Regulations, 1978*, section 6(3.2), (3.3).

<sup>106</sup> For the precise requirements, refer to section 5(2) of the Regulations.

- (a) meets the definition of sponsor;<sup>107</sup>
- (b) gives an undertaking;
- (c) is not subject to a removal or conditional removal order;
- (d) is not confined in a prison;
- (e) is not a bankrupt;
- (f) for the 12-month period preceding the undertaking, has a gross Canadian income less financial obligations that is equal to or greater than the LICO;
- (g) is not in default in respect of another undertaking given or co-signed;
- (h) has entered into a written agreement with the applicant whereby the sponsor undertakes to provide for the essential needs of the applicant and the applicant's accompanying dependants for 10 years, declares that the sponsor's obligations do not prevent the sponsor from honouring the agreement and undertaking, and the applicant undertakes to make every reasonable effort to provide for his or her essential needs and those of any accompanying dependants; and
- (i) if the sponsor's spouse has co-signed the undertaking, the spouse has entered into the agreement in paragraph (h).

Paragraphs (e) to (i) do not apply in Quebec.<sup>108</sup>

A visa officer may issue a visa to the applicant(s) if the sponsor (and spouse if a co-signer) meet the applicable requirements set out above.

The Appeal Division has taken the position that it may exercise discretionary relief in respect of a ground of refusal which invokes paragraph (a) or (f) above. The Appeal Division has yet to be presented with an appeal involving any of the other paragraphs and it remains to be decided if jurisdiction exists to exercise discretion to overcome a refusal based on these other requirements.

#### **1.3.4.2. Section 5(2)(f) of the Regulations**

Section 5(2)(f) of the Regulations sets out the requirement for the sponsor to meet the applicable LICO figure. The 12-month period preceding the date of the undertaking is the relevant

---

<sup>107</sup> See chapter I, "Introduction," for the case-law which establishes that the inability of the sponsor to meet the definition of "sponsor" because the sponsor is not residing in Canada is not a jurisdictional question, and therefore can be overcome by the Appeal Division's exercise of special relief.

<sup>108</sup> *Immigration Regulations, 1978*, section 5.1.

time period,<sup>109</sup> and for that period, the sponsor's gross Canadian income less all payments made or due on account of financial obligations must be equal to or greater than the applicable LICO.

The current financial circumstances of a sponsor are irrelevant to the determination of the legal validity of a refusal under section 5(2)(f) of the Regulations, and the Appeal Division's analysis in this respect is limited to a review of the financial circumstances in the 12 months preceding the filing of the undertaking.<sup>110</sup> The *Johl*<sup>111</sup> factors are not relevant to the issue of the legal validity of a financial refusal under the new Regulations.<sup>112</sup>

#### **1.3.4.2.1. How the LICO is determined**

##### **1.3.4.2.1.1. size of the family unit**

For the purposes of determining the applicable LICO, section 5(3)(a) of the Regulations defines the family unit as comprising

- the sponsor;
- the sponsor's dependants;
- the member of the family class to be sponsored and all dependants of the member, whether accompanying or not;
- all other persons and their dependants in respect of whom the sponsor gave or co-signed an undertaking that is still in effect; and
- where the sponsor's spouse has co-signed the undertaking, all other persons and their dependants in respect of whom the spouse gave or co-signed another undertaking that is still in effect.

##### **1.3.4.2.1.2. area of residence**

The Regulations provide that it is the sponsor's area of residence that is to be used.<sup>113</sup> Refer to section 1.1.7., "Area Of Residence," which continues to be relevant to the new Regulations.

---

<sup>109</sup> *Dhillon, Ranjit Kaur v. M.C.I.* (IAD V98-01839), Carver, March 26, 1999. The panel held that section 5(2)(f) of the Regulations does not permit taking an average of income earned outside the 12-month period leading to the date of the filing of the undertaking.

<sup>110</sup> *Jugpall, Sukhjeewan Singh v. M.C.I.* (IAD T98-00716), Aterman, Goodman, Townshend, April 12, 1999.

<sup>111</sup> *Johl, supra*, footnote 16.

<sup>112</sup> *Dhillon, Ranjit Kaur, supra*, footnote 109.

<sup>113</sup> *Immigration Regulations, 1978*, section 5(3)(b). It appears this provision was added to clarify earlier case-law: see section 1.1.7., "Area Of Residence."



#### 1.3.4.2.2. Whose income can be included

The Regulations allow for spouses to co-sign an undertaking, thereby allowing the spouse's income to be included with that of the sponsor for meeting the LICO. Married and common-law<sup>114</sup> spouses can be co-signers. The LICO must be met through the sponsor's and co-signer's income only. The Departmental practice which allowed co-sponsorship by various family members has ceased, which means siblings, for example, can no longer pool their resources to sponsor their parents.<sup>115</sup>

Where the spouse co-signs the undertaking, the sponsor and spouse are jointly and severally liable for the obligations contained in the undertaking. A spouse can be a co-signer provided the spouse meets some of the requirements applicable to a sponsor.<sup>116</sup>

#### 1.3.4.2.3. Visa officer's recalculation

Where a visa officer has information that a sponsor is no longer able to fulfil the undertaking, the officer or another immigration officer may recalculate the LICO. The relevant period is the 12-month period preceding the date on which the member of the family class met the requirements of the Act and Regulations.<sup>117</sup> This is not applicable in Quebec.<sup>118</sup>

#### 1.3.5. Process In Abeyance

If charges have been laid against a sponsor or co-signer who is a permanent resident, for certain specified offences, the immigration officer/visa officer shall not make a determination respecting the authorization to sponsor/application for an immigrant visa until the charges have been finally determined;<sup>119</sup> similarly, where the sponsor or co-signer is the subject of a report under section 27(1) of the *Immigration Act*, until a final determination has been made regarding the person's authorization to remain in Canada.<sup>120</sup>

---

<sup>114</sup> See section 5(1) of the Regulations.

<sup>115</sup> This is according to Citizenship and Immigration Canada Operations Memorandum IP 97-12, OP 97-18e, dated April 18, 1997, "New Family Class Sponsorship Regulations." [See the "Foreword" for a note about Operations Memoranda.] In *Tang, Tieu Long v. M.C.I.* (IAD T98-03766), Whist, Sangmuah, MacAdam, May 17, 1999, the sponsor's brother was held ineligible to co-sign the sponsor's undertaking. It has yet to be decided under the new Regulations whether the notion of co-sponsorship or joint sponsorship, whereby a spouse may pursue an appeal on behalf of a member of the family class upon the sponsor's death, will continue to apply. The Federal Court of Appeal upheld the practice under the old Regulations in *M.C.I. v. Gill, Kushwinder Kaur* (F.C.A., no. A-705-97), Linden, Isaac, Sexton, January 26, 1999, while allowing that the situation under the new Regulations may not be the same.

<sup>116</sup> *Immigration Regulations, 1978*, section 5(4). These requirements include meeting part of the definition of "sponsor" as well as the requirements set out in paragraphs (c) to (e) and (g) in section 1.2.4.1., "Introduction." A co-signing spouse must also enter into the agreement referred to in paragraph (h) of the same section.

<sup>117</sup> *Immigration Regulations, 1978*, section 6(1)(b.1). The date referred to in this provision is not entirely clear, but it would appear to run from when the applicant is assessed to have met all other requirements.

<sup>118</sup> *Immigration Regulations, 1978*, section 6(3.1).

<sup>119</sup> *Immigration Regulations, 1978*, sections 5(6), 6(3.4).

<sup>120</sup> *Immigration Regulations, 1978*, sections 5(7), 6(3.5).

#### 1.4. SECTION 19(1)(B) OF THE ACT

Section 19(1)(b)<sup>121</sup> of the *Immigration Act* is directed to the applicants for landing. It was held in *Oliva*<sup>122</sup> that a refusal may be founded on section 19(1)(b) of the Act even though a sponsor is exempt from the requirement to fulfil an undertaking (as in the sponsorship of a spouse or dependent son or daughter) because the two provisions operate separately.

If there are reasonable grounds to believe the applicants are or will be unable or unwilling to support themselves and those dependent on them for care and support, they are inadmissible unless they can satisfy an immigration officer that adequate arrangements have been made for their care and support. “Adequate arrangements” are arrangements other than those that involve social assistance.<sup>123</sup> A refusal made pursuant to section 19(1)(b) of the Act requires more than a sponsor’s inability to meet the low income cut-off.<sup>124</sup>

In *Bui*,<sup>125</sup> the panel’s understanding of the scope and intent of section 19(1)(b) of the Act turned on its reference to “social assistance” and

[it] appears directed at the question of whether an applicant would, in whole or in part, require social assistance [...] In answering that question, the issues of the applicant’s willingness and ability to support herself, and whether adequate arrangements are in place for her support, would appear to go together. That is, if the combination of arrangements put in place for the applicant, and of her willingness and ability to earn income, is sufficient to show that there is no serious possibility of her needing social assistance for support and care, then the application is not caught by section 19(1)(b).<sup>126</sup>

A visa officer must initially reach the conclusion that the applicant is or will be unable or unwilling to support himself or herself. The conclusion must be based on reasonable grounds.<sup>127</sup>

---

<sup>121</sup> Section 19(1)(b) of the *Immigration Act* reads:

19.(1) No person shall be granted admission who is a member of any of the following classes:

[...]

(b) persons who there are reasonable grounds to believe are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except persons who have satisfied an immigration officer that adequate arrangements, other than those that involve social assistance, have been made for their care and support.

<sup>122</sup> *Oliva, Manuela Sipin v. M.E.I.* (I.A.B. 86-9299), Eglington, Warrington, Rotman, March 26, 1987.

<sup>123</sup> Unemployment insurance benefits are not “social assistance”: *Gosal, supra*, footnote 22. A student loan is not irrelevant to the issue of “adequate arrangements”: *Wong, Wei Gang v. M.C.I.* (IAD V98-02259), Carver, May 28, 1999.

<sup>124</sup> *Bui, Thai Thi v. M.C.I.* (IAD V98-00178), Carver, June 23, 1999.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*, at 5.

<sup>127</sup> A visa officer need only have a reasonable belief regarding an applicant’s inability or unwillingness. A sponsor is not required to do more than establish on the usual civil standard of a balance of probabilities that an applicant is able and willing to support himself or herself: *Bui, supra*, footnote 124.

Then the exception in section 19(1)(b) of the Act must be examined. It excepts persons who have satisfied an immigration officer that adequate arrangements have been made for their care and support.<sup>128</sup> The sponsor's ability to fulfil the undertaking is a relevant consideration in assessing

the adequacy of arrangements<sup>129</sup> but is not the only consideration.<sup>130</sup> If an applicant is or will be able or willing to support himself or herself,<sup>131</sup> or if adequate arrangements have been made for the applicant's care and support,<sup>132</sup> section 19(1)(b) of the Act is not a valid ground of refusal. It is improper for the visa officer to proceed directly to a refusal based on the exception without examining the first part of section 19(1)(b) of the Act.<sup>133</sup>

Where an immigration officer fails to inquire properly into the circumstances of the applicant, relies solely on the matters contained in the definition of "undertaking" and ignores the care and support available from persons other than the sponsor, the officer has failed to make the determination required by section 19(1)(b) of the Act.<sup>134</sup> In this respect, as an appeal before the Appeal Division is a *de novo* hearing, the Appeal Division, as a general rule, makes its own determination on the validity of the section 19(1)(b) ground as opposed to simply ruling on alleged errors in the immigration officer's approach.

The Appeal Division held a refusal invalid where the visa officer, in concluding that arrangements were inadequate, had not considered the support available from the sponsor's brother. The sponsor's brother's support easily met the applicable low income cut-off figure. The Appeal Division used this evidence of support in the appeal on compassionate or humanitarian grounds.<sup>135</sup>

---

<sup>128</sup> See *Abdullah, Nizamudeed v. M.C.I.* (IAD T98-03265), Whist, MacAdam, Calvin, May 18, 1999, and *Gladstone, Winston Roy v. M.C.I.* (IAD T98-02117), Whist, Hoare, Sangmuah, July 19, 1999, where this two-step analysis was followed. In *Abdullah*, the applicant was unable to support herself and the arrangements made for her care and support were inadequate.

<sup>129</sup> *Abdullah, ibid.*

<sup>130</sup> If the sponsor is unable to fulfil the undertaking, the Appeal Division may consider other factors and section 19(1)(b) may or may not be a valid ground of refusal, depending on the facts. The panel in *Gladstone, supra*, footnote 128 decided that the LICO figure was not a useful guide in the particular case and was satisfied the sponsor and his wife could meet the needs of children remaining in Jamaica.

<sup>131</sup> In *Samra, supra*, footnote 42, in allowing the appeal in law, the panel limited its determination to the question of the applicant's willingness and ability to support himself. So, too, in *Tang, Khac Nhu v. M.C.I.* (IAD V98-02006), Clark, July 19, 1999, where the appeal was allowed in law as there were reasonable grounds to conclude that the applicant was willing and would be able to contribute to her own support.

<sup>132</sup> In *Del Valle, supra*, footnote 73, the question of adequate arrangements for support was the only aspect of section 19(1)(b) in issue, and its resolution turned on the sponsor's ability to fulfil her undertaking.

<sup>133</sup> *Virk, Gurdeep Kaur v. M.E.I.* (I.A.B. 86-6137), Mawani, Chambers, Howard, March 29, 1987.

<sup>134</sup> *Oliva, supra*, footnote 122.

<sup>135</sup> *Dhaliwal, Davinder Singh v. M.C.I.* (IAD V93-02589), Clark, September 14, 1994. The usual approach is to use evidence of support towards the legal grounds, as in *Mann, Earlene May v. M.E.I.* (I.A.B. 79-6171), Campbell, Glogowski, Loiselle, June 23, 1980, where evidence of a brother's support overcame the section 19(1)(b) refusal.

Where a refusal letter refers to section 19(1)(b) of the Act and section 6(1)(b) of the Regulations, (section 5(2)(f) under the New Regulations) it is a question of construction of the particular refusal letter as to whether the reference to the two provisions means there are two separate grounds of refusal.<sup>136</sup> There may be one ground of refusal, as in *Virk*,<sup>137</sup> where the sponsor's alleged inability to fulfil the undertaking led to the applicant's inadmissibility under section 19(1)(b) of the Act, and the panel concluded that the only ground of refusal was section 19(1)(b). In the sponsorship of a spouse, section 6(1)(b)(iii) of the Regulations does not apply, which in *Williamson*<sup>138</sup> supported the construction that section 19(1)(b) of the Act was the sole ground of refusal.

Where a visa officer refused an application for permanent residence under section 19(1)(b) of the Act after an immigration officer in Canada had been satisfied as to the sponsor's settlement arrangements, the Federal Court in *Khakoo* held that the visa officer erred, stating

[t]here is nothing on the face of paragraph 19(1)(b) which would lead to an interpretation that the immigration officer who has been satisfied must be the visa officer who is considering all aspects of the applicants' application for permanent residence. Nor is there anything on the face of paragraph 19(1)(b) or any other provision of the *Immigration Act* or *Regulations* to which I was directed, including subsection 6(1) of the *Regulations*, which would indicate in express terms, or even by necessary implication, that a visa officer has authority to override the previous satisfaction of an immigration officer even in circumstances, as here, where it is evident that the visa officer was in substantial disagreement with her colleague as to the adequacy of arrangements for support of the applicants other than through social assistance. As the applicants clearly came within the exception to paragraph 19(1)(b) noted above, the visa officer exceeded her jurisdiction in finding the applicants to be within that inadmissible class.<sup>139</sup>

In *Xu*<sup>140</sup>, the Federal Court Trial Division, although dealing with the judicial review of an Appeal Division decision, involving a section 19(1)(b) refusal under the old Regulations, commented *in obiter* on section 19(1)(b) refusals under the new Regulations. The Court held that under the current provisions of section 6(3) of the Regulations, an undertaking of support is

---

<sup>136</sup> See, for example, *Samra*, *supra*, footnote 42, where the panel construed the refusal as comprising two separate grounds.

<sup>137</sup> *Virk*, *supra*, footnote 133.

<sup>138</sup> *Williamson, Vanessa v. M.C.I.* (IAD M97-04454), Sivak, July 24, 1998. Similarly, under the new Regulations, as section 5(2)(f) is inapplicable in a spousal sponsorship, section 19(1)(b) was held to be the only ground of refusal: *Gladstone*, *supra*, footnote 128. In *Williamson* it was also confirmed that section 19(1)(b) of the Act may be used to refuse a spousal application and in so doing, the panel disagreed with *Bildan, Olga v. M.C.I.* (IAD T96-03930), Wiebe, October 24, 1997.

<sup>139</sup> *Khakoo, Gulshan M. v. M.C.I.* (F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995, at 7-8. According to *Khakoo*, a reassessment would have to be done by the same officer. *Khakoo* aside, the Appeal Division's *de novo* jurisdiction entitles it to determine the applicant's admissibility on the date of the hearing: *Randhawa, Parkash*, *supra*, footnote 88.

<sup>140</sup> *Xu, Guang Hui v. M.C.I.* (F.C.T.D., no. IMM-6396-98), O'Keefe, April 13, 2000.

proof of adequate arrangements for support of a spouse within the meaning of section 19(1)(b). Were it otherwise, a visa officer could thwart the amendments to section 6(3) of the Regulations by requiring exactly what that provision states shall not be required - proof of an ability of the sponsor to fulfill the undertaking.

The Trial Division decision in *Xu* was considered by the Appeal Division in the case of *Le*.<sup>141</sup> The Appeal Division noted that O'Keefe J.'s position is not binding on the panel, as it is clearly an *obiter* comment within the decision. The panel was not persuaded by O'Keefe, J.'s line of reasoning, which appears to rely upon a section in the Regulations to interpret a section in the *Immigration Act* itself. It was not clear to the panel that the wording of a regulation can take precedence over the wording in a statute when there appears to be a conflict in the wording or intent of the sections in question.

## 1.5. DEFAULT AND BREACH OF UNDERTAKING

Section 118(1) of the *Immigration Act* provides that an undertaking may be assigned by the Minister to Her Majesty in right of any province. Section 118(2) of the Act provides that any payments of a prescribed nature made directly or indirectly to an immigrant that result from a breach of an undertaking may be recovered in a court of competent jurisdiction as a debt due to Her Majesty in right of Canada or in right of the province to which the undertaking is assigned.

Section 56 of the *Immigration Regulations, 1978* provides that payments resulting from a breach of an undertaking and made directly or indirectly to an immigrant under an item described in column I of Schedule VI are payments that may be recovered from the person who gave the undertaking. Column I of Schedule VI lists payments of a prescribed nature, including income assistance under various provincial statutes.

A refusal is based on section 6(1)(b)(ii) of the *Immigration Regulations, 1978* (section 5(2)(g) of the New Regulations) where there has been default or breach of a previous outstanding undertaking. Use of the present tense in this provision allows for a consideration of whether the default has been corrected.<sup>142</sup>

An official demand for repayment is not a prerequisite for making out a default. A sponsor is in default where a relative who was the subject of an undertaking has received social assistance and there has been no restitution of the monies paid. That a sponsor did not wish his

---

<sup>141</sup> *Le, Tai Manh v. M.C.I.* (IAD T99-04772), Whist, June 13, 2000.

<sup>142</sup> *Ratnasabapathy, Ramesh v. M.C.I.* (IAD T95-05286), Maziarz, July 25, 1997. Reported: *Ratnasabapathy v. Canada (Minister of Citizenship and Immigration)* (1997), 38 Imm. L.R. (2d) 184 (I.A.D.). By the time of the hearing, the sponsor's relatives were no longer on welfare and this ground of refusal was accordingly held invalid; however, there was no evidence led regarding restitution of the welfare payments by the sponsor.

relative to collect social assistance is irrelevant<sup>143</sup> as is the fact that a sponsor offers his services in lieu of monetary restitution.<sup>144</sup>

Where the payments made are not listed in column I, there is no deemed breach of an undertaking. However, a sponsor may nevertheless be in default of the undertaking for failing to provide lodging, care and support to the applicants. An attempt at restitution of monies paid out is a relevant factor for consideration in an appeal under section 77(3)(a) and (b) of the Act.<sup>145</sup>

A sponsor was not in default of the undertaking for his wife where he had made arrangements to support her after their separation and divorce, there was no proof that she actually received social assistance payments, and she was no longer a member of the family class.<sup>146</sup>

Where the sponsor's parents, the subject of previous undertakings, had received social assistance for about two years until they were eligible for old age pensions, and there had not been restitution, the breach of the undertakings was continuing although the parents had died by the time of the hearing.<sup>147</sup>

## 1.6. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS<sup>148</sup>

### 1.6.1. "Old Regulations"

Discretionary relief having regard to compassionate or humanitarian considerations may be granted to a sponsor after a refusal is found valid on account of the sponsor's inability to fulfil the undertaking<sup>149</sup> or section 19(1)(b) of the Act. If special relief is warranted, the appeal will be allowed. "Compassionate or humanitarian considerations" are defined in *Chirwa*<sup>150</sup> as

[...] 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 provisions of the *Immigration Act*.

Traditionally, the test from *Romeo*<sup>151</sup> (per Member Townshend) has been applied: (1) the sponsor must present evidence that would create a desire to relieve the family's misfortunes; and

---

<sup>143</sup> *Randhawa, Jasbir Singh, supra*, footnote 16; *Tayo, Helen Posada v. M.E.I.* (I.A.B. 87-6583), Arpin, Mawani, Gillanders, January 9, 1989.

<sup>144</sup> *Taghizadeh-Barazande, Parviz v. M.C.I.* (IAD T97-00073), D'Ignazio, January 20, 1998.

<sup>145</sup> *Assaf, Mohamad Abdallah v. M.E.I.* (IAD V92-01259), Wlodyka, October 28, 1993.

<sup>146</sup> *Chaudhary, Navid Iqbal v. M.E.I.* (I.A.B. 86-4144), Petryshyn, Wright, Rayburn, October 28, 1987.

<sup>147</sup> *Dhillon, Pal Singh v. M.E.I.* (IAD V93-01470), Verma, November 2, 1994.

<sup>148</sup> Refer to chapter 9, "Compassionate or Humanitarian Considerations," for more on the topic.

<sup>149</sup> *Mavi, supra*, footnote 75.

<sup>150</sup> *Chirwa v. Canada (Minister of Manpower and Immigration)* (1970), 4 I.A.C. 338 (I.A.B.), at 350.

<sup>151</sup> *Romeo, Domenica v. M.E.I.* (IAD T89-01205), Sherman, Weisdorf, Townshend (dissenting), February 12, 1990.

(2) the evidence led must be weighed against the legal impediment which caused the refusal. The Trial Division of the Federal Court in *Kirpal*<sup>152</sup> has since held that the Appeal Division errs if it weighs the legal impediment against the humanitarian or compassionate factors present in the appeal. Yet there are decisions of the Federal Court of Appeal that sanction consideration of the legal impediment in the exercise of the Appeal Division's discretionary jurisdiction. They are canvassed in *Chauhan*.<sup>153</sup>

*Kirpal* also addressed the issue of an individual exercise of special relief for each sponsored family member in an appeal.<sup>154</sup> The Appeal Division does not generally undertake an individual assessment of compassionate or humanitarian factors for each applicant. Where the Appeal Division does engage in such individual assessments, it usually comes to a uniform conclusion for all applicants on the question of whether or not special relief is warranted.<sup>155</sup> *Kirpal* does not support an exercise of discretion which ignores the applicants' financial obligations for their non-accompanying dependants<sup>156</sup> or a reduction in the number of applicants for whom a sponsor is responsible in order to allow the sponsor to fulfil the undertaking.<sup>157</sup>

The objective in section 3(c) of the *Immigration Act*, "to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad," is also considered.<sup>158</sup>

## 1.6.2. "New Regulations"

### 1.6.2.1. Current Financial Circumstances

A sponsor's current financial circumstances are relevant to the appeal on compassionate or humanitarian grounds.<sup>159</sup> At a hearing, the Appeal Division "[...] is entitled to consider

---

<sup>152</sup> *Kirpal v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 352 (T.D.).

<sup>153</sup> *Chauhan, Gurpreet K. v. M.C.I.* (IAD T95-06533), Townshend, June 11, 1997. See also the discussion in chapter 9, "Compassionate or Humanitarian Considerations," section 9.1.2., "Exercise of Discretionary Jurisdiction."

<sup>154</sup> In *Chauhan, ibid.*, the panel articulated its disagreement with *Kirpal* in this respect.

<sup>155</sup> 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.

<sup>156</sup> *Del Valle, supra*, footnote 73.

<sup>157</sup> *Dosanjh, Balbir Kaur v. M.C.I.* (IAD V95-00550), McIsaac, July 31, 1997. Reported: *Dosanjh v. Canada (Minister of Citizenship and Immigration)* (1997), 38 Imm. L.R. (2d) 189 (I.A.D.).

<sup>158</sup> *Bath, supra*, footnote 43.

<sup>159</sup> *Jugpall, supra*, footnote 110. The panel cited *Chauhan, supra*, footnote 153 with approval, noting the importance of situating the compassionate or humanitarian factors in the context of the legal barrier to admissibility. *Jugpall* has been followed in other cases which have held that the current financial situation of a sponsor is relevant to the appeal on discretionary grounds. See, for example, *Patel, Hareshkumar v. M.C.I.* (IAD T98-00967), Buchanan, May 13, 1999; *Dhillon, Ranjit Kaur, supra*, footnote 109; *Samra, Pargat Singh v. M.C.I.* (IAD T98-01557), Boire, July 8, 1999; and *Shoker, Swarnjit Kaur v. M.C.I.* (IAD V98-02746), Clark, June 15, 1999.

contemporary matters which necessarily involve a consideration of changed circumstances when exercising its equitable jurisdiction.”<sup>160</sup> The assessment is of the sponsor’s income over the 12-month period preceding the date of the Appeal Division hearing<sup>161</sup> as compared with the applicable low income cut-off figure.<sup>162</sup>

#### 1.6.2.1.1. LICO not met

Where a sponsor has not overcome the ground of inadmissibility because the LICO figure cannot be met, according to *Jugpall*,<sup>163</sup> the appropriate test for the exercise of special relief is as articulated in *Chirwa*.<sup>164</sup> In *Soroor*,<sup>165</sup> the *Chirwa* test was applied where the LICO was met only for seven of the 12 months preceding the appeal.

In *Mendoza*,<sup>166</sup> the sponsor’s demonstrated emotional attachment to the applicants and his family’s present financial situation led to a favourable exercise of discretion although his income fell just short of the current LICO figure. In *Samra*,<sup>167</sup> the *Chirwa* test was used and the facts found insufficient to warrant special relief: there was no sense of misfortune in the lives of the applicants (the sponsor’s parents and siblings) and the emotional effects of separation arising out of a conscious choice to emigrate did not constitute compassionate or humanitarian considerations sufficient, in and of themselves, to warrant special relief.

#### 1.6.2.1.2. LICO met

Where a sponsor has in substance overcome the ground of inadmissibility because the LICO figure has been met, this fact weighs heavily in the exercise of statutory discretion because the legislative concern that the sponsor be solvent has been met.<sup>168</sup> A different and lower threshold for granting special relief is appropriate where current circumstances reveal that the

---

<sup>160</sup> *M.E.I. v. Gill, Hardeep Kaur* (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991, at 6-7; relied on in *Jugpall*, *supra*, footnote 110.

<sup>161</sup> This is in order to make the assessment consistent with the new Regulations which also adopt a 12-month time frame: *Luong*, *supra*, footnote 100.

<sup>162</sup> *Jugpall*, footnote 110.

<sup>163</sup> *Ibid.*

<sup>164</sup> *Chirwa*, *supra*, footnote 150. See section 1.5.1., “Old Regulations,” for the *Chirwa* test.

<sup>165</sup> *Soroor, Siamak v. M.C.I.* (IAD V98-01600), Hoare, May 7, 1999. The granting of special relief was warranted. See also *Patel*, *supra*, footnote 159, where *Chirwa* was the test given LICO was not met.

<sup>166</sup> *Mendoza, Bernardino Jr. v. M.C.I.* (IAD V98-00168), Carver, January 8, 1999. The *Chirwa* test was not mentioned in the panel’s decision. See too *M’Mbuyi, Charity Kongi v. M.C.I.* (IAD T99-05371), Michnick, June 9, 2000; *Haile, Tsege Gabregeorgies v. M.C.I.* (IAD T99-06854), D’Ignazio, May 3, 2000.

<sup>167</sup> *Samra, Pargat Singh*, *supra*, footnote 159.

<sup>168</sup> *Jugpall*, *supra*, footnote 110.



obstacle to admissibility has been overcome.<sup>169</sup> However, the changed financial circumstances of a sponsor do not, in and of themselves, constitute a basis for granting special relief.<sup>170</sup>

In *Tailor*,<sup>171</sup> the panel took a slightly different approach, in identifying the issue as whether on the totality of the considerations, including the improvement in the sponsor's financial circumstances, special relief was warranted.<sup>172</sup> The panel added that the present ability to meet the LICO figure should not be taken to be a single, undifferentiated consideration. The weight to be given this factor depended on a host of matters, such as whether it reflected a genuine financial stability. Similarly, in *Banipal*,<sup>173</sup> although LICO was met, the sponsor's income was tenuous and his housing expenses would rise with the arrival of the applicants, who were unlikely to contribute to the family income, all of which led to the conclusion that the sponsor's financial circumstances were not sufficiently changed to warrant applying a lower threshold for granting special relief.

In *Lam*,<sup>174</sup> the panel cited *Juggall* but articulated its approach to the issue of the relevance of overcoming the impediment to admissibility in a somewhat different fashion. The panel held that the relevance of overcoming the impediment to admissibility in the 12 months preceding the hearing should be viewed in the context of the long accepted proposition that the degree of compelling circumstances should be commensurate with the obstacle to admissibility in order to justify the granting of special relief. The closer a person is to overcoming the barrier to admissibility the fewer other compelling factors will be needed to succeed on appeal. The complete surmounting of the ground of inadmissibility weighed very heavily in the Appeal Division's assessment of the compassionate and humanitarian considerations of the case.

---

<sup>169</sup> *Ibid.* In *Luong, supra*, footnote 100, at 2, the panel cited *Juggall*'s "mildly compelling case" as an apt description of the standard. This lesser standard has been applied in several decisions, for example: *Singh (née Bangari)*, *Menachie* (IAD T98-02295), Hoare, June 22, 1999.

<sup>170</sup> *Ibid.* See also *Dhillon, Ranjit Kaur, supra*, footnote 109, the panel holding that the present ability to meet LICO is not, by itself, determinative; *Kaur, Paramjit v. M.C.I.* (IAD T99-06349), Kelley, July 11, 2000. In *Rupal, Tejwant Singh v. M.C.I.* (IAD V98-00765), Singh, January 8, 1999, LICO was met but there were insufficient other compassionate or humanitarian grounds to warrant granting special relief; *Singh, Lakhvir v. M.C.I.* (IAD T99-06247), D'Ignazio, May 16, 2000.

<sup>171</sup> *Tailor, Jyotiben v. M.C.I.* (IAD V98-01828), Carver, June 15, 1999.

<sup>172</sup> The facts in *Tailor* were that the sponsor and her spouse were intelligent and hard-working, at the early stages of promising careers, and were able to provide accommodation to the applicants, who were themselves a mechanical engineer, a teacher and a student in computer programming. Taking all these considerations into account, the panel gave considerable weight to the sponsor's ability to meet the financial requirements for sponsorship. See also *Tatla, Rajinder Singh v. M.C.I.* (IAD V98-02657), Carver, June 2, 1999, where the panel stated, at 2:

Where [the present ability to meet LICO] is shown to be stable, and not a temporary situation or one which may be jeopardized by imminent difficulties such as the need for immediate accommodation for the applicants, or a likelihood or a possibility of layoff in employment, then that financial factor has a greater weight going to discretionary jurisdiction.

<sup>173</sup> *Banipal, Jaswinder Singh v. M.C.I.* (IAD T98-01522), MacAdam, June 4, 1999.

<sup>174</sup> *Lam, Maggie Hung v. M.C.I.* (IAD T99-05731), Kelley, April 14, 2000.

The diligence shown by a sponsor at the time of filing an undertaking may be a consideration. A sponsor who appears to have little regard for meeting the financial requirements at the time of filing the undertaking may receive less consideration from the Appeal Division for an improvement in income by the date of hearing.<sup>175</sup>

#### 1.6.2.1.2.1. additional positive factors

Before special relief is warranted, there must be positive factors independent of financial circumstances that move the Appeal Division to conclude that it would be unfair to require a sponsor to start the sponsorship process all over again.<sup>176</sup> In *Luong*,<sup>177</sup> the panel expressed the view that undue emphasis on compassion and misfortune clouds the issue of whether special relief is warranted; that humanitarian factors cannot be reduced to just misfortune or distress; and that it is not necessary to characterize a situation as a misfortune in order to justify special relief. In the words of the panel:

[The] question that must be answered is whether it is just or fair for an appellant who meets the financial requirements for sponsorship to repeat the costly and time-consuming process of sponsorship, because of the rigidity of the new Regulations?<sup>178</sup>

In *Jugpall*,<sup>179</sup> the positive factors included the sponsor's diligence and self-sacrifice, and the support of a cohesive extended family.

In *Singh (née Bangari)*,<sup>180</sup> the sponsor's closeness to the applicant (her widowed mother), the fact that three of the applicant's five children lived in Canada, the fact that the applicant would be able to assist by caring for her grandchildren and would be able to develop a closer relationship with these grandchildren in Canada were the positive factors inducing the panel to grant special relief.<sup>181</sup>

The Appeal Division in *Tailor*<sup>182</sup> found a strong emotional attachment between the sponsor and the applicants (her parents and sibling), the applicants had a real interest in coming to Canada and the sponsor's mother would be able to reunite with her own widowed mother in Canada. These considerations, coupled with the fact that the sponsor and her husband were conscientious and hard-working, resulted in a favourable exercise of discretion. Again, in

---

<sup>175</sup> *Chang, Kong v. M.C.I.* (IAD V98-03274), Carver, June 23, 1999. This principle was not applied in the circumstances of this case.

<sup>176</sup> *Jugpall, supra*, footnote 110.

<sup>177</sup> *Luong, supra*, footnote 100.

<sup>178</sup> *Ibid.*, at 6.

<sup>179</sup> *Jugpall, supra*, footnote 110.

<sup>180</sup> *Singh (née Bangari), supra*, footnote 169.

<sup>181</sup> As in *Jugpall, supra*, footnote 110, there were no negative factors identified.

<sup>182</sup> *Tailor, supra*, footnote 171.

*Tatla*,<sup>183</sup> the positive factors found were the affection and closeness between the sponsor and the applicants (his mother and brother) and the fact that the sponsor's mother was a recent widow.

#### **1.6.2.1.2.2. absence of negative factors**

There should be no negative factors that would undermine any justification for granting special relief.<sup>184</sup> In *Be*<sup>185</sup> the panel found that the positive factors in the case were outweighed by the fact that the appellant had submitted to the visa post misleading information concerning her employment history.

#### **1.6.2.2. Johl Factors**

It was held in *Jugpall*<sup>186</sup> that the additional factors set out in the *Johl*<sup>187</sup> decision, such as the willingness of family members to support the undertaking and the employment prospects of the applicants, are not to be considered in the exercise of statutory discretion because to do so would undermine the legislative purpose of the changes to the Regulations.

---

<sup>183</sup> *Tatla, supra*, footnote 172.

<sup>184</sup> *Jugpall, supra*, footnote 110. The approach of canvassing the evidence for negative factors has been adopted in several cases, for example: *Tatla, ibid.*; and *Singh (née Bangari), supra*, footnote 169.

<sup>185</sup> *Be, Huy Lang v. M.C.I.* (IAD T98-00530), Maziarz, September 22, 1999.

<sup>186</sup> *Ibid.*

<sup>187</sup> *Johl, supra*, footnote 16. The factors are listed in section 1.1.3., "Undertaking Requirements And Relevant Factors To Be Considered In The Determination."

# CHAPTER 1

## TABLE OF CASES: FINANCIAL REFUSALS

### CASES

<i>Abdullah, Nizamudeed v. M.C.I.</i> (IAD T98-03265), Whist, MacAdam, Calvin, May 18, 1999 .....	1-21
<i>Abuan, Mary Ann Janet R. v. M.E.I.</i> (IAD V92-01508), Gillanders, May 21, 1993 .....	1-6, 1-9, 1-11, 1-13
<i>Assaf, Mohamad Abdallah v. M.E.I.</i> (IAD V92-01259), Wlodyka, October 28, 1993 .....	1-24
<i>Atwal, Bhupinder Singh v. M.E.I.</i> (IAD V93-01460), Durand, June 30, 1994 .....	1-13
<i>Banipal, Jaswinder Singh v. M.C.I.</i> (IAD T98-01522), MacAdam, June 4, 1999 .....	1-27
<i>Baring, Harwinder Kaur v. M.E.I.</i> (IAD V93-00614), Lam, Ho, Verma, August 10, 1994. ....	1-8
<i>Basra, Pinkjeet Kaur v. M.C.I.</i> (IAD V94-00508), Lam, October 17, 1996 .....	1-6, 1-13
<i>Bath, Satwant Kaur v. M.E.I.</i> (IAD V91-01006), Wlodyka, April 29, 1992 .....	1-7, 1-8, 1-9, 1-26
<i>Be, Huy Lang v. M.C.I.</i> (IAD T98-00530), Maziarz, September 22, 1999 .....	1-29
<i>Beaubrun, Marie Lourdes v. M.E.I.</i> (I.A.B. 79-1114), Loiselle, Houle, Tremblay, March 17, 1980 .....	1-6
<i>Bernal, Lisseth Polillo v. M.C.I.</i> (IAD T95-01230), Boire, June 30, 1998 .....	1-3
<i>Bildan, Olga v. M.C.I.</i> (IAD T96-03930), Wiebe, October 24, 1997 .....	1-22
<i>Brar (Dhaliwal), Dalvir Kaur v. M.C.I.</i> (IAD V97-00285), Baker, January 4, 1999 .....	1-6, 1-8
<i>Brar, Gurcharan Singh v. M.E.I.</i> (IAD V93-00593), Wlodyka, November 23, 1993 .....	1-5, 1-9, 1-10
<i>Bui, Thai Thi v. M.C.I.</i> (IAD V98-00178), Carver, June 23, 1999 .....	1-20, 1-21
<i>Cadiz, Mamerto Frilles v. M.E.I.</i> (I.A.B. 84-4019), Petryshyn, Hlady, Voorhees, October 15, 1985 .....	1-5
<i>Campbell, Carmen v. M.E.I.</i> (IAD T91-02166), Bell, Chu, Ahara, February 3, 1992 .....	1-8
<i>Chang, Kong v. M.C.I.</i> (IAD V98-03274), Carver, June 23, 1999 .....	1-28
<i>Chaudhary, Navid Iqbal v. M.E.I.</i> (I.A.B. 86-4144), Petryshyn, Wright, Rayburn, October 28, 1987 .....	1-24
<i>Chauhan, Gurpreet K. v. M.C.I.</i> (IAD T95-06533), Townshend, June 11, 1997 .....	1-25, 1-26
<i>Cheema, Jaspal Singh v. M.C.I.</i> (IAD TA0-02246), Néron, Bacon, Hoare, February 28, 2001 .....	1-16
<i>Chen, Zhu Ji v. M.C.I.</i> (IAD V99-02884), Workun, January 5, 2001 .....	1-16
<i>Cheung, Shiu Ming Anna v. M.C.I.</i> (IAD V97-01634), Carver, November 30, 1998 .....	1-4
<i>Chirwa v. Canada (Minister of Manpower and Immigration)</i> (1970), 4 I.A.C. 338 (I.A.B.) .....	1-25, 1-26
<i>De Ocampo, Maria Theresa v. M.C.I.</i> (IAD V98-00090), Singh, October 21, 1998 .....	1-6
<i>Del Valle, Alida Angelita v. M.C.I.</i> (IAD T94-03174), Goodman, March 6, 1997 .....	1-12, 1-21, 1-25
<i>Dhaliwal, Davinder Singh v. M.C.I.</i> (IAD V93-02589), Clark, September 14, 1994 .....	1-22
<i>Dhaliwal, Jagdish Singh v. M.E.I.</i> (I.A.B. 86-6078), Wlodyka, June 10, 1987 .....	1-7, 1-12
<i>Dhaliwal, Kulwant Singh v. M.C.I.</i> (IAD V95-02732), Jackson, Hoare, Nee, October 7, 1997 .....	1-5
<i>Dhillon, Balmeet Kaur v. M.C.I.</i> (IAD V95-02751), Lam, May 25, 1998 .....	1-7
<i>Dhillon, Pal Singh v. M.E.I.</i> (IAD V93-01470), Verma, November 2, 1994 .....	1-24
<i>Dhillon, Ranjit Kaur v. M.C.I.</i> (IAD V98-01839), Carver, March 26, 1999 .....	1-18, 1-26, 1-27

<i>Dosanjh, Balbir Kaur v. M.C.I.</i> (IAD V95-00550), McIsaac, July 31, 1997. Reported: <i>Dosanjh v. Canada (Minister of Citizenship and Immigration)</i> (1997), 38 Imm. L.R. (2d) 189 (I.A.D.) .....	1-25
<i>Dulay, Chamkor Singh v. M.C.I.</i> (IAD T99-06280), Hoare, August 23, 2000 .....	1-16
<i>Ebuna, Rosario Valderama v. M.C.I.</i> (IAD V99-02102), Baker, September 22, 2000 (reasons signed September 28, 2000) .....	1-16
<i>Gandham, Rehsam Kaur v. M.E.I.</i> (IAD V91-01666), MacLeod, Gillanders, Verma, March 3, 1993 .....	1-11
<i>Gill, Resham Singh v. M.E.I.</i> (IAD V93-02223), Clark, December 8, 1994 .....	1-5, 1-8
<i>Gill, Varinderjit (Badesha) v. M.C.I.</i> (IAD V98-01629), Borst, March 19, 1999 .....	1-12, 1-14
<i>Gill: M.C.I. v. Gill, Kushwinder Kaur</i> (F.C.A., no. A-705-97), Linden, Isaac, Sexton, January 26, 1999 .....	1-19
<i>Gill: M.E.I. v. Gill, Hardeep Kaur</i> (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991 .....	1-26
<i>Gladstone, Winston Roy v. M.C.I.</i> (IAD T98-02117), Whist, Hoare, Sangmuah, July 19, 1999 .....	1-21, 1-22
<i>Gosal, Jasvir Kaur v. M.E.I.</i> (IAD V93-02361), Ho, July 12, 1994 .....	1-5, 1-8, 1-10, 1-13, 1-20
<i>Haile, Tsege Gabregeorgies v. M.C.I.</i> (IAD T99-06854), D’Ignazio, May 3, 2000 .....	1-26
<i>Heer, Sukhinder Kaur v. M.E.I.</i> (I.A.B. 87-6200), Gillanders, Mawani, MacLeod, August 3, 1988 .....	1-7
<i>Huynh, Minh Nhon v. M.C.I.</i> (IAD V95-00717), Clark, October 29, 1996 .....	1-10
<i>Jagpal, Sawandeep Kaur v. M.C.I.</i> (IAD V96-00243), Singh, June 15, 1998 .....	1-25
<i>Johl, Baljinder Kaur v. M.E.I.</i> (I.A.B. 85-4006), Eglington, Arpin, Wright, January 26, 1987 .....	1-4, 1-10, 1-18, 1-29
<i>Jugpall, Sukhjeewan Singh v. M.C.I.</i> (IAD T98-00716), Aterman, Goodman, Townshend, April 12, 1999 .....	1-18, 1-26, 1-27, 1-28, 1-29
<i>Kadir, Nizam v. M.C.I.</i> (IAD T99-14672), Whist, December 6, 2000 .....	1-16
<i>Kahlon, Darshan Singh v. M.E.I.</i> (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: <i>Kahlon v. Canada (Minister of Employment and Immigration)</i> (1989), 7 Imm. L.R. (2d) 91 (F.C.A.) .....	1-5
<i>Kainth, Rupinder Kaur v. M.C.I.</i> (IAD V95-01204), Lam, January 7, 1997 .....	1-9, 1-13
<i>Kandasamy, Gunabalan v. M.C.I.</i> (IAD T97-04453), D’Ignazio, January 27, 1999 .....	1-5
<i>Kandawala, Aziz Ahmed v. M.C.I.</i> (IAD V99-01695), Baker, March 9, 2000 .....	1-16
<i>Kandola, Sarabjit Kaur v. M.C.I.</i> (IAD V94-00903), McIsaac, September 4, 1997 .....	1-14
<i>Kaur, Manjit v. M.E.I.</i> (I.A.B. 84-9064), D. Davey, Tisshaw, Suppa, December 13, 1985 .....	1-6, 1-7
<i>Kaur, Paramjit v. M.C.I.</i> (IAD T99-06349), Kelley, July 11, 2000 .....	1-27
<i>Khakoo, Gulshan M. v. M.C.I.</i> (F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995 .....	1-23
<i>Khosa, Manjit Kaur v. M.E.I.</i> (I.A.B. 82-6159), Loiselle, Falardeau-Ramsay, Tremblay, April 8, 1983 .....	1-7
<i>Kirpal v. Canada (Minister of Citizenship and Immigration)</i> , [1997] 1 F.C. 352 (T.D.) .....	1-25
<i>Kler, Balbir Kaur v. M.E.I.</i> (I.A.B. 84-9534), Hlady, Benedetti, Teitelbaum, December 4, 1984 .....	1-7
<i>Kooner, Parmjeet Kaur v. M.E.I.</i> (IAD V93-00508), Singh, June 28, 1994 .....	1-13
<i>Lall, Khamahwattee v. M.E.I.</i> (I.A.B. 84-9622), D. Davey, Glogowski, Suppa, July 11, 1985 .....	1-12
<i>Lam, Maggie Hung v. M.C.I.</i> (IAD T99-05731), Kelley, April 14, 2000 .....	1-28

<i>Lazaro, Lydia Niar v. M.C.I.</i> (IAD V98-02123), Clark, July 26, 1999 .....	1-4
<i>Le, Tai Manh v. M.C.I.</i> (IAD T99-04772), Whist, June 13, 2000 .....	1-23
<i>Luong, Van Cuong v. M.C.I.</i> (IAD T98-03247), Sangmuah, June 30, 1999 .....	1-16, 1-26, 1-27, 1-28
<i>M'Mbui, Charity Kongi v. M.C.I.</i> (IAD T99-05371), Michnick, June 9, 2000 .....	1-26
<i>Macaraig, Evangelina Cruz v. M.E.I.</i> (I.A.B. 83-6415), Hlady, Petryshyn, Tremblay, December 18, 1984 .....	1-11
<i>Madera, Nenette v. M.C.I.</i> (IAD V96-01369), Nee, March 25, 1998 .....	1-7
<i>Mann, Earlene May v. M.E.I.</i> (I.A.B. 79-6171), Campbell, Glogowski, Loisselle, June 23, 1980.....	1-22
<i>Mann, Kusum L. v. M.E.I.</i> (I.A.B. 85-9258), Tisshaw, Townshend, Ariemma, October 15, 1986 .....	1-7
<i>Maulion: M.C.I. v. Maulion, Ma Cecilia</i> (F.C.T.D., no. IMM-1054-95), Jerome, May 9, 1996. Reported: <i>Canada (Minister of Citizenship and Immigration) v. Maulion</i> (1996), 33 Imm. L.R. (2d) 244 (F.C.T.D.) .....	1-10
<i>Mavi, Jaswinder Kaur v. M.E.I.</i> (I.A.B. 83-10054), Suppa, D. Davey, Glogowski, August 1, 1985.....	1-12, 1-13, 1-25
<i>Mendoza, Bernardino Jr. v. M.C.I.</i> (IAD V98-00168), Carver, January 8, 1999.....	1-26
<i>Mohammed, Sarwari Begum v. M.E.I.</i> (I.A.B. 84-6249), Anderson, Chambers, Howard, April 29, 1986.....	1-4, 1-6
<i>Moushikh, Haroot v. M.C.I.</i> (IAD T98-00314), Buchanan, March 30, 1999 .....	1-6, 1-12
<i>Natividad, Quintin Pandac v. M.E.I.</i> (IAD V92-01200), Verma, January 6, 1994 .....	1-9
<i>Nazir, Mohamed A. v. M.E.I.</i> (I.A.B. 84-9578), D. Davey, Suppa, Voorhees, March 25, 1986.....	1-6
<i>Oliva, Manuela Sipin v. M.E.I.</i> (I.A.B. 86-9299), Eglington, Warrington, Rotman, March 26, 1987 .....	1-20, 1-21
<i>Patel, Hareshkumar v. M.C.I.</i> (IAD T98-00967), Buchanan, May 13, 1999 .....	1-26
<i>Peck, Lurline Rose v. M.E.I.</i> (I.A.B. 82-9436), Davey, Suppa, Tisshaw, April 25, 1984 .....	1-7
<i>Rai, Sharanjit Kaur v. M.C.I.</i> (IAD V97-01565), Boscariol, July 15, 1998 .....	1-6
<i>Rai, Surjit Kaur v. M.E.I.</i> (I.A.B. 84-6192), Chambers, Tisshaw, Anderson (dissenting), September 17, 1986.....	1-7
<i>Rajput, Sarwan Kumar v. M.E.I.</i> (I.A.B. 83-6694), Petryshyn, Hlady, Voorhees, September 16, 1985.....	1-6
<i>Ramos, Leticia Tecson v. M.E.I.</i> (I.A.B. 83-6512), Anderson, Chambers, Tisshaw, May 8, 1985 .....	1-5, 1-11
<i>Randhawa, Gurmit Kaur v. M.C.I.</i> (IAD V93-02994), Ho, March 13, 1995 .....	1-10
<i>Randhawa, Jasbir Singh v. M.E.I.</i> (IAD V90-00554), Wlodyka, Chambers, Verma, November 30, 1990.....	1-4, 1-24
<i>Randhawa, Parkash v. M.C.I.</i> (IAD V96-00057), Boire, September 17, 1997 .....	1-14, 1-23
<i>Ratnasabapathy, Ramesh v. M.C.I.</i> (IAD T95-05286), Maziarz, July 25, 1997. Reported: <i>Ratnasabapathy v. Canada (Minister of Citizenship and Immigration)</i> (1997), 38 Imm. L.R. (2d) 184 (I.A.D.) .....	1-24
<i>Romeo, Domenica v. M.E.I.</i> (IAD T89-01205), Sherman, Weisdorf, Townshend (dissenting), February 12, 1990 .....	1-25
<i>Rupal, Tejwant Singh v. M.C.I.</i> (IAD V98-00765), Singh, January 8, 1999 .....	1-27
<i>Samra, Balbir Kaur v. M.C.I.</i> (IAD V95-01531), Boscariol, Goodman, Dossa, February 24, 1997.....	1-7, 1-12, 1-13, 1-21
	1-22

<i>Samra, Pargat Singh v. M.C.I.</i> (IAD T98-01557), Boire, July 8, 1999.....	1-26, 1-27
<i>Sangha, Parmjit Kaur v. M.E.I.</i> (I.A.B. 84-6016), Voorhees, Howard, Anderson (dissenting), October 16, 1985.....	1-12
<i>Seepall, Mavis Roslyn v. M.C.I.</i> (IAD T93-06999), Channan, November 9, 1994.....	1-10
<i>Seepall: M.C.I. v. Seepall, Mavis Roslyn</i> (F.C.T.D., no. IMM-4926-94), Jerome, November 24, 1995. Reported: <i>Canada (Minister of Citizenship and Immigration) v. Seepall</i> (1995), 32 Imm. L.R. (2d) 31 (F.C.T.D.).....	1-10
<i>Sekhon, Jaswinder Kaur v. M.C.I.</i> (IAD V93-01781), Ho, June 12, 1995.....	1-5, 1-9, 1-13
<i>Shanmugeswaran, Gunasekaram v. M.C.I.</i> (IAD T98-04625), Whist, June 29, 1999.....	1-12, 1-16
<i>Sharma, Anju v. M.C.I.</i> (IAD V95-02535), Boire, September 10, 1997.....	1-13
<i>Sharma, Deepak Jiwanlal v. M.C.I.</i> (IAD T99-08360), Boire, January 29, 2001.....	1-16
<i>Shoker, Sulinder Singh v. M.C.I.</i> (IAD V96-02983), Boscariol, April 24, 1998.....	1-14
<i>Shoker, Swarnjit Kaur v. M.C.I.</i> (IAD V98-02746), Clark, June 15, 1999.....	1-26
<i>Sidhu, Jagjit Singh (deceased) and Sidhu, Surjit Kaur v. M.E.I.</i> (IAD V92-00644), Clark, Verma, Ho, May 11, 1994.....	1-9, 1-11
<i>Singh (née Bangari), Menachie</i> (IAD T98-02295), Hoare, June 22, 1999.....	1-27, 1-28, 1-29
<i>Singh, Lakhvir v. M.C.I.</i> (IAD T99-06247), D'Ignazio, May 16, 2000.....	1-27
<i>Singh, Mangal v. M.C.I.</i> (IAD T96-00761), Townshend, December 10, 1998.....	1-14
<i>Soroor, Siamak v. M.C.I.</i> (IAD V98-01600), Hoare, May 7, 1999.....	1-26
<i>Taccaban, Rosario Miguel v. M.C.I.</i> (IAD V98-02017), Carver, April 1, 1999.....	1-7
<i>Taghizadeh-Barazande, Parviz v. M.C.I.</i> (IAD T97-00073), D'Ignazio, January 20, 1998.....	1-24
<i>Taylor, Jyotiben v. M.C.I.</i> (IAD V98-01828), Carver, June 15, 1999.....	1-27, 1-29
<i>Tang, Khac Nhu v. M.C.I.</i> (IAD V98-02006), Clark, July 19, 1999.....	1-21
<i>Tang, Tieu Long v. M.C.I.</i> (IAD T98-03766), Whist, Sangmuah, MacAdam, May 17, 1999.....	1-19
<i>Tatla, Rajinder Singh v. M.C.I.</i> (IAD V98-02657), Carver, June 2, 1999.....	1-14, 1-27, 1-29
<i>Tayo, Helen Posada v. M.E.I.</i> (I.A.B. 87-6583), Arpin, Mawani, Gillanders, January 9, 1989.....	1-24
<i>Usha, Ramadhar v. M.E.I.</i> (IAD T93-00078), Ahara, June 23, 1993.....	1-7
<i>Villadiego, Elizabeth Arriola v. M.E.I.</i> (I.A.B. 78-6173), Campbell, Weselak, Beneditti, March 30, 1979.....	1-10
<i>Virk, Gurdeep Kaur v. M.E.I.</i> (I.A.B. 86-6137), Mawani, Chambers, Howard, March 29, 1987.....	1-21, 1-22
<i>Waage, Oscar Barton v. M.E.I.</i> (I.A.B. 81-6369), Loiselle, Glogowski, Tremblay, February 8, 1983.....	1-6
<i>Williamson, Vanessa v. M.C.I.</i> (IAD M97-04454), Sivak, July 24, 1998.....	1-22
<i>Wong, Wei Gang v. M.C.I.</i> (IAD V98-02259), Carver, May 28, 1999.....	1-20
<i>Xu, Guang Hui v. M.C.I.</i> (F.C.T.D., no. IMM-6396-98), O'Keefe, April 13, 2000.....	1-23

## CHAPTER 2

### Table of Contents

<b>2. CRIMINAL REFUSALS</b>	<b>2-1</b>
2.1. INTRODUCTION	2-1
2.2. JURISDICTION	2-2
2.3. STANDARD OF PROOF	2-3
2.4. EQUIVALENCY	2-4
2.5. EXCEPTIONS IN SECTIONS 19(1)(c.1) AND 19(2)(a.1)	2-10
2.6. CONVICTION	2-11
2.7. SECTION 19(1)(e) and (f)	2-13
2.8. SECTION 19(1)(i)	2-14
2.9. SECTION 19(2)(b)	2-14
2.10. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS	2-16



## CHAPTER 2

### 2.

### CRIMINAL REFUSALS

#### 2.1. 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 “criminally” inadmissible to Canada. Sponsorship refusals based on criminal inadmissibility are not considered on a regular basis by the Appeal Division. This chapter will only provide an outline of the issue of criminal inadmissibility. For a detailed analysis, reference should be made to chapters 7 and 8 of the paper entitled *Removal Order Appeals* (Legal Services, Immigration and Refugee Board, February 1, 2002).

The applicable provisions are found in section 19 of the *Immigration Act*.<sup>1</sup> The most common basis for criminal inadmissibility is the visa officer's conclusion that the applicant is a person described in section 19(1)(c), (c.1), (c.2); 19(1)(d); 19(2)(a), (a.1); or 19(2)(b). All of these provisions connect the applicant to offences found in an Act of Parliament. In addition, there are other provisions which have significant criminal elements. These are sections 19(1)(e); 19(1)(f); 19(1)(g); 19(1)(j); 19(1)(k); and 19(1)(l).

The criminal inadmissibility sections are outlined as follows:<sup>2</sup>

<ul style="list-style-type: none"> <li>• criminality - conviction in Canada (maximum imprisonment 10 years or more).....</li> </ul>	<b>s. 19(1)(c)</b>
<ul style="list-style-type: none"> <li>• criminality - equivalent conviction outside Canada (maximum imprisonment 10 years or more)</li> </ul>	<b>s. 19(1)(c.1)(i)</b>
<ul style="list-style-type: none"> <li>• criminality - committed equivalent act outside Canada (maximum imprisonment 10 years or more)</li> </ul>	<b>s. 19(1)(c.1)(ii)</b>
<ul style="list-style-type: none"> <li>• criminality - membership in criminal organization</li> </ul>	<b>s. 19(1)(c.2)</b>
<ul style="list-style-type: none"> <li>• criminality - organized crime</li> </ul>	<b>s. 19(1)(d)</b>
<ul style="list-style-type: none"> <li>• subversion, espionage, terrorism, by individuals and members of a group</li> </ul>	<b>ss. 19(1)(e), and (f)</b>
<ul style="list-style-type: none"> <li>• acts of violence, by individuals and members of a group .....</li> </ul>	<b>s. 19(1)(g)</b>
<ul style="list-style-type: none"> <li>• war criminals</li> </ul>	<b>s. 19(1)(j)</b>

<sup>1</sup> Section 19 of the *Immigration Act* is also a basis on which persons can be ordered removed from Canada. Therefore, the Appeal Division can see issues of criminal inadmissibility when dealing with section 70 appeals from removal orders as well as with section 77 appeals from sponsorship refusals.

<sup>2</sup> See the *Legislation Guide for the IAD*, Legal Services, IRB, January 2, 1998. For the full text of the criminal inadmissibility provisions refer to the relevant sections of the *Immigration Act*.

• danger to security	s. 19(1)(k)
• senior members of governments engaged in gross human rights violations	s. 19(1)(l)
• criminality - conviction in Canada (indictable or hybrid offences, punishable by maximum imprisonment less than 10 years)	s. 19(2)(a)
• criminality - equivalent conviction outside Canada (maximum imprisonment less than 10 years)	s. 19(2)(a.1)(i)
• criminality - committed equivalent act outside Canada (maximum imprisonment less than 10 years)	s.19(2)(a.1)(ii)
• criminality - two summary convictions, in Canada or outside Canada, or a combination thereof	s. 19(2)(b)

The Canadian criminal law provisions in place at the time of the application for permanent residence are to be used to determine the criminal admissibility of the applicant. Subsequent changes in legislation which are prejudicial to the applicant are not to be considered.<sup>3</sup>

## 2.2. JURISDICTION

As indicated above, criminality makes an applicant “inadmissible” to Canada. In a section 77 appeal this means that criminality is not a jurisdictional matter but rather a ground of refusal.

There is, however, a provision of the *Immigration Act* which, if applicable, removes the jurisdiction of the Appeal Division to hear the appeal. Section 77(3.01)<sup>4</sup> provides that in two situations the jurisdiction of the Appeal Division may be removed. In the first situation, a security certificate issued pursuant to section 40.1(1), which has been determined by the Federal Court of Canada to be reasonable, will oust the jurisdiction of the Appeal Division. This is a rarely seen situation. The second situation is more common. For the Appeal Division to lose jurisdiction over the appeal, the person must be within the inadmissible classes of section

<sup>3</sup> *Reyes, Frediswinda v. M.E.I.* (I.A.B. 86-9267), Ariemma, Arkin, Fatsis, January 13, 1987. Reported: *Reyes v. Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 148 (I.A.B.).

<sup>4</sup> Section 77(3.01) provides:

- 77.(3.01) No appeal lies to the Appeal Division under subsection (3) in respect of a person
- (a) with respect to whom a certificate has been filed under subsection 40.1(1) where it has been determined, pursuant to paragraph 40.1(4)(d), that the certificate is reasonable; or
  - (b) who is a member of an inadmissible class described in paragraph 19(1)(c),(c.1),(c.2) or (d) where the Minister is of the opinion that the person constitutes a danger to the public in Canada.

19(1)(c), (c.1), (c.2) or 19(1)(d) and the Minister must have formed the opinion that the person is a danger to the public.

Section 77(3.01) was enacted by Bill C-44 (S.C. 1995, c. 15) on July 10, 1995. An issue which has arisen is whether the Minister may file an opinion that the person is a danger to the public at any time prior to the Appeal Division's rendering its decision on an appeal. In the case of *Tsang*<sup>5</sup>, the Federal Court dealt with this issue in the situation where the appeal had been filed prior to the enactment of Bill C-44 and the hearing had commenced after the enactment. The hearing proceeded and the decision was reserved. Prior to the issuance of the decision, the Minister filed his opinion. The Court determined that the Minister was entitled to file his opinion when he did and that this extinguished the right of appeal to the Appeal Division.<sup>6</sup> The Court of Appeal subsequently upheld the decision.<sup>7</sup>

For a fuller discussion of "danger to the public opinions" please refer to Chapter 2 of the Removals Orders Appeals Paper.

### 2.3. STANDARD OF PROOF

The Federal Court of Appeal considered the standard of proof required for a visa officer to conclude, pursuant to sections 19(1)(c.2) and 19(2)(a.1)(ii) of the *Immigration Act*, that he had "reasonable grounds" for his belief that the appellant was a "member" of a criminal organization. It upheld the Trial Judge's definition of "reasonable grounds" as a standard of proof that, while falling short of a balance of probabilities, nonetheless connotes "a bona fide belief in a serious possibility based on credible evidence" It rejected the more rigorous standard that "reasonable grounds" must not only be credible, but also likely to be true on a balance of probabilities. The Court allowed that "[m]uch will depend on the context: the standard of proof is often more demanding before a power is exercised that has a serious impact on an important individual right. However, refusing to issue a visa to Mr. Chiau was not such a situation, even though the refusal was based on national security grounds".<sup>8</sup>

---

<sup>5</sup> *Tsang, Lannie Wai Har v. M.C.I.* (F.C.T.D., no. IMM-2585-95), Dubé, February 7, 1996.

<sup>6</sup> The Court relied on the transitional provisions found in section 15(3) of Bill C-44 to arrive at its conclusion. Section 15(3) provides:

15.(3) Subsection 77(3.01) of the Act, as enacted by subsection (2), applied to an appeal that has been made on or before the coming into force of that subsection and in respect of which the hearing has not been commenced, but a person who has made such an appeal may, within fifteen days after the person has been notified that, in the opinion of the Minister, the person constitutes a danger to the public in Canada, make an application for judicial review under section 82.1 of the Act with respect to the matter that was the subject of the decision made under subsection 77(1).

<sup>7</sup> *Tsang, Lannie Wai Har v. M.C.I.* (F.C.A., no. A-179-96), Marceau, Desjardins, McDonald, February 11, 1997. Reported: *Tsang v. Canada (Minister of Citizenship and Immigration)*(1997), 37 Imm. L.R. (2d) 1 (F.C.A.).

<sup>8</sup> *Chiau, Sing Chi Stephen v. M.C.I.* (A-75-98), Linden, Sexton, Evans, December 12, 2000. See two cases considering 19(1)(f)(iii)(B) *Sabour, Mohammad Reza v. M.C.I.* (F.C.T.D., no. IMM-3268-99), Lutfy, October 4, 2000 and *M.C.I. v. Owens, Kathleen* (F.C.T.D., no. IMM-5668-99), Dawson, October 11, 2000. [Judicial review of IAD V98-02014, Carver, November 4, 1999].

In a subsequent case <sup>9</sup>, citing the Trial Division's reasons in *Chiau*<sup>10</sup>, the Federal Court adopted the same standard of proof. It went on to remark on the deference which must be accorded to visa officers in similar cases:

The Supreme Court of Canada has held when dealing with a specialized administrative tribunal, courts will accord "significant deference" to it when performing its decision-making function. It is clear from the evidence that visa officer Delisle has extensive experience and specialized knowledge with reference to triad activities in Hong Kong and elsewhere. It is well within his competence to define the meaning of membership in a triad and more particularly in the Sun Yee On triad. He is clearly well aware of his role in protecting and maintaining the interests of Canadian security and his crucial obligation is to ensure that members or criminal organizations are not granted admission to Canada. Thus, the Court must view with considerable deference his definition of "reasonable grounds" and "member". In the case at bar, it certainly was within his jurisdiction to interpret paragraph 19(1)(c.2) in the manner he did, based on his extensive experience in this highly specialized field.

In upholding the visa officer's decision, the Court stated:

It is not up to this Court to decide whether or not the applicant is a member of a triad; the issue, for the Court, is whether there were reasonable grounds for the visa officer to believe that the applicant should be denied entry pursuant to s. 19(1)(c.2) and 19(2)(a.1)(ii). I am satisfied that the totality of the record, including the confidential affidavits, supports Officer Schultz's conclusions. It should not be forgotten that Officer Schultz had considerable experience and knowledge with respect to the activities of triads in Hong Kong.<sup>11</sup>

A certified question as to whether paragraph 19(1)(c.2) "membership in a criminal organization" of the *Immigration Act* in relation to a foreign national infringes subsection 2 (d) of the Charter was answered in the negative.<sup>12</sup>

## 2.4. EQUIVALENCY

Sections 19(1)(c.1) and 19(2)(a.1) of the *Immigration Act* contain the equivalency provisions. Equivalencing is the equating of a foreign conviction, act or omission to a Canadian offence.

Section 19(1)(c.1) provides as follows:

19.(1) No person shall be granted admission who is a member of any of the following classes:

---

<sup>9</sup> *Kin, Kwong Kwok v. M.C.I.* (F.C.T.D., no. IMM-3804-99), Nadon, December 15, 2000. While the decision post-dates the Court of Appeal decision in *Chiau, ibid*, it cites only the Trial Division decision.

<sup>10</sup> *Chiau, Sing Chi Stephen v. M.C.I.* [1998] 2 F.C.642 (T.D.).

<sup>11</sup> *Kin*, supra, footnote 9.

<sup>12</sup> *Yuen, Kwong Yau v. M.C.I.* (F.C.A., no. A-152-99), Létourneau, Sexton, Malone, December 21, 2000. [Judicial review of Adjudication 0003-96-1783, Murrant, December 4, 1997]. Appeal from (F.C.T.D., no. IMM-5272-97), Cullen, February 4, 1999, question certified March 5, 1999.

- (c.1) persons who there are reasonable grounds to believe
- (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or
  - (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,
- except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be.

Section 19(2)(a.1) provides as follows:

19.(2) No immigrant and, except as provided in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:

- (a.1) person who there are reasonable grounds to believe
- (i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years, or
  - (ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years,
- except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be.

There is a distinction between subparagraphs (i) and (ii) in both sections 19(1)(c.1) and 19(2)(a.1). Subparagraph (i) is used in the situation where there has been a **conviction** outside Canada whereas subparagraph (ii) is used in the situation where there has not been a conviction, but it is alleged that the person has “**committed**” an offence. The legislative intent behind the latter subparagraph has been interpreted as applying to any person not convicted of an offence but fleeing justice. It would therefore not apply to a person who had been convicted of an offence and at a later date pardoned.<sup>13</sup>

---

<sup>13</sup> *M.C.I. v. Aguilar, Valentin Ogose*, (ADQML-98-00476), Turmel, December 10, 1998.

To satisfy subparagraph (i), there must have been a conviction outside Canada and this conviction must then be compared to a Canadian offence. In section 19(1)(c.1)(i), 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 **ten years or more**.<sup>14</sup> In section 19(2)(a.1)(i), the determination to be made is whether the offence outside Canada would, if it had been committed in Canada, be an offence punishable by way of indictment by a maximum term of imprisonment of **less than ten years**.

To satisfy subparagraph (ii) in sections 19(1)(c.1) and 19(2)(a.1) 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 comparison with a Canadian offence. In section 19(1)(c.1)(ii)<sup>15</sup>, the comparison made is to a Canadian offence punishable by a maximum term of imprisonment of **ten years or more**. In section 19(2)(a.1)(ii), the comparison made is to a Canadian offence punishable by way of indictment by a maximum term of imprisonment of **less than ten years**.<sup>16</sup>

In addition to the requirement that the offence be triable by indictment, there is the requirement that the offence be punishable “under any Act of Parliament”. This second requirement is not met where the offence is punishable through the inherent jurisdiction of the court and not through any Act of Parliament.<sup>17</sup>

The standard of proof for the equivalency provisions is “reasonable grounds to believe” and not “beyond a reasonable doubt”.<sup>18</sup> The standard of “reasonable grounds to believe” is less

---

<sup>14</sup> For example, notwithstanding a conviction under Sri Lankan law, there was no equivalence with section 368 of the Criminal Code of Canada: *Ramanathapillai, Saraladevy v. M.C.I.* (IAD MA0-06418), di Pietro, February 26, 2002.

<sup>15</sup> For examples of Appeal Division cases arising from sponsorship refusals under section 19(1)(c.1)(ii) see: *Pimentel, Juliet P. v. M.C.I.* (IAD T99-03592), Kelley, Michnick, MacAdam, April 13, 2000. The following cases involve allegations that an applicant knowingly furnished false information: *Sahota, Baljit Singh v. M.C.I.* (IAD V99-01237), Boscariol, September 7, 2000; *Sroya, Sansar Singh v. M.C.I.* (IAD VA0-03542), July 26, 2001; *Sidhu Amarjit Kaur v. M.C.I.* (IAD VA1-01989), Mattu, March 12, 2002. However, in *Singh, Rajwinder v. M.C.I.* (IAD M99-08430), di Pietro, April 2, 2001 the panel held that the evidence of any intention to commit fraud was based on pure conjecture, whereas the Criminal Code requires knowledge that the document was forged. Similarly, in *Gill, Amir Kaur v. M.C.I.* (IAD V98-04531), Boscariol, July 21, 1999, the evidence did not establish the requisite knowledge on the part of the applicant.

<sup>16</sup> *Ahmed, Mohammed Kamal v. M.C.I.* (IAD M99-06900) Bourbonnais, December 6, 2000.

<sup>17</sup> *Massie, Pia Yona v. M.C.I.* (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000. There is sentencing jurisdiction under the common law and under the Criminal Code. 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...”.

<sup>18</sup> *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 (T.D.); 28 Imm. L.R. (2d) 252 (F.C.T.D.).

than a balance of probabilities.<sup>19</sup> The standard has been articulated as "a *bona fide* belief in a serious possibility based on credible evidence".<sup>20</sup>

In determining whether there are "reasonable grounds to believe" a person has committed an offence abroad, the Appeal Division should examine evidence pertaining to the offence.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

If the Canadian offence used for equivalencing is unconstitutional then there can be no equivalent Canadian offence.<sup>24</sup> However, there is no obligation to consider the constitutionality of foreign criminal law.<sup>25</sup>

There have been several Federal Court decisions which have provided the principles to be followed when determining equivalency.

In *Brannson*,<sup>26</sup> 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 elements correspond.

After *Brannson*, the Court in *Hill*<sup>27</sup> provided some further guidance and said that there were three ways to establish equivalency:

---

<sup>19</sup> *Ibid.*; *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306 (C.A.); *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.).

<sup>20</sup> *Choi, Min Su v. M.C.I.* (F.C.T.D., no. IMM-975-99), Denault, May 8, 2000.

<sup>21</sup> *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.).

<sup>22</sup> 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.

<sup>23</sup> *M.C.I. v. Legault, Alexander Henri* (F.C.A., no. A-47-95), Marceau, MacGuigan, Desjardins, October 1, 1997. Reported: *Legault v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 255 (F.C.T.D.).

<sup>24</sup> *Halm, supra*, footnote 18. 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, has stated that the Appeal Division does not have the jurisdiction to rule on the constitutionality of any legislation other than the *Immigration Act*. Challenges to the constitutionality of other federal legislation, as it may arise in an appeal before the Appeal Division, must be brought in another forum.

<sup>25</sup> *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.

<sup>26</sup> *Brannson v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 141 (C.A.), at 152-153.

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;
3. by a combination of paragraph one and two.

The visa officer is required to establish a *prima facie* case for equating the offence with a provision of the Canadian criminal law.<sup>28</sup> The visa officer, not a legal expert, must be satisfied that all the elements set out in section 19(2)(a.1)(ii) have been met.<sup>29</sup> 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.<sup>30</sup> 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.<sup>31</sup>

In some cases where the law of the foreign jurisdiction has not been adduced in evidence, use has been made of the legal doctrine *malum in se*. Black's Law Dictionary (5th edition) defines *malum in se* as follows:

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. Mr. Justice Urie said the following about the use of this doctrine:

---

<sup>27</sup> *Hill, Errol Stanley v. M.E.I.* (F.C.A., no. A-514-86), Hugessen, Urie (concurring), MacGuigan, January 29, 1987 at 2-3. Reported: *Hill v. Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 1 (F.C.A.).

<sup>28</sup> *Tsang, Sau Lin v. M.E.I.* (I.A.B. 85-9587), D. Davey, Chu, Ahara, January 8, 1988.

<sup>29</sup> *Choi, supra*, footnote 20.

<sup>30</sup> *Dayan v. Canada (Minister of Employment and Immigration)*, [1987] 2 F.C. 569 (C.A.).

<sup>31</sup> *Ibid.*



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 [...] 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.<sup>32</sup>

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.<sup>33</sup> 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.”<sup>34</sup>

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.<sup>35</sup>

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.<sup>36</sup>

An issue which has arisen on many occasions is with respect to 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 had the opportunity to deal with this issue in the case of *Li*.<sup>37</sup> In this case, the Federal Court – Trial Division had found that the availability of defences is not an essential element of the equivalency test.<sup>38</sup> The Court of Appeal disagreed and said as follows:

---

<sup>32</sup> *Dayan, supra*, footnote 30 at 578. See too *M.C.I. v. Obaseki, Eghe* (IAD T99-07461), Kalvin, November 15, 2000 where the Appeal Division 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.

<sup>33</sup> *Brannson, supra*, footnote 26.

<sup>34</sup> *Lei, Alberto v. S.G.C.* (F.C.T.D., no. IMM-5249-93), Nadon, February 21, 1994 at 4. Reported: *Lei v. Canada (Solicitor General)* (1994), 24 Imm. L.R. (2d) 82 (F.C.T.D.).

<sup>35</sup> *Lam, Chun Wai v. M.E.I.* (F.C.T.D., no. IMM-4901-94), Tremblay-Lamer, November 16, 1995. See too *Calatan, Wilma v. M.C.I.* (IAD V98-00495), Boscariol, July 10, 2000.

<sup>36</sup> *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.).

<sup>37</sup> *Li, Ronald Fook Shiu (F.C.A.)*, *supra*, footnote 25.

<sup>38</sup> *Li, Ronald Fook Shiu (F.C.T.D.)*, *supra*, footnote 25. *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.

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.<sup>39</sup>

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.

For a more detailed discussion of equivalency please see Chapter 8 of the Removal Order Appeals paper.

## **2.5. EXCEPTIONS IN SECTIONS 19(1)(c.1) AND 19(2)(a.1)**

Sections 19(1)(c.1) and 19(2)(a.1) provide for an exception from the inadmissibility of a person to Canada who otherwise fits within the proscribed class. The exception is for “persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission.”

The Minister must decide the question of rehabilitation. Reasons are required to be provided for decisions of this nature.<sup>40</sup> 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.<sup>41</sup> The Appeal Division does not have the jurisdiction to determine whether a person has or has not been rehabilitated within the exception to section 19(1)(c.1) or 19(2)(a.1).<sup>42</sup> Rehabilitation is a factor, however, which the Appeal Division can consider in the exercise of its discretionary jurisdiction<sup>43</sup>.

The Minister can delegate the power to determine rehabilitation.<sup>44</sup> The Court has held, however, that the visa officer has no duty to question the reasonableness of the Minister’s

---

<sup>39</sup> *Li, Ronald Fook Shiu (F.C.A.)*, *supra*, footnote 25 at 252.

<sup>40</sup> *Thamber, Avtar Singh v. M.C.I.* (F.C.T.C., 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.).

<sup>41</sup> *Thamber*, *supra*, footnote 40.

<sup>42</sup> *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.).

<sup>43</sup> See chapter 9, “Compassionate or Humanitarian Considerations,” for a more detailed discussion.

<sup>44</sup> Section 121 of the *Immigration Act*. This is a new power of delegation enacted by S.C. 1995, c. 15 (in force July 10, 1995). Under earlier legislation, the Minister could not delegate the power to decide rehabilitation in these cases. See *Ramawad v. Minister of Manpower and Immigration*, [1978] 2 S.C.R. 375; *Simpson, Brenda Rosemarie v. M.E.I.* (I.A.B. T86-9626), Sherman, Chu, Eglinton (concurring), July 16, 1987. Reported: *Simpson v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 20 (I.A.B.); and *Crawford*, *supra*, footnote 42.

decision on rehabilitation even where, on the face of the record, the decision may be unreasonable.<sup>45</sup>

An issue which has arisen is whether there is a duty on the visa officer to inform the applicant of the existence of the exception in sections 19(1)(c.1) and 19(2)(a.1). 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), as it then read, for the Governor in Council to be satisfied as to rehabilitation. In *Wong*<sup>46</sup>, the applicant gave 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 the Court 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*<sup>47</sup>, *Gill*<sup>48</sup> and *Dance*<sup>49</sup> 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 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 exception in these sections?<sup>50</sup>

One of the criteria for the application of the exception in sections 19(1)(c.1) and 19(2)(a.1) is that “at least five years have elapsed since the expiration of any sentence imposed for the offence...”. For immigration purposes, the Appeal Division has found that “any sentence imposed” would include any period of incarceration, probation or the suspension of a privilege.<sup>51</sup>

## 2.6. CONVICTION

One of the more common criminal inadmissibility sections seen in sponsorship appeals is section 19(1)(c) which provides that a person who has been convicted in Canada of an offence

---

<sup>45</sup> *Leung, Chi Wah Anthony v. M.C.I.* (F.C.T.D., no. IMM-1061-97), Gibson, April 20, 1998; certified 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) where on the face of the record the decision may be unreasonable?” Answered in the negative *Leung, Chi Wah Anthony v. M.C.I.* (F.C.A., no. A-283-98), Stone, Evans, Malone, May 3, 2002.

<sup>46</sup> *Wong, Yuen-Lun v. M.C.I.* (F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995.

<sup>47</sup> *Mohammed v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363 (C.A.).

<sup>48</sup> *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.

<sup>49</sup> *Dance, Neal John v. M.C.I.* (F.C.T.D., no. IMM-366-95), MacKay, September 21, 1995.

<sup>50</sup> In *Crawford, supra*, footnote 42 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.

<sup>51</sup> *Shergill, Ram Singh v. M.E.I.* (IAD W90-00010), Rayburn, Arpin, Verma, February 19, 1991.

that may be punishable under any Act of Parliament<sup>52</sup> by a maximum term of imprisonment of ten years or more is inadmissible. This provision would apply in the circumstances where the applicant had lived in Canada at some time and therefore had been convicted in Canada.

The use of the word “convicted” in sections 19(1)(c), (c.1); 19(2)(a), (a.1); and 19(2)(b) means a conviction that has not been expunged. Foreign convictions can also be expunged.<sup>53</sup> 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 ours.<sup>54</sup> Conversely, the Court held that it is not necessary to consider “Pardons” obtained under foreign legislation<sup>55</sup>.

Certain criminal offences in Canada can be proceeded with by indictment or by summary procedure. If proceeded with by indictment, the offence may be punishable by a maximum term of imprisonment of 10 years or more and therefore caught by the *Immigration Act*. If the offence is proceeded with summarily then section 787(1) of the *Criminal Code* provides that the maximum term of imprisonment is six months, unless otherwise provided. For immigration purposes, a person who has been convicted in Canada by summary procedure of an offence which could have been proceeded with by way of indictment (a hybrid offence) has been

---

<sup>52</sup> *Massie, supra*, footnote 17. The offence must be punishable under 'any Act of Parliament', however, a punishment imposed for criminal contempt is not codified and derives from the common law, therefore such a conviction does not fill the requirement.

<sup>53</sup> *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.). In *Burgon*, the Court had to consider the application to the definition of “convicted” in the *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 Ms. Burgon’s offence) and received a probation order was deemed not to be convicted of the offence. In the Court’s view, Ms. Burgon was not considered convicted under United Kingdom law and 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.). In *Barnett*, the Court considered another piece of legislation, the United Kingdom *Rehabilitation of Offenders Act, 1974*. This legislation 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, Mr. Barnett was not considered to have been convicted in the United Kingdom and he was not convicted for purposes of the *Immigration Act*.

<sup>54</sup> *Burgon, ibid.*, where the foreign jurisdiction was the United Kingdom.

<sup>55</sup> *Kan, Chow Cheung v. M.C.I.* (F.C.T.D., no. IMM-728-00), Rouleau, November 21, 2000.

convicted of a summary offence.<sup>56</sup> In the case of a foreign hybrid offence, it is irrelevant whether the foreign conviction was obtained by indictment or summary procedure.<sup>57</sup>

## 2.7. SECTION 19(1)(e) AND (f)

A visa officer may refuse an application for permanent residence to persons who there are reasonable grounds to believe have engaged in acts of espionage or subversion against democratic government, institutions or processes, as they are understood in Canada. The Federal Court of Appeal recently answered a certified question to clarify the meaning of the phrase “democratic government”.<sup>58</sup>

In the *Qu*<sup>59</sup> case, the respondent, a citizen of the People’s Republic of China (“PRC”), had engaged in espionage and subversion while active in the Chinese Students and Scholars Association (“CSSA”) at Concordia University in Montreal. The visa officer refused the respondent’s application for permanent residence pursuant to s. 19(1)(f)(i) of the Immigration Act. The Trial Division allowed the judicial review by finding that the CSSA was not a “democratic institution” and the respondent’s activities were not directed at “democratic government, institutions or processes, as they are understood in Canada. Question certified, “Do these reasons correctly interpret subparagraph 19(1)(f)(i) of the Immigration Act?” The Federal Court of Appeal held that the Trial Division erred when it held that the expression “democratic government, institutions or processes” (“institutions democratiques”) was restricted to institutions and processes involving “political governance”. The expression also encompasses institutions and processes, which although non-governmental, are part and parcel of the democratic fabric of Canada. A democratic institution for the purpose of s. 19(1)(f)(i) consists of a structured group of individuals established in accordance with democratic principles with preset goals and objectives who are engaged in lawful activities in Canada of a political, religious, social or economic nature.

In recent cases before the Appeal Division, the panels have considered the issue of whether there are reasonable grounds to believe that a person is or was a member of a group and whether there are reasonable grounds that the organization is or was engaged in terrorism.<sup>60</sup> If so, the panel must go on to consider whether the person may fall into the exception.<sup>61</sup>

---

<sup>56</sup> *Kai Lee v. Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 374 (C.A.). inadmissible if the person had been “convicted of an offence that, if committed in Canada, constitutes...an offence that may be punishable by way of indictment under any other Act of Parliament...” (section 19(2)(a)). Bill C-86 (S.C. 1992, c. 49, in force February 1, 1993) amended this section and the reasoning in *Kai Lee* appears to be no longer applicable because the change of wording in section 19(2)(a) now provides that as long as the offence may be punishable by way of indictment, a summary conviction is sufficient to bring the applicant within the section: *Ladbon, Kamran Modaressi v. M.C.I.* (F.C.T.D., no. IMM-1540-96), McKeown, May 24, 1996.

<sup>57</sup> *Potter v. Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 609 (C.A.).

<sup>58</sup> *M.E.I. v. Qu, Yong Jie* (F.C.A., no A-289-00) Richard, Décary, Noël, December 21, 2001; 2001 FCA 399. [Appeal from (F.C.T.C., no. IMM-5114-98), Lemieux, April 20, 2000.].

<sup>59</sup> *Ibid.*

<sup>60</sup> *Denton-James, Lucy Eastwood v. M.C.I* (V98-04493), Workun, April 3, 2002. The issue of an alleged membership of a triad was also considered in refusal under 19(1)(c.2) in *Poon, Wai Chin v. M.C.I.* (IAD VA0-00415), Clark, February 20, 2001.

## 2.8. SECTION 19(1)(i)

The Federal Court of Appeal recently held that paragraph. 19(1)(i) does not contain a rebuttable presumption. The presence of the words “have satisfied” in the excepting language suggests that a Ministerial exception is to be made prior to the decision of the visa officer. As the applicant failed to seek a Ministerial exception in a timely fashion, such an exception is no longer available to him. The Appeal Division was incorrect in deciding that there was a rebuttable presumption and that the applicant had met it.<sup>62</sup>

## 2.9. SECTION 19(2)(b)

Section 19(2)(b) provides as follows:

19.(2) No immigrant and, except as provided in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:

(b) persons who

(i) have been convicted in Canada under any Act of Parliament of two or more summary conviction offences not arising out of a single occurrence, other than offences designated as contraventions under the *Contraventions Act*,

(ii) there are reasonable grounds to believe have been convicted outside Canada of two or more offences, not arising out of a single occurrence, that, if committed in Canada, would constitute summary conviction offences under any Act of Parliament, or

(iii) have been convicted in Canada under any Act of Parliament of a summary conviction offence, other than an offence designated as a contravention under the *Contraventions Act*, and there are reasonable grounds to believe have been convicted outside Canada of an offence that, if committed in Canada, would constitute a summary conviction offence under any Act of Parliament,

where any part of the sentences imposed for the offences was served or to be served at any time during the five year period immediately preceding the day on which they seek admission to Canada.

In this provision, the term “occurrence” is synonymous with the terms “event” and “incident” and not synonymous 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.<sup>63</sup>

---

<sup>61</sup> *Avedian, Astrid s. v. M.C.I.* (IAD MA0-10714), Fortin, January 25, 2002 (reasons signed February 5, 2002).

<sup>62</sup> *M.C.I. v. Adam, Hawa Ibrahim* (F.C.A., no. A-19-98), Stone, Evans, Isaac (dissenting), January 11, 2001. (F.C.T.D., no. IMM-3380-96), Jerome, August 29, 1997). [Judicial review of IAD T95-05027, Townshend, August 16, 1996].

<sup>63</sup> *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,

In a judicial review from a visa officer's refusal based on subparagraph 19(2)(b)(ii), the applicant argued that the offences for which he was convicted were equivalent to municipal by-law infractions and not Criminal Code offences. The Court allowed the application because in order for an offence to be equivalent to a Criminal Code offence, it usually consists of the actus reus and mens rea. It held:

“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. Where there is no oral or documentary evidence as to the circumstances of the commission of the offences, the visa officer erred by importing into the analysis considerations not relevant to a determination of the essential elements of an offence.”<sup>64</sup>

---

1996. In this case, the applicant argued that his three convictions arose out of a single occurrence which was the applicant's difficult relationship with his former spouse. 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.

<sup>64</sup> *Popic, Bojan v. M.C.I.* (F.C.T.D., no. IMM-5727-98), Hansen, September 14, 2000.

## 2.10. 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 Appeal Division may consider whether or not compassionate or humanitarian considerations exist to warrant the granting of special relief pursuant to section 77(3)(b) of the *Act*.<sup>65</sup>

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.<sup>66</sup>

Where an applicant has been found inadmissible under section 19(1)(l), compassionate and humanitarian considerations should be considered on an appeal from the refusal<sup>67</sup>. This case clearly addresses divergence noted in earlier Appeal Division decisions.<sup>68</sup>

---

<sup>65</sup> For examples of cases involving compassionate and humanitarian considerations in refusals under section 19(1)(c.1)(ii) see *Brar, Swarnjit Kaur v. M.C.I.* (VA0-01880), Mattu, September 17, 2001; *Aujla, Shivdev Singh v. M.C.I.* (VA1-01088), Mattu, November 6, 2001; *Virk, Charanjit Singh v. M.C.I.* (VA0-03505), Mattu, March 15, 2002. Note too a decision where the panel held that the children’s interests outweighed the negative factors in the applicant’s history [ he was refused pursuant to section 19(2)(a)]: *Zanth, Karen-Lynn v. M.C.I.* (IAD M99-05734), di Pietro, May 23, 2001. However, in *James, Sharon Elizabeth v. M.C.I.* (IAD TA0-14459), Néron, February 21, 2002 and in *Mercado, Maria del Carme v. M.C.I.* (IAD TA0-08201), Sangmuah, June 7, 2001, the panels held that the best interests of the children did not require that the appeals be allowed.

<sup>66</sup> *Perry, Ivelaw Barrington v. M.C.I.* (IAD V94-01575), Ho, November 1, 1995.

<sup>67</sup> *Adam,* footnote 62. The Court agreed with the Trial Division that s.19(1)(l) does not contain a rebuttable presumption. However, the Appeal Division ought to have dealt with the issue of discretionary relief. The matter was remitted to the Appeal Division for redetermination on that issue.

<sup>68</sup> *Karam, Barbara v. M.C.I.* (IAD M97-03916), Sivak, Bourbonnais, Colavecchio, March 20, 2000. In this case the panel held that compassionate and humanitarian grounds can not be considered on appeal from a S.19(1)(l) refusal and the only relief available to such applicants is through Ministerial discretion. A different approach was taken in *Waizi, Suraya v.M.C.I.* (IAD T96-01942), Hoare, January 18,2000, where the Appeal Division held that it had the jurisdiction to grant special relief in cases involving a refusal based on s.19(1)(l) and *Elmi, Rahma Ahmed v. M.C.I.* (IAD TA0-01989), Sangmuah, August 27, 2001 where the panel held that there were insufficient humanitarian and compassionate considerations to warrant the granting of special relief.



## CHAPTER 2

### TABLE OF CASES: CRIMINAL REFUSALS

#### CASES

<i>Adam: M.C.I. v. Adam, Hawa Ibrahim</i> (F.C.A., no. A-19-98), Stone, Evans, Isaac (dissenting), January 11, 2001. (F.C.T.D., no. IMM-3380-96), Jerome, August 29, 1997) .....	2-14
<i>Aguilar: M.C.I. v. Aguilar, Valentin Ogose</i> , (ADQML-98-00476), Turmel, December 10, 1998 .....	2-6
<i>Ahmed, Mohammed Kamal v. M.C.I.</i> (IAD M99-06900) Bourbonnais, December 6, 2000 .....	2-6
<i>Alouache, Samir v. M.C.I.</i> (F.C.A., no. A-681-95), Strayer, Linden, Robertson, April 26, 1996 .....	2-14
<i>Alouache, Samir v. M.C.I.</i> (F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995. Reported: <i>Alouache v. Canada (Minister of Citizenship and Immigration)</i> (1995), 31 Imm. L.R. (2d) 68 (F.C.T.D.) .....	2-14
<i>Aujla, Shivdev Singh v. M.C.I.</i> (VA1-01088), Mattu, November 6, 2001 .....	2-16
<i>Avedian, Astrid s. v. M.C.I.</i> (IAD MA0-10714), Fortin, January 25, 2002 (reasons signed February 5, 2002) .....	2-13
<i>Baker v. M.C.I.</i> , [1999] 2 S.C.R. 817 (S.C.C.) .....	2-10
<i>Barnett, John v. M.C.I.</i> (F.C.T.D., no. IMM-4280-94), Jerome, March 22, 1996. Reported: <i>Barnett v. Canada (Minister of Citizenship and Immigration)</i> (1996), 33 Imm. L.R. (2d) 1 (F.C.T.D.) .....	2-12
<i>Brannson v. Canada (Minister of Employment and Immigration)</i> , [1981] 2 F.C. 141 (C.A.) .....	2-7, 2-9
<i>Brar, Swarnjit Kaur v. M.C.I.</i> (VA0-01880), Mattu, September 17, 2001 .....	2-16
<i>Burgon: M.E.I. v. Burgon, David Ross</i> (F.C.A., no. A-17-90), MacGuigan, Linden, Mahoney (concurring in the result), February 22, 1991. Reported: <i>Canada (Minister of Employment and Immigration) v. Burgon</i> (1991), 13 Imm. L.R. (2d) 102 (F.C.A.) .....	2-12
<i>Calatan, Wilma v. M.C.I.</i> (IAD V98-00495), Boscariol, July 10, 2000 .....	2-9
<i>Chiau, Sing Chi Stephen v. M.C.I.</i> (A-75-98), Linden, Sexton, Evans, December 12, 2000 .....	2-3
<i>Chiau, Sing Chi Stephen v. M.C.I.</i> [1998] 2 F.C.642 (T.D.) .....	2-4
<i>Choi, Min Su v. M.C.I.</i> (F.C.T.D., no. IMM-975-99), Denault, May 8, 2000 .....	2-7, 2-8
<i>Crawford, Haslyn Boderick v. M.E.I.</i> (I.A.B. T86-9309), Suppa, Arkin, Townshend (dissenting), May 29, 1987. Reported: <i>Crawford v. Canada (Minister of Employment and Immigration)</i> (1987), 3 Imm. L.R. (2d) 12 (I.A.B.) .....	2-10
<i>Dance, Neal John v. M.C.I.</i> (F.C.T.D., no. IMM-366-95), MacKay, September 21, 1995 .....	2-11
<i>Dayan v. Canada (Minister of Employment and Immigration)</i> , [1987] 2 F.C. 569 (C.A.) .....	2-8
<i>Denton-James, Lucy Eastwood v. M.C.I.</i> (V98-04493), Workun, April 3, 2002 .....	2-13
<i>Dhaliwal, Jagdish Kaur v. M.E.I.</i> (IAD V91-01669), MacLeod, Wlodyka, Singh, March 29, 1993 .....	2-11
<i>Elmi, Rahma Ahmed v. M.C.I.</i> (IAD TA0-01989), Sangmuah, August 27, 2001 .....	2-16
<i>Gill, Amir Kaur v. M.C.I.</i> (IAD V98-04531), Boscariol, July 21, 1999 .....	2-6
<i>Gill: M.E.I. v. Gill, Hardeep Kaur</i> (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991 .....	2-11

<i>Halm v. Canada (Minister of Employment and Immigration)</i> , [1995] 2 F.C. 331 (T.D.); 28 Imm. L.R. (2d) 252 (F.C.T.D.).....	2-7
<i>Hill, Errol Stanley v. M.E.I.</i> (F.C.A., no. A-514-86), Hugessen, Urie (concurring), MacGuigan, January 29, 1987 at 2-3. Reported: <i>Hill v. Canada (Minister of Employment and Immigration)</i> (1987), 1 Imm. L.R. (2d) 1 (F.C.A.) .....	2-8
<i>Howard, Kenrick Kirk v. M.C.I.</i> (F.C.T.D., no. IMM-5252-94), Dubé, January 4, 1996.....	2-7
<i>James, Sharon Elizabeth v. M.C.I.</i> (IAD TA0-14459), Néron, February 21, 2002 .....	2-16
<i>Jeworski, Dorothy Sau Yun v. M.E.I.</i> (I.A.B. W86-4070), Eglington, Goodspeed, Vidal, September 17, 1986. Reported: <i>Jeworski v. Canada (Minister of Employment and Immigration)</i> (1986), 1 Imm. L.R. (2d) 59 (I.A.B.) .....	2-9
<i>Kai Lee v. Canada (Minister of Employment and Immigration)</i> , [1980] 1 F.C. 374 (C.A.).....	2-12
<i>Kan, Chow Cheung v. M.C.I.</i> (F.C.T.D., no. IMM-728-00), Rouleau, November 21, 2000 .....	2-12
<i>Karam, Barbara v. M.C.I.</i> (IAD M97-03916), Sivak, Bourbonnais, Colavecchio, March 20, 2000 .....	2-16
<i>Kiani, Raja Ishtiaq Asghar v. M.C.I.</i> (F.C.T.D., no. IMM-3433-94), Gibson, May 31, 1995. Reported: <i>Kiani v. Canada (Minister of Citizenship and Immigration)</i> (1995), 31 Imm. L.R. (2d) 269 (F.C.T.D.) .....	2-7
<i>Kin, Kwong Kwok v. M.C.I.</i> (F.C.T.D., no. IMM-3804-99), Nadon, December 15, 2000 .....	2-4
<i>Ladbon, Kamran Modaressi v. M.C.I.</i> (F.C.T.D., no. IMM-1540-96), McKeown, May 24, 1996 .....	2-12
<i>Lam, Chun Wai v. M.E.I.</i> (F.C.T.D., no. IMM-4901-94), Tremblay-Lamer, November 16, 1995.....	2-9
<i>Legault, Alexander Henri v. S.S.C.</i> (F.C.T.D., no. IMM-7485-93), McGillis, January 17, 1995. Reported: <i>Legault v. Canada (Secretary of State)</i> (1995), 26 Imm. L.R. (2d) 255 (F.C.T.D.).....	2-7
<i>Legault: M.C.I. v. Legault, Alexander Henri</i> (F.C.A., no. A-47-95), Marceau, MacGuigan, Desjardins, October 1, 1997. Reported: <i>Legault v. Canada (Secretary of State)</i> (1995), 26 Imm. L.R. (2d) 255 (F.C.T.D.).....	2-7
<i>Lei, Alberto v. S.G.C.</i> (F.C.T.D., no. IMM-5249-93), Nadon, February 21, 1994 at 4. Reported: <i>Lei v. Canada (Solicitor General)</i> (1994), 24 Imm. L.R. (2d) 82 (F.C.T.D.) .....	2-9
<i>Leung, Chi Wah Anthony v. M.C.I.</i> (F.C.A., no. A-283-98), Stone, Evans, Malone, May 3, 2002.....	2-11
<i>Leung, Chi Wah Anthony v. M.C.I.</i> (F.C.T.D., no. IMM-1061-97), Gibson, April 20, 1998 .....	2-11
<i>Li, Ronald Fook Shiu v. M.C.I.</i> (F.C.A., no. A-329-95), Strayer, Robertson, Chevalier, August 7, 1996. Reported: <i>Li v. Canada (Minister of Citizenship and Immigration)</i> , [1997] 1 F.C. 235 (C.A.) .....	2-7, 2-9
<i>Li, Ronald Fook Shiu v. M.C.I.</i> (F.C.T.D., no. IMM-4210-94), Cullen, May 11, 1995 .....	2-7, 2-9
<i>Massie, Pia Yona v. M.C.I.</i> (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000.....	2-6, 2-12
<i>Mercado, Maria del Carme v. M.C.I.</i> (IAD TA0-08201), Sangmuah, June 7, 2001.....	2-16
<i>Mohammed v. Canada (Minister of Employment and Immigration)</i> , [1989] 2 F.C. 363 (C.A.) .....	2-11
<i>Obaseki: M.C.I. v. Obaseki, Eghe</i> (IAD T99-07461), Calvin, November 15, 2000.....	2-9
<i>Owens: M.C.I. v. Owens, Kathleen</i> (F.C.T.D., no. IMM-5668-99), Dawson, October 11, 2000 .....	2-3
<i>Perry, Ivelaw Barrington v. M.C.I.</i> (IAD V94-01575), Ho, November 1, 1995 .....	2-16
<i>Pimentel, Juliet P. v. M.C.I.</i> (IAD T99-03592), Kelley, Michnick, MacAdam, April 13, 2000 .....	2-6
<i>Poon, Wai Chin v. M.C.I.</i> (IAD VA0-00415), Clark, February 20, 2001.....	2-13
<i>Popic, Bojan v. M.C.I.</i> (F.C.T.D., no. IMM-5727-98), Hansen, September 14, 2000.....	2-15

<i>Potter v. Canada (Minister of Employment and Immigration)</i> , [1980] 1 F.C. 609 (C.A.) .....	2-12
<i>Qu: M.E.I. v. Qu, Yong Jie</i> (F.C.A., no A-289-00) Richard, Décary, Noël, December 21, 2001; 2001 FCA 399 .....	2-13
<i>Ramanathapillai, Saraladevy v. M.C.I.</i> (IAD MA0-06418), di Pietro, February 26, 2002 .....	2-6
<i>Ramawad v. Minister of Manpower and Immigration</i> , [1978] 2 S.C.R. 375 .....	2-10
<i>Ramirez v. Canada (Minister of Employment and Immigration)</i> , [1992] 2 F.C. 306 (C.A.) .....	2-7
<i>Reyes, Frediswinda v. M.E.I.</i> (I.A.B. 86-9267), Ariemma, Arkin, Fatsis, January 13, 1987. Reported: <i>Reyes v. Canada (Minister of Employment and Immigration)</i> (1987), 1 Imm. L.R. (2d) 148 (I.A.B.) .....	2-2
<i>Sabour, Mohammad Reza v. M.C.I.</i> (F.C.T.D., no. IMM-3268-99), Lutfy, October 4, 2000 .....	2-3
<i>Sahota, Baljit Singh v. M.C.I.</i> (IAD V99-01237), Boscarior, September 7, 2000 .....	2-6
<i>Shergill, Ram Singh v. M.E.I.</i> (IAD W90-00010), Rayburn, Arpin, Verma, February 19, 1991 .....	2-11
<i>Sidhu Amarjit Kaur v. M.C.I.</i> (IAD VA1-01989), Mattu, March 12, 2002 .....	2-6
<i>Simpson, Brenda Rosemarie v. M.E.I.</i> (I.A.B. T86-9626), Sherman, Chu, Eglinton (concurring), July 16, 1987. Reported: <i>Simpson v. Canada (Minister of Employment and Immigration)</i> (1987), 3 Imm. L.R. (2d) 20 (I.A.B.) .....	2-10
<i>Singh, Rajwinder v. M.C.I.</i> (IAD M99-08430), di Pietro, April 2, 2001 .....	2-6
<i>Sivakumar v. Canada (Minister of Employment and Immigration)</i> , [1994] 1 F.C. 433 (C.A.) .....	2-7
<i>Sroya, Sansar Singh v. M.C.I.</i> (IAD VA0-03542), July 26, 2001 .....	2-6
<i>Steward, Charles Chadwick v. M.E.I.</i> (F.C.A., no. A-962-87), Heald, Marceau, Lacombe, April 15, 1988. Reported: <i>Steward v. Canada (Minister of Employment and Immigration)</i> , [1988] 3 F.C. 487 (C.A.) .....	2-9
<i>Thamber, Avtar Singh v. M.C.I.</i> (F.C.T.C., no. Imm-2407-00), McKeown, March 12, 2001 .....	2-10
<i>Tsang, Lannie Wai Har v. M.C.I.</i> (F.C.A., no. A-179-96), Marceau, Desjardins, McDonald, February 11, 1997. Reported: <i>Tsang v. Canada (Minister of Citizenship and Immigration)</i> (1997), 37 Imm. L.R. (2d) 1 (F.C.A.) .....	2-3
<i>Tsang, Lannie Wai Har v. M.C.I.</i> (F.C.T.D., no. IMM-2585-95), Dubé, February 7, 1996 .....	2-3
<i>Tsang, Sau Lin v. M.E.I.</i> (I.A.B. 85-9587), D. Davey, Chu, Ahara, January 8, 1988 .....	2-8
<i>Virk, Charanjit Singh v. M.C.I.</i> (VA0-03505), Mattu, March 15, 2002 .....	2-16
<i>Waizi, Suraya v. M.C.I.</i> (IAD T96-01942), Hoare, January 18, 2000 .....	2-16
<i>Wong, Yuen-Lun v. M.C.I.</i> (F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995 .....	2-11
<i>Yuen, Kwong Yau v. M.C.I.</i> (F.C.A., no. A-152-99), Létourneau, Sexton, Malone, December 21, 2000 .....	2-4
<i>Zanth, Karen-Lynn v. M.C.I.</i> (IAD M99-05734), di Pietro, May 23, 2001 .....	2-16

# CHAPTER 3

## Table of Contents

<b>3. MEDICAL REFUSALS</b>	<b>3-1</b>
<b>3.1. MEDICAL EXAMINATION REQUIRED</b>	<b>3-1</b>
<b>3.2. MEDICAL INADMISSIBILITY</b>	<b>3-2</b>
<b>3.3. LEGAL VALIDITY OF THE REFUSAL</b>	<b>3-2</b>
3.3.1. Technical Defects	3-2
3.3.1.1. Defective Refusal Letter	3-3
3.3.1.2. Medical Notification Form	3-4
3.3.1.3. Duty of fairness owed by Visa and Medical Officers	3-5
3.3.2. Substantive Challenges	3-8
3.3.2.1. The Diagnosis and Prognosis	3-8
3.3.2.2. Medical Officers' Opinion	3-9
3.3.2.3. Excessive Demands	3-12
3.3.2.4. Mental Retardation Cases	3-17
3.3.2.5. Section 22 of the <i>Immigration Regulations, 1978</i>	3-18
3.3.2.6. Timing	3-19
<b>3.4. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS</b>	<b>3-20</b>

## CHAPTER 3

### 3. MEDICAL REFUSALS

#### 3.1. MEDICAL EXAMINATION REQUIRED

Pursuant to section 11(1) of the *Immigration Act*, every immigrant must undergo a medical examination by a medical officer.<sup>1</sup>

A “medical officer” is defined in section 2(1) of the *Immigration Act* as “...a qualified medical practitioner authorized or recognized by order of the Minister as a medical officer for the purposes of any or all provisions of this Act.”

A medical examination includes all medical investigations and tests as are reasonably required to properly assess whether the applicant is admissible to Canada.<sup>2</sup> The examination may be completed through more than one test or examination, if reasonably required, and once those tests have been undergone, section 11(1) of the *Immigration Act* has been complied with.<sup>3</sup>

Where an applicant has undergone a medical examination, but the report resulting therefrom is never received by the visa officer, the Appeal Division has ruled that the applicant has complied with the requirements of section 11(1) of the *Immigration Act*.<sup>4</sup> The rationale behind this approach is that it is the responsibility of the visa officers to ensure that they receive the results from their medical officers.<sup>5</sup>

It is rare that an appeal is allowed on discretionary grounds for a refusal to undergo a medical examination. It should be noted that the visa officer could likely not refuse the application again on the same ground if the applicant failed a second time to undergo a medical examination.<sup>6</sup> For a more complete discussion of this issue, see chapter 9, "Compassionate or Humanitarian Considerations".

---

<sup>1</sup> Section 6(1)(a) of the *Immigration Regulations, 1978* requires every dependant of an immigrant, whether the dependant is accompanying or not, to be admissible before a visa may be issued to the immigrant. In *Law, Yip Ging v. M.C.I.* (F.C.T.D., no. IMM-2395-96), Jerome, January 23, 1998, the Court did not question the visa officer's decision to add a non-accompanying dependent daughter to an application for permanent residence and required her to undergo a medical examination before continuing to process her father's application.

<sup>2</sup> *Alam, Quazi Nurul v. M.E.I.* (IAD T89-06725), Townshend, Tisshaw, Bell (dissenting), July 17, 1990.

<sup>3</sup> *Khan, Mobashsher Uddin v. M.E.I.* (IAD T89-01022), Sherman, Bell, Fatsis (dissenting), July 16, 1990.

<sup>4</sup> *Alam, supra*, footnote 2; *Khan, ibid*.

<sup>5</sup> *Alam, supra*, footnote 2.

<sup>6</sup> If the applicant does, in fact, go for a medical examination, then even if the first appeal is allowed on humanitarian or compassionate grounds, this does not preclude the visa officer from refusing the application on medical inadmissibility.

### 3.2. MEDICAL INADMISSIBILITY

Refusals on the ground of medical inadmissibility are based on section 19(1)(a) of the *Immigration Act*, which reads as follows:

19.(1) 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.

The Federal Court of Appeal in *Yogeswaran*<sup>7</sup> held that section 19(1)(a)(ii) of the Act does not encroach on the legislative authority of the provinces in respect of education as it is legislation relating to naturalization and aliens under section 91 of the *Constitution Act, 1867*.

### 3.3. LEGAL VALIDITY OF THE REFUSAL

The legal validity of the refusal has been challenged not only on substantive grounds, discussed below in subsection 3.3.2, but also for technical defects. In the analysis of caselaw concerning technical defects, set out below, the overlap between purely “technical defects” and natural justice issues has been highlighted.

#### 3.3.1. Technical Defects

Historically the Appeal Division and the Federal Court have framed many challenges to the refusal to issue immigrant 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.

Early decisions of the Immigration Appeal Board which allowed appeals in law in medical refusal cases, and especially those which followed the Federal Court’s decision in *Hiramen*,<sup>8</sup> 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

---

<sup>7</sup> *Yogeswaran, Thiyagrajah v. M.C.I.* (F.C.A., no A-344-97), Létourneau, Rothstein, McDonald, June 24, 1999.

<sup>8</sup> *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 section 3.3.1.2., “Medical Notification Form,” for further details.

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 Appeal Division's decision.<sup>9</sup> For example, where the appeal was allowed 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.<sup>10</sup> 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.<sup>11</sup> The effect of section 77(5) of the *Immigration Act* was examined by the Federal Court in *King*.<sup>12</sup> 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 Appeal Division.<sup>13</sup>

### 3.3.1.1. Defective Refusal Letter

Pursuant to section 77(1) of the *Immigration Act*, the visa officer is required to inform the sponsor of the reasons for the refusal of the sponsored application for permanent residence. The purpose of this provision is to ensure that the sponsor is 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.<sup>14</sup> However, the refusal letter should not be looked at in isolation from the record.<sup>15</sup> Section 77(1) of the Act can be complied with by setting out intelligible reasons in the record.<sup>16</sup>

---

<sup>9</sup> Section 77(5) of the *Immigration Act* provides that where an appeal has been allowed by the Appeal Division, 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.

<sup>10</sup> *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).

<sup>11</sup> *Dhami, Gurnam Singh v. M.E.I.* (I.A.B. 84-6036), Chambers, Tremblay, Howard, January 8, 1987.

<sup>12</sup> *King, Garvin v. M.C.I.* (F.C.T.D., no. IMM-2623-95), Dubé, May 23, 1996.

<sup>13</sup> The Appeal Division 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.

<sup>14</sup> *Shepherd, Tam Yue Philomena v. M.E.I.* (I.A.B. 82-6093), Davey, Benedetti, Suppa, November 18, 1982.

<sup>15</sup> *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.).

<sup>16</sup> *Tung, Nirmal Singh v. M.E.I.* (I.A.B. 86-6021), Mawani, Singh, Anderson (dissenting), June 30, 1987.

### 3.3.1.2. 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 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 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.<sup>17</sup>

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 Act, the refusal based on that form is not valid.<sup>18</sup> However, in assessing the Medical Notification form, the Appeal Division should consider the form as a whole, to see if it contains on its face a clear expression of the medical opinion required.<sup>19</sup> Further, the Appeal Division 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.<sup>20</sup> Nevertheless, where a probability regarding treatment was deduced from a mere possibility of health deterioration, the Federal Court has found the Medical Notification to be defective.<sup>21</sup> In addition, the Federal Court has upheld the Immigration Appeal Board's decision that the Medical Notification only expressed a possibility of excessive demands, rather than a probability, where the medical officers indicated that the progression and prognosis were unknown.<sup>22</sup>

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;<sup>23</sup>

---

<sup>17</sup> *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.

<sup>18</sup> *Hiramen*, *supra*, footnote 8.

<sup>19</sup> *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.).

<sup>20</sup> *Bola*, *ibid.*

<sup>21</sup> *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.).

<sup>22</sup> *M.E.I. v. Sidhu, Satinder Singh* (F.C.A., no. A-1250-88), Desjardins, Heald, Mahoney, January 12, 1990.

<sup>23</sup> *Tang, Lai Keng v. M.E.I.* (I.A.B. 79-6093), Campbell, Glogowski, Loiselle, September 20, 1979.



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.<sup>24</sup>

A refusal based on an expired Medical Notification form is invalid,<sup>25</sup> but Medical Notification forms with the “valid until” space left blank (as is usually the case in appeals before the Appeal Division) have been held not to be subject to challenge.<sup>26</sup>

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.<sup>27</sup>

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.<sup>28</sup> 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.<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup>

### 3.3.1.3. 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.<sup>32</sup> What is necessary to comply with the duty of fairness will depend on the circumstances of each case.

---

<sup>24</sup> *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.

<sup>25</sup> *Jean Jacques, Soutien v. M.E.I.* (I.A.B. 80-1187), Scott, Houle, Tremblay, May 20, 1981.

<sup>26</sup> *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.

<sup>27</sup> *Pattar, supra*, footnote 19.

<sup>28</sup> *Parmar, supra*, footnote 19.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Sihota, supra*, footnote 19.

<sup>31</sup> *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.

<sup>32</sup> *Gingiovenanu, Marcel v. M.E.I.* (F.C.T.D., no. IMM-3875-93), Simpson, October 30, 1995. Reported: *Gingiovenanu 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.*

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.<sup>33</sup> An immigration officer may also be under a duty to undertake further investigation or call for an updated medical examination.<sup>34</sup>

Visa officers routinely send a "fairness letter" inviting further medical evidence from applicants before a final decision on medical admissibility is made.<sup>35</sup> The Federal Court has indicated that the duty of fairness is variable and contextual. Failing to provide the applicant with the medical opinions the immigration officer relied on to deny the application is not a breach of natural justice where the fairness letter disclosed the case to be met and there were no special circumstances requiring disclosure of more information than was in the fairness letter<sup>36</sup>. The Federal Court, however, has been critical of the wording of some of the letters<sup>37</sup> 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.<sup>38</sup> In another case<sup>39</sup>, the letter failed to advise of the concern expressed in the narrative to the medical notification to the effect that "[h]is employment potential may be later restricted in conditions requiring heavy labour". 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.<sup>40</sup>

---

(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.).

<sup>33</sup> *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 Operations Memorandum IS 95-07, dated May 2, 1995, requires visa officers to advise applicants 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 (see Citizenship and Immigration Canada instructions OP 96-10, IP 96-13, EC 96-02, dated May 9, 1996). [See the "Foreword" for a note about Operations Memoranda.]

<sup>34</sup> *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.

<sup>35</sup> See the discussion in chapter 10, "Visa Officers and the Duty of Fairness", subsection 10.2.8., "Knowing Case to be Met and Opportunity to Respond." Earlier caselaw 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 maybe of doubtful authority in view of the current practice of immigration and medical officers.

<sup>36</sup> *Hersi, Mohamed Abdi v. M.C.I.* (F.C.T.D., no. IMM-5476-99), Dawson, December 11, 2000.

<sup>37</sup> *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.

<sup>38</sup> *Li, Leung Lun v. M.C.I.* (F.C.T.D., no. IMM-466-96), Tremblay-Lamer, September 30, 1998.

<sup>39</sup> *Behagan, Mariel v. M.C.I.* (F.C.T.D., no. IMM-3674-00) Dawson, April 6, 2001. Note that, the Court did not refer to *Ismaili* when considering Regulations section 22.

<sup>40</sup> *Acosta, Mercedes v. M.C.I.* (F.C.T.D., no. IMM-4790-97), Reed, January 7, 1999.

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.<sup>41</sup> Also, failure to disclose material from the Diabetes Association and the Health Canada Report did constitute a reviewable error as it impeded the applicant's meaningful participation in the process<sup>42</sup>. However, where no specific request for material is made by or on behalf of the applicant, the Court held that the Minister did not breach the duty of fairness by relying to the detriment of the applicant on material that modifies the content of the [1992 Medical Officer's ] Handbook in assessing the medical condition of the applicant without publishing or disclosing that material to the applicant.<sup>43</sup>

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.<sup>44</sup> The duty to consider the new medical evidence has been characterized by the Appeal Division as a legitimate expectation of the sponsor.<sup>45</sup>

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.<sup>46</sup>

The Federal Court in *Parmar*<sup>47</sup> 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." Recently, the Federal Court of Appeal reviewed at some length the caselaw concerning fairness letters and concluded that, "the duty of fairness prescribes minimum standards of procedural decency, and that the content of the duty varies according to context." The factors tending to limit the content of the duty in this case include: the absence of a legal right to a visa; the imposition on the applicant of the burden of establishing eligibility for a visa; the less serious impact on the individual that the refusal of a visa typically has, compared with the removal of a benefit, such as continuing residence in Canada; and the fact that the issue in dispute in this case is not one that the applicant is particularly well placed to address (namely the nature of the services that the son is likely to require in Canada and whether they would constitute an excessive demand) Furthermore, in the case at bar, the respondent was not denied the reasonable

---

<sup>41</sup> *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.

<sup>42</sup> *Redding, Jeannine Elise v. M.C.I.* (F.C.T.D., no. IMM-2661-00), Lemieux, August 22, 2001.

<sup>43</sup> *Park, Soung II v. M.C.I.* (F.C.A., no. A-708-00), Malone, Linden, Noël, October 19, 2001; 2001 FCA 313. *Jang, Young Doo v. M.C.I.* (F.C.A., no. A-270-00), Malone, Linden, Noël, October 19, 2001; 2001 FCA 312.

<sup>44</sup> *Lee, Sing v. M.E.I.* (F.C.T.D., no. T-2459-85), Martin, May 1, 1986.

<sup>45</sup> *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.

<sup>46</sup> *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.).

<sup>47</sup> *Parmar, supra*, footnote 19, at 7.

opportunity to respond to the visa officer's concerns about the admissibility of his son to which the duty of fairness entitled him. Specifically, the omission of further detail did not prevent the respondent from understanding the reason for the rejection of his visa application or from making further inquiries.<sup>48</sup>

With regard to the consequences on appeal of a finding that the visa officer has failed to comply with the requirements of procedural fairness, see chapter 10, "Visa Officers and the Duty of Fairness," section 10.3.2., "Options."

### 3.3.2. Substantive Challenges

#### 3.3.2.1. The Diagnosis and Prognosis

The Federal Court's statement in *Mohamed*<sup>49</sup> that the applicant must have been suffering from the medical condition diagnosed by the medical officers may seem to indicate that the Appeal Division is to consider the correctness of the medical diagnosis made by the medical officers. Likewise, the Federal Court's statement in *Uppal*<sup>50</sup> 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*,<sup>51</sup> the issue was squarely raised before the Federal Court. The Appeal Division had found that the diagnosis was erroneous, based on the evidence before it. The Federal Court held that the Appeal Division 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.

The Appeal Division has interpreted the Federal Court cases as still allowing the Appeal Division 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;<sup>52</sup> if there has been a definite diagnosis, its correctness cannot be challenged.

---

<sup>48</sup> *M.C.I. v. Khan, Shahid Hasan* (F.C.A., no. A-457-00), Linden, Evans, Malone, November 14, 2001; 2001 FCA 345. [Appeal from *Khan, Shahid Hasan v. M.C.I.* (F.C.T.D., no. IMM-4856-99), Heneghan, June 1, 2000.] The Court of Appeal reformulated the certified questions and gave the following answers. QUESTION 1: Should an applicant be given an opportunity to not only provide additional medical evidence but also respond to the conclusion that an applicant will place excessive demands on Canadian social services? ANSWER: Yes. QUESTION 2: To what extent must the material on which the conclusion with regard to excessive demands has been based be disclosed to the applicant? ANSWER: If a visa applicant is informed of the medical diagnosis, prognosis, and the services likely to be required, and is advised that, in view of the medical condition, admission would impose excessive demands on medical or social services, fairness does not normally require further disclosure, at least where additional information is not requested.

<sup>49</sup> *Mohamed v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 90 (C.A.).

<sup>50</sup> *Uppal v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565.

<sup>51</sup> *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.).

<sup>52</sup> *Nijjar, Ranjit Singh v. M.E.I.* (IAD V89-00964), Wlodyka, Chambers, Verma, January 9, 1991.

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.<sup>53</sup>

Certainty in prognosis is not required. The use of “long term” and “short term” in the prognosis is not vague.<sup>54</sup>

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.<sup>55</sup>

### 3.3.2.2. Medical Officers’ Opinion

The Appeal Division 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.<sup>56</sup>

In *Mohamed*,<sup>57</sup> the Federal Court set out the general rule as follows:

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.<sup>58</sup>

---

<sup>53</sup> *Uppal, supra*, footnote 50; *Shanker, supra*, footnote 26.

<sup>54</sup> *M.C.I. v. Ram, Venkat* (F.C.T.D., no. IMM-3381-95), McKeown, May 31, 1996. See also *Pattar, supra*, footnote 19, 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 Appeal Division 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.

<sup>55</sup> *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 Appeal Division 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.

<sup>56</sup> *Ahir v. Canada (Minister of Employment and Immigration)*, [1984] 1 F.C. 1098 (C.A.).

<sup>57</sup> *Mohamed, supra*, footnote 49.

<sup>58</sup> *Ibid.*, at 98.

Reasonableness is a question of fact; thus it is incumbent on a sponsor to establish an evidentiary foundation to any such challenge.<sup>59</sup>

The Appeal Division should not assume that the medical officers' opinion is reasonable based only on an agreement that the medical condition exists.<sup>60</sup>

In assessing reasonableness, the Appeal Division should consider whether the medical officers applied the correct criteria in assessing an applicant.<sup>61</sup> 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.<sup>62</sup> 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.<sup>63</sup>

"Tests of admissibility must be relevant to the purpose and duration for which admission is sought."<sup>64</sup> It is unreasonable for the medical officers to assess a visitor based on the same criteria used to assess an immigrant.<sup>65</sup> 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.<sup>66</sup> The Appeal Division has applied this reasoning in a number of cases.<sup>67</sup> In *Wong*,<sup>68</sup> 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,

---

<sup>59</sup> *Takhar, Manjit Singh v. M.E.I.* (IAD V90-00588), Wlodyka, Chambers, Verma, March 4, 1991.

<sup>60</sup> *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.).

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ajane, Gulbanoo Sadruddin v. M.C.I.* (F.C.T.D., no. T-1750-92), MacKay, March 29, 1996. Reported: *Ajane v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 165 (F.C.T.D.).

<sup>63</sup> *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.).

<sup>64</sup> Adjudicator Leckie, quoted with approval by the Federal Court in *Ahir, supra*, footnote 56, at 1101. See also *Deol, supra*, footnote 60; *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.

<sup>65</sup> *Ahir, ibid.*

<sup>66</sup> *Ng, supra*, footnote 64; *Chu, supra*, footnote 64. See also *Deol, supra*, footnote 60, where the Appeal Division 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.

<sup>67</sup> *Tejobunarto, Lianggono v. M.C.I.* (IAD T97-00565), Boire, July 28, 1998; *Grewal, Parminder Singh v. M.C.I.* (IAD V95-01266), Boscarior, 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.

<sup>68</sup> *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.).

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.<sup>69</sup>

The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence<sup>70</sup> and failure to consider the factors stipulated in section 22 of the Regulations.<sup>71</sup> 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).<sup>72</sup>

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.<sup>73</sup> 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.<sup>74</sup>

The Appeal Division 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 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.<sup>75</sup>

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.<sup>76</sup>

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.<sup>77</sup>

---

<sup>69</sup> *Ibid.*, at 2-3.

<sup>70</sup> *Ismaili, supra*, footnote 32.

<sup>71</sup> *Gao, supra*, footnote 33. See too *Abdelhadi, Abderrahim v. M.C.I.* (F.C.T.D., no. IMM-5362-99), McKeown, June 23, 2000.

<sup>72</sup> See discussion of *Ismaili, supra*, footnote 32, at section 3.3.2.4., "Section 22 of the *Immigration Regulations, 1978*."

<sup>73</sup> *Hussain, supra*, footnote 46.

<sup>74</sup> *Ajane, supra*, footnote 62. See also *Ludwig, supra*, footnote 63; and *Tong, Kwan Wah v. M.C.I.* (F.C.T.D., no. IMM-2565-96), Heald, October 31, 1997.

<sup>75</sup> *Syal-Bharadwa, Bela v. M.C.I.* (IAD V97-02011), Borst, November 30, 1999.

<sup>76</sup> *Hussain, supra*, footnote 46.

<sup>77</sup> *Ten, Luisa v. M.C.I.* (F.C.T.D., no. IMM-1606-97), Tremblay-Lamer, June 26, 1998.

Following cases like *Jiwanpuri*,<sup>78</sup> it appears that the Appeal Division can consider evidence other than strictly medical evidence to question the reasonableness of the medical opinion.

### 3.3.2.3. Excessive Demands

The term “excessive demands” in section 19(1)(a)(ii) of the *Immigration Act* is currently not defined<sup>79</sup>. The Court of Appeal<sup>80</sup>, in reformulating the certified questions by the Federal Court Trial Division<sup>81</sup>, considered this phrase as well as the following other issues under s. 19(1)(a)(ii):

Question 1: Is the portion of subparagraph 19(1)(a)(ii) of the *Immigration Act* which provides for inadmissibility on the ground of disability of no force or effect under section 52 of the Charter and should it be severed from the Immigration Act?

Answer: No.

Question 2: Is “more than normal” a legally acceptable measure of excessive demands under subparagraph 19(1)(a)(ii) of the *Immigration Act*? If so, what are the permissible criteria for the determination of normalcy?

Answer: There is no statutory definition of excessive demands. In these circumstances, when cost is the issue, demands are excessive when they reasonably might be expected to exceed by a significant degree the average per capita health care costs incurred by that section of the Canadian population in the same age range as the visa applicant.

Question 3: Is an election to have or not to have elective surgery relevant in determining whether or not a medical opinion under subparagraph 19(1)(a)(ii) of the *Immigration Act* is reasonable?

Answer: Yes. However, a person cannot waive the right to publicly funded medical services that all permanent residents possess. Evidence of an intention not to undergo a particular treatment must be weighed with all other relevant evidence in determining whether the person might reasonably be expected to make excessive demands on health services in Canada.

Question 4: Is the duty of fairness breached to a Manitoba sponsor of an immigrant and a Manitoba destined immigrant, when the Manitoba bonding program (if pertinent and

---

<sup>78</sup> *Jiwanpuri*, *supra*, footnote 51

<sup>79</sup> The *Immigration and Refugee Protection Regulations* (IRPR) define “excessive demands” in section 1(1). The definition includes reference to both cost and availability (it seems that “excessive demands” can be of either or both). The comparison group in the definition is the “average Canadian *per capita* health services and social services costs” over a defined period.

<sup>80</sup> *Deol, Charanjit Kaur v. M.C.I.* (F.C.A., no. A-403-01), Linden, Evans, Malone, June 21, 2002; 2002 FCA 271. For further commentary on this case, see “in brief” No. 8, August 6, 2002.

<sup>81</sup> *Deol, Charanjit Kaur v. M.C.I.* (F.C.T.D., no. IMM-1332-00), Muldoon, June 22, 2001; 2001 FCT 694, being a judicial review of IAD W97-00037, Wiebe, February 28, 2000.



applicable) is not disclosed to the sponsor and the applicant in the letter advising the applicant of a negative medical assessment and inviting the applicant to submit further information not already on the file?

Answer: No.

Question 5: Is the ability to pay relevant or irrelevant to the question of excessive demand under subparagraph 19(1)(a)(ii) of the *Immigration Act* when there is a Manitoba sponsor of an immigrant and a Manitoba destined immigrant, in light of the Manitoba bonding program if there be such program which is both accessible and applicable in these circumstances?

Answer: On the facts of this case, no excessive demands should not be inferred merely from the existence of the medical condition. The Appeal Division must consider the degree of impairment and the likelihood of excessive demands being placed on health or social services.<sup>82</sup> A person's intention not to undergo a particular treatment must be weighed with all other relevant evidence.<sup>83</sup>

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.<sup>84</sup> This direction arose in the context 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.<sup>85</sup> In one case, the Court found that the medical officer erred by looking at the general diabetes population rather than performing an assessment of the applicant's individual circumstances. Furthermore, the medical report applied the wrong standard by stating the question as whether, on the balance of probabilities, Miss Redding's medical condition is such as to cause or might reasonably be expected to cause excessive demands on health or social services.<sup>86</sup>

While the phrase "excessive demands" lacks precision, it is not constitutionally vague as a sponsor would know from that expression that evidence of the type and amount of services the medical condition in question would require would have to be produced.<sup>87</sup>

"Excessive demands" was held in *Jim*<sup>88</sup> to mean "more than what is normal or necessary". [...] the necessity of monitoring the applicant's health situation over a five year period, the

---

<sup>82</sup> *Deol, supra*, footnote 60.

<sup>83</sup> *Deol, supra*, footnote 80.

<sup>84</sup> *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.

<sup>85</sup> *Cabaldon Jr., Antonio Quindipan v. M.C.I.* (F.C.T.D., no. IMM-3675-96, Wetston, January 15, 1998.

<sup>86</sup> *Redding, supra*, footnote 42.

<sup>87</sup> *Grewal, Parminder Singh v. M.C.I.* (IAD V95-01266), Boscariol, September 2, 1997.

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".<sup>89</sup> In *Nyvt*,<sup>90</sup> the Federal Court relied on the factors set out in section 22 of the *Immigration Regulations, 1978* in determining the meaning of "excessive demands". However, it should be kept in mind that the Federal Court subsequently held that section 22 is *ultra vires* to the extent that section 22 sets out factors to be considered in forming an opinion as to excessive demands.<sup>91</sup>

Section 19(1)(a)(ii) of the *Immigration Act* does not set out a prescribed period of time following an applicant's admission into Canada, during which the applicant's medical condition would require care and treatment which would place excessive demands on health care services.<sup>92</sup>

There should be some evidentiary basis<sup>93</sup> for determining that an applicant's admission would cause or might reasonably be expected to cause excessive demands.<sup>94</sup> 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.<sup>95</sup> Neither does the fact that someone had been addicted to drugs automatically bring the person within section 19(1)(a)(ii) of the *Immigration Act*.<sup>96</sup>

---

<sup>88</sup> *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.). However, in *Deol, supra*, footnote 80, the Federal Court of Appeal has cautioned against reliance on "excessive demand" cases decided before *Ismaili*... "including *Jim*".

<sup>89</sup> See also *Ajane, supra*, footnote 62, 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.

<sup>90</sup> *Nyvt, Milan v. S.S.C.* (F.C.T.D., no. IMM-813-93), Reed, September 19, 1994. Reported: *Nyvt v. Canada (Secretary of State)* (1994), 26 Imm. L.R. (2d) 95 (F.C.T.D.).

<sup>91</sup> See discussion of *Ismaili, supra*, footnote 32, in subsection 3.3.2.5., "Section 22 of the *Immigration Regulations, 1978*."

<sup>92</sup> *Ram, supra*, footnote 54.

<sup>93</sup> *Mo, Wong v. M.C.I.* (F.C.T.D., no. IMM-4082-98) O'Keefe, February 14, 2001. See too *Kutuadu, Larry v. M.C.I.* (F.C.T.D., no. IMM-2705-99), O'Keefe, January 12, 2001.

<sup>94</sup> 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. [See the "Foreword" for a note about Operations Memoranda.] It should be noted that the Appeal Division has rarely seen these statutory declarations in appeals. See also *Kumar, Varinder v. M.C.I.* (IAD V97-03366), Boscariol, December 30, 1998; *Sidhu, Balwinder Singh v. M.C.I.* (IAD VA0-00322), Borst, January 23, 2001 where the panel comment on the sufficiency of the respondent's evidence.

<sup>95</sup> *Seyoum, Zerom v. M.E.I.* (F.C.A., no. A-412-90), Mahoney, Stone, Décary, November 15, 1990.

<sup>96</sup> *Burgon, supra*, footnote 55; *D'Costa Correia, supra*, footnote 55.

The jurisprudence is split on the question of whether the wealth of the applicant should be taken into account in assessing excessive demands on social services. In *Poon*<sup>97</sup>, the Court found that wealth was not relevant. In *Choi*<sup>98</sup>, the Court held it irrelevant that an applicant is wealthy and can afford to pay for special care. It stated that the Minister cannot impose as a term or condition of admission that the applicant waive all rights to social services.<sup>99</sup> In other decisions, the Courts have stated that “[T]here is [...] no basis for enforcing such a commitment as it runs counter to the basic right of all permanent residents of Canada to benefit from publicly funded social services regardless of personal assets or wealth.”<sup>100</sup> Nor is there a basis for binding the applicant and his family to reside in any specified part of Canada.<sup>101</sup> However, in a new line of cases<sup>102</sup>, the Courts have distinguished medical costs from social services costs and held that the ability to pay is relevant when considering “excessive demands” in terms of the costs of social services required. In *Wong*<sup>103</sup>, the Court adopted the approach taken by Reed J. in the earlier *Wong*<sup>104</sup> decision when she found that it would be incongruous to admit somebody as a permanent resident because he has significant financial resources but then refuse to take into account these same resources when assessing the admissibility of the dependant. The Court made a clear distinction between medical services and social services and found that evidence of the applicant’s ability to pay is only relevant with respect to social services.

*Deol*<sup>105</sup> went on to consider the standard to apply when cost is the issue. The Court held that “demands are excessive when they reasonably might be expected to exceed by a significant degree the average percapita health care costs incurred by that section of the Canadian population in the same age range as the visa applicant”.

Once the Court in *Wong*<sup>106</sup> determined social services to be the issue before it, it went on to find that under *Ontario’s Development Services Act*, persons who can afford to pay for social services must pay for them. Accordingly, and citing *Poste*<sup>107</sup>, the Court held that there must be consideration on specific services available in the particular community where the applicant chooses to reside.

---

<sup>97</sup> *Poon, Ching Ho v. M.C.I.* (F.C.T.D., no. IMM-2007-99), Pelletier, December 1, 2000.

<sup>98</sup> 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.).

<sup>99</sup> *Ibid.*

<sup>100</sup> *Hussain, supra*, footnote 46, at 8.

<sup>101</sup> *Ibid.*

<sup>102</sup> *Wong, Ching Shin Henry v. M.C.I.* (F.C.T.D., no. IMM-6060-99), McKeown, May 31, 2002; 2002 FCT 625. See also *Hilewitz, David v. M.C.I.* (F.C.T.D., no. IMM-5340-00), Gibson, August 8, 2002; 2002 FCT 844 [This case is noted notwithstanding the date of the update is July 1, 2002.]

<sup>103</sup> *Ibid.*

<sup>104</sup> *Wong, supra*, footnote 41.

<sup>105</sup> *Deol, supra*, footnote 80.

<sup>106</sup> *Wong, Ching Shin Henry v. M.C.I.* (F.C.T.D., no. IMM-6060-99) McKeown, May 31, 2002; 2002 FCT 625, *supra*, footnote 102.

<sup>107</sup> *Poste, supra*, footnote 84.

The Appeal Division has dealt with an applicant's physical disability and its impact on the validity of a refusal. In *Rai*,<sup>108</sup> 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*,<sup>109</sup> the applicant who suffered from quadriplegia was entitled to attendant care services, but never used them as he preferred to be independent. The Appeal Division 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.

In *Deol*,<sup>110</sup> the Court went on to state its opinion that cost alone can constitute "excessive demands" under subparagraph 19(1)(a)(ii). This view appears to be the predominant position taken by the Federal Court, Trial Division in another case<sup>111</sup>. The Court of Appeal went on in its analysis to cite several other Federal Court Trial Division cases and concluded that those cases stand for the more limited proposition that both cost and availability are relevant to determining the existence of excessive demands and the record must indicate that evidence relating to both factors was considered by the medical officer.<sup>112</sup>

In another Federal Court decision, the notions of scarcity of services and cost. were considered. In *Rabang*.<sup>113</sup>, 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. In respect of this section on excessive demands as well as the following section on mental retardation cases, see the addendum to this chapter "Legal Validity Issues in Medical Refusal Appeals: The Need for an Individualized Assessment".

---

<sup>108</sup> *Rai, Paraminder Singh v. M.C.I.* (IAD V97-00279), Carver, April 20, 1998.

<sup>109</sup> *Wahid, Gurbax Singh v. M.C.I.* (IAD T96-04717), Kitchener, January 21, 1998.

<sup>110</sup> *Deol, supra*, footnote 80.

<sup>111</sup> *Pervez, Anjum v. M.C.I.* (F.C.T.D., no. IMM-3756-00) Simpson, December 21, 2001; 2001 FCT 1420.

<sup>112</sup> *Poon, supra*, footnote 97 which was followed in *Manto, Samira Ahamin v. M.C.I.* (F.C.T.D., no. IMM-5841-99), O'Keefe, June 1, 2001.

<sup>113</sup> *Rabang, Ricardo Pablo v M.C.I.* (F.C.T.D., no. IMM-4576-98), Sharlow, November 29, 1999.

### 3.3.2.4. Mental Retardation<sup>114</sup> Cases

Special mention must be made of cases involving mental retardation. The concept of mental retardation cannot be used as a stereotype. The degree and probable consequences of the degree of mental retardation for excessive demands must be assessed by the Appeal Division. 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.<sup>115</sup> 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.<sup>116</sup>

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.<sup>117</sup>

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.<sup>118</sup>

Evans, J.A., writing for the Court in *Deol*<sup>119</sup>, stated, "Moreover, it is unrealistic to regard cost and availability as unconnected. If enough people need expensive but low demand health services, resources may have to be diverted from other services for which demand is higher, thereby creating or lengthening waiting lists for those services. Alternatively, an increased demand for a particular service may prevent the reallocation of funds to services that are in short supply." An opinion based on the need for special schooling, training and indefinite home care and supervision was found to be reasonable in *Choi*.<sup>120</sup> In *Jaferi*,<sup>121</sup> 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*,<sup>122</sup> the Federal Court found that the visa officer did not properly consider the issue of excessive demands as the evidence was that the

---

<sup>114</sup> The terminology adopted conforms to that used in the jurisprudence.

<sup>115</sup> *Deol, supra*, footnote 60; *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 67.

<sup>116</sup> *Sabater, supra*, footnote 115. Followed in *Prada, Oscar Ernesto v. M.C.I.* (F.C.T.D., no. IMM-2202-99), Hansen, February 1, 2001. See also *Poste, John Russell v. M.C.I.* (F.C.T.D., no. IMM-4601-96), Cullen, December 22, 1997; *Fei, supra*, footnote 37; and *Lau, Hing To v. M.C.I.* (F.C.T.D., no. IMM-4361-96), Pinard, April 17, 1998.

<sup>117</sup> *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.

<sup>118</sup> *Cabaldon Jr., Antonio Quindipan v. M.C.I.* (F.C.T.D., no. IMM-3675-96), Wetston, January 15, 1998.

<sup>119</sup> *Deol, supra*, footnote 80 at 7.

<sup>120</sup> *Choi, supra*, footnote 98.

<sup>121</sup> *Jaferi, supra*, footnote 32.

<sup>122</sup> *Ismaili, supra*, footnote 32.

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*.<sup>123</sup>

In *Ma*,<sup>124</sup> it was held to be well established that specialized education is a "social service" within the meaning of the Act. In *Sabater*,<sup>125</sup> the Federal Court held that services provided by schools to the handicapped may be considered as social services. The Federal Court of Appeal in *Thangarajan*<sup>126</sup> and in *Yogeswaran*<sup>127</sup> 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*,<sup>128</sup> 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."<sup>129</sup> The Federal Court has observed that the Appeal Division should not use stereotyping or irrelevant considerations in deciding whether to grant special relief.<sup>130</sup>

### 3.3.2.5. Section 22 of the *Immigration Regulations, 1978*

On February 1, 1993, section 114(1)(m) of the *Immigration Act* was amended to remove the Governor in Council's power to prescribe the factors to be considered in determining excessive demands.<sup>131</sup> Subsequently, section 22 of the *Immigration Regulations, 1978*, was held to be partially *ultra vires* by the Federal Court in *Ismaili*.<sup>132</sup> The Court held that section 22

---

<sup>123</sup> *Jaferi, supra*, footnote 32. See too *Sooknanan, Lochan Joey v. M.C.I.* (IAD T99-14665), Whist, June 27, 2001 where the panel held that the refusal was not valid in law. The medical officer did not specify the specific programs the applicant might require or their costs and failed to consider the family support available to the applicant when assessing whether she was likely to put excessive demands on support services.

<sup>124</sup> *Ma, supra*, footnote 37.

<sup>125</sup> *Sabater, supra*, footnote 115.

<sup>126</sup> *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.

<sup>127</sup> *Yogeswaran, supra*, footnote 7.

<sup>128</sup> *Deol, supra*, footnote 60 and *Sooknanan, supra*, footnote 123.

<sup>129</sup> *Ibid.*, at 7.

<sup>130</sup> *Budhu, Pooran Deonaraine v. M.C.I.* (F.C.T.D., no. IMM-272-97), Reed, March 20, 1998.

<sup>131</sup> S.C. 1992, c. 49, s. 102(4).

<sup>132</sup> *Ismaili, supra*, footnote 32. See also *Ning, Au Yiu v. M.C.I.* (F.C.T.D., no. IMM-2883-96), Rothstein, July 24, 1997.

should only be read as prescribing the factors to be considered on the health and safety issue and that section 19(1)(a)(ii) of the Act must be interpreted without reference to the provisions of section 22 of the Regulations.

The Federal Court has held on several occasions that the medical officers err in law if they fail to take into consideration the factors set out in section 22 of the *Immigration Regulations, 1978*.<sup>133</sup> Given the *Ismaili* decision, those cases currently only apply to that portion of section 22 which is relevant to determining whether an applicant is likely to be a danger to public health or public safety. In any case, the medical officers may also look at factors outside of section 22.<sup>134</sup> In considering the notions of scarcity of services and costs, one is reminded by the Court<sup>135</sup> to “treat with care ‘excessive demand’ cases decided before *Ismaili*”<sup>136</sup>, which relied on section 22.

The Appeal Division has held that it is no longer compulsory or necessary for medical officers in formulating their opinion under section 19(1)(a)(ii) of the Act to consider the factors listed in section 22 of the Regulations; however, if they do choose to use all or some of the factors set out in section 22 of the Regulations, there is no reason why they cannot do so.<sup>137</sup>

### 3.3.2.6. Timing

To the extent that they are based on the opinion of a medical officer, concurred in by at least one other medical officer, medical refusals are an exception to the *Kahlon* principle that the Appeal Division is to determine the admissibility of applicants at the time of the hearing.<sup>138</sup> Generally, the reasonableness of a medical opinion is to be assessed at the time it was given and relied on by a visa officer.<sup>139</sup> Nevertheless, in making that assessment, the Appeal Division may rely on any relevant evidence adduced before it.<sup>140</sup> Further, where the Appeal Division 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.<sup>141</sup>

Evidence as to an applicant’s condition subsequent to the refusal has limited relevance to the legal validity of the refusal. In *Shanker*,<sup>142</sup> 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

---

<sup>133</sup> See, for example, *Jiwanpuri, supra*, footnote 51; and *Gao, supra*, footnote 33.

<sup>134</sup> *Sabater, supra*, footnote 115.

<sup>135</sup> *Deol, supra*, footnote 80.

<sup>136</sup> *Ismaili, supra*, footnote 32.

<sup>137</sup> *Lok, Siu Ling Winnie v. M.C.I.* (IAD T93-10404), Band, October 12, 1995.

<sup>138</sup> *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.).

<sup>139</sup> See, for example, *Jiwanpuri, supra*, footnote 51; *Gao, supra*, footnote 33; and *Mohamed, supra*, footnote 49.

<sup>140</sup> *Jiwanpuri, supra*, footnote 51.

<sup>141</sup> *Kahlon, supra*, footnote 138.

<sup>142</sup> *Shanker, supra*, footnote 26.

officer's opinion was unreasonable at the time it was given and relied on by the visa officer.<sup>143</sup> It is not enough to simply show that the applicant is no longer suffering from the medical condition.<sup>144</sup>

### 3.4. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

A detailed discussion of this topic can be found in chapter 9, "Compassionate or Humanitarian Considerations."<sup>145</sup>

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.<sup>146</sup> Improvement will be considered in favour of the sponsor (although a decision to grant special relief probably should not turn solely on this criterion),<sup>147</sup> while evidence that the condition is stable or has deteriorated may be considered against the sponsor.<sup>148</sup>

In *Szulikowski*,<sup>149</sup> the Appeal Division 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*,<sup>150</sup> 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.

---

<sup>143</sup> *Jiwanpuri, supra*, footnote 51.

<sup>144</sup> *Mohamed, supra*, footnote 49.

<sup>145</sup> Also, see the following cases where the refusal was valid in law and there were sufficient humanitarian and compassionate considerations to warrant the granting special relief include: *Nadalini, Enrica v. M.C.I.* (IAD VA1-00276), Mattu, July 10, 2001 (reasons signed July 26, 2001) and *Gill, Gurpal Kaur v. M.C.I.* (IAD T97-02345), Whist, January 21, 2000 (reasons signed February 17, 2000).

<sup>146</sup> According to one decision of the Federal Court, the Appeal Division 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 Appeal Division 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 Appeal Division'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.

<sup>147</sup> *Choi, Tommy Yuen Hung v. M.E.I.* (I.A.B. 84-9134), Weisdorf, Suppa, Teitelbaum, September 2, 1986.

<sup>148</sup> *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.

<sup>149</sup> *Szulikowski, Myron Joseph (Mike) v. M.C.I.* (IAD V97-03154), Nee, August 13, 1998.

<sup>150</sup> *Rai, supra*, footnote 108.



See too subsection 3.3.2.4 "Mental Retardation Cases", for treatment of the exercise of discretionary relief in cases of mental retardation.

## CHAPTER 3

### TABLE OF CASES: MEDICAL REFUSALS

#### CASES

<i>Abdelhadi, Abderrahim v. M.C.I.</i> (F.C.T.D., no. IMM-5362-99), McKeown, June 23, 2000.....	3-11
<i>Acosta, Mercedes v. M.C.I.</i> (F.C.T.D., no. IMM-4790-97), Reed, January 7, 1999 .....	3-6
<i>Ahir v. Canada (Minister of Employment and Immigration)</i> , [1984] 1 F.C. 1098 (C.A.).....	3-9, 3-10
<i>Ajaneer, Gulbanoo Sadruddin v. M.C.I.</i> (F.C.T.D., no. T-1750-92), MacKay, March 29, 1996. Reported: <i>Ajaneer v. Canada (Minister of Citizenship and Immigration)</i> (1996), 33 Imm. L.R. (2d) 165 (F.C.T.D.) .....	3-10, 3-11, 3-14
<i>Alam, Quazi Nurul v. M.E.I.</i> (IAD T89-06725), Townshend, Tisshaw, Bell (dissenting), July 17, 1990.....	3-1
<i>Badwal, Tripta v. M.E.I.</i> (F.C.A., no. A-1193-88), MacGuigan, Urie, Mahoney, November 14, 1989. Reported: <i>Badwal v. Canada (Minister of Employment and Immigration)</i> (1989), 9 Imm. L.R. (2d) 85; 64 D.L.R. (4th) 561 (F.C.A.) .....	3-4
<i>Behagan, Mariel v. M.C.I.</i> (F.C.T.D., no. IMM-3674-00) Dawson, April 6, 2001.....	3-6
<i>Boateng, Dora Amoah v. M.C.I.</i> (F.C.T.D., no. IMM-2700-97), Lutfy, September 28, 1998 .....	3-6
<i>Bola, Lakhvir Singh v. M.E.I.</i> (F.C.A., no. A-417-88), Marceau, Stone, Desjardins (dissenting), May 18, 1990. Reported: <i>Bola v. Canada (Minister of Employment and Immigration)</i> (1990), 11 Imm. L.R. (2d) 14 (F.C.A.) .....	3-4
<i>Budhu, Pooran Deonaraine v. M.C.I.</i> (F.C.T.D., no. IMM-272-97), Reed, March 20, 1998 .....	3-18
<i>Burgon: M.E.I. v. Burgon, David Ross</i> (F.C.A., no. A-17-90), MacGuigan, Linden, Mahoney (concurring in the result), February 22, 1991. Reported: <i>Canada (Minister of Employment and Immigration) v. Burgon</i> (1991), 13 Imm. L.R. (2d) 102 (F.C.A.) .....	3-9, 3-14
<i>Cabaldon Jr., Antonio Quindipan v. M.C.I.</i> (F.C.T.D., no. IMM-3675-96), Wetston, January 15, 1998.....	3-13, 3-17
<i>Chauhan, Gurpreet K. v. M.C.I.</i> (IAD T95-06533), Townshend, June 11, 1997.....	3-20
<i>Choi, Hon Man v. M.C.I.</i> (F.C.T.D., no. IMM-4399-94), Teitelbaum, July 18, 1995. Reported: <i>Choi v. Canada (Minister of Citizenship and Immigration)</i> (1995), 29 Imm. L.R. (2d) 85 (F.C.T.D.).....	3-15
<i>Choi, Tommy Yuen Hung v. M.E.I.</i> (I.A.B. 84-9134), Weisdorf, Suppa, Teitelbaum, September 2, 1986.....	3-20
<i>Chong Alvarez: M.E.I. v. Chong Alvarez, Maria Del Refugio</i> (IAD V90-01411), Wlodyka, April 10, 1991.....	3-4
<i>Chu, Raymond Tak Wah v. M.C.I.</i> (F.C.T.D., no. IMM-272-94), Jerome, January 16, 1996. ....	3-10
<i>Chun, Lam v. M.C.I.</i> (F.C.T.D., no. IMM-5208-97), Teitelbaum, October 29, 1998.....	3-10
<i>D'Costa Correia, Savio John v. M.C.I.</i> (IAD T96-03318), Maziarz, February 27, 1998.....	3-9
<i>Deol, Charanjit Kaur v. M.C.I.</i> (F.C.A., no. A-403-01), Linden, Evans, Malone, June 21, 2002; 2002 FCA 271 .....	3-12, 3-13
<i>Deol, Charanjit Kaur v. M.C.I.</i> (F.C.T.D., no. IMM-1332-00), Muldoon, June 22, 2001; 2001 FCT 694.....	3-12

<i>Deol, Daljeet Singh v. M.E.I.</i> (F.C.A., no. A-280-90), MacGuigan, Linden, Robertson, November 27, 1992. Reported: <i>Deol v. Canada (Minister of Employment and Immigration)</i> (1992), 18 Imm. L.R. (2d) 1 (F.C.A.).....	3-10, 3-13, 3-17, 3-18
<i>Dhami, Gurnam Singh v. M.E.I.</i> (I.A.B. 84-6036), Chambers, Tremblay, Howard, January 8, 1987.....	3-3
<i>Fei, Wan Chen v. M.C.I.</i> (F.C.T.D., no. IMM-741-96), Heald, June 30, 1997 .....	3-6, 3-17
<i>Fung, Alfred Wai To v. M.E.I.</i> (I.A.B. 83-6205), Hlady, Glogowski, Petryshyn, December 14, 1984.....	3-5
<i>Gao, Yude v. M.E.I.</i> (F.C.T.D., no. T-980-92), Dubé, February 8, 1993. Reported: <i>Gao v. Canada</i> ( <i>Minister of Employment and Immigration</i> ) (1993), 18 Imm. L.R. (2d) 306 (F.C.T.D.).....	3-6, 3-11, 3-19
<i>Gill, Gurpal Kaur v. M.C.I.</i> (IAD T97-02345), Whist, January 21, 2000 (reasons signed February 17, 2000).....	3-20
<i>Gingiovenanu, Marcel v. M.E.I.</i> (F.C.T.D., no. IMM-3875-93), Simpson, October 30, 1995. Reported: <i>Gingiovenanu v. Canada (Minister of Employment and Immigration)</i> (1995), 31 Imm. L.R. (2d) 55 (F.C.T.D.).....	3-5
<i>Grewal, Parminder Singh v. M.C.I.</i> (IAD V95-01266), Boscariol, November 21, 1997.....	3-10
<i>Grewal, Parminder Singh v. M.C.I.</i> (IAD V95-01266), Boscariol, September 2, 1997.....	3-13
<i>Hersi, Mohamed Abdi v. M.C.I.</i> (F.C.T.D., no. IMM-5476-99), Dawson, December 11, 2000.....	3-6
<i>Hilewitz, David v. M.C.I.</i> (F.C.T.D., no. IMM-5340-00), Gibson, August 8, 2002; 2002 FCT 844.....	3-15
<i>Hiramen, Sandra Cecilia v. M.E.I.</i> (F.C.A., no. A-956-84), MacGuigan, Thurlow, Stone, February 4, 1986.....	3-2, 3-4
<i>Ho, Nam Van v. M.C.I.</i> (IAD C97-00009), Wiebe, January 13, 2000.....	3-13
<i>Hussain, Amin v. M.C.I.</i> (F.C.T.D., no. IMM-3419-95), Noël, September 26, 1996. Reported: <i>Hussain v. Canada (Minister of Citizenship and Immigration)</i> (1996), 35 Imm. L.R. (2d) 86 (F.C.T.D.).....	3-7, 3-11, 3-15
<i>Ismaili, Zafar Iqbal v. M.C.I.</i> (F.C.T.D., no. IMM-3430-94), Cullen, August 17, 1995. Reported: <i>Ismaili v. Canada (Minister of Citizenship and Immigration)</i> (1995), 29 Imm. L.R. (2d) 1 (F.C.T.D.).....	3-5, 3-11, 3-14, 3-17, 3-18
<i>Jaferi, Ali v. M.C.I.</i> (F.C.T.D., no. IMM-4039-93), Simpson, October 24, 1995. Reported: <i>Jaferi</i> <i>v. Canada (Minister of Citizenship and Immigration)</i> (1995), 35 Imm. L.R. (2d) 140 (F.C.T.D.) .....	3-5, 3-17
<i>Jang, Young Doo v. M.C.I.</i> (F.C.A., no. A-270-00), Malone, Linden, Noël, October 19, 2001; 2001 FCA 312 .....	3-7
<i>Jean Jacques, Soutien v. M.E.I.</i> (I.A.B. 80-1187), Scott, Houle, Tremblay, May 20, 1981.....	3-5
<i>Jiwanpuri, Jasvir Kaur v. M.E.I.</i> (F.C.A., no. A-333-89), Marceau, Stone, MacGuigan, May 17, 1990. Reported: <i>Jiwanpuri v. Canada (Minister of Employment and Immigration)</i> (1990), 10 Imm. L.R. (2d) 241 (F.C.A.) .....	3-8, 3-12, 3-19
<i>Kahlon, Darshan Singh v. M.E.I.</i> (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: <i>Kahlon v. Canada (Minister of Employment and Immigration)</i> (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).....	3-19
<i>Kaila, Harmandeep Kaur v. M.C.I.</i> (IAD V95-02830), McIsaac, October 2, 1997 .....	3-10
<i>Khan, Mary Angela v. M.E.I.</i> (I.A.B. 85-9043), Tisshaw, Blumer, Ahara, October 6, 1986. ....	3-5
<i>Khan, Mobashsher Uddin v. M.E.I.</i> (IAD T89-01022), Sherman, Bell, Fatsis (dissenting), July 16, 1990.....	3-1
<i>Khan, Shahid Hasan v. M.C.I.</i> (F.C.T.D., no. IMM-4856-99), Heneghan, June 1, 2000.....	3-8
<i>Khan: M.C.I. v. Khan, Shahid Hasan</i> (F.C.A., no. A-457-00), Linden, Evans, Malone, November 14, 2001; 2001 FCA 345 .....	3-8

*King, Garvin v. M.C.I.* (F.C.T.D., no. IMM-2623-95), Dubé, May 23, 1996 ..... 3-3

*Kirpal, Anil Kumar v. M.C.I.* (F.C.T.D., no. IMM-888-96), Gibson, October 18, 1996. Reported:  
*Kirpal v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 352 (T.D.) ..... 3-20

*Kumar, Varinder v. M.C.I.* (IAD V97-03366), Boscariol, December 30, 1998 ..... 3-14

*Kutuadu, Larry v. M.C.I.* (F.C.T.D., no. IMM-2705-99), O’Keefe, January 12, 2001 ..... 3-14

*Lau, Hing To v. M.C.I.* (F.C.T.D., no. IMM-4361-96), Pinard, April 17, 1998 ..... 3-17

*Law, Yip Ging v. M.C.I.* (F.C.T.D., no. IMM-2395-96), Jerome, January 23, 1998 ..... 3-1

*Lee, Sing v. M.E.I.* (F.C.T.D., no. T-2459-85), Martin, May 1, 1986 ..... 3-7

*Li, Leung Lun v. M.C.I.* (F.C.T.D., no. IMM-466-96), Tremblay-Lamer, September 30, 1998..... 3-6

*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.) ..... 3-17

*Litt, Mohinder Kaur v. M.C.I.* (IAD V95-01928), Jackson, June 11, 1998..... 3-9

*Lok, Siu Ling Winnie v. M.C.I.* (IAD T93-10404), Band, October 12, 1995..... 3-19

*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.) ..... 3-10

*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.) ..... 3-11

*Ma, Chiu Ming v. M.C.I.* (F.C.T.D., no. IMM-812-97), Wetston, January 15, 1998. .... 3-6, 3-18

*Mahey, Gulshan v. M.C.I.* (IAD V96-02119), Clark, July 20, 1998. .... 3-5

*Mahey: M.C.I. v. Mahey, Gulshan* (F.C.T.D., no. IMM-3989-98), Campbell, May 11, 1999 ..... 3-5

*Mangat, Parminder Singh v. S.S.C.* (F.C.T.D., no. T-153-85), Strayer, February 25, 1985. .... 3-3

*Manto, Samira Ahamin v. M.C.I.* (F.C.T.D., no. IMM-5841-99), O’Keefe, June 1, 2001 ..... 3-16

*Mo, Wong v. M.C.I.* (F.C.T.D., no. IMM-4082-98) O’Keefe, February 14, 2001..... 3-14

*Mohamed v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 90 (C.A.) ..... 3-8, 3-9, 3-19, 3-20

*Mohamed, Liaquat Ali v. M.E.I.* (I.A.B. 85-9648), Sherman, Chu, Eglington (dissenting), July 27,  
 1987..... 3-5

*Moledina, Narjis v. M.E.I.* (IAD T91-02516), Ahara, Chu, Fatsis, May 8, 1992..... 3-20

*Nadalini, Enrica v. M.C.I.* (IAD VA1-00276), Mattu, July 10, 2001 (reasons signed July 26, 2001) ..... 3-20

*Nagra, Ajaib Singh v. M.C.I.* (IAD V94-00245), Bartley, July 14, 1997..... 3-10

*Ng, Kam Fai Andrew v. M.C.I.* (F.C.T.D., no. IMM-2903-94), Jerome, January 16, 1996. .... 3-10

*Nijjar, Ranjit Singh v. M.E.I.* (IAD V89-00964), Wlodyka, Chambers, Verma, January 9, 1991. .... 3-8

*Ning, Au Yiu v. M.C.I.* (F.C.T.D., no. IMM-2883-96), Rothstein, July 24, 1997..... 3-18

*Nyvtl, Milan v. S.S.C.* (F.C.T.D., no. IMM-813-93), Reed, September 19, 1994. Reported: *Nyvtl v.*  
*Canada (Secretary of State)* (1994), 26 Imm. L.R. (2d) 95 (F.C.T.D.) ..... 3-14

*Park, Soung II v. M.C.I.* (F.C.A., no. A-708-00), Malone, Linden, Noël, October 19, 2001; 2001  
 FCA 313 ..... 3-7

*Parmar, Jaipal Singh v. M.E.I.* (F.C.A., no. A-836-87), Heald, Urie, Stone, May 16, 1988 ..... 3-4, 3-5, 3-7

<i>Pattar: M.E.I. v. Pattar, Sita Kaur</i> (F.C.A., no. A-710-87), Marceau, Desjardins, Pratte (dissenting), October 28, 1988. Reported: <i>Pattar v. Canada (Minister of Employment and Immigration)</i> (1988), 8 Imm. L.R. (2d) 79 (F.C.A.).....	3-4, 3-5, 3-9
<i>Pervez, Anjum v.. M.C.I.</i> (F.C.T.D., no. IMM-3756-00) Simpson, December 21, 2001;2001 FCT 1420.....	3-16
<i>Phan, Hat v. M.C.I.</i> (IAD W93-00090), Wiebe, September 4, 1996 .....	3-9
<i>Poon, Ching Ho v. M.C.I.</i> (F.C.T.D., no. IMM-2007-99), Pelletier, December 1, 2000.....	3-15, 3-16
<i>Poste, John Russell v. M.C.I.</i> (F.C.T.D., no. IMM-4601-96), Cullen, December 22, 1997 .....	3-13, 3-17
<i>Prada, Oscar Ernesto v. M.C.I.</i> (F.C.T.D., no. IMM-2202-99), Hansen, February 1, 2001 .....	3-17
<i>Rabang, Ricardo Pablo v M.C.I.</i> (F.C.T.D., no. IMM-4576-98), Sharlow, November 29, 1999.....	3-16
<i>Rai, Paraminder Singh v. M.C.I.</i> (IAD V97-00279), Carver, April 20, 1998. ....	3-16, 3-20
<i>Ram: M.C.I. v. Ram, Venkat</i> (F.C.T.D., no. IMM-3381-95), McKeown, May 31, 1996. ....	3-9, 3-14
<i>Redding, Jeannine Elise v. M.C.I.</i> (F.C.T.D., no. IMM-2661-00), Lemieux, August 22, 2001 .....	3-7, 3-13
<i>Sabater, Llamado D. Jr. v. M.C.I.</i> (F.C.T.D., no. IMM-2519-93), McKeown, October 13, 1995. Reported: <i>Sabater v. Canada (Minister of Citizenship and Immigration)</i> (1995), 31 Imm. L.R. (2d) 59 (F.C.T.D.). ....	3-17, 3-18, 3-19
<i>Seyoum, Zerom v. M.E.I.</i> (F.C.A., no. A-412-90), Mahoney, Stone, Décary, November 15, 1990. ....	3-14
<i>Shah, Nikita v. M.C.I.</i> (IAD T96-02633), D'Ignazio, June 23, 1998 .....	3-7
<i>Shanker, Gurdev Singh v. M.E.I.</i> (F.C.A., no. A-535-86), Mahoney, Pratte, Heald, June 25, 1987. ....	3-5, 3-9, 3-19
<i>Shepherd, Tam Yue Philomena v. M.E.I.</i> (I.A.B. 82-6093), Davey, Benedetti, Suppa, November 18, 1982.....	3-3
<i>Sidhu, Balwinder Singh v. M.C.I.</i> (IAD VA0-00322), Borst, January 23, 2001 .....	3-14
<i>Sidhu: M.E.I. v. Sidhu, Satinder Singh</i> (F.C.A., no. A-1250-88), Desjardins, Heald, Mahoney, January 12, 1990.....	3-4
<i>Sihota: M.E.I. v. Sihota, Sukhminder Kaur</i> (F.C.A., no. A-76-87), Mahoney, Stone, MacGuigan, January 25, 1989.....	3-4, 3-5
<i>Singh, Balbir Kaur v. M.C.I.</i> (IAD V97-01550), Carver, May 8, 1998.....	3-9
<i>Singh, Narinder Pal v. M.C.I.</i> (IAD T97-04679), D'Ignazio, September 27, 1999.....	3-7
<i>Singh: M.E.I. v. Singh, Pal</i> (F.C.A., no. A-197-85), Lacombe, Urie, Stone, February 4, 1987. Reported: <i>Canada (Minister of Employment and Immigration) v. Singh</i> (1987), 35 D.L.R. (4th) 680 (F.C.A.).....	3-3
<i>Sooknanan, Lochan Joey v. M.C.I.</i> (IAD T99-14665), Whist, June 27, 2001.....	3-18
<i>Stefanska, Alicja Tunikowska v. M.E.I.</i> (F.C.T.D., no. T-1738-87), Pinard, February 17, 1988. Reported: <i>Stefanska v. Canada (Minister of Employment and Immigration)</i> (1988), 6 Imm. L.R. (2d) 66 (F.C.T.D.). ....	3-6
<i>Syal-Bharadwa, Bela v. M.C.I.</i> (IAD V97-02011), Borst, November 30, 1999.....	3-11
<i>Szulikowski, Myron Joseph (Mike) v. M.C.I.</i> (IAD V97-03154), Nee, August 13, 1998 .....	3-20
<i>Takhar, Manjit Singh v. M.E.I.</i> (IAD V90-00588), Wlodyka, Chambers, Verma, March 4, 1991. ....	3-10
<i>Tang, Lai Keng v. M.E.I.</i> (I.A.B. 79-6093), Campbell, Glogowski, Loiselle, September 20, 1979.....	3-4
<i>Tejobunarto, Lianggono v. M.C.I.</i> (IAD T97-00565), Boire, July 28, 1998 .....	3-10
<i>Ten, Luisa v. M.C.I.</i> (F.C.T.D., no. IMM-1606-97), Tremblay-Lamer, June 26, 1998.....	3-11

<i>Thangarajan, Rajadurai Samuel v. M.C.I.</i> (F.C.T.D., no. IMM-3789-97), Reed, August 5, 1998.....	3-18
<i>Thangarajan: M.C.I. v. Thangarajan, Rajadurai Samuel</i> (F.C.A., no. A-486-98), Létourneau, Rothstein, McDonald, June 24, 1999.....	3-18
<i>Tong, Kwan Wah v. M.C.I.</i> (F.C.T.D., no. IMM-2565-96), Heald, October 31, 1997.....	3-11
<i>Tonnie v. M.E.I.</i> (IAD T91-00202), Bell, Fatsis, Singh, March 30, 1992.....	3-20
<i>Truong, Lien Phuong v. M.C.I.</i> (IAD T96-00900), Kitchener, Bartley, Boire, April 7, 1997.....	3-17
<i>Tung, Nirmal Singh v. M.E.I.</i> (I.A.B. 86-6021), Mawani, Singh, Anderson (dissenting), June 30, 1987.....	3-3
<i>Uppal v. Canada (Minister of Employment and Immigration)</i> , [1987] 3 F.C. 565.....	3-8
<i>Wahid, Gurbax Singh v. M.C.I.</i> (IAD T96-04717), Kitchener, January 21, 1998.....	3-16
<i>Wong, Chan Shuk King v. M.C.I.</i> (F.C.T.D., no. IMM-2359-95), Simpson, May 24, 1995. Reported: <i>Wong v. Canada (Minister of Citizenship and Immigration)</i> (1996), 34 Imm. L.R. (2d) 18 (F.C.T.D.).....	3-10, 3-11
<i>Wong, Ching Shin Henry v. M.C.I.</i> (F.C.T.D., no. IMM-3366-96), Reed, January 14, 1998.....	3-7
<i>Wong, Ching Shin Henry v. M.C.I.</i> (F.C.T.D., no. IMM-3366-96), Reed, November 27, 1998.....	3-7
<i>Wong, Ching Shin Henry v. M.C.I.</i> (F.C.T.D., no. IMM-6060-99) McKeown, May 31, 2002; 2002 FCT 625.....	3-15
<i>Yogeswaran, Thiyagrajah v. M.C.I.</i> (F.C.A., no A-344-97), Létourneau, Rothstein, McDonald, June 24, 1999.....	3-2, 3-18
<i>Zheng, Bi Quing v. M.E.I.</i> (IAD T91-01428), Sherman, Weisdorf, Tisshaw, January 3, 1992.....	3-20

# CHAPTER 4

## Table of Contents

<b>4. ADOPTIONS</b>	<b>4-1</b>
<b>4.1. DEFINITIONS</b>	<b>4-1</b>
4.1.1. <i>Convention on Protection of Children and Co-operation in respect of Intercountry Adoption</i>	4-2
<b>4.2. INTERPRETATION OF THE REGULATIONS REGARDING ADOPTIONS</b>	<b>4-3</b>
4.2.1. Introduction	4-3
4.2.2. Genuine Parent and Child Relationship and Immigration Purpose	4-4
<b>4.3. TRANSITIONAL PROVISIONS</b>	<b>4-8</b>
<b>4.4. CHILD TO BE ADOPTED</b>	<b>4-9</b>
<b>4.5. SPLITTING AND DELETING OF APPLICATIONS</b>	<b>4-12</b>
<b>4.6. DETERMINING THE LEGAL VALIDITY OF THE ADOPTION</b>	<b>4-13</b>
4.6.1. Foreign Law	4-14
4.6.1.1. Glossary of Terms	4-14
4.6.1.2. Proof of Foreign Law	4-14
4.6.1.3. Declaratory Judgments and Deeds	4-17
4.6.1.4. Presumption of Validity under Foreign Law	4-19
4.6.1.5. Parent and Child Relationship Created by Operation of Law	4-21
<b>4.7. POWER OF ATTORNEY</b>	<b>4-21</b>
<b>4.8. REVOCATION OF ADOPTION</b>	<b>4-22</b>
<b>4.9. PUBLIC POLICY</b>	<b>4-24</b>
<b>4.10. CANADIAN CHARTER OF RIGHTS AND FREEDOMS</b>	<b>4-25</b>
<b>4.11. REPEAT APPEALS</b>	<b>4-26</b>

## CHAPTER 4

### 4. ADOPTIONS

Children who have been adopted by permanent residents or Canadian citizens may qualify as members of the family class<sup>1</sup> pursuant to paragraph (b) of the definition of “member of the family class” in section 2(1) of the *Immigration Regulations, 1978* (the “*Regulations*”), namely, as the sponsor’s dependent son or dependent daughter, and be sponsored as such. As well, a child whom a sponsor intends to adopt may also qualify as a member of the family class.<sup>2</sup>

#### 4.1. DEFINITIONS

Prior to February 1, 1993, the definition of “adopted” in section 2(1) of the *Regulations* read as follows:

2.(1) “adopted” means adopted in accordance with the laws of any province of Canada or of any country other than Canada or any political subdivision thereof where the adoption created a relationship of parent and child.

Substantial changes concerning adoptions were made to the *Regulations* on February 1, 1993 and March 17, 1994. They are as follows:

2.(1) “adopted” means a person who is adopted in accordance with the laws of a province or of a country other than Canada or any political subdivision thereof, where the adoption creates a genuine relationship of parent and child, 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. [SOR/93-44] (effective February 1, 1993)

[...]

6.1(3) A person who is adopted outside Canada and whose adoption is subsequently revoked by a foreign authority may only sponsor an application for landing made by a member of the family class if an immigration officer is satisfied that the revocation of the adoption was not obtained for the purpose of sponsoring an application for landing made by that member. [SOR/93-44] (effective February 1, 1993)

[...]

2.(1) “daughter” means, with respect to a person, a female

(a) who is the issue of that person and who has not been adopted by another person, or

(b) who has been adopted by that person before having attained 19 years of age. [SOR/93-44] (effective February 1, 1993)

---

<sup>1</sup> The child must be a member of the family class at the time of the application. If the adoption is completed after the application is filed, the process must be started anew: *M.C.I. v. Subala, Josephine* (F.C.T.D., no. IMM-3164-96), Rothstein, July 22, 1997. See also *Gu, Wenyan v. M.C.I.* (IAD V94-01149), Dossa, June 11, 1997; and *Akyeampong, Mercy Gyan Mans v. M.C.I.* (IAD T98-04409), D’Ignazio, May 26, 1999.

<sup>2</sup> For a discussion of this topic, see section 4.4 “Child to be Adopted”, below.



[...]

2.(1) “son” means, with respect to a person, a male

(a) who is the issue of that person and who has not been adopted by another person, or<sup>3</sup>

(b) who has been adopted by that person before having attained 19 years of age. [SOR/93-44] (effective February 1, 1993)

[...]

6.(1) Subject to subsections (1.1), (3.1), (3.2), (4), (5) and (6), 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 “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 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. [SOR/94-242] (effective March 17, 1994)

(1.01) Paragraph (1)(e) is retroactive and applies in respect of all applications for landing made by members of the family class pending on April 15, 1994. [SOR/94-242] (effective March 17, 1994)

#### **4.1.1. *Convention on Protection of Children and Co-operation in respect of Intercountry Adoption***<sup>4</sup>

Canada ratified the *Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* on December 19, 1996 and it came into force on April 1, 1997. On that date, sections 4 and 6(1) of the *Immigration Regulations, 1978* were amended to comply with the terms of the Convention.

Section 4(4) was added to the *Regulations*.<sup>5</sup> This amendment removes from the family class persons adopted or intended to be adopted not in accordance with the Convention. This provision only applies where both the province and the foreign country have implemented the Convention. Where the applicant is described in section 4(4), the sponsor’s appeal will be dismissed for lack of jurisdiction.

Section 6(1)(c) of the *Regulations* was amended<sup>6</sup> by making it subject to section 6(1)(c.1). Section 6(1)(c) provides that a “no objection” certificate must be obtained from the

---

<sup>3</sup> In *M.C.I. v. Joshi, Soma Devi* (F.C.T.D., no. IMM-1985-96), Jerome, March 20, 1997, the Court held that a stepson is not included in the definition of “son” as the word “issue” has a clear meaning in Canadian law. However, in this case, the child was an adopted son under customary Indian law.

<sup>4</sup> For current information about the status of the Convention, you may visit its internet web site at <<http://www.hcch.net>>.

<sup>5</sup> SOR/97-146.

<sup>6</sup> *Ibid.*

province in relation to a child who has been adopted; an orphaned sibling, nephew/niece or grandchild; or an orphan or abandoned child to be adopted.

Section 6(1)(c.1)<sup>7</sup> provides that a visa may be issued to a child to be adopted or a child who has been adopted where the province of intended destination and the country of origin have implemented the Convention and the central authorities of the province and country have approved the adoption.

There is no transitional provision in SOR/97-146, the implementing instrument. Thus the case law will determine whether the new law applies to a particular application. The Federal Court held in *McDoom*<sup>8</sup> that an applicant has an accrued right to have an application determined based on the regulations in effect on the date the application was accepted and that the applicant should not be made subject to new and additional requirements made part of the regulations after the application date. While in *Kahlon*,<sup>9</sup> the Federal Court held that the applicable law is that in effect at the date of the hearing, *Kahlon* is distinguishable as it related to a beneficial change in the regulations and the Court did not address the issue of retrospective application of amendments to regulations or the issue of accrued rights since these issues were not before the Court.

Consequently, the key date is the date of application for permanent residence. If the application was filed before April 1, 1997, then the amendments to the *Regulations* do not apply to the application.

## 4.2. INTERPRETATION OF THE REGULATIONS REGARDING ADOPTIONS

### 4.2.1. Introduction

The *Regulations* require an adoption to take place before the child reaches 19 years of age.<sup>10</sup> The *Regulations*<sup>11</sup> also seek to prevent anyone from using adoption as a means to circumvent other immigration requirements. They are intended to prohibit what are commonly known as “adoptions of convenience”, just as they prohibit “marriages of convenience.”<sup>12</sup> It should be noted that a few years ago, it was held in many cases of the Immigration Appeal Board and the Appeal Division that the concept of “adoption of convenience” did not exist prior to the

---

<sup>7</sup> *Ibid.*

<sup>8</sup> *McDoom v. Minister of Manpower and Immigration*, [1978] 1 F.C. 323 (T.D.).

<sup>9</sup> *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.).

<sup>10</sup> Prior to February 1, 1993, adoptions had to take place prior to the child’s attaining 13 years of age. Note, however, that some foreign legislation may provide for a different age restriction. For example, section 10(iv) of the *Hindu Adoptions and Maintenance Act, 1956*, provides that the adoption must take place before the child has completed the age of 15 years, unless a custom or usage permits otherwise.

<sup>11</sup> For case-law related to the definition of “adopted” prior to February 1, 1993 and the interpretation of some sections of the *Hindu Adoptions and Maintenance Act, 1956*, see Wlodyka, A., *Guide to Adoptions under the Hindu Adoptions and Maintenance Act, 1956*, 25 Imm. L.R. (2d) 8.

<sup>12</sup> See chapter 6, “Marriages and Engagements for Immigration Purposes.”

amendments of February 1, 1993.<sup>13</sup> However, subsequent Federal Court and Appeal Division decisions dictate an examination of the *bona fides* of the relationship of parent and child under the definition of “adopted” pre-dating February 1, 1993.<sup>14</sup> This represents an important change of direction in the jurisprudence.

The accepted view now is that adoption cases, whether under the former or the current definitions, involve a two-stage process: (1) proof of the legality of the foreign adoption; and (2) proof that a genuine parent-child relationship exists.<sup>15</sup> The present definition of “adopted” in section 2(1) of the *Regulations* outlines three conditions for an adoption:

- the adoption must be legal under the laws of the jurisdiction where it was performed;
- the adoption creates a genuine relationship of parent and child; and
- the person has not been adopted for the purpose of gaining admission to Canada or gaining the admission to Canada of any of the person’s relatives.<sup>16</sup>

The first condition is discussed in section 4.5., “Determining the Legal Validity of the Adoption.”

#### **4.2.2. Genuine Parent and Child Relationship and Immigration Purpose**

It may be argued that the genuineness of an adoption and its purpose are intimately related and cannot be examined separately. However, a plain reading of the definition of “adopted” leaves no doubt that they are, at least in theory, distinct conditions. Moreover, if an applicant fails to meet either one of these two conditions, a refusal of the application for permanent residence could result. A non-genuine parent and child relationship would suffice for a refusal of the application for permanent residence without the need to examine whether or not the purpose of the adoption was to gain admission to Canada.

---

<sup>13</sup> See, for example, *Banga, Harjit Ram v. M.E.I.* (I.A.B. 86-6175), Arpin, Gillanders, MacLeod, September 10, 1987. Reported: *Banga v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 1 (I.A.B.).

<sup>14</sup> *Gill, Banta Singh v. M.C.I.* (F.C.A., no. A-859-96), Marceau, Linden, Robertson, July 14, 1998. See also *Khaira, Avtar Singh v. M.C.I.* (F.C.T.D., no. IMM-3635-97), Pinard, May 25, 1998; *Dhaliwal, Jagir Singh v. M.C.I.* (F.C.T.D., no. IMM-1127-96), Rouleau, November 19, 1996; *M.C.I. v. Sharma, Chaman Jit* (F.C.T.D., no. IMM-453-95), Wetston, August 28, 1995; *M.C.I. v. Edrada, Leonardo Lagmacy* (F.C.T.D., no. IMM-5199-94), MacKay, February 29, 1996; *Gosal, Paramjit Singh v. M.C.I.* (IAD V95-00090), Verma, March 25, 1996; and *Bhachu, Gurdip Singh v. M.C.I.* (IAD V95-00313), Lam, June 3, 1996. For case-law on the concept of “adoption of convenience” under the former definition of “adopted”, see *Sahota, Manjit Singh v. M.E.I.* (I.A.B. 83-6510), Howard, Anderson, P. Davey, February 11, 1985; *Kalair, Sohan Singh v. M.E.I.* (I.A.B. 82-6104), Chambers, Howard, P. Davey, January 9, 1987; and *Sidhu, Narinder Singh v. M.C.I.* (IAD V95-00492), Verma, May 1, 1996.

<sup>15</sup> *Gill, ibid.*; *Sharma, ibid.*; *Edrada, ibid.*

<sup>16</sup> In *M.C.I. v. White, Robert Edward* (F.C.T.D., no. IMM-3933-97), Pinard, May 25, 1998, the Court stated that as part of the assessment of whether the adoption was done for immigration purposes, the Appeal Division must deal with the findings of the visa officer to that effect.

The definition of “adopted” gives no guidance on whether the mere presence of an immigration purpose is sufficient to exclude an applicant as an “adopted” child or whether it must be the primary purpose.<sup>17</sup> It is possible that there may be cases where there is evidence of a genuine parent-child relationship, for example, evidence of nurturing, educational participation and supervision by the adoptive parents and at the same time, evidence that gaining admission to Canada was the purpose of the adoption, although this may be rare. Evidence of the immigration purpose could be established through admissions, hostile witnesses or correspondence.

The possibility of an adoption creating a genuine relationship of parent and child yet at the same time establishing an immigration purpose raises an unresolved legal issue. It is suggested that the genuineness of the relationship is the more important element and that a *primary* purpose, rather than a mere purpose, of gaining admission to Canada is required in order to exclude an applicant from membership in the family class as an “adopted” child. Otherwise, the naïve admission that an applicant’s adoption would facilitate admission to Canada could render the applicant ineligible despite convincing evidence of a genuine parent-child relationship. It is likely that the Minister will rely more commonly on the weakness of the evidence of a genuine parent-child relationship to argue that the adoption was carried out for the purpose of gaining admission to Canada.

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 Appeal Division, in *De Guzman*,<sup>18</sup> 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.<sup>19</sup>

---

<sup>17</sup> See, by way of comparison, section 4(3) of the *Regulations* which provides:

4.(3) The family class does not include a spouse who entered 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.

<sup>18</sup> *De Guzman, Leonor G. v. M.C.I.* (IAD W95-00062), Ariemma, Bartley, Wiebe, August 16, 1995.

<sup>19</sup> *Ibid.*, at 5. However, this is not to say that the test for determining whether the definition of adopted in the *Immigration Regulations* is met is the test of best interests of the child used in family law. See *Dhatt, Sukhvinder Singh v. M.C.I.* (IAD W97-00053), Wiebe, November 16, 1998.

*De Guzman* identified some of the factors used in assessing the genuineness of a relationship of parent and child as follows:<sup>20</sup>

- (a) motivation of the adopting parent(s);<sup>21</sup>
- (b) to a lesser extent, the motivation and conditions of the natural parent(s);
- (c) authority and suasion of the adopting parent(s) over the adopted child;
- (d) supplanting of the authority of the natural parent(s) by that of the adoptive parent(s);
- (e) relationship of the adopted child with the natural parent(s) after adoption;<sup>22</sup>
- (f) treatment of the adopted child versus natural children by the adopting parent(s);
- (g) relationship between the adopted child and the adopting parent(s) before the adoption;
- (h) 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
- (i) 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;<sup>23</sup>

---

<sup>20</sup> *Ibid.*, at 6.

<sup>21</sup> 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.

<sup>22</sup> 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 21. 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, Jiqui (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.

- the composition of the adopted child’s biological family, including the cultural context of the family (for example, 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 Appeal Division must consider all the evidence in context. Where the Appeal Division failed to consider facts that were not contradicted and showed that a genuine parent-child relationship existed, the Court held that the 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.”<sup>24</sup>

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<sup>25</sup>.

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). It is recommended that all the circumstances of the case be analyzed, including the demonstrated intentions and declarations of both adoptive and natural parents when available. In the case of young children, it is suggested that their

---

<sup>23</sup> This list of factors has been drawn largely on the basis of case-law under the former definition of “adopted”. With regard to the timing of the sponsorship, while delay in sponsorship usually 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.

<sup>24</sup> *Pabla, Dial v. M.C.I.* (F.C.T.D., no. IMM-1210-00), Blais, December 12, 2000.

<sup>25</sup> *Sinniah, Sinnathamby v. M.C.I.* (F.C.T.D., no. IMM-5954-00), Dawson, July 25, 2002; 2002 FCT 822. [This case is noted notwithstanding the date of the update is July 1, 2002.]

intentions may not be a proper consideration.<sup>26</sup> This would not, however, preclude considering and assessing the declarations of a child in the context of other available evidence. Testimony of other witnesses, both ordinary and expert,<sup>27</sup> may also assist the Appeal Division in its assessment.

The Appeal Division has made findings in many cases that the sponsor and the applicant have a genuine relationship but that the relationship is not one of parent and child.<sup>28</sup>

#### 4.3. TRANSITIONAL PROVISIONS

Any application initiated on or after February 1, 1993 is to be treated according to the new definitions of “adopted”, “daughter” and “son” which came into effect on that date. The effective (“lock-in”) date of a sponsored application for permanent residence is the date of filing of the application itself and not the date of the undertaking of assistance (unless the amending legislation were to expressly stipulate that the latter date governed).<sup>29</sup>

For applications filed prior to February 1, 1993, section 6(1)(e) of the *Regulations* reiterates the concept of an adoption for immigration purposes, and its application was made retroactive by section 6(1.01) to applications for landing pending on April 15, 1994. Section 6(1)(e) applies to applications submitted prior to February 1, 1993 and which have not been concluded on April 15, 1994, except where the undertaking of assistance was filed prior to March 27, 1992. Section 6(1)(e) is very specific in that it states that it only applies to persons “described in paragraph (b) of the definition of ‘member of the family class’ in section 2(1), or a dependant of a member of the family class [...]”. Thus, it would not apply to persons who filed

---

<sup>26</sup> See, by analogy, *Bal, Sukhjinder Singh v. S.G.C.* (F.C.T.D., no. IMM-1212-93), McKeown, October 19, 1993.

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> *Canada (Minister of Employment and Immigration) v. Lidder*, [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.), followed in *M.C.I. v. San Luis, Luzviminda Peralta* (F.C.T.D., no. IMM-5054-94), Dubé, July 6, 1995. Note, however, that Citizenship and Immigration Canada appears to consider a different “lock-in” date which is more generous than that in *Lidder*. Citizenship and Immigration Canada considers the earliest of the following two: sponsorship undertaking or application for permanent residence plus fee (see Citizenship and Immigration Canada Operations Memorandum IS 94-07, dated March 4, 1994). [Note that such Departmental instructions do not bind the Appeal Division.] See also *M.C.I. v. Jimenez, Emilia* (F.C.T.D., no. IMM-415-95), Teitelbaum, October 23, 1995.

The case of *M.E.I. v. Porter, Kathleen* (F.C.A., no. A-353-87), Hugessen, MacGuigan, Desjardins, April 14, 1988 should also be kept in mind. The Court held that the visa officer’s refusal based on an administrative delay of the Minister’s own creation was invalid in law. The circumstances for the delay in the filing of the application for permanent residence would have to be examined.

their undertakings before March 27, 1992, as the definition of “member of the family class”, which came into force on February 1, 1993, does not apply to them.<sup>30</sup>

A “pending application” should be understood as one which was filed before February 1, 1993 and for which a decision had not been made on April 15, 1994.

It should also be noted that section 6(1)(e) does not address the aspect of “genuine relationship” found in the new definition of “adopted”; it only refers to “the purpose of gaining admission to Canada”. The intent behind this different wording is not clear and it could be argued that it is merely an oversight with no significant consequence. A non-genuine relationship in these circumstances is generally one that is intended mainly to facilitate immigration as a family class member. And a relationship created for the purpose of facilitating immigration to Canada would likely be non-genuine. The Appeal Division would appear to retain its discretionary jurisdiction in a refusal based solely on section 6(1)(e) and not on the definition of “adopted” because the applicant would continue to be a member of the family class. However, this issue becomes moot when one considers the reasoning in *Gill*,<sup>31</sup> *Sharma*<sup>32</sup> and other case-law to the effect that the concept of an “adoption of convenience” also existed under the former definition of “adopted”. Therefore, if there were no genuine parent and child relationship, the applicant would not satisfy the definition of “adopted” and would not be a member of the family class, i.e., the sponsor’s dependent son/daughter.

#### 4.4. CHILD TO BE ADOPTED

Where the child has not been adopted in the foreign jurisdiction but the sponsor intends to adopt him or her in Canada, the visa officer and the Appeal Division must consider whether the child falls under paragraph (g) of the definition of “member of the family class” in section 2 of the Regulations. If the child does not fall under the section, he or she is not a member of the family class.

---

<sup>30</sup> *Gosal, supra*, footnote 14; *Sidhu, Narinder Singh, supra*, footnote 14; *Bhachu, supra*, footnote 14. See also *Padwal, Ram Singh v. M.C.I.* (IAD W94-00195), Wiebe, July 27, 1995; and *Toor, Gurdarshan Singh v. M.C.I.* (IAD V95-00959), McIsaac, February 4, 1997.

Section 11 of SOR/92-101, which came into force on March 27, 1992, provides:

11. The Immigration *Regulations, 1978*, as they read immediately before the coming into force of these amendments, shall continue to apply in respect of any member of the family class where, before the date of the coming into force of these amendments,

(a) a sponsor residing in Quebec has submitted a Form 1344 on behalf of that person to the Minister; or

(b) any other sponsor has given an undertaking to the Minister.

In *M.C.I. v. Bal, Sarbjit Singh* (F.C.T.D., no. IMM-4547-98), Gibson, July 26, 1999, the Federal Court concluded that the Appeal Division erred in determining that s. 6(1)(e) does not apply to applications that are supported by undertakings of assistance filed prior to March 27, 1992 (note that neither the Appeal Division nor the Federal Court made reference to s. 11 of SOR/92-101).

<sup>31</sup> *Gill, Banta Singh, supra*, footnote 14.

<sup>32</sup> *Sharma, Chaman Jit, supra*, footnote 14.



The definition<sup>33</sup> reads as follows:

- 2.(1) "member of the family class", which respect to any sponsor means
- (g) any child under 19 years of age<sup>34</sup> whom the sponsor intends to adopt and who is
    - (i) an orphan,
    - (ii) an abandoned child whose parents cannot be identified,
    - (iii) a child born outside of marriage who has been placed with a child welfare authority for adoption,
    - (iv) a child whose parents are separated and who has been placed with a child welfare authority for adoption, or
    - (v) a child one of whose parents is deceased and who has been placed with a child welfare authority for adoption,

Also relevant is section 6.(1), which reads in part:

6(1) ... 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 dependents if

6.(1)(c.1) in the case of a child described in ... paragraph (g) ..., the province of intended destination and the country of origin have implemented the *Convention on Protection of Children and Co-operation in respect of Intercountry Adoption* that was signed at The Hague on May 29, 1993 and that came into force on May 1, 1995, and the central authorities of the province and that country have approved the adoption;

An issue that has arisen in this context involves the requirement that the child be placed with a child welfare authority. In *Shaw*,<sup>35</sup> the Federal Court of Appeal dealt with the issue of whether the child in that case, a Jamaican resident, was a child born outside of marriage and placed with a child welfare authority for adoption. The sponsor was a resident of Quebec. The Court stated:

Subparagraph 4(1)(g)(iii) refers to a child who "has been placed with a child welfare authority for adoption." The Regulations do not indicate whether the child welfare authority is the one of the country of the child's residence or the one of his country of adoption. What must be clear, I would have thought, is that the child must be available for adoption. This would normally be done by an indication to that effect from a child welfare authority in the country where the child resides. Here, however, the special consent for adoption and surrender given by the mother makes no doubt that the child was available for adoption. It should suffice for the purpose of subparagraph 4(1)(g)(iii).

---

<sup>33</sup> Formerly section 4(1) of the Regulations.

<sup>34</sup> Changed from 13 years of age in 1993.

<sup>35</sup> *Shaw, Estella v. M.E.I.* (F.C.A., no. A-94-89), Hugessen, Desjardins, Décary, September 18, 1991.

The definition has been interpreted in light of the *Shaw* decision in a number of Appeal Division cases. All cases agree that sponsors must establish that they intend to adopt the child. With respect to the involvement of child welfare authorities, some cases have interpreted *Shaw* as requiring sponsors to establish that the child be indeed available for adoption (evidence of consent to adopt by the biological parent will fulfill this requirement), and that the relevant authorities have either approved the adoption or have issued a "no objection" letter. Actual placement of the child with a child welfare authority has not been required.<sup>36</sup> In other cases, panels seem to interpret *Shaw* as requiring simply that the child be available for adoption as the reasons do not mention any involvement by any child welfare authority.<sup>37</sup> All these cases involved adoptions by a relative of the child.

In *Mann*,<sup>38</sup> the Appeal Division noted the inconsistent approaches in the cases and commented that the issue is made even more difficult by the fact that the various child welfare laws in Canada are different. After noting that the *Adoptions Act*<sup>39</sup> of British Columbia (BC) specifies that the provisions with respect to approval of adoption do not apply to adoptions involving relatives, it concluded that the *ratio* in *Shaw* applied only in jurisdictions such as Quebec where there is statutory provision for involvement of child welfare authorities. Therefore, in order to meet the regulations with respect to a child to be adopted in BC, the child must be placed with a child welfare authority in the country where the child resides. The panel also found that "so long as the birth parent retains the exclusive right to decide whether or not to allow a particular person to adopt their child, the child is not 'available for adoption' in the relevant sense."

In *Gill*,<sup>40</sup> the same Board member revisited the issues and stated that, following *Shaw*, she was prepared to accept that the requirement for placement with a child welfare authority could be met by proof that the relevant provincial authority had no objections to the proposed adoption. She was also prepared to concede that "*Shaw* may stand for the proposition that if a 2(1)(g)(v) applicant is 'available for adoption', then that overrides the requirement of any involvement of a child welfare authority whatsoever, whether in the country of the applicant's residence or the province of the proposed adoption. If so, evidence that the applicant is 'available for adoption' will be the sole issue to be decided in such jurisdiction." However, as to what constitutes

---

<sup>36</sup> *Rana, Mohammad Saleem v. M.E.I.* (IAD M91-11175), Blumer, Fairweather, Weisdorf, May 28, 1992 (re Pakistan/Ontario); *Dooprajh, Anthony v. M.C.I.* (IAD M94-07504), Durand, November 27, 1995 (re Trinidad and Tobago/Quebec); *Singh, Sajjan v. M.C.I.* (IAD T95-03410), Leousis, August 18, 1997 (re India/Ontario); and *Sinnathamby, Ravindran v. M.C.I.* (IAD V95-02243), Nee, August 28, 1997 (re Trinidad/British Columbia). In this last case, the adoptive parents were granted custody of the child by a court in Trinidad and a home study was conducted by a registered social worker in BC. The panel concluded that this evidence, together with the mother's consent, satisfied the requirements in *Shaw*.

<sup>37</sup> *Singh, Mohan v. M.C.I.* (IAD T96-01198), Boire, February 6, 1998 (re India/Ontario); and *Beryar (Deol), Narinder Kaur v. M.C.I.* (IAD T96-01231), Townshend, October 23, 1998 (re India/Ontario).

<sup>38</sup> *Mann, Surjit Kaur v. M.C.I.* (IAD V96-00141), Clark, September 28, 1999. Followed in *Liem, Khee Hian John v. M.C.I.* (IAD T99-06609), D'Ignazio, February 7, 2001.

<sup>39</sup> R.S.B.C. 1996, c.5.

<sup>40</sup> *Gill, Bahader Singh v. M.C.I.* (IAD V96-01769), Clark, May 17, 1999. The reasoning in *Gill* was adopted in *Lidhar, Onkar Singh v. M.C.I.* (IAD V96-02942), Singh, October 21, 1999.

"available for adoption", the member stated that in her opinion, *Shaw* could not stand for the proposition that in provinces which do not statutorily mandate some role for their child welfare authorities in the adoption of foreign children by relatives, that the requirement could be met solely by a document from the birth parent consenting to the adoption. The member went on to say:

This would defeat the purpose of the over-all scheme of the Act in relation to adoptions of all children having only one parent. Why would anyone adopt such a child in India when they can bypass all of the requirements of subsection 2(1) "adopted" children simply by having the surviving parent execute an affidavit of consent permitting the child to come to Canada to be adopted by relatives in Canada?

#### 4.5. SPLITTING AND DELETING OF APPLICATIONS

Although less frequent, there may be cases involving the sponsorship of parents as members of the family class whose application includes their adopted child as their dependant. The listed dependant's adoption may not satisfy the requirements of the *Regulations*.

Where the principal applicant refuses to delete the listed child from the application, either the entire application may be refused or all remaining family members may be processed towards visa issuance without regard to the child.<sup>41</sup> The latter course of action would remove any right of appeal to the Appeal Division unless the child also qualified as a member of the family class in his or her own right, as where the sponsor is the child's own parent.<sup>42</sup> See Chapter 7, section 7.4.5. ("Dependant"), for an in-depth discussion of this issue.

---

<sup>41</sup> *Mundi v. Canada (Minister of Employment and Immigration)*, [1986] 1 F.C. 182 (C.A.). Over the years, visa posts abroad have received different instructions as to which course of action should be preferred. Citizenship and Immigration Canada Operations Memorandum IS 94-07, dated March 4, 1994, suggested that if the principal applicant did not agree to deleting the child's name from the application, the application would be refused in total because the adopted child did not meet the requirements of section 6(1)(e) of the *Regulations* and was not a member of the family class. More recently, Citizenship and Immigration Canada Operations Memorandum IS 95-01, dated January 11, 1995, indicates that the child is to be deleted and processing completed for all other eligible applicants. On this change of policy, see *Khera, Joga Singh v. M.C.I.* (F.C.T.D., no. IMM-3009-95), Muldoon, December 14, 1995.

<sup>42</sup> *Bailon, Leonila Catillo v. M.E.I.* (F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986. See also *Chow, Sau Fa v. M.C.I.* (F.C.T.D., no. IMM-5200-97), Reed, July 29, 1998.

#### 4.6. DETERMINING THE LEGAL VALIDITY OF THE ADOPTION

One element of the definition of “adopted” which has remained constant since the *Regulations* came into force is the requirement that the adoption be in accordance with the laws of either any Canadian jurisdiction or the laws of the country where the adoption took place. The other elements of the definition, discussed earlier, involve the requirement that the adoption create a parent and child relationship and that the adoption not be performed for the purpose of gaining admission to Canada.

Most adoption cases that come before the 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.<sup>43</sup> For example, in the case of Indian adoptions, that evidence is usually the *Hindu Adoptions and Maintenance Act, 1956* (HAMA).<sup>44</sup>

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.

The definition of “adopted” in the *Regulations* incorporates reference to foreign laws and therefore, it is important to keep in mind the following:

- strictly speaking, the issue of which law is relevant is not one of conflict of laws as the Appeal Division is not called upon to choose which law applies: the definition makes it clear that the place of adoption dictates which law applies;<sup>45</sup>
- what is relevant is to understand how foreign law is proved; and
- it is also relevant to identify and understand the principles of conflict of laws which touch upon the effect of foreign laws and judgments on Canadian courts and tribunals.<sup>46</sup>

---

<sup>43</sup> 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.

<sup>44</sup> For a detailed examination of HAMA and its interpretation in Canadian law, see Wlodyka, A., *supra*, footnote 11. Note, however, that this article was written in 1994 and has not been updated to reflect the current state of the law.

<sup>45</sup> See *Canada (Minister of Employment and Immigration) v. Sidhu*, [1993] 2 F.C. 483 (C.A.).

<sup>46</sup> 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.”

## 4.6.1. Foreign Law

### 4.6.1.1. Glossary of Terms

The following terms are used in reference to foreign law:

- “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;<sup>47</sup>
- “*in personam*”: where the purpose of the action is only to affect the rights of the parties to the action *inter se* [between them];<sup>48</sup>
- “*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];<sup>49</sup>
- “deed of adoption”: registered document purporting to establish the fact that an adoption has taken place.

### 4.6.1.2. Proof of Foreign Law<sup>50</sup>

The usual rule in Canada is that foreign law is a fact which must be pleaded and proved.<sup>51</sup> The Appeal Division cannot take judicial notice of it. In cases before the Appeal Division, the burden of proving the foreign law or custom lies on the party relying on it, in most cases, the sponsor.<sup>52</sup>

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 Appeal Division is not entitled to take judicial notice of the proof presented in other cases,<sup>53</sup> although it can adopt or follow the reasoning of other panels regarding their interpretation of the foreign law. The Appeal Division has also examined the text of the law itself and given it a reasonable interpretation where expert evidence respecting its meaning was

---

<sup>47</sup> Dukelow, D.A., and Nuse, B., *The Dictionary of Canadian Law* (Scarborough: Carswell, 1991), at 259.

<sup>48</sup> McLeod, J.G., *The Conflict of Laws* (Calgary: Carswell, 1983), at 60.

<sup>49</sup> *Ibid.*

<sup>50</sup> See also *Weighing Evidence*, Legal Services, Immigration and Refugee Board, December 31, 1999.

<sup>51</sup> Castel, *supra*, footnote 46, 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.

<sup>52</sup> *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576; 8 Imm. L.R. (2d) 175 (C.A.).

<sup>53</sup> *Kalair, Sohan Singh v. M.E.I.* (F.C.A., no. A-919-83), Stone, Heald, Urie, November 29, 1984.

lacking.<sup>54</sup> The Appeal Division has rejected arguments that it is not competent to interpret foreign law.<sup>55</sup>

Section 23 of the *Canada Evidence Act*<sup>56</sup> 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, purported to be under the seal of the court, without further proof. However, the 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.<sup>57</sup>

Under general legal principles, if the foreign law is not proven, it is said that the court will simply apply the relevant local law.<sup>58</sup> The implications of this proposition are threefold:

- when the relevant foreign law is not proven, the court ought not to dismiss the case for lack of evidence;
- given that the court will proceed in the absence of evidence, the court ought to apply its own law;
- the reason for the application of the *lex fori* [domestic law] is the presumed uniformity of law.<sup>59</sup>

In *Ali*,<sup>60</sup> the Appeal Division considered the validity of an adoption performed in Fiji. At issue was whether there had been compliance with section 6(4) of the *Adoptions Act* of Fiji which required that the adopting parent (the sponsor) be a resident of Fiji at the time of the adoption. The definition of “resident” under the foreign law was not proven in the case, which led the concurring member to state:

It is trite law that if a foreign law is not adequately proved, it is proper for me to decide the issue according to Canadian law.<sup>61</sup>

---

<sup>54</sup> *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.).

<sup>55</sup> *Gill, Ranjit Singh v. M.C.I.* (IAD V96-00797), Clark, April 7, 1999.

<sup>56</sup> R.S.C. 1985, c. C-5.

<sup>57</sup> *Brar, Kanwar Singh v. M.E.I.* (IAD W89-00084), Goodspeed, Arpin, Vidal (concurring in part), December 29, 1989.

<sup>58</sup> Schiff, S., *Evidence in the Litigation Process*, 4th ed., vol. 2 (Toronto: Carswell, 1993), at 1056.

<sup>59</sup> McLeod, *supra*, footnote 48, at 39.

<sup>60</sup> *Ali, Abdul Rauf v. M.E.I.* (IAD V89-00266), Wlodyka (concurring), Singh, MacLeod, June 28, 1990.

<sup>61</sup> *Ibid.*, concurring reasons, at 3. Another case in which Canadian law was applied on the basis of domicile in the context of a revocation of adoption is *Chu, Si Gina v. M.E.I.* (IAD V90-00836), Wlodyka, MacLeod, Verma, September 4, 1992. The panel in this case did not accept a revocation of adoption done in China on the basis that neither the sponsor nor her adoptive father had had any real and substantial connection with China at the time the revocation was obtained.

This, however, should not be interpreted so as to confer on the Appeal Division a jurisdiction which it otherwise does not have. The jurisdiction of the Appeal Division in an adoption case is to determine whether or not the adoption in question falls within the statutory definition in the *Regulations*, i.e., (i) has been proven under the relevant law, (ii) creates a genuine parent and child relationship, and (iii) was not performed for immigration purposes. It is not to adjudicate the status of adoption generally.<sup>62</sup> The statutory definition, as indicated earlier, requires that the adoption be in accordance with the laws of the jurisdiction where the adoption took place. Thus, in a foreign adoption, the absence of evidence about the applicable foreign law does not authorize the Appeal Division to consider whether the adoption was carried out in accordance with Canadian law.<sup>63</sup>

For example, in *Siddiq*,<sup>64</sup> 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 appeal was dismissed for lack of jurisdiction. The absence of an adoption law in the foreign jurisdiction could not have the effect of allowing the Appeal Division to adjudicate the adoption under Canadian law.

Another example is *Alkana*,<sup>65</sup> 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

---

<sup>62</sup> 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 *Sidhu, supra*, footnote 45, 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].”

<sup>63</sup> In *Fan, Jiang v. M.C.I.* (F.C.T.D., no. IMM-1537-97), Hugessen, September 3, 1998, the Court noted that the definition of “adopted” in the *Regulations* is not legislation about adoption but about immigration.

<sup>64</sup> *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 Somali 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 more recent decision involving a case of guardianship in Morocco, see *Demnati, Ahmed v. M.C.I.* (M99-10260), di Pietro, April 3, 2001.

<sup>65</sup> *Alkana, Robin John v. M.E.I.* (IAD W89-00261), Goodspeed, Arpin, Rayburn, November 16, 1989.

admission of 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.”<sup>66</sup>

In a much earlier case, *Lam*,<sup>67</sup> 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.<sup>68</sup>

#### 4.6.1.3. Declaratory Judgments and Deeds

Sponsors before the 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 Appeal Division ought to look behind the judgment to determine either its validity or its effect on the issues before the Appeal Division.

As stated by Wlodyka, A. in *Guide to Adoptions under the Hindu Adoptions and Maintenance Act, 1956*:<sup>69</sup>

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*<sup>70</sup>. 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.

In *Sandhu*,<sup>71</sup> 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

---

<sup>66</sup> *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 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 Appeal Division accepted the expert evidence that Christians in Pakistan may adopt.

<sup>67</sup> *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.

<sup>68</sup> *Lit, ibid.*, at 4.

<sup>69</sup> Wlodyka, *supra*, footnote 11, at 46.

<sup>70</sup> *Taggar, supra*, footnote 52.

<sup>71</sup> *Sandhu, Bachhitar Singh v. M.E.I.* (I.A.B. 86-10112), Eglington, Goodspeed, Chu, February 4, 1988.



not be impeached for any error either of fact or of law.”<sup>72</sup> 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.<sup>73</sup>

*Sandhu* was distinguished in *Brar*<sup>74</sup> 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.<sup>75</sup>

The majority of the panel determined that the declaratory judgment had no weight.<sup>76</sup> 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 Appeal Division.

In *Atwal*,<sup>77</sup> the majority accepted the declaratory judgment but noted that

[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.<sup>78</sup>

---

<sup>72</sup> *Ibid.*, at 14.

<sup>73</sup> *Sandhu, Bachhitar Singh, supra*, footnote 71 was followed in *Patel, Ramesh Chandra v. M.E.I.* (I.A.B. 85-9738), Jew, Arkin, Tisshaw, April 15, 1988.

<sup>74</sup> *Brar, supra*, footnote 57.

<sup>75</sup> *Ibid.*, at 10.

<sup>76</sup> 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.

<sup>77</sup> *Atwal, ibid.*

<sup>78</sup> *Ibid.*, at 4.

In *Sran*,<sup>79</sup> the 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 Appeal Division in light of *Taggar*.<sup>80</sup>

An adoption deed may be presented as proof of the validity of an adoption. In *Aujla*,<sup>81</sup> 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<sup>82</sup> 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.<sup>83</sup>

#### 4.6.1.4. Presumption of Validity under Foreign Law

The Appeal Division has dealt with the issue of adoption deeds in the context of section 16 of HAMA, which creates a presumption of validity.<sup>84</sup> In *Dhillon*,<sup>85</sup> the sponsor 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

---

<sup>79</sup> *Sran, Pritam Kaur v. M.C.I.* (IAD T93-10409), Townshend, May 10, 1995, at 6.

<sup>80</sup> *Taggar, supra*, footnote 52.

<sup>81</sup> *Aujla, Surjit Singh v. M.E.I.* (I.A.B. 87-6021), Mawani, November 10, 1987.

<sup>82</sup> *Dhillon, Harnam Singh v. M.E.I.* (F.C.A., no. A-387-85), Pratte, Marceau, Lacombe, May 27, 1987.

<sup>83</sup> *Aujla, supra*, footnote 81, 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.

<sup>84</sup> 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.

<sup>85</sup> *Dhillon, Harnam Singh, supra*, footnote 82. 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.

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.<sup>86</sup>

In *Singh*,<sup>87</sup> 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.<sup>88</sup>

In *Seth*,<sup>89</sup> the 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 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*,<sup>90</sup> the 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*<sup>91</sup>, 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 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.

---

<sup>86</sup> *Dhillon, Harnam Singh, supra*, footnote 82, at 2.

<sup>87</sup> *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].

<sup>88</sup> *Ibid.*, at 44.

<sup>89</sup> *Seth, supra*, footnote 43.

<sup>90</sup> *Persaud, Kowsilia v. M.C.I.* (IAD T96-00912), Calvin, July 13, 1998.

<sup>91</sup> *Sinniah, supra*, footnote 25.

#### 4.6.1.5. Parent and Child Relationship Created by Operation of Law

This issue has arisen in the context of section 12 of HAMA,<sup>92</sup> which many Immigration Appeal Board decisions interpreted as having the effect of creating a parent and child relationship by operation of law.<sup>93</sup>

In light of more recent jurisprudence, it is questionable that section 12 of HAMA, or any other similar provision in foreign law, can be seen as determinative of the question of whether a parent and child relationship exists to satisfy the requirements of the *Regulations*. In *Sharma*,<sup>94</sup> 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.<sup>95</sup>

In *Rai*,<sup>96</sup> the applicant had been adopted under the *Alberta Child Welfare Act*. The 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.

#### 4.7. 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<sup>97</sup> to someone to act in his or her stead. The power of attorney gives the person named in

---

<sup>92</sup> 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 [...]

<sup>93</sup> See, for example, *Banga, supra*, footnote 13; *Sandhu, Gurcharan Singh v. M.E.I.* (I.A.B. 87-9066), Eglinton, 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.). For a contrary view, see *Kalair, supra*, footnote 14.

<sup>94</sup> *Sharma, Chaman Jit, supra*, footnote 14.

<sup>95</sup> *Ibid.*, at 4. This two-stage process has been followed in *Edrada, supra*, footnote 14 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, supra*, footnote 14). These cases indicate that the issue had already been determined by the Federal Court in *Singh, supra*, footnote 87.

<sup>96</sup> *Rai, Suritam Singh v. M.C.I.* (IAD V95-02710), Major, Wiebe, Dossa, November 30, 1999.

<sup>97</sup> *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 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.”

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.<sup>98</sup>

Another issue is whether a sponsor can give a power of attorney to the biological parent of the person to be adopted. In *Poonia*,<sup>99</sup> in dealing with the requirements of a giving and taking ceremony under Indian law, and after reviewing a number of Indian authorities, the 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.

#### 4.8. REVOCATION OF ADOPTION

The concept of revocation of adoption was introduced in the *Regulations* with the enactment of section 6.1(3).<sup>100</sup> This provision allows an immigration officer (and the Appeal Division) to consider whether the revocation by a foreign authority was obtained for the purpose of sponsoring an application for landing 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.

This does not mean that the issue of revocation did not arise before section 6.1(3) was enacted. Visa officers have 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 Appeal Division (and the Immigration Appeal Board) have had occasion to consider the matter.

In *Sharma*,<sup>101</sup> the Appeal Division was presented with a declaratory judgment from an Indian court nullifying the adoption of the sponsor. The judgment was obtained by the sponsor's biological father in an uncontested proceeding. After considering the expert evidence presented by the parties, the 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 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

---

<sup>98</sup> 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.

<sup>99</sup> *Poonia, Jagraj v. M.E.I.* (IAD T91-02478), Arpin, Townshend, Fatsis, October 5, 1993.

<sup>100</sup> Section 6.1(3) of the *Regulations* reads:

6.1(3) A person who is adopted outside Canada and whose adoption is subsequently revoked by a foreign authority may only sponsor an application for landing made by a member of the family class if an immigration officer is satisfied that the revocation of the adoption was not obtained for the purpose of sponsoring an application for landing made by that member.

<sup>101</sup> *Sharma, Sudhir Kumar v. M.E.I.* (IAD V92-01628), Wlodyka, Singh, Verma, August 18, 1993.

only possible reason for nullifying an adoption under Indian law, misrepresentation, was not present in the case.<sup>102</sup>

In *Chu*,<sup>103</sup> 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 *Sausa*,<sup>104</sup> the panel identified the issues as follows: (1) “[...] whether the legal relationship of ‘father’ and ‘daughter’ survived the adoption [...]” and (2) “[...] whether the subsequent revocation of the adoption under the laws of the Philippines reinstates the legal status of [the applicant] to that of ‘father’ within the context of Canadian immigration law.”<sup>105</sup>

With respect to the first issue, and relying on the definitions of “father” and “daughter” in the *Regulations*, the panel ruled that the relationship of father and daughter had been severed by the adoption.<sup>106</sup>

With respect to the second issue, the panel first ruled, relying on *Lidder*,<sup>107</sup> that section 6.1(3) was not applicable to the case because the provision post-dated the date of the application for permanent residence. The panel then went on to distinguish *Sharma*<sup>108</sup> noting that in that case, the expert evidence had put into question the validity of the Indian declaratory judgment, whereas here, the expert evidence supported a conclusion that the revocation was valid under Philippine law. However, the panel refused to recognize the revocation on the basis of *Chu*.<sup>109</sup> As in that case, the sponsor and the adoptive parent had no real and substantial connection with the Philippines at the time of the revocation, and in the view of the Appeal Division, “[...] the domicile of both the adoptive parent and adopted child at the time of the revocation is

---

<sup>102</sup> See also *Heir, Surjit Singh v. M.E.I.* (I.A.B. 80-6116), Howard, Campbell, Hlady, January 16, 1981.

<sup>103</sup> *Chu, supra*, footnote 61.

<sup>104</sup> *Sausa, Eleonor Rabelas v. M.C.I.* (IAD W94-00009), Wiebe, June 3, 1996.

<sup>105</sup> *Ibid.*, at 6. See also *Quindipan, Aurelio Jr. v. M.C.I.* (IAD T95-03321), Townshend, November 6, 1997.

<sup>106</sup> In *Borno, Marie Yvette v. M.C.I.* (F.C.T.D., no. IMM-1369-95), Nadon, February 22, 1996, the applicant, who had come to Canada as the adoptive daughter of her sponsor, tried to sponsor her biological mother. There was no revocation of the adoption in this case; instead, counsel argued that because the Quebec authorities had not approved the adoption carried out in Haiti, the adoption was not valid. Both the Appeal Division ((IAD M93-06069), Blumer, April 7, 1995) and the Court rejected the argument. The Court noted, at 3:

I fully agree with the Appeal Division. The definition of “adopted” in subsection 2(1) of the Regulations is unambiguous. A person adopted “in accordance with the laws of a country other than Canada” is “adopted” for the purposes of the Regulations. The applicant does not challenge the lawfulness of her adoption under the laws of Haiti. And there is no question that the applicant’s natural mother, given her adoption by Ms. Tunis, is not her “mother” for the purposes of the Regulations.

<sup>107</sup> *Lidder, supra*, footnote 29.

<sup>108</sup> *Sharma, Sudhir Kumar, supra*, footnote 101.

<sup>109</sup> *Chu, supra*, footnote 61.

determinative of the governing law [in this case, Manitoba].”<sup>110</sup> There was no evidence to show that revocation of an adoption was recognized or available in Manitoba.

In the alternative, the Appeal Division found that if section 6.1(3) did apply, the sponsor would not have to prove that the revocation was valid under the law of Manitoba but would have to establish that the revocation was not obtained for the purpose of immigration. This she failed to do. The panel looked at a number of factors, including the timing of the revocation, the reasons given for it, and the conduct of the parties after the revocation.

In *Purba*,<sup>111</sup> 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 Appeal Division hearing showed that the adoption was void *ab initio*;<sup>112</sup> 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 [...].<sup>113</sup>

#### 4.9. PUBLIC POLICY

At times, sponsors have argued that certain provisions in the foreign adoption legislation are discriminatory and should not be recognized by Canadian authorities on the basis of public policy. *Sidhu*<sup>114</sup> dealt with a situation where the purported adoption had not been recognized by the visa officer because it was in contravention of HAMA. The sponsor argued before the Appeal Division that the relevant provision in HAMA was discriminatory and should not be given effect because to do so would be contrary to public policy. The Appeal Division accepted the argument and held that the adoption was valid. The Federal Court of Appeal set aside the decision noting that

[p]aragraph 4(1)(b) [of the *Regulations*] represents the conflict of laws rule of the *Immigration Act*. There is here no “material” rule of conflict in the sense of a substantive rule of law applicable since there is no federal adoption legislation. Nor are we in a situation where there is a law of “immediate application” in the sense of a law which must unilaterally and immediately apply so as to protect the political, social and economic

---

<sup>110</sup> *Sausa, supra*, footnote 104, at 11.

<sup>111</sup> *Purba, Surinder Kaur v. M.C.I.* (IAD T95-02315), Teitelbaum, September 10, 1996.

<sup>112</sup> 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.

<sup>113</sup> *Purba, supra*, footnote 111, at 8.

<sup>114</sup> *Sidhu, Jagdish Singh v. M.E.I.* (IAD M90-02200), Blumer, Durand, Angé, February 4, 1991.

organization of Canada to the exclusion of the foreign law that would normally be applicable by virtue of the conflict of laws rule of Canada. Such a situation, when it occurs, can only have the effect of excluding *in toto* the relevant foreign legislation. For instance, if the present adoption were valid under the HAMA, but contrary to Canadian public policy, a rule of immediate application could stipulate that the adoption will not be recognized in Canada. The Canadian authorities would then be obligated to refuse to recognize an adoption performed abroad for reasons of public policy. This is not what the Board did [...]

What the Board did [...] was to purge clause 11(ii) of the HAMA as being contrary to Canadian public policy and then to validate what would be an otherwise invalid adoption according to the Indian legislation [...]

In my view, the Board erred.

[...] the Board had no jurisdiction under the *Immigration Act* to grant a foreign adoptive status which was not valid under foreign law on the grounds that the cause of the invalidity is contrary to Canadian public policy. [Footnotes omitted]<sup>115</sup>

Even if an adoption meets the requirements of the foreign law, it appears that the Appeal Division may refuse to recognize it on grounds of public policy.<sup>116</sup> In *Chahal*,<sup>117</sup> the appellant, a Canadian citizen living in Canada, had been adopted in India. She then tried to sponsor her adoptive family. The panel found that the adoption did not comply with the requirements of HAMA. In obiter, it went on to say that in circumstances where the adopted child is ordinarily resident and domiciled in Canada, to recognize a foreign adoption would be contrary to public policy because the protective jurisdiction of the British Columbia Supreme Court would be denied to that child.

#### **4.10. 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 Appeal Division (and the Immigration Appeal Board) have rejected these arguments.<sup>118</sup>

In a different context, the Federal Court of Appeal, in *Li*,<sup>119</sup> dealt with an argument that an adjudicator considering the issue of equivalency must have regard to whether the procedures

---

<sup>115</sup> *Sidhu, supra*, footnote 45, at 489-490. See also, *Seth, supra*, footnote 43.

<sup>116</sup> *Chahal, Gobinder Kaur v. M.E.I.* (IAD V89-00287), Mawani, Gillanders, Verma, October 6, 1989.

<sup>117</sup> *Ibid.*

<sup>118</sup> 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.

<sup>119</sup> *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*<sup>120</sup> [... 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.<sup>121</sup>

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*,<sup>122</sup> the 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.<sup>123</sup> A different approach was followed in *Daley*,<sup>124</sup> where the 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*,<sup>125</sup> the 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.

#### 4.11. 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 Act. 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.<sup>126</sup> Repeat appeals from these refusals require a more restrictive approach. Two tools are available to the Appeal Division to deal with attempts to relitigate unsuccessful appeals:

---

<sup>120</sup> *R. v. Terry*, [1996] 2 S.C.R. 207.

<sup>121</sup> *Li, supra*, footnote 119, at 257.

<sup>122</sup> *Dular, Shiu v. M.C.I.* (IAD V93-02409), Ho, Lam, Verma, February 22, 1996. See also *Bahadur, Ramdhani v. M.E.I.* (IAD T89-01108), Ariemma, Tisshaw, Bell (dissenting), January 14, 1991 (re the age 13 limitation in the former *Regulations*).

<sup>123</sup> *M.C.I. v. Dular, Shiu* (F.C.T.D., no. IMM-984-96), Wetston, October 21, 1997.

<sup>124</sup> *Daley, Joyce v. M.E.I.* (IAD T89-01062), Sherman, Bell, Chu, February 3, 1992.

<sup>125</sup> *Supra*, footnote 96.

<sup>126</sup> *Singh, Gurmukh v. M.C.I.* (IAD T98-08941), Wales, March 15, 2000.

the doctrines of *res judicata* and abuse of process<sup>127</sup>. The Appeal Division must allow the sponsor to present the alleged new evidence before finding either an abuse of process or *res judicata*.<sup>128</sup> The Appeal Division is under no obligation to grant a full oral hearing, new evidence by way of affidavit is acceptable.<sup>129</sup>

If the evidence adduced is in fact new evidence, then the 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.<sup>130</sup> Further, whether or not to apply the doctrine of *res judicata* in any case is a matter of discretion.<sup>131</sup> In *Bhatti*<sup>132</sup>, 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 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.<sup>133</sup> In some cases, it may be appropriate to consider applying the doctrine of abuse of process instead of or in addition to *res judicata*.<sup>134</sup> See Chapter 6, section 6.7 (“Repeat Appeals”) for an in-depth discussion of these issues.

---

<sup>127</sup> *Hira, Chaman Lal v. M.C.I.* (IAD V99-01877), Boscariol, Ross, Mattu, July 14, 2000.

<sup>128</sup> *Kular, Jasmal v. M.C.I.* (F.C.T.D., no. IMM-4990-99), Nadon, August 30, 2000.

<sup>129</sup> *Sekhon, Amrik Singh v. M.C.I.* (F.C.T.D., no. IMM-1982-01), McKeown, December 10, 2001.

<sup>130</sup> *Sangha, Amarjit v. M.C.I.* (IAD VA1-04029), Boscariol, February 21, 2002.

<sup>131</sup> *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.R. 460; *Raika, Labh Singh v. M.C.I.* (IAD VA1-02630), Boscariol, June 6, 2002.

<sup>132</sup> *Bhatti, Darshan Singh v. M.C.I.* (IAD VA1-03848), Workun, April 19, 2002.

<sup>133</sup> *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.

<sup>134</sup> *Sangha, supra*, footnote 130; *Bagri, Sharinder Singh v. M.C.I.* (VA1-00913), Boscariol, December 10, 2001.

## CHAPTER 4

### TABLE OF CASES: FOREIGN ADOPTIONS

#### CASES

<i>Addow, Ali Hussein v. M.C.I.</i> (IAD T96-01171), D'Ignazio, October 15, 1997 .....	4-16
<i>Akyeampong, Mercy Gyan Mans v. M.C.I.</i> (IAD T98-04409), D'Ignazio, May 26, 1999.....	4-1
<i>Ali, Abdul Rauf v. M.E.I.</i> (IAD V89-00266), Wlodyka (concurring), Singh, MacLeod, June 28, 1990.....	4-15
<i>Alkana, Robin John v. M.E.I.</i> (IAD W89-00261), Goodspeed, Arpin, Rayburn, November 16, 1989.....	4-16, 4-17
<i>Atwal, Manjit Singh v. M.E.I.</i> (I.A.B. 86-4205), Petryshyn, Wright, Arpin (concurring), May 8, 1989.....	4-18, 4-18
<i>Aujla, Surjit Singh v. M.E.I.</i> (I.A.B. 87-6021), Mawani, November 10, 1987. ....	4-19
<i>Badwal, Jasbir Singh v. M.E.I.</i> (I.A.B. 87-10977), Sherman, Bell, Ahara, May 29, 1989.....	4-18
<i>Bagri, Sharinder Singh v. M.C.I.</i> (VA1-00913), Boscarior, December 10, 2001.....	4-27
<i>Bahadur, Ramdhani v. M.E.I.</i> (IAD T89-01108), Ariemma, Tisshaw, Bell (dissenting), January 14, 1991. ....	4-26
<i>Bailon, Leonila Catillo v. M.E.I.</i> (F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986.....	4-12
<i>Bal, Sukhjinder Singh v. S.G.C.</i> (F.C.T.D., no. IMM-1212-93), McKeown, October 19, 1993.....	4-8
<i>M.C.I. v. Bal, Sarbjit Singh</i> (F.C.T.D., no. IMM-4547-98), Gibson, July 26, 1999.....	4-9
<i>Banga, Harjit Ram v. M.E.I.</i> (I.A.B. 86-6175), Arpin, Gillanders, MacLeod, September 10, 1987. Reported: <i>Banga v. Canada (Minister of Employment and Immigration)</i> (1987), 3 Imm. L.R. (2d) 1 (I.A.B.) .....	4-4, 4-21
<i>Beryar (Deol), Narinder Kaur v M.C.I.</i> (IAD T96-01231), Townshend, October 23, 1998 .....	4-11
<i>Bhachu, Gurdip Singh v. M.C.I.</i> (IAD V95-00313), Lam, June 3, 1996.....	4-4, 4-9
<i>Bhatti, Darshan Singh v. M.C.I.</i> (IAD VA1-03848), Workun, April 19, 2002 .....	4-27
<i>Bilimoriya, Parviz v. M.C.I.</i> (IAD T93-04633), Muzzi, September 18, 1996.....	4-13
<i>Borno, Marie Yvette v. M.C.I.</i> (F.C.T.D., no. IMM-1369-95), Nadon, February 22, 1996.....	4-23
<i>Borno, Marie Yvette v. M.C.I.</i> (IAD M93-06069), Blumer, April 7, 1995.....	4-23
<i>Brar, Kanwar Singh v. M.E.I.</i> (IAD W89-00084), Goodspeed, Arpin, Vidal (concurring in part), December 29, 1989. ....	4-15, 4-18
<i>Brown, Josiah Lanville v. M.C.I.</i> (IAD T89-02499), Buchanan, June 23, 1999.....	4-8
<i>Burmi, Joginder Singh v. M.E.I.</i> (I.A.B. 88-35651), Sherman, Arkin, Weisdorf, February 14, 1989.....	4-18
<i>Capiendo, Rosita v. M.C.I.</i> (IAD W95-00108), Wiebe, August 18, 1997.....	4-7
<i>Chahal, Gobinder Kaur v. M.E.I.</i> (IAD V89-00287), Mawani, Gillanders, Verma, October 6, 1989.....	4-25
<i>Chiu, Jacintha Chen v. M.E.I.</i> (I.A.B. 86-6123), Mawani, Gillanders, Singh, July 13, 1987. ....	4-19
<i>Chow, Sau Fa v. M.C.I.</i> (F.C.T.D., no. IMM-5200-97), Reed, July 29, 1998.....	4-12
<i>Chu, Si Gina v. M.E.I.</i> (IAD V90-00836), Wlodyka, MacLeod, Verma, September 4, 1992.....	4-15, 4-23

<i>Daley, Joyce v. M.E.I.</i> (IAD T89-01062), Sherman, Bell, Chu, February 3, 1992.....	4-26
<i>Danyluk v. Ainsworth Technologies Inc.</i> , [2001] S.C.R. 460; <i>Raika, Labh Singh v. M.C.I.</i> (IAD VA1-02630), Boscariol, June 6, 2002.....	4-27
<i>De Guzman, Leonor G. v. M.C.I.</i> (IAD W95-00062), Ariemma, Bartley, Wiebe, August 16, 1995.....	4-5, 4-6
<i>Demnati, Ahmed v. M.C.I.</i> (M99-10260), di Pietro, April 3, 2001 .....	4-16
<i>Dhaliwal, Jagir Singh v. M.C.I.</i> (F.C.T.D., no. IMM-1127-96), Rouleau, November 19, 1996 .....	4-4
<i>Dhatt, Sukhvinder Singh v. M.C.I.</i> (IAD W97-00053), Wiebe, November 16, 1998. ....	4-5
<i>Dhillon, Gurpal Kaur v. M.E.I.</i> (I.A.B. 83-9242), D. Davey, Benedetti, Suppa, July 30, 1985.....	4-25
<i>Dhillon, Harnam Singh v. M.E.I.</i> (F.C.A., no. A-387-85), Pratte, Marceau, Lacombe, May 27, 1987.....	4-19, 4-20
<i>Dhillon, Harnam Singh v. M.E.I.</i> (I.A.B. 83-6551), Petryshyn, Glogowski, Voorhees, January 3, 1985.....	4-19
<i>Dizon, Julieta Lacson v. M.C.I.</i> (IAD V98-02115), Carver, September 1, 1999.....	4-6
<i>Dooprajh, Anthony v. M.C.I.</i> (IAD M94-07504), Durand, November 27, 1995. ....	4-8, 4-11
<i>Dular, Shiu v. M.C.I.</i> (IAD V93-02409), Ho, Lam, Verma, February 22, 1996. ....	4-26
<i>Dular: M.C.I. v. Dular, Shiu</i> (F.C.T.D., no. IMM-984-96), Wetston, October 21, 1997.....	4-26
<i>Edrada: M.C.I. v. Edrada, Leonardo Lagmacy</i> (F.C.T.D., no. IMM-5199-94), MacKay, February 29, 1996. ....	4-4, 4-21
<i>Fan, Jiang v. M.C.I.</i> (F.C.T.D., no. IMM-1537-97), Hugessen, September 3, 1998.....	4-16
<i>Gill, Bahader Singh v. M.C.I.</i> (IAD V96-01769), Clark, May 17, 1999 .....	4-12
<i>Gill, Balvir Singh v. M.C.I.</i> (V99-03132), Mattu, September 25, 2000.....	4-27
<i>Gill, Balwinder Singh v. M.E.I.</i> (IAD W89-00433), Goodspeed, Arpin, Rayburn, September 13, 1990.....	4-22
<i>Gill, Banta Singh v. M.C.I.</i> (F.C.A., no. A-859-96), Marceau, Linden, Robertson, July 14, 1998 .....	4-4, 4-9, 4-21
<i>Gill, Banta Singh v. M.C.I.</i> (F.C.T.D., no. IMM-760-96), Gibson, October 22, 1996 .....	4-21
<i>Gill, Gurmandeep Singh v. M.C.I.</i> (IAD W95-00111), Wiebe, October 17, 1996 .....	4-6
<i>Gill, Ranjit Singh v. M.C.I.</i> (IAD V96-00797), Clark, April 7, 1999. ....	4-15
<i>Gosal, Paramjit Singh v. M.C.I.</i> (IAD V95-00090), Verma, March 25, 1996. ....	4-4, 4-9
<i>Gossal, Rajinder Singh v. M.E.I.</i> (I.A.B. 87-9401), Sherman, Chu, Benedetti, February 15, 1988. Reported: <i>Gossal v. Canada (Minister of Employment and Immigration)</i> (1988), 5 Imm. L.R. (2d) 185 (I.A.B.) .....	4-15
<i>Gu, Wenyan v. M.C.I.</i> (IAD V94-01149), Dossa, June 11, 1997.....	4-1
<i>Heir, Surjit Singh v. M.E.I.</i> (I.A.B. 80-6116), Howard, Campbell, Hlady, January 16, 1981. ....	4-23
<i>Hira, Chaman Lal v. M.C.I.</i> (IAD V99-01877), Boscariol, Ross, Mattu, July 14, 2000.....	4-27
<i>Jalal, Younas v. M.C.I.</i> (IAD M93-06071), Blumer, August 16, 1995 reported: <i>Jalal v. Canada (Minister of Citizenship and Immigration)</i> (1995), 39 Imm. L.R. (2d) 146 (I.A.D.).....	4-17
<i>Jaswal, Kaushaliya Devi v. M.E.I.</i> (IAD W89-00087), Goodspeed, Wlodyka, Rayburn, September 27, 1990.....	4-19
<i>Jimenez: M.C.I. v. Jimenez, Emilia</i> (F.C.T.D., no. IMM-415-95), Teitelbaum, October 23, 1995.....	4-8
<i>Joshi: M.C.I. v. Joshi, Soma Devi</i> (F.C.T.D., no. IMM-1985-96), Jerome, March 20, 1997.....	4-2

<i>Kahlon, Darshan Singh v. M.E.I.</i> (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: <i>Kahlon v. Canada (Minister of Employment and Immigration)</i> (1989), 7 Imm. L.R. (2d) 91 (F.C.A.) .....	4-3
<i>Kalair, Sohan Singh v. M.E.I.</i> (F.C.A., no. A-919-83), Stone, Heald, Urie, November 29, 1984.....	4-14
<i>Kalair, Sohan Singh v. M.E.I.</i> (I.A.B. 82-6104), Chambers, Howard, P. Davey, January 9, 1987 .....	4-4, 4-21
<i>Kaler, Gurdip Singh v. M.C.I.</i> (IAD V99-04536), Baker, October 10, 2000 .....	4-27
<i>Kalida, Malika v. M.C.I.</i> (IAD M96-08010), Champoux, July 3, 1997.....	4-13
<i>Khaira, Avtar Singh v. M.C.I.</i> (F.C.T.D., no. IMM-3635-97), Pinard, May 25, 1998.....	4-4
<i>Khera, Joga Singh v. M.C.I.</i> (F.C.T.D., no. IMM-3009-95), Muldoon, December 14, 1995.....	4-12
<i>Kler, Sukhdev Singh v. M.E.I.</i> (I.A.B. 82-6350), Goodspeed, Vidal, Arpin, May 25, 1987.....	4-22
<i>Kular, Jasmail v. M.C.I.</i> (F.C.T.D., no. IMM-4990-99), Nadon, August 30, 2000.....	4-27
<i>Kwan, Man Tin v. M.C.I.</i> (F.C.T.D., no. IMM-5527-00), Muldoon, August 30, 2001 .....	4-6
<i>Lam, Wong Do v. M.M.I.</i> (I.A.B.), October 2, 1972.....	4-17
<i>Li, Ronald Fook Shiu v. M.C.I.</i> (F.C.A., no. A-329-95), Strayer, Robertson, Chevalier, August 7, 1996. Reported: <i>Li v. Canada (Minister of Citizenship and Immigration)</i> , [1997] 1 F.C. 235 (C.A.) .....	4-25, 4-26
<i>Lidder: Canada (Minister of Employment and Immigration) v. Lidder</i> , [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.).....	4-8, 4-23
<i>Lidhar, Onkar Singh v. M.C.I.</i> (IAD V96-02942), Singh, October 21, 1999 .....	4-12
<i>Liem, Khee Hian John v. M.C.I.</i> (IAD T99-06609), D'Ignazio, February 7, 2001 .....	4-11
<i>Lit, Jaswant Singh v. M.M.I.</i> (I.A.B. 76-6003), Scott, Benedetti, Legaré, August 13, 1976 .....	4-17
<i>Ly, Ngoc Lan v. M.C.I.</i> (IAD T99-04453), Kelley, June 22, 2000 .....	4-6
<i>Magnet, Marc v. M.E.I.</i> (IAD W89-00002), Arpin, Goodspeed, Rayburn, April 10, 1990. ....	4-25
<i>Mann, Surjit Kaur v. M.C.I.</i> (IAD V96-00141), Clark, September 28, 1999 .....	4-11
<i>Mattam, Mary John v. M.E.I.</i> (I.A.B. 86-10213), Arkin, Fatsis, Ahara, December 10, 1987. ....	4-25
<i>McDoom v. Minister of Manpower and Immigration</i> , [1978] 1 F.C. 323 (T.D.).....	4-3
<i>Minhas, Surinder Pal Singh v. M.C.I.</i> (IAD M98-10540), Colavecchio, December 15, 1999 .....	4-6
<i>Molina, Rufo v. M.C.I.</i> (IAD T98-04608), Kelley, November 8, 1999 .....	4-6
<i>Mundi v. Canada (Minister of Employment and Immigration)</i> , [1986] 1 F.C. 182 (C.A.).....	4-12
<i>Okafor-Ogbujiagba, Anthony Nwafor v. M.C.I.</i> (IAD T94-05539), Aterman, April 14, 1997.....	4-14
<i>Pabla, Dial v. M.C.I.</i> (F.C.T.D., no. IMM-1210-00), Blais, December 12, 2000 .....	4-7
<i>Padwal, Ram Singh v. M.C.I.</i> (IAD W94-00195), Wiebe, July 27, 1995.....	4-9
<i>Patel, Ramesh Chandra v. M.E.I.</i> (I.A.B. 85-9738), Jew, Arkin, Tisshaw, April 15, 1988 .....	4-18
<i>Paul, Satnam Singh v. M.E.I.</i> (I.A.B. 87-6049), Howard, Anderson (dissenting), Gillanders, February 13, 1989. ....	4-22
<i>Pawar, Onkar Singh v. M.C.I.</i> (IAD T98-04518), D'Ignazio, October 1, 1999.....	4-18
<i>Persaud, Kowsilia v. M.C.I.</i> (IAD T96-00912), Calvin, July 13, 1998 .....	4-20
<i>Poonia, Jagraj v. M.E.I.</i> (IAD T91-02478), Arpin, Townshend, Fatsis, October 5, 1993.....	4-22

<i>Porter: M.E.I. v. Porter, Kathleen</i> (F.C.A., no. A-353-87), Hugessen, MacGuigan, Desjardins, April 14, 1988.....	4-8
<i>Punni, Pal Singh v. M.C.I.</i> (IAD V99-01483), Boscariol, June 30, 2000.....	4-27
<i>Purba, Surinder Kaur v. M.C.I.</i> (IAD T95-02315), Teitelbaum, September 10, 1996.....	4-24
<i>Quindipan, Aurelio Jr. v. M.C.I.</i> (IAD T95-03321), Townshend, November 6, 1997.....	4-23
<i>Rai, Suritam Singh v. M.C.I.</i> (IAD V95-02710), Major, Wiebe, Dossa, November 30, 1999.....	4-21
<i>Rajam, Daniel v. M.C.I.</i> (IAD V98-02983), Carver, November 5, 1999.....	4-6
<i>Rana, Mohammad Saleem v. M.E.I.</i> (IAD M91-11175), Blumer, Fairweather, Weisdorf, May 28, 1992.....	4-11
<i>Sahota, Manjit Singh v. M.E.I.</i> (I.A.B. 83-6510), Howard, Anderson, P. Davey, February 11, 1985.....	4-4
<i>Sai, Jiqiu (Jacqueline) v. M.C.I.</i> (IAD TA0-11403), Michnick, August 22, 2001.....	4-6
<i>San Luis: M.C.I. v. San Luis, Luzviminda Peralta</i> (F.C.T.D., no. IMM-5054-94), Dubé, July 6, 1995.....	4-8
<i>Sandhu, Bachhitar Singh v. M.E.I.</i> (I.A.B. 86-10112), Eglington, Goodspeed, Chu, February 4, 1988.....	4-17, 4-18
<i>Sandhu, Gurcharan Singh v. M.E.I.</i> (I.A.B. 87-9066), Eglington, Teitelbaum, Sherman, November 13, 1987.....	4-21
<i>Sangha, Amarjit v. M.C.I.</i> (IAD VA1-04029), Boscariol, February 21, 2002.....	4-27
<i>Sausa, Eleonor Rabelas v. M.C.I.</i> (IAD W94-00009), Wiebe, June 3, 1996.....	4-23, 4-24
<i>Sekhon, Amrik Singh v. M.C.I.</i> (F.C.T.D., no. IMM-1982-01), McKeown, December 10, 2001.....	4-27
<i>Seth, Kewal Krishan v. M.C.I.</i> (IAD M94-05081), Angé, March 27, 1996.....	4-13, 4-20, 4-25
<i>Sharma, Sudhir Kumar v. M.E.I.</i> (IAD V92-01628), Wlodyka, Singh, Verma, August 18, 1993.....	4-22, 4-23
<i>Sharma: M.C.I. v. Sharma, Chaman Jit</i> (F.C.T.D., no. IMM-453-95), Wetston, August 28, 1995.....	4-4, 4-9, 4-21
<i>Shaw, Estella v. M.E.I.</i> (F.C.A., no. A-94-89), Hugessen, Desjardins, Décary, September 18, 1991.....	4-10
<i>Shergill, Kundan Singh v. M.E.I.</i> (I.A.B. 86-6108), Mawani, Gillanders, Singh, April 8, 1987. Reported: <i>Shergill v. Canada (Minister of Employment and Immigration)</i> (1987), 3 Imm. L.R. (2d) 126 (I.A.B.).....	4-21
<i>Siddiq, Mohammad v. M.E.I.</i> (I.A.B. 79-9088), Weselak, Davey, Teitelbaum, June 10, 1980.....	4-16
<i>Sidhu, Jagdish Singh v. M.E.I.</i> (IAD M90-02200), Blumer, Durand, Angé, February 4, 1991.....	4-24
<i>Sidhu, Narinder Singh v. M.C.I.</i> (IAD V95-00492), Verma, May 1, 1996.....	4-4, 4-9
<i>Sidhu: Canada (Minister of Employment and Immigration) v. Sidhu</i> , [1993] 2 F.C. 483 (C.A.).....	4-13, 4-16, 4-25
<i>Singh (Ajaib): Singh v. Canada (Minister of Employment and Immigration)</i> , [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, <i>Singh v. Canada (Minister of Employment and Immigration)</i> (1991), 13 Imm. L.R. (2d) 46 [Appeal Note].....	4-20, 4-21
<i>Singh, Ajaib v. M.E.I.</i> (I.A.B. 87-4063), Mawani, Wright, Petryshyn, April 26, 1988.....	4-18
<i>Singh, Babu v. M.E.I.</i> (F.C.A., no. A-210-85), Urie, Mahoney, Marceau, January 15, 1986.....	4-16
<i>Singh, Gurmukh v. M.C.I.</i> (IAD T98-08941), Wales, March 15, 2000.....	4-27
<i>Singh, Mohan v. M.C.I.</i> (IAD T96-01198), Boire, February 6, 1998.....	4-11
<i>Sinnathamby, Ravindran v. M.C.I.</i> (IAD V95-02243), Nee, August 28, 1997.....	4-11

<i>Sinniah, Sinnathamby v. M.C.I.</i> (F.C.T.D., no. IMM-5954-00), Dawson, July 25, 2002; 2002 FCT 822.....	4-7
<i>Sohal, Talwinder Singh v. M.C.I.</i> (IAD V95-00396), Clark, May 23, 1996.....	4-7
<i>Sran, Pritam Kaur v. M.C.I.</i> (IAD T93-10409), Townshend, May 10, 1995.....	4-19
<i>Subala: M.C.I. v. Subala, Josephine</i> (F.C.T.D., no. IMM-3164-96), Rothstein, July 22, 1997.....	4-1
<i>Syed, Abul Maali v. M.E.I.</i> (IAD T89-01164), Tisshaw, Spencer, Townshend, January 7, 1992.....	4-25
<i>Taggar: Canada (Minister of Employment and Immigration) v. Taggar</i> , [1989] 3 F.C. 576; 8 Imm. L.R. (2d) 175 (C.A.).....	4-14, 4-17, 4-19
<i>Terry: R. v. Terry</i> , [1996] 2 S.C.R. 207.....	4-26
<i>Toor, Gurdarshan Singh v. M.C.I.</i> (IAD V95-00959), McIsaac, February 4, 1997.....	4-6, 4-9
<i>Toor, Rajwant Singh v. M.C.I.</i> (IAD VA0-00917), Clark, June 1, 2001 (reasons signed June 8, 2001).....	4-27
<i>Vuong, Khan Duc v. M.C.I.</i> (F.C.T.D., no. IMM-3139-97), Dubé, July 21, 1998.....	4-13
<i>Wang, Yan-Qiao v. M.C.I.</i> (IAD T96-04690), Muzzi, October 6, 1997.....	4-14
<i>White: M.C.I. v. White, Robert Edward</i> (F.C.T.D., no. IMM-3933-97), Pinard, May 25, 1998.....	4-4
<i>Zenati, Entissar v. M.C.I.</i> (IAD M98-09459), Bourbonnais, September 17, 1999.....	4-16

# CHAPTER 5

## Table of Contents

<b>5. FOREIGN MARRIAGES</b> .....	<b>5-1</b>
<b>5.1. GENERALLY</b> .....	<b>5-1</b>
<b>5.2. DEFINITIONS</b> .....	<b>5-1</b>
<b>5.3. INTERPRETATION</b> .....	<b>5-1</b>
5.3.1. Formal Validity .....	5-1
5.3.2. Registration .....	5-2
5.3.3. Declaratory judgments .....	5-3
5.3.4. Essential Validity .....	5-3
<b>5.4. EXEMPTION FROM STRICT COMPLIANCE WITH LAW</b> .....	<b>5-4</b>
<b>5.5. TIMING</b> .....	<b>5-5</b>



## CHAPTER 5

### 5. FOREIGN MARRIAGES

#### 5.1. GENERALLY

A visa officer may refuse an application for permanent residence by the alleged spouse of a sponsor because the alleged spouse has failed to prove the validity of the marriage.

#### 5.2. DEFINITIONS

Where the validity of a marriage is in issue on appeal, the following definitions of “spouse” and of “marriage” set out in section 2 of the *Immigration Regulations, 1978*, (the “*Regulations*”) are relevant:

“spouse”, with respect to any person, means the party of the opposite sex to whom that person is joined in marriage;

“marriage” means the matrimony recognized as a marriage by the laws of the country in which it took place, but does not include any matrimony whereby one party to that matrimony became at any given time the spouse of more than one living person.

#### 5.3. INTERPRETATION

The definition of “marriage” in the *Regulations* includes both the state of being married (essential validity) and the ceremony of marriage (formal validity).<sup>1</sup>

##### 5.3.1. Formal Validity

In general, formal validity includes the nature of, and prerequisites for, a ceremony.<sup>2</sup> 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.<sup>3</sup> 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. In the absence of evidence to the

---

<sup>1</sup> *Virk, Sukhpal Kaur v. M.E.I.* (IAD V91-01246), Wlodyka, Gillanders, Verma, February 9, 1993.

<sup>2</sup> McLeod, James G., *The Conflict of Laws* (Calgary: Carswell, 1983), at 253.

<sup>3</sup> *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 Kuwaiti 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; and *Sobhan, Rumana v. M.C.I.* (IAD T95-07352), Boire, February 3, 1998. And for a discussion of marriage law in Nigeria, see *Iyamu, Lucky Ukponahunsi v. M.C.I.* (IAD T98-02216), Kelley, September 16, 1999.

contrary, it must be presumed that the foreign law purports to be exhaustive as to the defects that invalidate a marriage.<sup>4</sup> Depending on the applicable law, as proved, the absence of a ceremony may<sup>5</sup> or may not invalidate the marriage.<sup>6</sup> If it is not proven that the marriage is valid, the applicant is not the “spouse” of the sponsor for purposes of the *Regulations* and therefore not a member of the family class.

The Appeal Division has ruled that where an application for landing is validly refused on the grounds of failure to properly solemnize the marriage, but the sponsor and applicant go through a proper religious ceremony following the refusal, that ground becomes invalid in the context of an appeal which is a hearing *de novo*.<sup>7</sup> However, the Federal Court, in more recent jurisprudence, has taken a different approach in ruling that the Appeal Division lacks jurisdiction if the applicant is not a member of the family class at the time of the application for landing.<sup>8</sup>

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 a s.70 appeal involving a misrepresentation may argue that he or she was not married at the time of landing as a single dependant.<sup>9</sup>

### 5.3.2. Registration

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.<sup>10</sup> In other words, registration constitutes *prima facie* evidence of the marriage and of the validity of the marriage<sup>11</sup> until a court of competent jurisdiction rules otherwise<sup>12</sup> or “until compelling evidence is adduced to show that the marriage was not duly solemnized prior to its registration”.<sup>13</sup>

---

<sup>4</sup> *Mann, Harnek Singh v. M.E.I.* (I.A.B. 85-6199), Wlodyka, June 5, 1987.

<sup>5</sup> See, for example, *Mann, Harnek Singh, ibid.*; and *Chiem, My Lien v. M.C.I.* (F.C.T.D., no. IMM-838-98), Rothstein, January 11, 1999.

<sup>6</sup> *Mann, Kirpal Singh v. M.E.I.* (I.A.B. 86-6008), Mawani, Gillanders, Wlodyka, April 14, 1987.

<sup>7</sup> *Ahlwat, Balbir Singh v. M.E.I.* (IAD V91-00896), Wlodyka, Verma, Arpin, May 13, 1993.

<sup>8</sup> *M.C.I. v. Subala, Josephine* (F.C.T.D., no. IMM-3164-96), Rothstein, July 22, 1997.

<sup>9</sup> *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).

<sup>10</sup> In *Tran, ibid.*, 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.

<sup>11</sup> *Parmar, Ramesh Kumar v. M.E.I.* (I.A.B. 85-9772), Eglington, Weisdorf, Ahara, September 12, 1986.

<sup>12</sup> *Kaur, Gurmit v. C.E.I.C.* (F.C.T.D., no. T-2490-84), Jerome, May 8, 1985.

<sup>13</sup> *Parmar, supra*, footnote 11, at 15.

Therefore, even if a marriage has been registered and a certificate presented, if registration is challenged and other evidence on the record about the marriage ceremony is confused and contradictory, it may be found that the sponsor has failed to prove that a valid marriage took place.<sup>14</sup>

### 5.3.3. Declaratory judgments

Little weight may be given to an *ex parte* judgment *in personam*<sup>15</sup> 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.<sup>16</sup>

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.<sup>17</sup>

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.<sup>18</sup>

### 5.3.4. Essential Validity

Essential validity includes matters relating to consent to marry, existing prior marriage,<sup>19</sup> prohibited degrees of relationship<sup>20</sup> and non-consummation of the marriage.<sup>21</sup>

In cases that raise an issue of essential validity, there is conflicting authority on what law governs; that is, whether it is the foreign law (the law of prenuptial domicile of the purported

---

<sup>14</sup> *Lotay, Harjit Kaur v. M.E.I.* (I.A.D. T89-03205), Ariemma, Townshend, Bell, April 18, 1990; *Bakridi, Faizl Abbas v. M.C.I.* (IAD V99-03930), Baker, January 9, 2001.

<sup>15</sup> An *in personam* judgment is one that binds only the two persons to an action.

<sup>16</sup> *Gill, Sakinder Singh v. M.E.I.* (IAD V89-01124), Gillanders, Verma, Wlodyka, July 16, 1990.

<sup>17</sup> *Burmi, Joginder Singh v. M.E.I.* (I.A.B. 88-35,651), Sherman, Arkin, Weisdorf, February 14, 1989.

<sup>18</sup> *Sinniah, Sinnathamby v. M.C.I.* (F.C.T.D., no. IMM-5954-00), Dawson, July 25, 2002; 2002 FCT 822. [This case is noted notwithstanding the date of the update is July 1, 2002.]

<sup>19</sup> 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, Sriharan 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.

<sup>20</sup> 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*.

<sup>21</sup> *McLeod, supra*, footnote 2, at 256.

spouses) or Canadian domestic law (the law of their intended matrimonial home) that should be applied.

While the Federal Court of Appeal sanctioned the application of the law of the intended matrimonial home in the *Narwal*<sup>22</sup> case, it subsequently clarified in its decision in *Kaur, Narjinder* 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”.<sup>23</sup> The Court 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.<sup>24</sup>

#### 5.4. EXEMPTION FROM STRICT COMPLIANCE WITH LAW

The appellant has the duty of providing objective evidence of a customary law of marriage, for example that marriage by proxy is legal in Ghana. 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.<sup>25</sup>

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

---

<sup>22</sup> *M.E.I. v. Narwal, Surinder Kaur* (F.C.A., no. A-63-89), Stone, Marceau, MacGuigan, April 6, 1990.); *Xu, Yuan Fei v. M.C.I.* (IAD M99-04636), Sivak, June 5, 2000. In this case, the panel applied the law of the parties’ intended matrimonial home. The sponsor and his wife were first cousins and the Chinese marriage law prohibits marriage between collateral relatives by blood up to the third degree of kinship. Therefore, the marriage was not valid in China. The panel found that the degrees of consanguinity which are a bar to the lawful solemnization of marriage in Ontario do not include first cousins. However, 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*.

<sup>23</sup> *Kaur, Narjinder 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.).

<sup>24</sup> *Ibid.* See too *Donoso Palma, Segio 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.

<sup>25</sup> *Quao, Daniel Essel v. M.C.I.* (F.C.T.D., no. IMM-5240-99), Blais, August 15, 2000. [Judicial review of IAD M98-09172, Colavecchio, October 5, 1999.]

custom or usage, the sponsor has the onus of clearly proving its existence.<sup>26</sup> 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.<sup>27</sup> The testimony of an expert witness,<sup>28</sup> even a transcript of the testimony of an expert witness in another hearing,<sup>29</sup> may be accepted as establishing the existence of a custom.

## 5.5. TIMING

If the sponsor fails to prove the validity of the marriage, then the applicant is not the spouse of the sponsor for the purposes of the *Regulations* and therefore not a member of the family class. This general rule applies even if the sponsor and the applicant went through an engagement ceremony prior to the alleged marriage and the applicant was thus a fiancé (a member of the family class) at the time of the application for landing.<sup>30</sup>

Sometimes, the visa officer who reviews the documentation submitted in a sponsored application might detect a problem with the legality of the marriage. The visa officer may decide to process the application as a fiancée case and, if refused, the refusal would be based on Immigration Regulations 6(1)(d) and the Appeal Division would deal with the matter as a fiancée refusal.

In one case involving an alleged prior existing marriage, the sponsor was found to lack the capacity to marry the applicant at the time of their marriage because the sponsor's divorce decree relating to his first marriage had not been made absolute. The Appeal Division held that its jurisdiction did not extend to amending the application for permanent residence by a spouse to that of a fiancé.<sup>31</sup>

Another panel, however, has held that in some circumstances, the Appeal Division does have such jurisdiction. Accordingly, in a case involving a prior fiancé relationship, the panel found that it would be consistent with the rules of natural justice to convert the spousal to a fiancé application as the marriage had been discovered to be invalid due to an error that could be rectified. The sponsor in this case believed that she had entered into a valid marriage with the applicant at the time of submitting an undertaking of assistance for him. It was not until the hearing before the Appeal Division that it was discovered that the marriage was invalid. When the issue of invalidity was raised, the sponsor requested, and was granted, an adjournment. The sponsor and the applicant then entered into a valid marriage. On these special facts, the panel took jurisdiction. To do otherwise, it reasoned, would impose undue hardship on the sponsor and

---

<sup>26</sup> *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576; *Mann, Jashanjit Kaur (Brar) v. M.C.I.* (IAD V98-03059), Boscariol, April 26, 2000.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Atwal, Jaswinder Kaur v. M.E.I.* (I.A.B. 85-4204), Petryshyn, Wright, Rayburn, January 30, 1989.

<sup>29</sup> *Bhullar, Sawarnjit Kaur v. M.E.I.* (IAD W89-00375), Goodspeed, Rayburn, Arpin (concurring), November 19, 1991.

<sup>30</sup> *Lotay, supra*, footnote 14.

<sup>31</sup> *Punia, Bulwant Singh v. M.E.I.* (I.A.D. V92-01594), Gillanders, July 27, 1993.

the applicant: a new application would have to be submitted, and there would be another refusal, essentially on the same grounds, leading to the filing of another appeal, all of which could take several years.<sup>32</sup>

---

<sup>32</sup> *Ly-Au, Kiet Nhi v. M.C.I.* (I.A.D. V95-02577), Lam, December 8, 1997. See also *Leung, Tak, v. M.C.I.* (IAD V98-00819), Baker, February 11, 1999.

## CHAPTER 5

### TABLE OF CASES: FOREIGN MARRIAGES

#### CASES

<i>Ahlwat, Balbir Singh v. M.E.I.</i> (IAD V91-00896), Wlodyka, Verma, Arpin, May 13, 1993 .....	5-2
<i>Atwal, Jaswinder Kaur v. M.E.I.</i> (I.A.B. 85-4204), Petryshyn, Wright, Rayburn, January 30, 1989.....	5-5
<i>Badhan, Lyle Kishori v. M.C.I.</i> (IAD V95-00432), Boscariol, September 3, 1997 .....	5-3
<i>Bakridi, Faizl Abbas v. M.C.I.</i> (IAD V99-03930), Baker, January 9, 2001 .....	5-3
<i>Bhullar, Sawarnjit Kaur v. M.E.I.</i> (IAD W89-00375), Goodspeed, Rayburn, Arpin (concurring), November 19, 1991 .....	5-5
<i>Brar, Karen Kaur v. M.C.I.</i> (IAD VA0-02573), Workun, December 4, 2001 .....	5-4
<i>Burmi, Joginder Singh v. M.E.I.</i> (I.A.B. 88-35,651), Sherman, Arkin, Weisdorf, February 14, 1989.....	5-3
<i>Chiem, My Lien v. M.C.I.</i> (F.C.T.D., no. IMM-838-98), Rothstein, January 11, 1999 .....	5-2
<i>Donoso Palma, Segio v. M.C.I.</i> (IAD MA1-03349), di Pietro, July 9, 2002 .....	5-4
<i>El Salfiti, Dina Khalil Abdel Karim v. M.E.I.</i> (IAD M93-08586), Durand, January 24, 1994 .....	5-1
<i>Gill, Sakinder Singh v. M.E.I.</i> (IAD V89-01124), Gillanders, Verma, Wlodyka, July 16, 1990.....	5-3
<i>Grewal, Inderpal Singh v. M.C.I.</i> (IAD T91-04831), Muzzi, Aterman, Leousis, February 23, 1995 .....	5-3
<i>Iyamu, Lucky Ukponahunsi v. M.C.I.</i> (IAD T98-02216), Kelley, September 16, 1999 .....	5-1
<i>Kaur, Gurmit v. C.E.I.C.</i> (F.C.T.D., no. T-2490-84), Jerome, May 8, 1985 .....	5-3
<i>Kaur, Narjinder v. M.E.I.</i> (F.C.A., no. A-405-89), Marceau, Desjardins, Linden, October 11, 1990, at 5. Reported: <i>Kaur v. Canada (Minister of Employment and Immigration)</i> (1990), 12 Imm. L.R. (2d) 1 (F.C.A.).....	5-4
<i>Leung, Tak, v. M.C.I.</i> (IAD V98-00819), Baker, February 11, 1999.....	5-6
<i>Li, Bing Qian v. M.C.I.</i> (F.C.T.D., no. IMM-4138-96), Reed, January 8, 1998 .....	5-2
<i>Lit, Jaswant Singh v. M.E.I.</i> (I.A.B. 76-6003), Scott, Benedetti, Legaré, May 30, 1978 .....	5-1
<i>Lotay, Harjit Kaur v. M.E.I.</i> (I.A.D. T89-03205), Ariemma, Townshend, Bell, April 18, 1990 .....	5-3
<i>Ly-Au, Kiet Nhi v. M.C.I.</i> (I.A.D. V95-02577), Lam, December 8, 1997.....	5-6
<i>Mann, Harnek Singh v. M.E.I.</i> (I.A.B. 85-6199), Wlodyka, June 5, 1987 .....	5-2
<i>Mann, Jashanjit Kaur (Brar) v. M.C.I.</i> (IAD V98-03059), Boscariol, April 26, 2000 .....	5-5
<i>Mann, Kirpal Singh v. M.E.I.</i> (I.A.B. 86-6008), Mawani, Gillanders, Wlodyka, April 14, 1987 .....	5-2
McLeod, James G., <i>The Conflict of Laws</i> (Calgary: Carswell, 1983).....	5-1
<i>Nadesapillai, Sritharan v. M.C.I.</i> (IAD T99-11883), Hoare, August 1, 2001 .....	5-3
<i>Narwal: M.E.I. v. Narwal, Surinder Kaur</i> (F.C.A., no. A-63-89), Stone, Marceau, MacGuigan, April 6, 1990.).....	5-4
<i>Parmar, Ramesh Kumar v. M.E.I.</i> (I.A.B. 85-9772), Eglinton, Weisdorf, Ahara, September 12, 1986.....	5-2
<i>Punia, Bulwant Singh v. M.E.I.</i> (I.A.D. V92-01594), Gillanders, July 27, 1993 .....	5-5

<i>Quao, Daniel Essel v. M.C.I.</i> (F.C.T.D., no. IMM-5240-99), Blais, August 15, 2000.....	5-5
<i>Ramdai, Miss v. M.C.I.</i> (IAD T95-01280), Townshend, October 22, 1997 .....	5-2
<i>Ratnasabapathy, Jeyarajan v. M.C.I.</i> (F.C.T.D., no. IMM-382-98), Blais, September 27, 1999 .....	5-3
<i>Saini, Jaswinder Kaur v. M.C.I.</i> (IAD T89-07659), D'Ignazio, August 26, 1999 .....	5-3
<i>Savehilaghi, Hasan v. M.C.I.</i> (IAD T97-02047), Kalvin, June 4, 1998 .....	5-3
<i>Shaheen, Shahnaz v. M.C.I.</i> (IAD T95-00090), Wright, February 20, 1997 .....	5-1
<i>Sinniah, Sinnathamby v. M.C.I.</i> (F.C.T.D., no. IMM-5954-00), Dawson, July 25, 2002; 2002 FCT 822.....	5-3
<i>Sobhan, Rumana v. M.C.I.</i> (IAD T95-07352), Boire, February 3, 1998 .....	5-1
<i>Subula: M.C.I. v. Subala, Josephine</i> (F.C.T.D., no. IMM-3164-96), Rothstein, July 22, 1997 .....	5-2
<i>Taggar: Canada (Minister of Employment and Immigration) v. Taggar</i> , [1989] 3 F.C. 576.....	5-5
<i>Tran, My Ha v. M.C.I.</i> (IAD V95-01139), Singh, March 9, 1998.....	5-2
<i>Virk, Sukhpal Kaur v. M.E.I.</i> (IAD V91-01246), Wlodyka, Gillanders, Verma, February 9, 1993 .....	5-1
<i>Xu, Yuan Fei v. M.C.I.</i> (IAD M99-04636), Sivak, June 5, 2000 .....	5-4



# CHAPTER 6

## Table of Contents

<b>6. MARRIAGES AND ENGAGEMENTS FOR IMMIGRATION PURPOSES -----</b>	<b>6-1</b>
<b>6.1. THE LEGISLATIVE FRAMEWORK-----</b>	<b>6-1</b>
6.1.1. Marriages for immigration purposes -----	6-1
6.1.2. Engagements for immigration purposes-----	6-1
<b>6.2. THE JURISPRUDENCE-----</b>	<b>6-1</b>
6.2.1. The tests-----	6-1
6.2.2. Marriages for immigration purposes -----	6-1
6.2.3. Engagements for immigration purposes-----	6-3
<b>6.3. ASCERTAINING PURPOSE AND INTENTION: THE CRITERIA-----</b>	<b>6-3</b>
6.3.1. Inconsistent or contradictory statements -----	6-4
6.3.2. Previous attempts by applicant to gain admission to Canada -----	6-4
6.3.3. Previous marriages-----	6-4
6.3.4. Arranged marriages-----	6-5
6.3.5. Mutual Interest -----	6-5
6.3.5.1. Knowledge about the other -----	6-5
6.3.5.2. Contact between the couple-----	6-5
6.3.5.3. Family ties -----	6-6
6.3.5.4. Financial support and exchange of gifts-----	6-6
6.3.5.5. Delay in submission of sponsorship application -----	6-6
6.3.5.6. Persistence in pursuing appeal -----	6-6
6.3.6. “Compatibility” -----	6-6
6.3.7. Summary -----	6-8
<b>6.4. ASCERTAINING PURPOSE AND INTENTION: TIMING-----</b>	<b>6-8</b>
<b>6.5. DISCRETIONARY JURISDICTION -----</b>	<b>6-9</b>
6.5.1. Marriages for immigration purposes -----	6-9
6.5.2. Engagements for immigration purposes-----	6-10
<b>6.6. CHANGE IN MARITAL STATUS -----</b>	<b>6-10</b>
6.6.1. Marriage after filing of undertaking of assistance, but before filing of application for permanent residence-----	6-10
6.6.2. Marriage after filing of undertaking of assistance and application for permanent residence, but before refusal of application -----	6-10
6.6.3. Marriage after refusal, but before hearing of appeal-----	6-10
6.6.4. Marriage after commencement, but before completion of hearing of appeal -----	6-11
6.6.5. Summary of change in status -----	6-11
6.6.6. Legal impediment to proposed marriage in Canada -----	6-11
6.6.7. Converting spousal application to fiancé(e) application -----	6-12
<b>6.7. REPEAT APPEALS -----</b>	<b>6-12</b>
6.7.1. Introduction-----	6-12
6.7.2. Doctrine of <i>Res Judicata</i> -----	6-12
6.7.3. Abuse of Process-----	6-14
6.7.4. Special Circumstances Exception to <i>Res Judicata</i> and Abuse of Process -----	6-15
6.7.5. Are there Special Circumstances? Procedure for Assessment of Evidence in Repeat Claims -----	6-15
6.7.6. Using <i>Res Judicata</i> and Abuse of Process -----	6-16

6.7.7. Evidentiary framework for the application of either *res judicata* or abuse of process:  
Examination of Decisive New Evidence ----- 6-18  
6.7.8. Summary ----- 6-20

## CHAPTER 6

### 6. MARRIAGES AND ENGAGEMENTS FOR IMMIGRATION PURPOSES

#### 6.1. THE LEGISLATIVE FRAMEWORK

##### 6.1.1. Marriages for immigration purposes

A Canadian citizen or permanent resident may sponsor an application for permanent residence made by a member of the family class. Section 2(1) of the *Immigration Regulations, 1978*, (the “Regulations”) includes “the sponsor’s spouse” as a member of the family class. However, a spouse is excluded from the family class if the spouse is caught by section 4(3) of the Regulations. Section 4(3) states:

4.(3) The family class does not include a spouse who entered 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.

##### 6.1.2. Engagements for immigration purposes

Section 2(1) of the Regulations also describes as a member of the family class “the sponsor’s fiancée.” There is no provision corresponding to section 4(3) of the Regulations that excludes a sponsored fiancé(e) from the family class if the engagement is for immigration purposes. Section 6(1)(d)(i) of the Regulations imposes conditions for the issuance of an immigrant visa, that is, a visa officer may issue a visa to a fiancé(e) if:

(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.

#### 6.2. THE JURISPRUDENCE

##### 6.2.1. The tests

##### 6.2.2. Marriages for immigration purposes

Section 4(3) of the Regulations imposes a double or two-pronged test. An application for permanent residence cannot be refused on the basis of section 4(3) unless it is found “that there is both a marriage entered into by the sponsored spouse primarily for purposes of immigration and lack of intention on his or her part to live permanently with the other spouse.”<sup>1</sup> A spouse must be caught by both prongs of the test to be excluded from the family class.<sup>2</sup> There is no need to

---

<sup>1</sup> *Horbas v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 359 (T.D.), at 369.

<sup>2</sup> *Parmar, Ramesh Kumar v. M.E.I.* (I.A.B. 85-9772), Eglington, Weisdorf, Ahara, September 12, 1986

pursue an analysis with respect to the second prong when the first prong is not met.<sup>3</sup> To successfully challenge a refusal, a sponsor can establish either that the applicant did not enter into the marriage primarily to gain admission to Canada or that the applicant intends to reside permanently with the sponsor.

The burden of proving that a new person has a right to come into Canada or that his admission would not be contrary to the *Immigration Act* or to the regulations rests on that person<sup>4</sup>. Counsel for the Minister does not have the burden on an appeal to the Appeal Division to demonstrate that the visa officer's refusal of an application for permanent residence was correct;<sup>5</sup> therefore, the onus is on the sponsor to prove that the applicant is not caught by section 4(3).<sup>6</sup> Additional evidence which was not before the immigration or visa officer may be taken into account on appeal.<sup>7</sup>

In deciding whether or not an applicant has the intention of residing permanently with the sponsor, the applicant's intentions, not the sponsor's beliefs or intentions, must be examined.<sup>8</sup> Thus, a sponsor's belief regarding an applicant's intentions is not determinative and that asserted belief must be tested to ascertain whether or not it can be supported objectively.<sup>9</sup> An adverse inference may be drawn where an applicant could give relevant evidence but fails to do so.<sup>10</sup>

---

<sup>3</sup> *M.C.I. v. Davydenko, Anna* (F.C.T.D., no. IMM-1482-00), Pinard, March 30, 2001; 2001 FCT 257.

<sup>4</sup> *Tran, Viet Hung v. M.C.I.* (F.C.T.D., no. IMM-6290-00), Blanchard, November 15, 2001; 2001 FCT 1255. However, the panel found that the visa officer committed an error in law by requiring that the applicant prove "beyond a reasonable doubt" the genuineness of his relationship: *Bhatoa, Jindri v. M.C.I.* (IAD TAO-06734), Whist, November 5, 2001.

<sup>5</sup> *M.C.I. v. Heera, Lilloutie* (F.C.T.D., no. IMM-5316-93), Noël, October 27, 1994.

<sup>6</sup> *S.G.C. v. Bisla, Satvinder* (F.C.T.D., no. IMM-5690-93), Denault, November 28, 1994.

<sup>7</sup> *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.).

<sup>8</sup> *Bisla, supra*, footnote 6. See also *Pharwaha, Mandeep Singh v. M.C.I.* (IAD T97-02897), D'Ignazio, February 24, 1999 (applicant's intention governs). The applicant's attitude as discerned from the record of interview with the visa officer may form the basis for finding that the applicant lacked the requisite intention: *Rattan, Sushmendra Kaur v. M.E.I.* (F.C.T.D., no. IMM-28-93), Reed, January 19, 1994. See also *Noël, Mirlande v. M.C.I.* (IAD M98-03502), Sivak, June 9, 1999 and *Grewal, Bhupinder Singh v. M.C.I.* (IAD V99-00137), Borst, January 31, 2000, to the same effect as *Rattan*. The intentions of an applicant's family may be relevant to assessing the applicant's intention: *Bath, Simarjit Kaur v. M.C.I.* (F.C.T.D., no. IMM-4095-98), Reed, August 5, 1999. But the intentions of third parties are not the primary intentions to be considered by the decision-maker: *Kandiah, Vigneswaran v. M.C.I.* (F.C.T.D. no., IMM-2055-01), Heneghan, May 30, 2002; 2002 FCT 619.

<sup>9</sup> *Heera, supra*, footnote 5.

<sup>10</sup> *Brar, Kuljit Singh v. M.C.I.* (IAD V93-02858), Clark, March 13, 1995. An inference regarding lack of intention to reside with a sponsor can be drawn from the evidence without a specific statement from an applicant to that effect: *Fafard, Marie Lynda Carolle v. M.C.I.* (IAD T97-04405), Boire, January 21, 1999. However, see *M.C.I. v. Brar, Amritpal Singh* (F.C.T.D., no. IMM-2761-01), Dawson, April 18, 2002; 2002 FCT 442. The Court held that, having weighed the evidence before it, the Appeal Division was not obliged to draw an adverse inference from the applicant's failure to testify.

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).<sup>11</sup>

Evidence relevant to the primary purpose for the marriage can also be relevant to the assessment of intention to reside permanently with the sponsor.<sup>12</sup>

The visa officer ought to address both prongs of the test in section 4(3). Some older case-law suggests that if the officer has addressed only one prong and, for example, has neglected the question of an applicant’s intention to reside permanently with the sponsor, then the officer has erred and the refusal is invalid as a result.<sup>13</sup> However, this approach is now questionable in light of *Kahlon*,<sup>14</sup> which establishes that a sponsorship appeal is a hearing *de novo* at which the issue of section 4(3) is before the Appeal Division for fresh determination.

### 6.2.3. Engagements for immigration purposes

Section 6(1)(d)(i) of the Regulations imposes two requirements which must both be met before a visa may issue to a fiancé(e): first, the sponsor and fiancé(e) must intend to reside together permanently after marriage and second, they must not have become engaged primarily to gain the fiancé(e)’s admission to Canada.<sup>15</sup> Thus, not meeting either requirement can result in a refusal<sup>16</sup>.

The intentions of both sponsor and applicant must be ascertained,<sup>17</sup> as regards both requirements of section 6(1)(d)(i). That is, for a sponsor to succeed on appeal, both sponsor and applicant must intend to reside together permanently after marriage and must not have become engaged primarily to gain the fiancé(e)’s admission to Canada.<sup>18</sup>

## 6.3. ASCERTAINING PURPOSE AND INTENTION: THE CRITERIA

The application of the test in section 4(3) of the Regulations “raise[s] difficult questions of fact, the more so because [it involves] the assessment of the intention of the sponsored

---

<sup>11</sup> *Singh, Ravinder Kaur v. M.E.I.* (I.A.B. 86-10228), Chu, Suppa, Eglinton (dissenting), August 8, 1988, at 5.

<sup>12</sup> *Bisla, supra*, footnote 6; *Meelu, Beant Singh v. M.C.I.* (F.C.T.D., no. IMM-841-99), Gibson, January 7, 2000.

<sup>13</sup> *Parmar, supra*, footnote 2. In deciding this question, the record may be looked at in conjunction with the refusal letter: *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.).

<sup>14</sup> *Kahlon, supra*, footnote 7.

<sup>15</sup> *Jung, Harry Kam v. M.E.I.* (I.A.B. 84-6237), D. Davey, Chambers, Anderson, May 17, 1985; *Budnick, Joseph v. M.E.I.* (I.A.B. 86-4090), Vidal, Goodspeed, Eglinton, September 16, 1986; *Sandhu, Daljit Kaur v. M.E.I.* (I.A.B. 87-6347), Mawani, October 20, 1987.

<sup>16</sup> *Wu, Nai Him v. M.C.I.* (IAD V99-01203), Cochran, May 8, 2000.

<sup>17</sup> *Sidhu, Kulwant Kaur v. M.E.I.* (I.A.B. 88-35458), Ahara, Rotman, Eglinton (dissenting), August 25, 1988; *Rasenthiram, Kugenthiraja v. M.C.I.* (IAD T98-01452), Buchanan, February 17, 1999.

<sup>18</sup> *Luu, Quoc Ve v. M.C.I.* (IAD V98-00489), Major, March 3, 1999; *Bath, Simarjit Kaur v. M.C.I.* (IAD T97-01959), Kalvin, July 29, 1998; affirmed in *Bath, supra*, footnote 8.

spouse.”<sup>19</sup> This is likewise true as regards section 6(1)(d)(i) of the Regulations. In assessing purpose and intention, the following criteria are considered.

### 6.3.1. 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 [spouse or fiancé(e)] 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.<sup>20</sup>

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.<sup>21</sup>

### 6.3.2. Previous attempts by applicant to gain admission to Canada

Relevant, though not conclusive,<sup>22</sup> is the applicant’s history of previous attempts to gain admission to Canada.<sup>23</sup> 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*.<sup>24</sup>

### 6.3.3. 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.<sup>25</sup>

---

<sup>19</sup> *Horbas, supra*, footnote 1, at 368.

<sup>20</sup> *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.

<sup>21</sup> *M.C.I. v. Dasent, Maria Jackie* (F.C.A., no. A-18-95), Strayer, Linden, McDonald, January 18, 1996.

<sup>22</sup> *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, supra*, footnote 15. 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.

<sup>23</sup> 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.

<sup>24</sup> *Maire, Beata Jolanta v. M.C.I.* (F.C.T.D., no. IMM-5420-98), Sharlow, July 28, 1999.

<sup>25</sup> *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.*

#### 6.3.4. 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.<sup>26</sup>

#### 6.3.5. Mutual Interest

##### 6.3.5.1. 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 the couple.<sup>27</sup>

##### 6.3.5.2. 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.<sup>28</sup>

---

*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.

<sup>26</sup> *Brar, Baljit Kaur v. M.C.I.* (IAD V93-02983), Clark, July 7, 1995. Reported: *Brar v. Canada (Minister of Citizenship 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.

<sup>27</sup> *Sandhu, Daljit Kaur, supra*, footnote 15; *Bhargal, 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.

<sup>28</sup> 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. In *Parmar, supra*, footnote 2, at 19, the panel found that the applicant's intention to reside permanently with the sponsor was supported by evidence on the basis of which it could not be said "that opportunities for physical union [had] been passed up." This same panel inferred consummation of the marriage from the fact of cohabitation. 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).

### 6.3.5.3. Family ties

Depending on the cultural or religious context, the Appeal Division will consider evidence regarding family ties, contact between the couple and their respective in-laws<sup>29</sup> and the presence of members of both families at engagement and marriage ceremonies.<sup>30</sup>

### 6.3.5.4. Financial support and exchange of gifts

In relation to certain cultural contexts, the exchange of gifts<sup>31</sup> and financial support<sup>32</sup> have been viewed favourably by the Appeal Division as indicators of a genuine relationship.

### 6.3.5.5. Delay in submission of sponsorship application

Delay in submitting a sponsorship application may not be a significant factor in repudiating the genuineness of a fiancé or spousal relationship because if the engagement or marriage were 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.”<sup>33</sup> However, if there is no satisfactory explanation for the delay, it may be significant.<sup>34</sup>

### 6.3.5.6. 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.<sup>35</sup>

## 6.3.6. “Compatibility”

The 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 Appeal Division has stated:<sup>36</sup>

---

<sup>29</sup> *Sandhu, Corazon Dalmacio Campos, supra*, footnote 22.

<sup>30</sup> *Chaikosky, supra*, footnote 28, 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.

<sup>31</sup> *Sandhu, Corazon Dalmacio Campos, supra*, footnote 22.

<sup>32</sup> *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.).

<sup>33</sup> *Sandhu, Daljit Kaur, supra*, footnote 15 at 7-8.

<sup>34</sup> *Johal, Surinder Singh v. M.E.I.* (IAD V87-6546), Wlodyka, Singh, Verma, February 15, 1989.

<sup>35</sup> *Bahal, Vijay Kumar v. M.C.I.* (IAD T97-02759), Townshend, August 4, 1998.

<sup>36</sup> *Sandhu, Corazon Dalmacio Campos, supra*, footnote 22 at 5-6.



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 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.

A mere listing of incompatibilities will not ordinarily establish inadmissibility under section 4(3) of the Regulations. In the words of the Appeal Division:<sup>37</sup>

No matter how incompatible persons may be within the customs and practices of their own community, they may still be genuinely committed to each other and to the marriage. This evidence simply does not get to the issue of the intention of the applicant. It is not in itself other objective evidence which tends to prove that lack of the requisite intention on the part of the applicant which is necessary to reach a finding that he or she is inadmissible under section 4(3).

In deciding upon the validity of refusals where incompatibility has been alleged, differences in religion,<sup>38</sup> education and language,<sup>39</sup> and age<sup>40</sup> have been examined. It is not contrary to the *Canadian Charter of Rights and Freedoms* to consider differences in age, education and marital status of the parties.<sup>41</sup>

---

<sup>37</sup> *Brar, Kuljit Singh, supra*, footnote 10 at 5.

<sup>38</sup> See, for example, *Sandhu, Corazon Dalmacio Campos, supra*, footnote 22, 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.

<sup>39</sup> 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.

<sup>40</sup> 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.

<sup>41</sup> *Parmar, Charanjit Singh v. M.C.I.* (IAD V98-04542), Boscarior, November 23, 1999.

### 6.3.7. Summary

The case-law indicates that no single criterion is decisive. It is the interplay of several factors that leads the Appeal Division in any given case to make its finding as to the purpose for, and intentions in respect of, a marital relationship or a relationship between fiancés.<sup>42</sup>

## 6.4. ASCERTAINING PURPOSE AND INTENTION: TIMING

Section 4(3) of the Regulations excludes from the family class a spouse “who entered 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.” The relevant time for determining the primary purpose of the marriage and the applicant’s intention in respect of residing permanently with the sponsor is the time of entering into the marriage.<sup>43</sup> Subsequent evidence may be examined in order to determine the intention at the time of the marriage.<sup>44</sup>

In *Kaloti*,<sup>45</sup> the Federal Court of Appeal held that intention is fixed in time at the time of the marriage and cannot be changed. However, the Court did not address the question of whether a new application could be made on new evidence pertaining to a spouse’s intent at the time of the marriage. In *Kular*<sup>46</sup>, Justice Nadon held that where there is new evidence, pertaining to a

---

<sup>42</sup> 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.

<sup>43</sup> See, for example, *Singh, Ranjit Kaur v. S.S.C.* (IAD T93-07239), Channan, Aterman, Ramnarine, July 29, 1994, where the panel held that marriage and subsequent birth of a child do not in themselves demonstrate the intention of the applicant at the time of the marriage; the dissenting reasons in *Salh, Surinder Kaur v. M.E.I.* (I.A.B. 87-9964), MacLeod, Chu, Townshend (dissenting), February 12, 1988; and *Singh, Ravinder Kaur, supra*, footnote 11, at 2, where the dissenting member stated: “The intention, or rather the absence of the prescribed intentions, at the time of application, at date of immigration interview, at date of refusal or date of appeal hearing, is not the issue. Only the state of intention at the time the marriage was contracted can be used in the application of subsection 4(3) [...]”.

<sup>44</sup> *Gill, Banta Singh v. M.C.I.* (F.C.A., no. A-859-96), Marceau, Linden, Robertson, July 14, 1998, the Court of Appeal holding that intent (in the context of a foreign adoption) is generally inferred from conduct whether before, during or after the fact.

<sup>45</sup> *Kaloti, Yaspal Singh v. M.C.I.* (F.C.A., no. A-526-98), Décary, Sexton, Evans, March 13, 2000. The Court in *Kaloti* did not consider *Gill, Banta Singh, supra*, footnote 44, which held that intent may be inferred from conduct after the fact, which would appear to make subsequent evidence relevant to the question of intention in a section 4(3) refusal. See also *Tong, Hing Nyap v. M.C.I.* (F.C.T.D., no. IMM-724-98), Strayer, August 19, 1998, where the Court briefly refers to the conduct of a couple since the time of their wedding on the question of their intentions. In *Khan, Naseem v. M.C.I.* (IAD T95-03520), Townshend, April 18, 1997, the panel held that the issue of an applicant’s intention at the time of marriage is fixed and finite, and there can never be a change of circumstances, thus *res judicata* will invariably apply. See also the following decisions which apply *res judicata*: *Sekhon, Jagdev Singh v. M.C.I.* (IAD V97-02348), Borst, November 24, 1998 (doctrine of *res judicata* applies unless sponsor presents significant new evidence); *Toore, Jagraj Singh v. M.C.I.* (IAD V98-04536), Borst, February 7, 2000 (new evidence did not cast light on intention at time of marriage); *Sandhu, Parkash Kaur v. M.C.I.* (IAD W98-00033), Wiebe, August 24, 1999; *Kular, Jasmal v. M.C.I.* (IAD T98-00523), Maziarz, September 20, 1999; and *Koon, Chun Wah v. M.C.I.* (IAD T97-05159), Wales, October 1, 1999 (appeal was not decided on *res judicata* but its applicability was analyzed).

<sup>46</sup> *Kular, Jasmal 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.] The Court went on to state that, “If in the IAD’s opinion the evidence

spouse's intention at the time of the marriage, an applicant can bring a second application. The Appeal Division must allow an applicant to present the new evidence before deciding whether the second application will constitute an abuse of process or whether it should be dismissed by reason of *res judicata*.

With respect to fiancé(e)s and the determination of the primary purpose of an engagement and intention to reside permanently together, the timing question is unclear. Some Appeal Division decisions appear to have focused on the intentions of the couple at the time of their becoming engaged.<sup>47</sup> The Appeal Division has also focused on future intentions, with past conduct as an indicator of an applicant's future intentions.<sup>48</sup> In cases where the Appeal Division has merely tracked the wording of section 6(1)(d)(i), it appears to look to the time of the engagement to determine its primary purpose and to treat the issue of intention to reside together following marriage as forward looking.<sup>49</sup>

## 6.5. DISCRETIONARY JURISDICTION

If an applicant is not a member of the family class, the Appeal Division may not grant discretionary relief on compassionate or humanitarian grounds, otherwise it would be exercising discretion beyond its jurisdiction over members of the family class.<sup>50</sup> Thus, the exercise of discretionary relief is precluded for the spouse caught by section 4(3) of the Regulations, but not for the fiancé(e) who is unable to meet the requirements of section 6(1)(d)(i) of the Regulations.

### 6.5.1. Marriages for immigration purposes

Where there are two grounds of refusal, one of which is based on section 4(3) of the Regulations, and the second of which is a substantive ground such as medical inadmissibility, the validity of the section 4(3) ground will determine whether discretionary relief may be exercised to overcome the second ground. If it is determined that the applicant is caught by section 4(3) and as a result not a member of the family class, the appeal will be dismissed for lack of jurisdiction.<sup>51</sup> However, if the applicant is not caught by section 4(3), discretionary relief may be exercised to overcome the second ground should it be found valid in law.

---

adduced does not constitute new evidence, then it will certainly be open to it to dismiss the application on the ground that it is abusive of its process. If the evidence adduced is in fact new evidence, then the Board can decide whether the issues raised are *res judicata*." For a detailed analysis of these topics, see section 6.7 ("Repeat Appeals").

<sup>47</sup> *Tran, Ai v. M.C.I.* (IAD T96-04689), Kitchener, October 24, 1997; *Hua, Chiu-Hung v. M.C.I.* (IAD M96-02238), Sivak, December 10, 1996; *Tan, Kimeang v. M.C.I.* (IAD T96-05120), Kitchener, December 18, 1997.

<sup>48</sup> *Bath, supra*, footnote 18; affirmed in *Bath, supra*, footnote 8.

<sup>49</sup> See, for example, *Nagra, Manjit Kaur v. M.C.I.* (IAD V95-02556), McIsaac, June 24, 1997, at 2, where the panel concluded: "[...] I find that the appellant and applicant intend to reside together permanently, and that they did not become engaged primarily for the purpose of the applicant gaining admission to Canada as a member of the family class." In *Boparai, Hardeep Kaur v. M.C.I.* (IAD VA0-01582), Baker, June 27, 2001, the panel held that while the applicant entered into the marriage primarily for the purpose of gaining admission to Canada, he "now intended to reside" with the appellant permanently.

<sup>50</sup> *Garcia, Elsa v. M.E.I.* (I.A.B. 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979.

<sup>51</sup> *Chaikosky, supra*, footnote 28.

### **6.5.2. Engagements for immigration purposes**

While unlikely that a panel would grant discretionary relief in favour of a sponsor after concluding that the sponsor's engagement was for immigration purposes,<sup>52</sup> the right to appeal on compassionate or humanitarian grounds exists nonetheless.

## **6.6. CHANGE IN MARITAL STATUS**

Where a fiancé(e) 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 fiancé(e).<sup>53</sup>

### **6.6.1. 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.<sup>54</sup>

### **6.6.2. 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.<sup>55</sup> 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.

### **6.6.3. Marriage after refusal, but before hearing of appeal**

The general approach, based on *Kaur*,<sup>56</sup> is that the initial application by a fiancé(e) is to be dealt with entirely without reference to a subsequent marriage.<sup>57</sup>

---

<sup>52</sup> *Dyal, Rapinderjit Kaur v. M.E.I.* (I.A.B. 87-6066), Wlodyka, Anderson, Gillanders, April 25, 1988; *Bhangal, supra*, footnote 27; *Shergill, Gurdawar Singh v. M.C.I.* (IAD V94-00986), McIsaac, November 30, 1995.

<sup>53</sup> 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.

<sup>54</sup> *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.

<sup>55</sup> *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.

<sup>56</sup> *Kaur, supra*, footnote 55.

<sup>57</sup> *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.

#### 6.6.4. Marriage after commencement, but before completion of hearing of appeal

Where a fiancé(e) marries a sponsor after the commencement of the appeal hearing, the appeal is heard as a fiancé(e) appeal.<sup>58</sup>

#### 6.6.5. Summary of change in status

The Appeal Division typically views the critical time for determining the status of an applicant (i.e. spouse or fiancé(e)) 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 fiancé(e) relationship if consistent with other evidence.<sup>59</sup>

As summarized by the Appeal Division:<sup>60</sup>

[...] in the Board's opinion, the decision in *Kahlon*<sup>61</sup> 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.

#### 6.6.6. Legal impediment to proposed marriage in Canada

An intervening marriage may have an impact on the issuance of a visa to an applicant. It may create a legal impediment to the proposed marriage within the meaning of section 6(1)(d)(ii) of the Regulations.<sup>62</sup> However, the existence of a potential impediment to a proposed marriage has been held to be largely irrelevant to the issue to be decided on an appeal.<sup>63</sup>

---

<sup>58</sup> *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.).

<sup>59</sup> See, for example, *Mann, Paramjit Kaur v. M.E.I.* (IAD V89-00516), Chambers, Gillanders, Verma, March 20, 1990; *Bhandhal, supra*, footnote 57; *Ta, Suy Khuong v. M.C.I.* (IAD W99-00121), D'Ignazio, November 21, 2000.

<sup>60</sup> *Gill, Manjeet Singh v. M.E.I.* (IAD V87-6408), Mawani, MacLeod, Verma, August 16, 1989, at 3.

<sup>61</sup> *Kahlon, supra*, footnote 7, where it was held that a hearing of an appeal by the Immigration Appeal Board is a hearing *de novo* in a broad sense.

<sup>62</sup> *Khella, supra*, footnote 57. Section 6(1)(d)(ii) provides:

(ii) there are no legal impediments to the proposed marriage of the sponsor and the fiancée under the laws of the province in which they intend to reside.

<sup>63</sup> *Gill, Manjeet Singh, supra*, footnote 60. The issue being essentially one of intention and genuineness of the fiancé(e) relationship, the fact that there might be difficulties in the couple's attempt to marry in Canada was held to be irrelevant. However, where the couple married prior to the appellant's divorce from her first husband, the panel dismissed the appeal for lack of jurisdiction as the facts did not come within the definition of "marriage" in section 2(1) of the *Regulations*. *Arputharaj, Stella Arul Mary v. M.C.I.* (IAD MA0-06438), Beauchemin, July 9, 2001 (reasons signed July 10, 2001).

### **6.6.7. Converting spousal application to fiancé(e) application**

In unique circumstances,<sup>64</sup> and generally with the consent of counsel for the Minister, the Appeal Division has “converted” a spousal application to that of a fiancé(e).<sup>65</sup> By treating an applicant as a fiancé(e), the applicant continues to be a member of the family class and is not required to recommence the immigration process with a new application for permanent residence.

## **6.7. REPEAT APPEALS**

### **6.7.1. Introduction**

The *Immigration Act* (‘the Act’) contemplates that there will be re-applications in immigration matters and hence the possibility of repeat appeals to the 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 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 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 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 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*.

### **6.7.2. 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;

---

<sup>64</sup> Usually where a sponsor and applicant genuinely believe they are validly married but later discover there is a defect in regard to the marriage.

<sup>65</sup> *Ly-Au, Kiet Nhi v. M.C.I.* (IAD V95-02577), Lam, December 8, 1997; *Leung, Tak v. M.C.I.* (IAD V98-00819), Baker, February 11, 1999; *Lorenzo, Margaret Mary Fay v. M.C.I.* (IAD V98-02124), Baker, September 14, 1999.

- 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<sup>66</sup> were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.<sup>67</sup>

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.<sup>68</sup>

In the context of appeals before the 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 Appeal Division. The decision made by the 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 intention of the parties at the time of the marriage or the genuineness of a parent/child relationship in an adoption.<sup>69</sup>

The rules governing *res judicata* should not be mechanically applied. Once a determination is made that the criteria for *res judicata* are met the Appeal Division must still consider whether as a matter of discretion *res judicata* ought to be applied.<sup>70</sup> The Supreme Court of Canada in *Danyluk*<sup>71</sup> listed factors which may be considered in the exercise of that discretion.

---

<sup>66</sup> 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.

<sup>67</sup> *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.

<sup>68</sup> *Machin et al v. Tomlison* (2000), 51 OR (3d) (OCA) 566 at 571.

<sup>69</sup> 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 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."

<sup>70</sup> *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.

<sup>71</sup> *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

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 Appeal Division will balance the public interest in the finality of litigation with the public interest in ensuring that justice is done.

### 6.7.3. Abuse of Process

Even though repeat appeals at the 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.<sup>72</sup>

In particular, it can be used to prevent the abuse of tribunal procedures by applicants who would otherwise re-apply *ad infinitum*.<sup>73</sup>

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.<sup>74</sup>

Abuse of process is a particularly powerful tool for preserving tribunal resources and for upholding the integrity of the process by avoiding inconsistent results.<sup>75</sup> It has been held that exposing a court to the risk of inconsistent decisions is an abuse of process.<sup>76</sup>

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.<sup>77</sup> The use of abuse of process ought to be

---

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 these factors, it would seem the last (potential for injustice) is the one that would be most relevant for the 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.

<sup>72</sup> *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (O.C.A.).

<sup>73</sup> *O'Brien v. Canada* (1993), 153 N.R. 313 (FCA).

<sup>74</sup> *Kaloti, supra*, footnote 45, at 5.

<sup>75</sup> Lange text, *supra*, footnote 67 at 348.

<sup>76</sup> *R. v. Duhamel* (1984), 57 A.R. 204 (S.C.C.).



reserved for cases where there is an additional serious element present, beyond the mere fact of relitigation, justifying the application of abuse of process<sup>78</sup>.

#### **6.7.4. 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.<sup>79</sup>

The exception of special circumstances applies where in the previous proceedings there was fraud or other misconduct that raises natural justice issues.<sup>80</sup> 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.<sup>81</sup>

...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.<sup>82</sup>

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.

#### **6.7.5. 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.<sup>83</sup> 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.

---

<sup>77</sup> *Abacus Cities Ltd. (Bankrupt) v. Bank of Montreal* (1987), 80 A.R 254 (C.A.) at 259.

<sup>78</sup> *Dhaliwal, Baljit Kaur v. M.C.I.*, (F.C.T.D., IMM-1760-01), Campbell, December 21, 2001.

<sup>79</sup> 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.

<sup>80</sup> 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.

<sup>81</sup> Lange text, *supra*, footnote 67 at 205.

<sup>82</sup> *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1998), 47 D.L.R. (4<sup>th</sup>) 431 at 438.

<sup>83</sup> Lange text, *supra*, footnote 67 at 208.

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.<sup>84</sup> 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.<sup>85</sup> The 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.<sup>86</sup>

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.<sup>87</sup>

Submissions in writing from the Minister and the Appellant, together with supporting affidavits and other material, may be entertained on such a motion. The Appeal Division should be presented with a summary of the new evidence that the appellant feels supports a second appeal.<sup>88</sup>

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.

#### **6.7.6. 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

---

<sup>84</sup> *Sekhon, Amrik Singh v. M.C.I.* (F.C.T.D. IMM-1982-01), McKeown, December 12, 2001. The Federal Court approved the 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.)

<sup>85</sup> *Sekhon, supra*, footnote 69, at 19.

<sup>86</sup> *Sekhon, supra*, footnote 8284. See also, *Kaloti, supra*, footnote 45.

<sup>87</sup> *Kaloti, supra*, footnote 45, at 5.

<sup>88</sup> *Sekhon, supra*, footnote 6969.

of process and where the requirements of issue estoppel are met, it is an abuse of process by relitigation.<sup>89</sup>

It is open to the Appeal Division to apply either or both doctrines in appropriate cases.<sup>90</sup> 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.<sup>91</sup>

The Court in *Dhaliwal*<sup>92</sup> 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*<sup>93</sup> 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.<sup>94</sup>

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.<sup>95</sup> 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.

---

<sup>89</sup> Lange text, *supra*, footnote 67 at 344-5.

<sup>90</sup> *Sekhon*, *supra*, footnote 69.

<sup>91</sup> In *Kaloti*, *supra*, footnote 45, the Court quoted from the judgement 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.*

<sup>92</sup> *Dhaliwal*, *supra*, footnote 78.

<sup>93</sup> Lange text, *supra*, footnote 67 at 345

<sup>94</sup> *Saskatoon Credit*, *supra*, footnote 82 at 438.

<sup>95</sup> *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.

In all but exceptional circumstances,<sup>96</sup> 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.

### **6.7.7. 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”<sup>97</sup> 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.<sup>98</sup> 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 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.<sup>99</sup>

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 Appeal Division will determine if the evidence found to be capable of altering the result does in fact produce a different disposition.

#### **2. Evidence that came into existence following the first appeal**

---

<sup>96</sup> 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.

<sup>97</sup> *Lundrigan Group Ltd. v. Pilgrim* (1989), 75 Nfld. & P.E.I.R. 217 (Nfld. C.A.) at 223.

<sup>98</sup> 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.

<sup>99</sup> *M.C.I. v. Nirwan, Malkiat Singh* (IAD VA0-01903), Clark, April 24, 2001, at 5.

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.<sup>100</sup> 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 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.<sup>101</sup> Evidence that stems from the period of time between the two appeals ought to be further examined.<sup>102</sup> The Appeal Division must differentiate between that which is **decisive** fresh evidence and that which is merely **additional** 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.<sup>103</sup> In the latter, where it is merely additional new evidence, the Appeal Division may find the appeal is *res judicata*.<sup>104</sup> In addition to a finding of *res judicata*, the 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.

---

<sup>100</sup> While courts may only consider new evidence that was in existence at the time of the previous court decision, the Appeal Division is in a unique position. Under the 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.

<sup>101</sup> *Kaloti, supra*, footnote 45 at 4. Also see *Sekhon, supra*, footnote 69, at 12, where the Appeal Division discusses the fixed point in time for determining the *bona fides* of a parent /child relationship.

<sup>102</sup> *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 97, 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.

<sup>103</sup> 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”.

<sup>104</sup> *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).

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*.

#### **6.7.8. 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.

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*.

## CHAPTER 6

### TABLE OF CASES: MARRIAGES AND ENGAGEMENTS FOR IMMIGRATION PURPOSES

#### CASES

<i>Abacus Cities Ltd. (Bankrupt) v. Bank of Montreal</i> (1987), 80 A.R. 254 (C.A.).....	6-15
<i>Alzaim (Sekala), Khadija v. M.C.I.</i> (IAD TA1-05412), Sangmuah, April 23, 2002 .....	6-18
<i>Angle v. Minister of National Revenue</i> (1974), 47 D.L.R. (3d) 544 (S.C.C.) .....	6-13
<i>Arputharaj, Stella Arul Mary v. M.C.I.</i> (IAD MA0-06438), Beauchemin, July 9, 2001 (reasons signed July 10, 2001) .....	6-11
<i>Bahal, Vijay Kumar v. M.C.I.</i> (IAD T97-02759), Townshend, August 4, 1998 .....	6-6
<i>Basi, Navjot Singh v. M.C.I.</i> (IAD V95-00664), Lam, July 4, 1996 .....	6-5
<i>Bassi, Viyay Kamal Lata v. M.C.I.</i> (IAD V99-02989), Borst, October 17, 2000 .....	6-18
<i>Bath, Simarjit Kaur v. M.C.I.</i> (IAD T97-01959), Kalvin, July 29, 1998 .....	6-3
<i>Bath, Simarjit Kaur v. M.C.I.</i> (F.C.T.D., no. IMM-4095-98), Reed, August 5, 1999 .....	6-2
<i>Bhandhal, Amanpreet Kaur v. M.E.I.</i> (IAD T89-06326), Bell, Tisshaw, Townshend, April 4, 1990 .....	6-10
<i>Bhangal, Baljit Singh v. M.E.I.</i> (IAD W90-00173), Goodspeed, December 6, 1991 .....	6-5
<i>Bhatoa, Jindri v. M.C.I.</i> (IAD TA0-06734), Whist, November 5, 2001 .....	6-2
<i>Bhinder, Satinder Kaur v. M.C.I.</i> (IAD TA0-20537), MacAdam, June 13, 2002 .....	6-14
<i>Boparai, Hardeep Kaur v. M.C.I.</i> (IAD VA0-01582), Baker, June 27, 2001 .....	6-9
<i>Bradford &amp; Bigley Society v. Seddon</i> , [1999] 1 W.L.R. 1482 at 1490 (C.A.).....	6-17
<i>Brar, Baljit Kaur v. M.C.I.</i> (IAD V93-02983), Clark, July 7, 1995. Reported: <i>Brar v. Canada</i> ( <i>Minister of Citizenship and Immigration</i> ) (1995), 29 Imm. L.R. (2d) 186 (IAD).....	6-5
<i>Brar, Kuljit Singh v. M.C.I.</i> (IAD V93-02858), Clark, March 13, 1995 .....	6-2
<i>Brar: M.C.I. v. Brar, Amritpal Singh</i> (F.C.T.D., no. IMM-2761-01), Dawson, April 18, 2002; 2002 FCT 442 .....	6-2
<i>Budnick, Joseph v. M.E.I.</i> (I.A.B. 86-4090), Vidal, Goodspeed, Eglington, September 16, 1986 .....	6-3
<i>Cant, Bant Singh v. M.C.I.</i> (IAD V97-02643), Boscariol, January 12, 2000 .....	6-5
<i>Chadha, Neena v. M.C.I.</i> (IAD VA0-01981), Boscariol, March 26, 2002 .....	6-14
<i>Chaikosky, Marianne v. M.E.I.</i> (I.A.B. 84-4156), Petryshyn, Hlady, Voorhees, June 7, 1985 .....	6-5
<i>Chand, Rekha v. M.C.I.</i> (V99-04372), Mattu, December 4, 2001 .....	6-20
<i>Cheng, Shawn v. M.C.I.</i> (IAD V96-02631), Boscariol, April 27, 1998 .....	6-5
<i>Chow, Wing Ken v. M.E.I.</i> (I.A.B. 86-9800), Tisshaw, Jew, Bell (dissenting), July 8, 1988. Reported: <i>Chow v. Canada (Minister of Employment and Immigration)</i> (1988), 6 Imm. L.R. (2d) 97 (I.A.B.).....	6-11
<i>Cobb v. Holding Lumber Co.</i> (1977), 79 D.L.R. (3d) 332 (B.C.S.C.) .....	6-15
<i>Coolen, Andrea Van v. M.E.I.</i> (I.A.B. 84-9741), D. Davey, Benedetti, Petryshyn, October 2, 1985 .....	6-5
<i>Danyluk v. Ainsworth Technologies Inc.</i> [2001] S.C.J. No.46, Q.L.....	6-14
<i>Dasent: M.C.I. v. Dasent, Maria Jackie</i> (F.C.A., no. A-18-95), Strayer, Linden, McDonald, January 18, 1996 .....	6-4

<i>Davydenko: M.C.I. v. Davydenko, Anna</i> (F.C.T.D., no. IMM-1482-00), Pinard, March 30, 2001; 2001 FCT 257.....	6-2
<i>Devia, Zarish Norris v. M.C.I.</i> (IAD T94-05862), Band, April 23, 1996 .....	6-4
<i>Dhaliwal, Baljit Kaur v. M.C.I.</i> , (F.C.T.D., IMM-1760-01), Campbell, December 21, 2001 .....	6-15
<i>Dhaliwal, Charanjit Kaur v. M.E.I.</i> (I.A.B. 85-6194), Ariemma, Mawani, Singh, May 7, 1987 .....	6-10
<i>Dhaliwal, Kulwinder Kaur Nijjar v. M.C.I.</i> (IAD V99-04535), Cochran, October 10, 2000 (reasons signed on October 31, 2000) .....	6-20
<i>Dhaliwal, Rup Singh v. M.C.I.</i> (IAD V96-00458), Jackson, September 5, 1997 .....	6-7
<i>Dhillon, Gurprit Singh v. M.E.I.</i> (I.A.B. 89-00571), Sherman, Ariemma, Tisshaw, August 8, 1989 .....	6-7
<i>Dhillon, Manohar Singh v. M.C.I.</i> (IAD VA0-01782), Boscariol, June 29, 2001.....	6-19
<i>Dyal, Rapinderjit Kaur v. M.E.I.</i> (I.A.B. 87-6066), Wlodyka, Anderson, Gillanders, April 25, 1988 .....	6-10
<i>Fafard, Marie Lynda Carolle v. M.C.I.</i> (IAD T97-04405), Boire, January 21, 1999 .....	6-2
<i>Garcia, Elsa v. M.E.I.</i> (I.A.B. 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979 .....	6-9
<i>Gill, Balbir Kaur v. M.E.I.</i> (I.A.B. 88-00074), Wlodyka, MacLeod, Verma, February 7, 1989.....	6-10
<i>Gill, Banta Singh v. M.C.I.</i> (F.C.A., no. A-859-96), Marceau, Linden, Robertson, July 14, 1998 .....	6-8
<i>Gill, Harjinder Singh v. M.C.I.</i> (IAD VA1-00462), Boscariol, February 8, 2002 .....	6-20
<i>Gill, Manjeet Singh v. M.E.I.</i> (IAD V87-6408), Mawani, MacLeod, Verma, August 16, 1989 .....	6-11
<i>Glaw, Gerhard Franz v. M.C.I.</i> (IAD T97-02268), Townshend, July 21, 1998 .....	6-7
<i>Grewal, Bhupinder Singh v. M.C.I.</i> (IAD V99-00137), Borst, January 31, 2000 .....	6-2
<i>Heera: M.C.I. v. Heera, Lilloutie</i> (F.C.T.D., no. IMM-5316-93), Noël, October 27, 1994 .....	6-2
<i>Horbas v. Canada (Minister of Employment and Immigration)</i> , [1985] 2 F.C. 359 (T.D.), at 369 .....	6-1
<i>Hua, Chiu-Hung v. M.C.I.</i> (IAD M96-02238), Sivak, December 10, 1996 .....	6-9
<i>Jassar, Surjit Singh v. M.C.I.</i> (IAD V94-01705), Lam, May 14, 1996 .....	6-5
<i>Johal, Surinder Singh v. M.E.I.</i> (IAD V87-6546), Wlodyka, Singh, Verma, February 15, 1989 .....	6-6
<i>Jung, Harry Kam v. M.E.I.</i> (I.A.B. 84-6237), D. Davey, Chambers, Anderson, May 17, 1985 .....	6-3
<i>Kahlon, Darshan Singh v. M.E.I.</i> (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: <i>Kahlon v. Canada (Minister of Employment and Immigration)</i> (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).....	6-2
<i>Kaloti, Yaspal Singh v. M.C.I.</i> (F.C.A., no. A-526-98), Décary, Sexton, Evans, March 13, 2000.....	6-8
<i>Kandiah, Vigneswaran v. M.C.I.</i> (F.C.T.D. no., IMM-2055-01), Heneghan, May 30, 2002; 2002 FCT 619 .....	6-2
<i>Kaur, Amarjit v. M.C.I.</i> (IAD T97-03654), Buchanan, June 24, 1999.....	6-10
<i>Kaur, Gurmit v. C.E.I.C.</i> (F.C.T.D., no. T-2490-84), Jerome, May 8, 1985.....	6-10
<i>Khan, Naseem v. M.C.I.</i> (IAD T95-03520), Townshend, April 18, 1997 .....	6-8
<i>Khella, Kulwinder Kaur v. M.E.I.</i> (IAD V89-00179), Singh, Angé, Verma, June 29, 1989.....	6-10
<i>Koon, Chun Wah v. M.C.I.</i> (IAD T97-05159), Wales, October 1, 1999 .....	6-8
<i>Kular, Jasmal v. M.C.I.</i> (F.C.T.D., no. IMM-4990-99), Nadon, August 30, 2000 .....	6-8
<i>Kular, Jasmal v. M.C.I.</i> (IAD T98-00523), Maziarz, September 20, 1999.....	6-8
<i>Leung, Tak v. M.C.I.</i> (IAD V98-00819), Baker, February 11, 1999 .....	6-12



<i>Litt, Gurdev Singh v. M.C.I.</i> (V99-03351), Baker, December 18, 2000.....	6-18
<i>Lorenzo, Margaret Mary Fay v. M.C.I.</i> (IAD V98-02124), Baker, September 14, 1999 .....	6-12
<i>Lundrigan Group Ltd. v. Pilgrim</i> (1989), 75 Nfld. & P.E.I.R. 217 (Nfld. C.A.) .....	6-18
<i>Luu, Quoc Ve v. M.C.I.</i> (IAD V98-00489), Major, March 3, 1999 .....	6-3
<i>Ly-Au, Kiet Nhi v. M.C.I.</i> (IAD V95-02577), Lam, December 8, 1997 .....	6-12
<i>Machin et al v. Tomlison</i> (2000), 51 OR (3d) (OCA) .....	6-13
<i>Maire, Beata Jolanta v. M.C.I.</i> (F.C.T.D., no. IMM-5420-98), Sharlow, July 28, 1999 .....	6-4
<i>Malik, Estelita v. M.E.I.</i> (I.A.B. 86-4271), Rayburn, Goodspeed, Petryshyn, April 11, 1988.....	6-4
<i>Mann, Paramjit Kaur v. M.E.I.</i> (IAD V89-00516), Chambers, Gillanders, Verma, March 20, 1990.....	6-11
<i>Martin, Juliee v. M.C.I.</i> (IAD V95-00961), Lam, October 18, 1996 .....	6-4
<i>Martin: M.C.I. v. Martin, Juliee Ida</i> (F.C.T.D., no. IMM-4068-96), Heald, August 13, 1997.....	6-4
<i>Meelu, Beant Singh v. M.C.I.</i> (F.C.T.D., no. IMM-841-99), Gibson, January 7, 2000.....	6-3
<i>Melo, Eduardo Manuel v. M.C.I.</i> (IAD T94-07953), Hoare, February 7, 2001 .....	6-18
<i>Nagra, Manjit Kaur v. M.C.I.</i> (IAD V95-02556), McIsaac, June 24, 1997 .....	6-9
<i>Nijjar (Mann), Gurtejpal Kaur v. M.C.I.</i> (IAD V98-03483), Borst, December 8, 2000.....	6-18
<i>Nirwan: M.C.I v. Nirwan, Malkiat Singh</i> (IAD VA0-01903), Clark, April 24, 2001 .....	6-19
<i>Noël, Mirlande v. M.C.I.</i> (IAD M98-03502), Sivak, June 9, 1999.....	6-2
<i>O'Brien v. Canada</i> (1993), 153 N.R. 313 (FCA).....	6-14
<i>Owens, Christine Janet v. M.E.I.</i> (F.C.A., no. A-615-83), Urie, Le Dain, Marceau, March 27, 1984.....	6-10
<i>Parmar, Charanjit Singh v. M.C.I.</i> (IAD V98-04542), Boscariol, November 23, 1999 .....	6-7
<i>Parmar, Kuljit Kaur v. M.C.I.</i> (IAD VA1-03015), Boscariol, May 13, 2002.....	6-20
<i>Pharwaha, Mandeep Singh v. M.C.I.</i> (IAD T97-02897), D'Ignazio, February 24, 1999.....	6-2
<i>Pillai, Rajkumar Vadugaiyah v. M.C.I.</i> , (F.C.T.D., Imm-6124-00), Gibson, December 21, 2001 .....	6-14
<i>Rattan, Sushmendra Kaur v. M.E.I.</i> (F.C.T.D., no. IMM-28-93), Reed, January 19, 1994 .....	6-2
<i>S.G.C. v. Bisla, Satvinder</i> (F.C.T.D., no. IMM-5690-93), Denault, November 28, 1994 .....	6-2
<i>Sahota, Paramjit Kaur v. M.C.I.</i> (IAD VA0-00929), Baker, October 31, 2000 .....	6-18
<i>Salh, Surinder Kaur v. M.E.I.</i> (I.A.B. 87-9964), MacLeod, Chu, Townshend (dissenting), February 12, 1988 .....	6-8
<i>Samra, Kulwinder Kaur v. M.C.I.</i> (IAD VA0-01995), Baker, June 27, 2001 .....	6-20
<i>Samra, Sukhwinder Kaur v. M.C.I.</i> (IAD VA1-01988), Boscariol, December 14, 2001 .....	6-20
<i>Sandhu, Corazon Dalmacio Campos v. M.E.I.</i> (I.A.B. 86-4082), Rayburn, Goodspeed, Arkin, April 7, 1987 .....	6-4
<i>Sandhu, Daljit Kaur v. M.E.I.</i> (I.A.B. 87-6347), Mawani, October 20, 1987 .....	6-3
<i>Sandhu, Parkash Kaur v. M.C.I.</i> (IAD W98-00033), Wiebe, August 24, 1999.....	6-8
<i>Sandhu, Randeep Kaur v. M.C.I.</i> (IAD VA0-04145), Boscariol, December 14, 2001 .....	6-20
<i>Sangha (Mand), Narinder Kaur v. M.C.I.</i> (IAD V97-01626), Carver, September 21, 1998.....	6-7
<i>Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.</i> (1998), 47 D.L.R. (4 <sup>th</sup> ).....	6-15
<i>Sau, Cecilia Mui Fong v. M.C.I.</i> (IAD V96-00079), Boscariol, January 2, 1997 .....	6-4

<i>Sekhon, Amrik Singh v. M.C.I.</i> (F.C.T.D. IMM-1982-01), McKeown, December 12, 2001.....	6-16
<i>Sekhon, Jagdev Singh v. M.C.I.</i> (IAD V97-02348), Borst, November 24, 1998.....	6-8
<i>Sekhon: M.C.I. v. Sekhon, Amrik Singh</i> (IAD T99-05069), Sangmuah, March 30, 2001 .....	6-13
<i>Shergill, Gurdawar Singh v. M.C.I.</i> (IAD V94-00986), McIsaac, November 30, 1995 .....	6-10
<i>Sidhu, Gurdip Singh v. M.E.I.</i> (IAD W90-00023), Goodspeed, Arpin, Rayburn, September 12, 1990.....	6-8
<i>Sidhu, Kulwant Kaur v. M.E.I.</i> (I.A.B. 88-35458), Ahara, Rotman, Eglington (dissenting), August 25, 1988 .....	6-3
<i>Singh, Muriel v. M.E.I.</i> (I.A.B. 86-1098), Angé, Cardinal, Lefebvre, January 8, 1987 .....	6-4
<i>Singh, Ranjit Kaur v. S.S.C.</i> (IAD T93-07239), Channan, Aterman, Ramnarine, July 29, 1994 .....	6-8
<i>Singh, Ravinder Kaur v. M.E.I.</i> (I.A.B. 86-10228), Chu, Suppa, Eglington (dissenting), August 8, 1988.....	6-3
<i>Singh: M.C.I. v. Singh, Jagdip</i> , (F.C.T.D., no. IMM-2297-01), Tremblay-Lamer, March 22, 2002; 2002 FCT 313.....	6-4
<i>Singh: M.E.I. v. Singh, Pal</i> (F.C.A., no. A-197-85), Lacombe, Urie, Stone, February 4, 1987. Reported: <i>Canada (Minister of Employment and Immigration) v. Singh</i> (1987), 35 D.L.R. (4th) 680 (F.C.A.) .....	6-3
<i>Su, Khang San v. S.S.C.</i> (IAD T93-12061), Aterman, June 1, 1994 .....	6-10
<i>Ta, Suy Khuong v. M.C.I.</i> (IAD W99-00121), D'Ignazio, November 21, 2000.....	6-11
<i>Tan, Kimeang v. M.C.I.</i> (IAD T96-05120), Kitchener, December 18, 1997.....	6-9
<i>Tong, Hing Nyap v. M.C.I.</i> (F.C.T.D., no. IMM-724-98), Strayer, August 19, 1998.....	6-8
<i>Toore, Jagraj Singh v. M.C.I.</i> (IAD V98-04536), Borst, February 7, 2000 .....	6-8
<i>Tran, Ai v. M.C.I.</i> (IAD T96-04689), Kitchener, October 24, 1997.....	6-9
<i>Tran, Viet Hung v. M.C.I.</i> (F.C.T.D., no. IMM-6290-00), Blanchard, November 15, 2001; 2001 FCT 1255 .....	6-2
<i>Tut, Sukhbir Singh v. M.C.I.</i> (IAD V98-03881), Mattu, March 7, 2002 .....	6-15
<i>Virk, Raspal Singh v. M.E.I.</i> (I.A.B. 86-9145), Fatsis, Arkin, Suppa, December 18, 1986. Reported: <i>Virk v. Canada (Minister of Employment and Immigration)</i> (1988), 2 Imm. L.R. (2d) 127 (I.A.B.) .....	6-6
<i>Wu, Nai Him v. M.C.I.</i> (IAD V99-01203), Cochran, May 8, 2000 .....	6-3

# CHAPTER 7

## Table of Contents

<b>7. RELATIONSHIP</b> -----	<b>7-1</b>
<b>7.1. GENERALLY</b> -----	<b>7-1</b>
<b>7.2. NOT A MEMBER OF THE FAMILY CLASS</b> -----	<b>7-3</b>
7.2.1. The Definition-----	7-3
7.2.2. Jurisdiction-----	7-5
<b>7.3. TIMING</b> -----	<b>7-7</b>
7.3.1. History of the Relevant Provisions of the <i>Immigration Regulations, 1978</i> -----	7-8
7.3.2. Determining the Relevant Provision to Apply-----	7-9
7.3.2.1. <i>Kahlon</i> -----	7-9
7.3.2.1.1. Exceptions-----	7-10
7.3.2.2. <i>Lidder</i> -----	7-10
7.3.2.3. <i>Lidder, Kahlon</i> and section 11 of SOR/92-101-----	7-10
7.3.2.4. Other Caselaw-----	7-11
<b>7.4. SPECIFIC RELATIONSHIPS</b> -----	<b>7-12</b>
7.4.1. “Unmarried Son” and “Unmarried Daughter”-----	7-12
7.4.2. “Dependent Daughter” and “Dependent Son”-----	7-12
7.4.2.1. Definitions-----	7-12
7.4.2.2. Timing-----	7-14
7.4.2.3. Student status-----	7-16
7.4.2.3.1. Requirement to be “continuously enrolled and in attendance”-----	7-18
7.4.2.3.1.1. When does the program of studies end and the period of interruption begin?-----	7-20
7.4.2.3.1.2. How is “an aggregate period not exceeding one year” calculated?-----	7-24
7.4.2.3.2. The Educational Institution-----	7-26
7.4.2.4. Physical or Mental Disability-----	7-27
7.4.3. “Spouse”-----	7-28
7.4.3.1. “Timing”-----	7-28
7.4.4. “Fiancé”-----	7-28
7.4.5. “Dependant”-----	7-28

## CHAPTER 7

### 7. RELATIONSHIP

#### 7.1. GENERALLY

A permanent resident or a Canadian citizen<sup>1</sup> may sponsor the application for permanent residence (application for landing) of a member of the family class.<sup>2</sup>

Membership in the family class is determined by the relationship of the applicant to the sponsor. Applicants who qualify as family class members may bring their dependants<sup>3</sup> to Canada with them.<sup>4</sup> Those dependants may, or may not be, members of the family class in relation to the sponsor. For example, where the sponsor sponsors the application of his wife and their minor son, both the wife and son are members of the family class. In addition to being the dependant of the wife, the child is also the dependent son of the sponsor. On the other hand, if the sponsor sponsors the application of his wife and minor step-son whom he has not adopted, only the wife is a member of the family class. The stepson is the dependant of the wife and is eligible to come to Canada on that basis; however, the child is not the dependent son of the sponsor, as he does not come within the definition of “son” in section 2(1) of the Regulations. Nor does he come within any of the other categories of the family class.

In *Gill*,<sup>5</sup> the refusal was based on the fact that the applicants were not the orphaned nephews of the sponsor. While the applicants were orphans, they were not his nephews. They could, nevertheless, have been members of the family class if the sponsor had communicated his intention to adopt the children to the visa officer. It was incumbent on the sponsor to do so and it was found that such an intention probably arose only after the refusal. Moreover, there was no credible evidence that the sponsor still intended to adopt the children.

---

<sup>1</sup> Section 2(1) of the *Regulations*, defines “sponsor” as “a Canadian citizen or permanent resident who is at least 19 years of age, who resides in Canada and who sponsors an application for landing.” This definition was amended effective April 1, 1997 to state more clearly the residency requirements. “Landing” is defined in section 2(1) of the Act as “lawful permission to establish permanent residence in Canada.”

<sup>2</sup> Pursuant to section 6(2) of the Act and section 6.1(1) of the Regulations. “Member of the family class” is defined in section 2(1) of the Regulations.

<sup>3</sup> The relevant definition of “dependant” in section 2(1) of the Regulations, is as follows:

(c) with respect to a person [...] (i) the spouse of that person, (ii) any dependent son or dependent daughter of that person or of the spouse of that person, and (iii) any dependent son or dependent daughter of a son or daughter referred to in subparagraph (ii).

<sup>4</sup> Pursuant to section 6(1)(a) of the Regulations, which provides:

6.(1) Subject to [...], 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

(a) he and his dependants, whether accompanying dependants or not, are not members of any inadmissible class and otherwise meet the requirements of the Act and these Regulations.

<sup>5</sup> *Gill, Balwant Singh v. M.C.I.* (IAD V96-00795), Boscariol, February 4, 1998.

In *Tomy*,<sup>6</sup> the application for permanent residence was refused as the visa officer found the applicant not to be the sponsor's dependent daughter. After the appeal had commenced, the sponsor's husband, the applicant's father, died. The panel found that the applicant then became a member of the family class under paragraph (h) of the definition of "member of the family class" (see section 7.2.1. which sets out the definition).

In *Buttar*,<sup>7</sup> the application for permanent residence included the sponsor's mother and her dependant, the sponsor's adopted sister. After the filing of the notice of appeal, the principal applicant died. The panel dismissed the appeal for lack of jurisdiction. At the times of filing and refusal, only the mother was a member of the family class. The applicant could not be considered a co-applicant with the right to have her application continue to be processed. The applicant must apply for landing as a member of the family class if she wishes to be landed under that category.

If the application is refused by an immigration officer or a visa officer,<sup>8</sup> the sponsor may appeal that refusal to the Immigration Appeal Division.<sup>9</sup> The issue of whether or not an applicant is a member of the family class is a jurisdictional issue, that is, for the Appeal Division to assume jurisdiction, the applicant must be found to be a member of the family class.

The principal applicant must establish that she/he is a member of the family class and that all of her/his accompanying dependants meet the definition of "dependant."<sup>10</sup> Further, the family class applicant must establish that all of her/his dependants, whether accompanying or not, meet the requirements of the Act and the Regulations.<sup>11</sup>

In *Savehilaghi*,<sup>12</sup> the application for landing included the wife, as the principal applicant, and her dependent son. After the filing of the appeal, the principal applicant gave up custody of the child to the child's paternal grandfather. The panel held that the child was still her dependant. Section 6(5)(a)(ii) of the Regulations would only apply if custody had vested in the former spouse. In another case,<sup>13</sup> section 9(2)(a)(ii) of the Regulations<sup>14</sup> was interpreted to require sole custody or guardianship. Therefore, the appeal was allowed as the applicant and his former spouse had joint custody and guardianship of the applicants. Section 6(5) makes no

---

<sup>6</sup> *Tomy, Teresa v. M.C.I.* (IAD T96-05836), Calvin, March 16, 1998.

<sup>7</sup> *Buttar, Jasvir Singh v. M.C.I.* (IAD V96-02982), Boscariol, March 23, 1998.

<sup>8</sup> Pursuant to section 77(1) of the Act.

<sup>9</sup> Pursuant to section 77(3) of the Act.

<sup>10</sup> Section 2(l) of the Regulations, *supra*, footnote 3.

<sup>11</sup> Pursuant to section 6(1)(a) of the Regulations, subject to the exceptions set out in section 6(5)(a) of the Regulations.

<sup>12</sup> *Savehilaghi, Hasan v. M.C.I.* (IAD T97-02047), Calvin, June 4, 1998.

<sup>13</sup> *Zadorojnyi, Alexandre v. M.C.I.* (IAD V98-03484), Singh, September 16, 1999.

<sup>14</sup> This section applies where the immigrant is not a member of the family class, an assisted relative or a Convention refugee. The wording is the same.

reference to , and therefore no exception for, runaways or persons unwilling to comply or to be included in the application for permanent residence.<sup>15</sup>

A refusal based on lack of proof of relationship involves a factual determination made after an assessment of all the evidence. Each case will be decided on its own particular facts. Findings of credibility play a decisive role in the outcome of these appeals.

An applicant may submit false, contradictory or unverifiable documents to prove relationship. A refusal could be justified in circumstances that lead a visa officer to conclude that relationship has not been established. On appeal, the Appeal Division will have the benefit of the sponsor's evidence under oath as well as additional documentary evidence<sup>16</sup>. The visa officer's decision may be overturned in the face of this new evidence.

The starting point for considering a refusal founded on lack of proof of relationship is to look to the definition of the particular relationship which is in issue.

## **7.2. NOT A MEMBER OF THE FAMILY CLASS**

### **7.2.1. The Definition**

The definition of "member of the family class" in section 2(1) of the Regulations is as follows:

"member of the family class," with respect to any sponsor, means

- (a) the sponsor's spouse,
- (b) the sponsor's dependent son or dependent daughter,
- (c) the sponsor's father or mother,
- (d) the sponsor's grandfather or grandmother,
- (e) the sponsor's brother, sister, nephew, niece, grandson or granddaughter, who is an orphan and is under 19 years of age and unmarried,
- (f) the sponsor's fiancée,
- (g) any child under 19 years of age whom the sponsor intends to adopt and who is
  - (i) an orphan,
  - (ii) an abandoned child whose parents cannot be identified,

---

<sup>15</sup> *Johnson, Ann Marie v. M.C.I.* (IAD T98-00316), Boire, November 18, 1998.

<sup>16</sup> *Eshete, Hanna Belyna v. M.C.I.* (F.C.T.D., no. IMM-3610-00), McKeown, February 2, 2001. [Judicial review of IAD M98-06224, Bourbonnais, February 29, 2000.] The Court deferred to the reasonable finding by the IAD that the two siblings were not members of the family class, because the evidence with respect to their ages was inconclusive. "The panel reached the conclusion that the appellant had failed to establish, on the balance of probabilities, the age of her sister Tigist and her brother Fiseha. She simply said she did not know their birth dates, and the documentary evidence filed is, by her own admission, inconclusive. The other documents filed by the appellant, i.e. the baptismal certificates of Tigist and Fiseha, the contents of which were confirmed by a journalist called Abiy Mekuria, cannot be given any more weight, firstly because they were issued on January 30, 1995, i.e. after the persons concerned had applied for permanent residence in Canada, and secondly because the information they contain was also provided by interested parties who made the declarations of birth."

- (iii) a child born outside of marriage who has been placed with a child welfare authority for adoption,
- (iv) a child whose parents are separated and who has been placed with a child welfare authority for adoption, or
- (v) a child one of whose parents is deceased and who has been placed with a child welfare authority for adoption, or
- (h) one relative regardless of the age or relationship of the relative to the sponsor, where the sponsor does not have a spouse, son, daughter, father, mother, grandfather, grandmother, brother, sister, uncle, aunt, nephew or niece
  - (i) who is a Canadian citizen,
  - (ii) who is a permanent resident, or
  - (iii) whose application for landing the sponsor may otherwise sponsor.<sup>17</sup>

The following persons are excluded from the family class:

- (a) the applicant's spouse,<sup>18</sup>
  - where the applicant and spouse are separated and no longer cohabiting,
  - and by virtue of section 6(5)(a)(i) of the Regulations, the spouse's admissibility to Canada is not assessed.
- (b) the son or daughter of the applicant or of the applicant's spouse,<sup>19</sup>
  - where the separated and non-cohabiting spouse, or the applicant's former spouse, has custody of the child,
  - and by virtue of section 6(5)(a)(ii) of the Regulations, the son's or daughter's admissibility to Canada is not assessed.<sup>20</sup>
- (c) the sponsor's spouse,
  - where the spouse "entered 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."<sup>21</sup>
- (d) a person who is adopted, or is intended to be adopted,

---

<sup>17</sup> The Appeal Division held that "relative" in section 2(1)(h) is to be given a broad interpretation and includes persons connected by ties of affinity as well as consanguinity: *Mlinarich, Cecilia Lucy v. M.C.I.* (IAD T99-04979), Buchanan, September 22, 2000.

<sup>18</sup> Pursuant to section 4(2) of the Regulations.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Singh, Ajmer v. M.C.I.* (IAD TA0-03130), Sangmuah, July 4, 2001. However, see *Nenadic, Miroslav v. M.C.I.* (VA1-03824), Boscariol, September 18, 2002 where the panel held that the visa officer's failure to properly inform and advise the sponsor the effect and consequences of not having his son examined for admissibility at the time the sponsor himself applied for permanent residence was a breach of procedural fairness, given the sponsor's expressed desire at the time of someday obtaining custody and having his son join him in Canada. [This case is noted notwithstanding the date of the update is July 1, 2002.]

<sup>21</sup> Section 4(3) of the Regulations. For a discussion of the application and interpretation of this provision, see chapter 6, "Marriages and Engagements for Immigration Purposes."

where the adoption is not in accordance with the *Convention on Protection of Children and Co-operation in respect of Intercountry Adoption*,<sup>22</sup> where the province of intended destination and the country of origin have implemented the Convention.

(e) a spouse who is less than 16 years of age<sup>23</sup>

Note also that an applicant who was “opted-out” pursuant to section 6(5)(a)(iii) of the Regulations is excluded from the family class.<sup>24</sup> The opting-out provision was revoked on March 27, 1992 by SOR/92-101.

### 7.2.2. Jurisdiction

The Appeal Division has the jurisdiction and obligation to decide whether an appeal comes within section 77 of the Act, and thus whether the Appeal Division has authority to hear the appeal.<sup>25</sup> In making this decision, it must determine certain jurisdictional facts.<sup>26</sup>

For example, in *Malik*,<sup>27</sup> according to the documents, the principal applicant would have been 55 years old when she gave birth to her son. Evidence of the birth appeared genuine. The panel determined that it was more likely that the records with respect to her age were not accurate and the unmarried son was her dependant. In *Cheng*,<sup>28</sup> the sponsor claimed the certificate of adoption that was used to obtain the applicant’s passport was false and the child lived with her maternal aunt because of China’s one child policy. In the absence of evidence of Chinese adoption law and since the Chinese authorities had accepted the certificate, the panel found the applicant had been adopted and was not a member of the family class. In *Johal*,<sup>29</sup> the visa officer’s investigation established that the applicant was married. The visa officer did not search any marriage registry or attempt to find anyone who had attended the marriage. Several of the villagers the visa officer interviewed recanted. The panel determined on a balance of probabilities that the applicant was unmarried. In another spousal sponsorship,<sup>30</sup> despite a marriage certificate filed by the former spouse in her application for permanent residence, other evidence established that the sponsor’s first marriage had been contracted under the customary

---

<sup>22</sup> For a more detailed discussion, see chapter 4, “Adoptions.”

<sup>23</sup> Section 4(3.1) of the Regulations. This provision came into force on November 11, 1998. (SOR98/544)

<sup>24</sup> *Sheriff, Sithi Zehra v. M.E.I.* (F.C.A., no. A-152-93), Strayer, Linden, McDonald, November 2, 1995. Reported: *Sheriff v. Canada (Minister of Employment and Immigration)* (1995), 31 Imm. L.R. (2d) 246 (F.C.A.).

<sup>25</sup> Where the sponsor was not a permanent resident at the time of her son’s application for landing, the Appeal Division had no jurisdiction to hear the appeal: *Alexander, Margaret Leuth v. M.C.I.* (IAD V99-03966), Mattu, April 26, 2001.

<sup>26</sup> *Sheriff, supra*, footnote 24.

<sup>27</sup> *Malik, Mohammad F. v. M.C.I.* (IAD T94-05689), Kalvin, January 21, 1998.

<sup>28</sup> *Cheng (Zheng), Run De v. M.C.I.* (IAD T97-00078), Kitchener, January 21, 1998.

<sup>29</sup> *Johal, Sarabjit Kaur v. M.C.I.* (IAD V95-01029), Boscariol, May 21, 1997.

<sup>30</sup> *Iyamu, Lucky Ukponahunsi v. M.C.I.* (IAD T98-02216), Kelley, September 16, 1999.



law of Nigeria only. That marriage had been validly dissolved prior to his second marriage and the sponsor's second wife was a "spouse".

In *Sheriff*,<sup>31</sup> the Federal Court of Appeal held that the Appeal Division may examine the circumstances in which an opting-out declaration was made to determine its validity and its own jurisdiction in the appeal.

A sponsor has a right of appeal to the Appeal Division only when an application for landing made by a member of the family class is refused.<sup>32</sup> Thus, in order for the Appeal Division to accept jurisdiction, the applicant must establish that she/he is a member of the family class.

In *Bath*,<sup>33</sup> the second application for permanent residence was refused on the same basis as the first, that is, that the sponsor's sister had adopted the applicant. The panel held that this was the same issue, the same parties, the same law and the same factual matter to be determined and so the appeal was dismissed for lack of jurisdiction by reason of the application of *res judicata*<sup>34</sup>. This can be contrasted with the situation in *Koon*<sup>35</sup> where the applicant was first sponsored as a fiancée and refused and then sponsored again as a spouse. The matter was not *res judicata* as the refusals were not based on the same provisions. As well, the examination of the intention of the parties with respect to engagement and marriage are to be determined as at different dates.

Where the applicant is not a member of the family class, there is also no jurisdiction to consider the granting of special relief based on the existence of compassionate or humanitarian considerations.<sup>36</sup> For example, in *Bans*,<sup>37</sup> the sponsor conceded that the applicant had not been enrolled in any educational institution from August 1990 to July 1994, which disqualified the applicant as a dependent son. The sponsor wished to provide evidence of his financial support and evidence to establish the existence of compassionate and humanitarian considerations. Since the applicant was not a member of the family class, there was no jurisdiction to grant discretionary relief. For a discussion of the situation where alleged dependants are split from the application during processing, please refer to section 7.4.5., "Dependant."

---

<sup>31</sup> *Sheriff, supra*, footnote 24.

<sup>32</sup> *Bailon, Leonila Catillo v. M.E.I.* (F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986; *Chow, Sau Fa v. M.C.I.* (F.C.T.D., no. IMM-5200-97), Reed, July 29, 1998; sections 77(1) and 77(3)(a) of the Act. See also *Kaushal, Sushma Kumari v. M.E.I.* (I.A.B. 86-09045), Eglinton, Warrington, Rotman, March 27, 1987; *Mangat, Harpreet Kaur v. M.C.I.* (IAD V95-02807), Boscariol, July 18, 1997; and *Sandhawal, Baljit Kaur v. M.C.I.* (IAD V95-01730), Boscariol, March 26, 1997.

<sup>33</sup> *Bath, Ragbir Singh v. M.C.I.* (IAD V95-01993), Lam, December 8, 1997. Reported: *Bath v. Canada (Minister of Citizenship and Immigration)* (1997), 42 Imm. L.R. (2d) 182 (I.A.D.).

<sup>34</sup> See Chapter 6 - 6.7 for a detailed analysis of the issues *res judicata* and abuse of process.

<sup>35</sup> *Koon, Chun Wah v. M.C.I.* (IAD T97-05159), Wales, October 1, 1999.

<sup>36</sup> Section 77(3)(b) of the Act provides for an appeal on compassionate or humanitarian grounds.

<sup>37</sup> *Bans, Hari v. M.C.I.* (IAD V96-00986), Singh, March 11, 1997.

### 7.3. TIMING

The definitions relevant to determining whether an applicant is a member of the family class or a dependant have been amended over the years. Since the processing of applications for permanent residence can take years, the relevant definitions must be ascertained. In determining which definitions apply, section 11 of SOR/92-101, the *Interpretation Act*<sup>38</sup> and the Federal Court decisions of *McDoom*,<sup>39</sup> *Kahlon*,<sup>40</sup> and *Lidder*<sup>41</sup> should be considered.

Where an undertaking of assistance was filed prior to March 27, 1992, the definitions that were in effect prior to March 27, 1992 continue to apply to the application.<sup>42</sup> However, such applications are still subject to amendments made to other provisions of the Regulations, after that date.<sup>43</sup>

In *Mascardo*,<sup>44</sup> the applications of the sponsor's adopted sons were refused in 1991, as the sons had each attained the age of 13 years. The appeal was heard in 1993, by which time the relevant definition had been amended to include persons adopted before attaining the age of 19 years. Following *Kahlon*,<sup>45</sup> the panel applied the then current definition.

---

<sup>38</sup> R.S.C. 1985, c. I-21.

<sup>39</sup> *McDoom v. Canada (Minister of Manpower and Immigration)*, [1978] 1 F.C. 323 (C.A.).

<sup>40</sup> *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.).

<sup>41</sup> *Canada (Minister of Employment and Immigration) v. Lidder*, [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.).

<sup>42</sup> Section 11 of SOR/92-101 preserved that right. Section 11, which came into force on March 27, 1992, provides:

11. The *Immigration Regulations, 1978*, as they read immediately before the coming into force of these amendments, shall continue to apply in respect of any member of the family class where, before the date of the coming into force of these amendments,

(a) a sponsor residing in Quebec has submitted a Form 1344 on behalf of that person to the Minister; or

(b) any other sponsor has given an undertaking to the Minister.

<sup>43</sup> For an illustration, see *Dular, Shiu v. M.C.I.* (IAD V93-02409), Ho, Lam, Verma, February 22, 1996. On judicial review, the Federal Court agreed with the panel's determination as to which regulations were applicable: see *M.C.I. v. Dular, Shiu* (F.C.T.D., no. IMM-984-96), Wetston, October 21, 1997. However, the Federal Court allowed the application for judicial review and the matter was referred back to the Appeal Division, see below, footnote 55.

<sup>44</sup> *Mascardo, Angelina Gelera v. M.E.I.* (IAD T92-07718), Ahara, April 23, 1993.

<sup>45</sup> *Kahlon, supra*, footnote 40.

### 7.3.1. History of the Relevant Provisions of the *Immigration Regulations, 1978*

The definitions of “dependent son” and “dependent daughter” were created on March 27, 1992.<sup>46</sup> “Dependent son”<sup>47</sup> and “dependent daughter”<sup>48</sup> replaced “unmarried son” and “unmarried daughter,”<sup>49</sup> and introduced a dependency test. The definition of “dependant” was also amended on March 27, 1992, and the provision allowing for “opting out” of dependants was revoked. In addition, section 11 of the amending instrument (SOR/92-101) provided that the former regulations continued to apply to those applications where the undertaking had been filed before March 27, 1992. The Appeal Division, in applying section 11, has narrowed its application to the changes made by SOR/92-101, in that applicants are still affected by, and able to benefit from, certain favourable amendments made to the Regulations after that date.<sup>50</sup>

The term “member of the family class” is currently defined in section 2(1) of the Regulations. However, prior to February 1, 1993, the family class was not defined in the definition section of the Regulations. Section 4 of the Regulations described those persons who could be sponsored as members of the family class. On February 1, 1993,<sup>51</sup> the section 4 provisions regarding whom could be sponsored were transferred to the new definition of “member of the family class.”

The definitions “son” and “daughter” were also amended on February 1, 1993<sup>52</sup> to raise the age by which an applicant must have been adopted from 13 years<sup>53</sup> to 19 years.<sup>54</sup> While the age

---

<sup>46</sup> SOR/92-101.

<sup>47</sup> The definition is found in section 2(1) of the Regulations.

<sup>48</sup> *Ibid.* The definition is quoted in full at section 7.4.2.1., “Definitions.”

<sup>49</sup> Section 4(1) of the Regulations, provided (prior to March 27, 1992):

4.(1) [...] every Canadian citizen and every permanent resident may [...] sponsor an application for landing made

(b) by his unmarried son or daughter.

<sup>50</sup> See *Jimenez, Pedro Lucas v. M.E.I.* (IAD V91-01572), Wlodyka, Gillanders, MacLeod, February 24, 1993. Reported: *Jimenez v. Canada (Minister of Employment and Immigration)* (1993), 19 Imm. L.R. (2d) 124 (I.A.D.), where the Appeal Division held the relevant definitions to be “unmarried son” and the subsequent more favourable definition of “son.” To the same effect, see *Dular, supra*, footnote 43 (I.A.D.). On judicial review, the Federal Court agreed with the panel’s determination as to which regulations were applicable: see *Dular, supra*, footnote 43 (F.C.T.D.).

<sup>51</sup> SOR/93-44.

<sup>52</sup> SOR/93-44.

<sup>53</sup> Prior to February 1, 1993, the definitions read as follows:

“daughter” means, with respect to a person, a female

(a) who is the issue of that person and who has not been adopted by another person, or

(b) who has been adopted by that person before having attained thirteen years of age.

“son” means, with respect to a person, a male

(a) who is the issue of that person and who has not been adopted by another person, or

(b) who has been adopted by that person before having attained thirteen years of age.

requirement was found to violate section 15 of the *Canadian Charter of Rights and Freedoms*, the Appeal Division found that the provision is saved under section 1 of the *Charter*. The objective of limiting the sponsorship of adults as members of the family class outweighs the infringement on the ability of adoptive parents of adults to sponsor their children.<sup>55</sup> This change to the age requirement came into effect in conjunction with amendments to the definition of “adopted”.<sup>56</sup> On March 17, 1994, the Regulations were again amended by section 6(1.01) to ensure the exclusion of adoptions of convenience extended retroactively to applications pending on April 15, 1994.

### 7.3.2. Determining the Relevant Provision to Apply

The determination of whether an applicant is a member of the family class is a jurisdictional question. Determining which definition to apply is part of that question. Consequently, the Appeal Division should make its own determination of the issue and may raise the matter on its own initiative.<sup>57</sup>

#### 7.3.2.1. *Kahlon*

In *Kahlon*,<sup>58</sup> the Federal Court held that an appeal from a refusal of a sponsored application for landing is a hearing *de novo* in the broadest sense. Hence, the Appeal Division is to apply the law as it reads at the time of the hearing. In *Kahlon*, the Regulations had been amended between the time of the refusal and the hearing. At the time of the hearing, the principal applicant’s “illegitimate” children qualified as dependants. The principle of *de novo* hearing established by *Kahlon* yields to a contrary intent expressed in legislation or regulation.

---

<sup>54</sup> Section 2(1) of the Regulations now provides:

“daughter” means, with respect to a person, a female

- (a) who is the issue of that person and who has not been adopted by another person, or
- (b) who has been adopted by that person before having attained 19 years of age.

“son” means, with respect to a person, a male

- (a) who is the issue of that person and who has not been adopted by another person, or
- (b) who has been adopted by that person before having attained 19 years of age.

<sup>55</sup> *Dular, Shiu v. M.C.I.* (IAD V93-02409), Boscariol, May 24, 2000 (reasons signed June 5, 2000).

<sup>56</sup> For a more detailed discussion on determining whether the applicant has been “adopted,” see chapter 4, “Adoptions.”

<sup>57</sup> Section 69.4(2) of the Act provides:

69.4(2) The Appeal Division has, in respect of appeals made pursuant to sections [...] 77, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to [...] the refusal to approve an application for landing made by a member of the family class.

<sup>58</sup> *Kahlon, supra*, footnote 40.

### 7.3.2.1.1. Exceptions

In the case of an amendment which is detrimental to the applicant, the Appeal Division must consider the *Interpretation Act* provisions which preserve rights accrued before the amendment.<sup>59</sup> The Federal Court in *Kahlon* did not need to consider those provisions, as the changes benefited the applicants. In *McDoom*,<sup>60</sup> the Federal Court held that applicants should not be prejudiced by additional requirements imposed by amendments made to the Regulations after the application date.

Section 11 of SOR/92-101 provides that the former Regulations continue to apply to those applications where the undertaking has been given before March 27, 1992. The Appeal Division, in applying section 11, has narrowed its application to the changes made by SOR/92-101, in that applicants are still affected by, and able to benefit from, certain favourable amendments made to the Regulations after that date.<sup>61</sup>

### 7.3.2.2. Lidder

The effective date of a sponsored application for permanent residence is the date the application for permanent residence (application for landing) is filed.<sup>62</sup> It does not matter that the requirements for membership in the family class were met prior to that date if they are no longer met by the date of the application.

### 7.3.2.3. Lidder, Kahlon and section 11 of SOR/92-101

SOR/92-101 came into effect after the *Kahlon* and *Lidder* decisions were rendered. Hence, as a regulatory provision, it takes precedence over these decisions where they come into conflict.

In the case of undertakings filed before March 27, 1992, the law that applies is the Regulations as they read before their amendment by SOR/92-101 on March 27, 1992.

Where the undertaking was filed on or after March 27, 1992, the law that applies is the law as it read on the date of filing of the application for permanent residence.<sup>63</sup>

---

<sup>59</sup> Section 43 of the *Interpretation Act* provides:

43. Where an enactment is repealed in whole or in part, the repeal does not [...]

(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed.

<sup>60</sup> *McDoom*, *supra*, footnote 39.

<sup>61</sup> See *Jimenez*, *supra*, footnote 50, where the Appeal Division held the relevant definitions to be “unmarried son” and the subsequent more favourable definition of “son.” To the same effect, see *Dular*, *supra*, footnote 43 (I.A.D.). On judicial review, the Federal Court agreed with the panel’s determination as to which regulations were applicable: see *Dular*, *supra*, footnote 43 (F.C.T.D.).

<sup>62</sup> *Lidder*, *supra*, footnote 41.

<sup>63</sup> See, for example, *M.C.I. v. San Luis, Luzviminda Peralta* (F.C.T.D., no. IMM-5054-94), Dubé, July 6, 1995; and *M.C.I. v. Nikolova, Velitchka* (F.C.T.D., no. IMM-16-95), Wetston, October 10, 1995. In these cases, both

#### 7.3.2.4. Other Caselaw

*Mahmood*<sup>64</sup> concerned an application by the sponsor's sister under paragraph 2(1)(h), namely as a relative of a sponsor who does not have in Canada a relative of a prescribed kind. Between the time of the application and the date of her interview by the visa officer, the sponsor's spouse, two other sisters and a brother had been granted permanent resident status. The Federal Court held that the Regulations and the underlying policy suggest that, as a general rule, a visa officer may issue a visa only if the applicant satisfies the statutory requirements for eligibility at the date of the decision.

In a few decisions, the Federal Court does not appear to have considered section 11 of SOR/92-101 or section 6(6)<sup>65</sup> of the Regulations in reaching its decision.<sup>66</sup>

In one decision,<sup>67</sup> the Federal Court held that applications that were filed, at the request of the Minister, during the processing of an "in-Canada" application for permanent residence of the applicants' mother, had to be processed and either granted or refused. It did not matter that the applications were requested only to obtain information with regard to the processing of the mother's application. Further, since these applications were still outstanding when the mother sponsored her children, their applications became sponsored applications when the undertaking was filed. It did not matter that the mother was not eligible to sponsor the applications when they were filed. The date of the original applications was the effective date of the application. The Court went on to find that the applicants were entitled to be processed under the laws in effect at the time the applications were filed. In this case, the original applications were filed in August of 1990. According to section 11 of SOR/92-101, the former definitions only continued to apply to applications in which the undertaking had been filed prior to March 27, 1992. Since the undertaking was filed in December of 1992, the current definitions of "dependent son" and "dependent daughter" should have applied to these applications, even if they were filed in August of 1990. In this case, the Court did not consider section 11 of SOR/92-101 and to that extent, the decision regarding the applicable law is *per incuriam*, and not binding.

In a more recent decision of the Federal Court, the application for permanent residence was refused by the visa officer on the ground that the adoption was one of convenience. The Appeal Division allowed the appeal on the basis that section 6(1)(e) does not apply to applications for permanent residence still pending on April 15, 1994 for which the undertaking of assistance was filed prior to March 27, 1992. This position is consistently taken by the Appeal Division. The Court disagreed, stating:

---

the undertaking and the applications were filed after March 27, 1992, and the Court only makes reference to *Lidder* in determining the applicable law.

<sup>64</sup> *Mahmood, Zia v. M.C.I.* (F.C.T.D., no. IMM-4616-99), Evans, August 23, 2000. [Judicial review of IAD V98-02242, Borst, August 26, 1999.]

<sup>65</sup> See section 7.4.2.2., "Timing."

<sup>66</sup> In *San Luis and Nikolova, supra*, footnote 63, the Court makes broad statements which could be interpreted as meaning that the date of the undertaking is not relevant. However, the Court did not consider section 11 or section 6(6), nor was it strictly necessary for it to do so on the facts of the cases.

<sup>67</sup> *M.C.I. v. Jimenez, Emilia* (F.C.T.D., no. IMM-415-95), Teitelbaum, October 23, 1995.

...by virtue of subsection 6(1.01) of the Regulations, paragraph 6 (1) (e) of the Regulations applies to person [sic] who applied for landing in Canada as members of the family class, regardless of when their applications were made or received and of when undertakings of support for them were filed, if their applications were pending at the 15<sup>th</sup> of April, 1994 and if, at the time their applications are being dealt with, they are persons described in paragraph (b) of the definition “member of the family class” in subsection 2 (1) of the Regulations. On the facts of this matter, the applicant was such a person.<sup>68</sup>

In *Mouait*<sup>69</sup> the Appeal Division considered the situation where the sponsor initiated the undertaking to sponsor her orphaned brother almost a year prior to the applicant’s 19<sup>th</sup> birthday. A number of errors on the part of the department resulted in the undertaking being perfected, and his application for landing being made, well after his 19<sup>th</sup> birthday. The panel found there were extraordinary circumstances to consider the lock-in date to be the date of the undertaking and they deemed the undertaking to have been perfected prior to the applicant’s 19<sup>th</sup> birthday.

## **7.4. SPECIFIC RELATIONSHIPS**

### **7.4.1. “Unmarried Son” and “Unmarried Daughter”**

If the Appeal Division determines that the definitions of “unmarried son” and “unmarried daughter” that pre-date March 27, 1992 apply, then it will go on to determine whether a particular applicant can satisfy the relevant definition. In making this determination, the Appeal Division should also consider the definition of “unmarried” and the appropriate definitions of “son” and “daughter.”<sup>70</sup> “Unmarried” was defined, prior to March 27, 1992, as “[...] not married and has never been married.”<sup>71</sup> This determination is a factual one based on the evidence presented to the Appeal Division in each case.<sup>72</sup>

### **7.4.2. “Dependent Daughter” and “Dependent Son”**

#### **7.4.2.1. Definitions**

Section 2(1) of the Regulations provides:

“dependent daughter” means a daughter who

(a) is less than 19 years of age and unmarried,

---

<sup>68</sup> *M.C.I. v. Bal, Sarbjit Singh* (F.C.T.D., no. IMM-4547-98), Gibson, July 26, 1999 at paragraph 8. For a more detailed discussion on this issue, see Chapter 4, “Adoptions”.

<sup>69</sup> *Mouait, Zoubida v. M.C.I.* (IAD V98-04334), Cochran, Mattu, Baker, August 14, 2000.

<sup>70</sup> See *Jimenez, Pedro Lucas, supra*, footnote 50 and *Dular, supra*, footnote 43 (I.A.D.).

<sup>71</sup> On March 27, 1992, the definition of “unmarried” was revoked.

<sup>72</sup> For examples of such determinations, see *Khan, Idrees Azmatullah v. M.E.I.* (IAD V92-01293), Gillanders, MacLeod, Verma, March 4, 1993; and *Abraham, Adam Ahmed v. M.E.I.* (IAD T92-09223), Fatsis, November 16, 1993.

(b) is enrolled and in attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution and

(i) has been continuously enrolled and in attendance in such a program since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, to be wholly or substantially financially supported by her parents since attaining 19 years of age or, if married before 19 years of age, the time of her marriage, or

(c) is wholly or substantially financially supported by her parents and

(i) is determined by a medical officer to be suffering from a physical or mental disability, and

(ii) is determined by an immigration officer, on the basis of information received by the immigration officer, including information from the medical officer referred to in subparagraph (i), to be incapable of supporting herself by reason of such disability.

The definition of “dependent son” is identical except for references to gender.

In determining whether the applicants are members of these classes, the definitions of “daughter” and “son” and sections 2(7) and 6(6)<sup>73</sup> of the Regulations should also be considered.

The current definitions of “daughter” and “son” are as follows:<sup>74</sup>

“daughter” [“son”] means, with respect to a person, a female [a male]

(a) who is the issue of that person and who has not been adopted by another person, or

(b) who has been adopted by that person before having attained 19 years of age.

Section 2(7) of the Regulations provides:

2.(7) For the purposes of subparagraph (b)(i) of the definitions “dependent son” and “dependent daughter”, where a person has interrupted a program of studies for an aggregate period not exceeding one year, the person shall not be considered thereby to have failed to have continuously pursued a program of studies.

---

<sup>73</sup> See section 7.4.2.2., “Timing”.

<sup>74</sup> Section 2(1) of the Regulations. Refer also to section 7.3., “Timing,” regarding the appropriate version of the definitions to be used. See too *M.A.O. v. M.C.I.* (IAD T99-14852), Hoare, January 18, 2002 where the Appeal Division found that the applicant was not the “issue” of the appellant and that he was therefore not a dependent son. It held that “issue” has a clear biological element and rejected the argument that the definitions of “issue” and “child of the marriage” accepted in Somali Islamic law should be applied.



To come within these definitions, a daughter or son has to establish dependency either by showing she/he is under 19 years of age and unmarried,<sup>75</sup> or by showing she/he is dependent due to a disability or full-time, continuous attendance at an educational institution. Section 2(7) of the Regulations allows the interruption of studies for an aggregate period not exceeding one year.

#### 7.4.2.2. Timing

Section 6(6) of the Regulations provides:

6.(6) A visa officer shall not issue an immigrant visa to a dependent son or dependent daughter referred to in paragraph (b) of the definition “member of the family class” in subsection 2(1) or a dependent son or dependent daughter of a member of the family class unless

(a) at the time the application for an immigrant visa is received by an immigration officer, the son or daughter meets the criteria respecting age, and marital or student status set out in the definition “dependent son” and “dependent daughter” in subsection 2(1); and

(b) at the time the visa is issued, the son or daughter meets the criteria respecting marital or student status set out in those definitions.

The date on which the requirements of the definition must be met is clarified by section 6(6) of the Regulations. The age requirement must be met at the time the application is filed, and the marital and student status requirements must be met both at the time of filing the application and when the visa is issued.

In one case, where the applicant met the definition of “dependent daughter” as a full-time student at the time of application and the time of refusal, she was not disqualified although at the time of the appeal, she had not been in school for more than a year. The panel interpreted section 6(6) of the Regulations to mean the relevant criteria had to be met at the time of the visa officer’s decision, which they were.<sup>76</sup> In another case, the Federal Court upheld the Appeal Division’s decision. It reasoned: “This does not mean that the hearing before the Appeal Division is not *de novo* in nature or that the panel cannot entertain new evidence. What it means is that the question of law that was before the visa officer was the same question that was before the Appeal Division. The panel was entirely correct therefore in holding that the relevant time for determination of “dependent son” was the date on which the visa officer made the decision not to issue the visas.”<sup>77</sup>

---

<sup>75</sup> Note that the definition of “unmarried” was revoked on March 27, 1992. Previously it was defined as “[...] not married and has never been married.”

<sup>76</sup> *Balanay, Dina Barreras v. M.C.I.* (IAD T96-03362), Townshend, June 11, 1998.

<sup>77</sup> *M.C.I. v. Fu, Yu Lan* (F.C.T.D., no. IMM-2386-99), Rouleau, June 27, 1999. [Judicial review of IAD T95-04950, Townshend, April 13, 1999.] However, see *Jammeh, Kebba v. M.C.I.* (IAD T99-07601), Whist, March 27, 2001 where the panel declined to follow the Federal Court, Trial Division in *Fu* and cited the principle established by the Federal Court of Appeal in *Kahlon, supra*, footnote 40.

The Federal Court seems to have come to the same conclusion in *Yep*.<sup>78</sup> The Court held that the visa officer had erred in finding that the applicant had not been continuously enrolled and in attendance as a student since attaining the age of 19 years. In referring the matter back to another visa officer, the Court stated that the applicant was not to be prejudiced by the passage of time. The new visa officer was to consider the matter as it stood at the time of the initial refusal.

However, in *Kanchan*<sup>79</sup>, the Appeal decision declined to follow *Balanay*<sup>80</sup> and held that the relevant criteria had to be met at the date of the hearing, as it is a hearing de novo, rather than at the date of refusal. In this case, the applicant was in full-time enrolment and attendance at the filing of the application and at the refusal. It was unfortunate that she was adversely affected by the erroneous decision of the visa officer but there was no evidence that she had been a student since April of 1998 to the time of the hearing in January of 2000.

In *Kaur*,<sup>81</sup> the Appeal Division came to the following conclusions regarding the interpretation of sections 6(6) and 2(7) of the Regulations in terms of paragraphs (a) and (b) of the definition of “dependent son”: (1) where an unmarried applicant files an application prior to attaining 19 years of age, he/she need not be a student at that time or become a student after attaining 19 years of age but he/she is required to remain unmarried until the visa is issued; (2) where an applicant is 19 years of age or over when he/she files an application, the applicant is required to be a student since attaining 19 years of age and wholly or substantially financially supported by his/her parents during the relevant period, and this student status must continue to exist at the time the visa is issued; (3) where an applicant is not in school when he/she turns 19, the one-year period in section 2(7) of the Regulations is calculated from when the applicant turned 19 years of age. In the particular case, since the applicant was not in school on the day he turned 19, section 2(7) applied from that date. The applicant returned to school within the one-year window allowed. He therefore met the definition of “dependent son”.

In *Soto*,<sup>82</sup> the applicant was 17 years of age at the time of filing his application for permanent residence. The initial refusal was based on the ground that the sponsor’s paternity had not been established. The Appeal Division allowed the appeal in August of 1996 and the application was refused again. The applicant had married in October of 1996 and he was no longer a “dependent son”. The panel interpreted section 6(6)(b) as meaning that if the applicant had originally qualified as a “dependent son” by being under 19 years and unmarried, and during the processing of his application, including any appeals, he had gone over the age of 19, he would continue to qualify as a “dependent son” so long as he remained unmarried, regardless of his student status. The panel distinguished both *Balanay*<sup>83</sup> and *Yep*<sup>84</sup>. Whether or not the

---

<sup>78</sup> *Yep, Zhi Tong v. M.C.I.* (F.C.T.D., no. IMM-4377-96), Muldoon, July 23, 1998.

<sup>79</sup> *Kanchan, Ramkoomarie v. M.C.I.* (IAD T99-06129), D’Ignazio, February 24, 2000. *Voronych, Anatoli v. M.C.I.* (IAD TA0-04441), Whist, March 27, 2001.

<sup>80</sup> *Balanay, supra*, footnote 76.

<sup>81</sup> *Kaur, Dalbir v. M.C.I.* (IAD T96-01560), Boire, July 8, 1998.

<sup>82</sup> *Soto, Hugo Alejandro v. M.C.I.* (IAD V97-02822), Carver, December 30, 1998.

<sup>83</sup> *Balanay, supra*, footnote 76.

<sup>84</sup> *Yep, supra*, footnote 78.

applicant was a “dependent son” was not *res judicata*. It does not matter that an applicant could not be sponsored earlier because he had to perform mandatory military service or that the military authorities would not allow him to enroll in a course of studies: the applicant was not a “dependent son” and the Appeal Division could provide no remedy.<sup>85</sup> Similarly, in *Tewg*,<sup>86</sup> the Federal Court found that the applicant had ceased to be a dependent son when his studies were interrupted as a result of mandatory military service for a two-year period. In that case, however, the Court held that the visa officer erred in not considering the “Last Remaining Family Members” policy in her assessment of humanitarian and compassionate grounds.

In another case, the sponsor sought to sponsor her daughter the day before the amendment to the Regulations which imposed an age requirement. The officer did not tell her that the change would come into effect the next day, and the sponsor could not complete an undertaking because no forms were available. There were still no forms available the next day. By the time she obtained the forms, the law had changed. The daughter’s application was refused due to her age. Had she filed the undertaking on the first day on which she requested the form, her daughter would have come within the definition of “unmarried daughter.” The Appeal Division allowed the appeal on the basis that the sponsor should not be penalized by the failure of immigration officials to assist her.<sup>87</sup>

#### 7.4.2.3. Student status

Paragraph (b) of the definition of “dependent daughter” and “dependent son” has two requirements: one relates to student status, the other to financial dependency. The applicant must meet both requirements to satisfy the definition.<sup>88</sup>

The daughter or son must be enrolled and in attendance at the time of the application and at the time that the visa is issued.<sup>89</sup> In addition, she/he must have been continuously enrolled and in attendance since reaching 19 years of age,<sup>90</sup> or if she/he married before the age of 19, since the time of the marriage.

Even though an applicant had been continuously enrolled and in attendance at an educational institution since the date of the application, he was held not to be a “dependent son” because he had worked full time for one and one-half years after he turned 19 but before the application date.<sup>91</sup>

---

<sup>85</sup> *Sanchez, Lino v. M.C.I.* (IAD T94-02722), Ariemma, October 27, 1995.

<sup>86</sup> *Tewg, Jun-Yen v. M.C.I.* (F.C.T.D., no. IMM-4760-96), Rouleau, January 26, 1998. See also *Chang, Shun Ching v. M.C.I.* (IAD V95-01743), Singh, June 16, 1997.

<sup>87</sup> *Brown, Phillipa Patrice v. M.C.I.* (IAD T93-11210), Leousis, June 28, 1996.

<sup>88</sup> See, for example, *Casinathan, Anandarajan v. M.C.I.* (IAD T94-00402), Hopkins, October 19, 1994; and *Loyal, Harbhajan Singh v. M.C.I.* (IAD T93-12919), Muzzi, September 15, 1995.

<sup>89</sup> Section 6(6) of the Regulations. But see *Balanay, supra*, footnote 76.

<sup>90</sup> See *Kaur, Dalbir, supra*, footnote 81, regarding the application of section 2(7) of the Regulations where the applicant was not in school on turning 19.

<sup>91</sup> *Marikar, Fathuma Hooriya v. M.C.I.* (IAD T94-00362), Muzzi, July 17, 1995.

In *Szikora-Rehak*,<sup>92</sup> 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,<sup>93</sup> 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 daughter".

In *Tiri*,<sup>94</sup> 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 son."

In *Huang*,<sup>95</sup> 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.

In *Bains*,<sup>96</sup> 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 financially supported by his parents.

Credibility is 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.<sup>97</sup> In another,<sup>98</sup> 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. In *Huang*,<sup>99</sup> the issue was whether or not the applicant had been continuously enrolled and in attendance in school from 1993 to 1997. Contradictory evidence had been provided to the visa post and during an interview, the applicant was unable to

---

<sup>92</sup> *Szikora-Rehak, Terezia v. M.C.I.* (IAD V97-01559), Jackson, April 24, 1998.

<sup>93</sup> *Popov, Oleg Zinovevich v. M.C.I.* (IAD T97-05162), Aterman, November 26, 1998.

<sup>94</sup> *Tiri, Felicitas v. M.C.I.* (IAD T96-02148), Hoare, April 22, 1998.

<sup>95</sup> *Huang, Su-Juan v. M.C.I.* (IAD V97-02369), Carver, August 21, 1998.

<sup>96</sup> *Bains, Sohan Singh v. M.C.I.* (IAD V95-01233), Singh, April 14, 1997.

<sup>97</sup> *Ali, Akram v. M.C.I.* (IAD T93-12274), Teitelbaum, June 2, 1994.

<sup>98</sup> *Sangha, Jaswinder Kaur v. M.C.I.* (IAD V95-02919), Singh, February 24, 1998.

<sup>99</sup> *Huang, Mei Yu v. M.C.I.* (IAD V97-03817), Carver, August 31, 1999.

answer questions about his courses and referred to handwritten notes. The panel put greater weight on the corroborative evidence, in particular, a transcript document, to find the applicant was a “dependent son”.

In *Hu*<sup>100</sup>, the applicant had been deleted from the application of the rest of the family as he was not a “dependent son”. The applicant had indicated that from September 1994 to 1997 he studied accounting at the Broadcast and Television University of Kaiping City. He said he attended for 5 hours a day. He was unable to indicate how many subjects he took in each semester. He was unable to list the courses that were reported in the academic record he submitted. The visa officer concluded that all the school documents submitted were false and, even giving the applicant the benefit of the doubt regarding “his attending or watching or following some of the accounting courses taught on TV university since Sep94, this is at best a part-time proposition”. The Court held that these conclusions were reasonably open to the visa officer.

#### **7.4.2.3.1. Requirement to be “continuously enrolled and in attendance”**

An issue that frequently arises is whether the son or daughter has been continuously enrolled in an educational program. The applicant is considered to be continuously pursuing studies as long as an interruption in the applicant’s studies does not exceed an aggregate period of one year.<sup>101</sup>

The Federal Court recently considered the interpretation of section 2(7) of the Regulations in *Rochester*<sup>102</sup>. The Appeal Division had agreed with the visa officer that the applicant had not established that she was a “dependent daughter” based on her student status. The applicant turned 19 years of age in February 1995. From August 1995 to February 1996, the applicant attended an afternoon program at an educational institution for 3 hours a day, four days a week. In addition, she attended a sewing program from 8 a.m. to 3 p.m., five days a week at an individual’s home. The sewing program was sponsored by the Minister of Labour Skills Development and appears to have been affiliated with the educational institution she attended. Counsel conceded that it was open to the Appeal Division to find the afternoon program was not a full-time program. The Court held that the Appeal Division did not err in finding that the sewing program did not qualify because it was not held at an educational institution. No evidence had been led before the Appeal Division that the home was an educational institution. The applicant did not qualify as a dependent daughter during that period. The Court then looked at the period of September 1996 to August 1997. The applicant pursued a two year business course for 3 hours daily in the evenings. In the absence of further details, the Appeal Division did not err in finding that program was part-time. While neither period exceeded the 12 months

---

<sup>100</sup> *Hu, Run Ai (Yen Oil Chow) v. M.C.I.* (F.C.T.D., no. IMM-6829-98), Lemieux, March 2, 2000.

<sup>101</sup> Section 2(7) of the Regulations. Note that while section 2(7) of the Regulations refers back to paragraph (b)(i) of the definitions “dependent daughter” and “dependent son,” it does not use the phrase “continuously enrolled and in attendance”. Instead it refers to having “**continuously pursued a program of studies**” (emphasis added).

<sup>102</sup> *Rochester, Cislyn Bernice Kerr v. M.C.I.* (F.C.T.D., no. IMM-3203-98), Evans, July 8, 1999.

allowed in section 2(7), the aggregate did. As the Appeal Division committed no reviewable error with respect to either period, the application for judicial review was dismissed.

In *Yep*,<sup>103</sup> the Federal Court commented that there is nothing in the definition which excludes an applicant who is a “pay student”. There is no requirement that an applicant obtain a degree, rather the requirement is that the applicant be enrolled full-time in an academic, professional or vocational course.

In *Patel*,<sup>104</sup> the visa officer concluded that “ a program of studies” within section 2(7) required a natural progression of courses rather than unrelated trade courses. As there was no factual basis for applying that section in this case and as the Minister did not argue that section 2(7) assists in interpreting section 2(1), the Federal Court made no finding on whether the applicant had pursued a course of studies. In a subsequent case, relying on the approach taken in *Patel*, the Court upheld the visa officer’s conclusions that there was insufficient evidence of an organized program of study.<sup>105</sup>

This issue has arisen in the Appeal Division as well but it cannot be said there is a consistent approach. For example, in *Kaur*,<sup>106</sup> the applicant was a medical student who graduated in December 1992. She enrolled in a computer program from August 1993 to October 1995. The panel held that the enrolment in the program was in response to the visa officer’s request for information regarding ongoing studies. The term “program of study” suggests the taking of courses which are inter-related and lead to a designation. In contrast, in *Anapolis*,<sup>107</sup> when the school the applicant was attending offered a semester of courses the applicant had already taken, she took a tourism course. This change in program was not a break in studies to be considered under section 2(7).

In addition, relevant provisions of the *Interpretation Act*<sup>108</sup> must be applied in interpreting the Regulations. The *Interpretation Act* applies to every federal statute and regulation, unless a contrary intention is expressed in the statute.<sup>109</sup> In addition, the principles of statutory interpretation derived from the case-law<sup>110</sup> continue to apply where they are not inconsistent with the *Interpretation Act*.<sup>111</sup>

---

<sup>103</sup> *Yep, supra*, footnote 78.

<sup>104</sup> *Patel, Kamlesh Kumar v. M.C.I.* (F.C.T.D., no. IMM-2678), McKeown, April 21, 1999.

<sup>105</sup> *Desai, Abrar Ahmed Gulammohmed v. M.C.I.* (F.C.T.D., no. IMM-1248-00), McKeown, November 5, 2001; 2001 FCT 1204.

<sup>106</sup> *Kaur, Paramjeet v. M.C.I.* (IAD T94-02007), Wright, May 19, 1995.

<sup>107</sup> *Anapolis, Perpetua v. M.C.I.* (IAD T95-07959), Hoare, July 18, 1997.

<sup>108</sup> R.S.C. 1985, c. I-21.

<sup>109</sup> Section 3(1) of the *Interpretation Act*.

<sup>110</sup> For a comprehensive discussion of these principles, refer to textbooks such as *Dreidger on the Construction of Statutes*, R. Sullivan, 3rd ed. (Toronto: Butterworths, 1994); and *The Interpretation of Legislation in Canada*, P. Côté, 2nd ed. (Cowansville, Qué.: Les Éditions Yvon Blais Inc., 1991).

<sup>111</sup> Section 3(3) of the *Interpretation Act*.

The relevant provisions of the *Interpretation Act* are as follows:

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

37. (1) The expression “year” means any period of twelve consecutive months [...]

Further, the relevant objective of the Act, found in section 3(c), should be considered in interpreting the intention of the legislators:

3. It is hereby declared that [...] the [...] regulations made under this Act shall be designed and administered in such a manner as to promote the domestic and international interests of Canada recognizing the need

(c) to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad.

There is conflicting case-law on the degree to which section 2(7) of the Regulations should be given a liberal interpretation. For example, one panel commented that there may be cases where “an aggregate period not exceeding one year” should be given a liberal interpretation, in acknowledging the contextual realities of the case.<sup>112</sup>

#### **7.4.2.3.1.1. When does the program of studies end and the period of interruption begin?**

The Appeal Division has taken the approach that first it must be asked whether there has been an interruption in a program of studies. In making this assessment, the regular school vacation breaks are considered part of the program of studies, and are not considered an interruption in the studies. Where the applicant had been accepted at the institution but had to wait for an opening to attend, the Appeal Division held that the interruption in studies, from March 1995 to September 1996, was not for an aggregate period exceeding one year when the two three-month annual school vacations, which fell during that period, were taken into account.<sup>113</sup> An interruption is considered to be something that is not a normal or expected part of the course of studies. The next question is whether the interruption lasted for an aggregate period which exceeded one year.<sup>114</sup>

---

<sup>112</sup> *Estoesta, Samuel E. v. M.C.I.* (IAD W94-00069/W94-00070), Wiebe, May 30, 1995, where the panel disagreed with the interpretation in *Walczak, Henry v. S.S.C.* (IAD T93-12927), Aterman, August 3, 1994, of “an aggregate period not exceeding one year.” In this regard, see also *Dhaliwal, Jaswinder Singh v. M.C.I.* (IAD T95-01900), Aterman, April 1, 1997 where the *Walczak* panel gave a large and liberal construction to section 2(7) on the facts of this case.

<sup>113</sup> *Kanchan, supra*, footnote 79.

<sup>114</sup> *Walczak, supra* footnote 112; *Estoesta, supra*, footnote 112.

The failure to gain admission to an educational institution has been considered to be unanticipated and thus an interruption in the program of studies.<sup>115</sup> Also, the cancellation of a course that resulted in a voluntary withdrawal has also been considered to be an unexpected interruption.<sup>116</sup> Further, the Appeal Division has held that the reason for the interruption is not relevant.<sup>117</sup>

Both enrollment and attendance must be established. The failure to attend, even if enrolled, is a failure to attend continuously.<sup>118</sup> However, the Appeal Division has held that “attendance” does not need to be physical, as in the case of an applicant who was registered in full-time courses at a university and completed his degree by correspondence while he cared for his dying father.<sup>119</sup> The Federal Court has held that “attendance” has both a qualitative and a quantitative element. The quantitative element relates to the amount of time that the applicant is attending class. The qualitative component relates to the applicant’s ability to demonstrate knowledge of what is happening in the courses she is attending. Where the applicant only attended 77% of his classes and was unable to demonstrate knowledge of what was going on in his classes, the Federal Court upheld the visa officer’s opinion that the applicant was not in attendance at the program for which he was enrolled.<sup>120</sup> The Federal Court held that the visa officer did not err in concluding the applicant had not established he had been in attendance as a full-time student. The evidence was that the applicant “did not attend classes well” and that he “did not speak the language he was learning.”<sup>121</sup> While this is not a clear statement, it seems to follow the qualitative line of jurisprudence.

Prior to the Court of Appeal’s decision in *Sandhu*,<sup>122</sup> there was divergent jurisprudence in the Federal Court with respect to this matter<sup>123</sup>. In *Patel*,<sup>124</sup> the Court commented, in obiter, that

---

<sup>115</sup> *Walczak, supra*, footnote 112.

<sup>116</sup> *Estoesta, supra*, footnote 112.

<sup>117</sup> *Garrido, Elvira T. v. M.C.I.* (IAD V94-00993), Ho, September 7, 1995 (left school to support mother after father’s death); *Casinathan, supra*, footnote 88 (re school closure due to civil war, strife, natural disaster).

<sup>118</sup> *Estoesta, supra*, footnote 112.

<sup>119</sup> *Parsur, Tenzin Tashi v. M.C.I.* (IAD V95-01362), Singh, October 17, 1996. Note, however, that in this case the applicant was the sponsor’s stepson. There was no indication on the record that the applicant had been adopted by the sponsor; hence he may not be a member of the family class despite the panel’s findings regarding the issue of “dependent son.”

<sup>120</sup> *Khaira, Amandeep Singh v. M.C.I.* (F.C.T.D., no. IMM-3378-95), Gibson, November 12, 1996. Reported: *Khaira v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 257 (F.C.T.D.). To the same effect is *Malkana, Charanjit Singh v. M.C.I.* (F.C.T.D., no. IMM-3377-95), Gibson, December 18, 1996. Reported: *Malkana v. Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 288 (F.C.T.D.) *Takhar, Tarlochan Singh v. M.C.I.* (F.C.T.D., no. IMM-2747-00), McKeown, June 8, 2001.

<sup>121</sup> *Chowdhury, Saifur Rahman et al. v. M.C.I.* (F.C.T.D., no. IMM-828-98), Pinard, April 16, 1999, at paragraph 9.

<sup>122</sup> *M.C.I. v. Sandhu, Jagwinder Singh* (F.C.A., no. A-63-01), Sexton, Strayer, Sharlow, February 28, 2002; 2002 FCA 79.

<sup>123</sup> *Dhami, Tarlochan Singh v. M.C.I.* (F.C.T.D., no. IMM-1528-00) Dawson, July 18, 2001.

<sup>124</sup> *Patel, Chinubhai Madhavlal v. M.C.I.* (F.C.T.D., no. IMM-829-98), Tremblay-Lamer, October 5, 1998.



the term “in attendance” simply refers to the physical presence of the applicant, not the quality of that attendance. The Court relied on the plain meaning of the section. As well, interpretation of a statute should not add to the terms of the law. While there is expressly discretion to be exercised in assessing and determining financial dependency stated in the legislation, there is no such discretion stated with respect to student status. Student status should be determined solely on the documentary evidence.

In very brief reasons, Campbell, J. adopted the reasoning in *Patel*<sup>125</sup> and held that the phrase “attendance as a full-time student in an academic, professional or vocational program at a university, college or other educational institution” does not require a qualitative finding with respect to the education received. In this case, however, the visa officer apparently concluded ‘... computer training at technical schools does “not amount to higher education” referred to in the definition of “dependant son” in s. 2(1)(b) of the *Regulations*,<sup>126</sup> which suggests that he did not consider the course to be an “academic, professional or vocational program” rather than the applicant’s attendance did not have the qualitative element. The Federal Court Trial Decision followed *Patel*<sup>127</sup> and certified the following question in *Sandhu*<sup>128</sup> :

“Does the Immigration Officer have the authority under subparagraph 2(1)(b)(i) to determine the quality of the attendance of an alleged “dependent son” enrolled as a full-time student in a program?”

The Federal Court of Appeal in *Sandhu*<sup>129</sup> allowed the appeal and answered the certified questions as follows:

“Under subparagraph 2(1)(b)(i) of the Immigration Regulations a Visa Officer has authority to determine whether the alleged ‘dependent son’ has been enrolled and in attendance as a full-time student in an educational program in a genuine, meaningful and bona fide respect.”

In the course of its judgment, it reviewed the divergent views as reflected in recent caselaw, and agreed with an earlier decision that found attendance “necessarily implies both physical and mental presence”.<sup>130</sup> It held that a failure to demonstrate even a rudimentary knowledge of the subjects studied can lead to an inference that an applicant was not in attendance as a full-time student, but that poor academic performance is by and in itself an insufficient basis upon which to so conclude. It directed the visa officer to consider more than mere physical attendance in determining whether the person has been “in attendance as a full-time student” and to make sufficient inquiries in order to satisfy himself that the student meets the requirements of subparagraph 2(1)(b)(i).

---

<sup>125</sup> *Ibid.*

<sup>126</sup> *Balasrishnan, Vasantha Mallika Devi et al v. M.C.I.* (F.C.T.D., no. IMM-117-99), Campbell, October 8, 1999 at paragraph 2.

<sup>127</sup> *Patel, supra*, footnote 124.

<sup>128</sup> *Sandhu, supra*, footnote 122.

<sup>129</sup> *Sandhu, supra*, footnote 122.

<sup>130</sup> *Chen, Cui Ying v. M.C.I.* (F.C.T.D., no. IMM-470-99), Sharlow, August 29, 2000.

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.<sup>131</sup> 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.

In the recent case of *Bola*<sup>132</sup>, the Court cites *Sandhu* and adds to the list of factors to be considered. It held that the visa officer may have to determine the worth of a student's contribution to the education institution he or she attends, including any contribution beyond the applicant's academic performance. Where an applicant did not attend all his classes, but fulfilled the expectations of the school through his commitment to the college's soccer team, the Court found that the visa officer erred by focussing solely on part of the applicant's academic performance to the exclusion of all else. It held that to limit the qualitative investigation of his attendance at the institution to purely academic performance, is a reviewable error.<sup>133</sup>

The Federal Court has further held that the phrase "as a full-time student..." refers to the applicant's type of enrollment, that is, whether it is full-time or part-time. It does not relate to the applicant's attendance. Thus the failure to attend 33% of the classes does not mean that the applicant is not a "full-time student." It is not essential, to fall within the definition "dependent son," that an individual be in full-time attendance. It is essential that the applicant's enrollment and attendance be as a full-time student.<sup>134</sup>

The Federal Court has held that the visa officer must consider the documentary evidence, in particular, the information provided by the educational institution when determining if the enrollment is full-time. For example, in *Tran*,<sup>135</sup> reference in one translated document to "course 23" was insufficient to make a finding that the attendance was not full-time in light of the rest of the documentary evidence, including a reference in another document to "session 23".

---

<sup>131</sup> 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. [This case is noted notwithstanding the date of the update is July 1, 2002.]

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*, *Bola, Ravinder Singh v. M.C.I.* (F.C.T.D., no. IMM-4532-00), Campbell, June 25, 2002; 2002 FCT 716.

<sup>134</sup> *Khaira, supra*, footnote 120.

<sup>135</sup> *Tran, Vu Son v. M.C.I.* (F.C.T.D. no., IMM-850-00), Rothstein, August 20, 2001. See also, *Mir-Hussaini, Seyed-Hasan v. M.C.I.* (F.C.T.D., no. IMM-5208-00), MacKay, March 22, 2002.

The Appeal Division has held that what constitutes full-time studies is a question of fact.<sup>136</sup> This decision stated that the number of hours spent in class may be a factor, but it is not determinative in every case. Other factors to be considered are the nature of the studies and the institution, whether the institution considers the program to be full-time, whether a degree, diploma or certification is offered at the end, and how much of the student's time is taken up, whether by the number of courses or the complexity of the work involved.

In *Anapolis*,<sup>137</sup> the applicant attended a computer/secretarial course three hours a day, five days a week. Labs and homework added two hours to her daily attendance. The applicant was not involved in any other activities. The Minister did not refute that this was a full-time program.

In *Tiri*,<sup>138</sup> the panel accepted that the applicant had no choice but to attend classes at night. The applicant was in a graduate program and the classes in his program were not offered in the daytime. The course load was 12 hours, but he only attended six hours because he had already completed half of the courses for that semester. Course availability has consequences for a student's schedule and the applicant was found to be a full-time student.

The Appeal Division considered whether optional courses should be included in the applicant's program, in *Huang*.<sup>139</sup> The panel was of the view that attending optional courses sounded much like "auditing" courses, which could not be used to boost a part-time program to a full-time program. The panel also doubted that an academic year composed of one or just a handful of courses that were being repeated because of earlier failures could constitute full-time studies.

While an applicant does not have to establish "full-time attendance" at an educational institution, she must establish that she is in attendance at the program for which she is enrolled.<sup>140</sup>

#### **7.4.2.3.1.2. How is "an aggregate period not exceeding one year" calculated?**

The Appeal Division has held that scheduled school vacation breaks are not to be included in calculating the aggregate one-year period.<sup>141</sup> However, one panel has held that, where the applicant's plans failed and she was not accepted into another educational institution and was thus forced to wait until the next school year to enroll in a program of studies, the vacation break after her graduation from high school was to be counted in calculating the one-

---

<sup>136</sup> *Bernabe, Marieline J. v. M.C.I.* (IAD V95-00471), Boscariol, March 18, 1997. See *Rochester, supra*, footnote 102, for an example of where such evidence was not led. There the Federal Court held that in the absence of such evidence, the Appeal Division's finding the program was part-time was reasonably open to it.

<sup>137</sup> *Anapolis, supra*, footnote 107.

<sup>138</sup> *Tiri, supra*, footnote 94.

<sup>139</sup> *Huang, Su-Jian, supra*, footnote 95.

<sup>140</sup> *Khaira, supra*, footnote 120.

<sup>141</sup> *Walczak, supra*, footnote 112; *Casinathan, supra*, footnote 88.

year period. If she had been accepted, then that break would have become part of the educational program.<sup>142</sup>

The Appeal Division has not taken a consistent approach to calculating this period.

In *Walczak*,<sup>143</sup> the Appeal Division held that an applicant does not continue to be a student from the time the applicant finishes her previous course to the time she is notified of the failure to gain admission. It is only if the applicant has been accepted into the institution that the applicant continues to be a student. Thus, where an applicant had finished one course of studies in May of 1992, written and failed an entrance exam to another institution in July 1992, and was forced to wait until July 1993 to attend school again, she had interrupted her studies for an aggregate period exceeding one year (14 months).

In *Estoesta*,<sup>144</sup> the applicant did not attend school from August 30, 1992 to September 6, 1993. The cancellation of a course caused the interruption, and then he voluntarily withdrew. The Appeal Division held that section 2(7) must be read in the context of the educational system. Such programs are generally described in school years. In this case, the “aggregate period not exceeding one year” was held to be the September to August school year. The applicant was found to be a “dependent son.”

In *Flores*,<sup>145</sup> the applicant was in school until March 1991, at which time she was hospitalized. She did not complete her first semester and thus could not attend the second semester of school. She did not resume her studies until June 1992. The Appeal Division held that subsection 2(7) permits an aggregate interrupted time of only one year of studies. The applicant was found not to be a “dependent daughter” as she had interrupted her studies for more than 14 months. The Appeal Division did not explain what period of time comprised “one year of studies” in this case.

In *Siyam*,<sup>146</sup> the Appeal Division held that the applicant, while technically not in attendance for 15 months, only interrupted her studies for one school year. By registering when she did, the panel found she did all she could to continuously pursue a program of studies.<sup>147</sup>

In *Dhaliwal*,<sup>148</sup> giving a large and liberal interpretation to the provision, the panel found that the applicant continued to hold the status of a full-time student where she was precluded

---

<sup>142</sup> *Walczak, supra*, footnote 112.

<sup>143</sup> *Walczak, supra*, footnote 112.

<sup>144</sup> *Estoesta, supra*, footnote 112.

<sup>145</sup> *Flores, Victoria v. M.C.I.* (IAD V94-01641), Singh, July 18, 1996.

<sup>146</sup> *Siyam, Surinder Singh v. M.C.I.* (IAD V94-00514), McIsaac, July 23, 1996. See also *Khella, Gian Singh v. M.C.I.* (IAD V95-00416), Dossa, April 24, 1997, where the applicant missed essentially one school year (15 months) due to failing and re-writing one exam.

<sup>147</sup> However, it became apparent during cross-examination that there was another period of time during which she did not attend. Thus, the aggregate period exceeded one year and she was found not to be a “dependent daughter.”

<sup>148</sup> *Dhaliwal, supra*, footnote 112.

from continuing her studies due to reasons beyond her control. Her exam results were released too late to enable her to enroll, necessitating a year's wait. Her program of studies encompassed the time she sat her exams until the results were released.

The "aggregate period" referred to in section 2(7) of the *Regulations* means the sum total of the interrupted studies.<sup>149</sup>

#### 7.4.2.3.2. The Educational Institution

Periods of private, or self-study, with a tutor but not in conjunction with a program at an educational institution, have been held not to constitute attendance in an educational program as required by the definition of "dependent son."<sup>150</sup>

In *Balanay*,<sup>151</sup> the refusal was based on the finding that the educational institution did not exist, as it had no listed telephone number. The panel considered the context of a rural city in a Third World country and the efforts made by the visa officer and found that on the balance of probabilities, the educational institution did exist.

The issue of the genuine nature of the educational institution has been raised before the Appeal Division.<sup>152</sup> In *Tomy*,<sup>153</sup> the visa officer took the view that an institution requires such things as a curriculum, examination results, diplomas and official transcripts and the institution in question was like a business that helps students pass the LSAT or GMAT. The panel held such institutions come within the meaning of "other educational institutions." There is nothing in the definition that requires recognition or accreditation by government. In *Chandiwala*,<sup>154</sup> the applicant had been pursuing a course in Islamic studies in a private Madressa. The panel found that the program was an academic one that would vocationally prepare the applicant to teach and that the Madressa fell within the designation of "other educational institution." In *Patel*,<sup>155</sup> the Federal Court held that there is nothing in the phrase "other educational institution" that excludes private institutions. There is no requirement that the institution be under the control, management or supervision of any government authority. One cannot read into the definition words such as "authorized" or "approved by government". The Court certified the question of whether government control, management or supervision is required by the section. The Court has also upheld that where the institution is not regulated, in this case, it was a private religious

---

<sup>149</sup> *Siyon, supra*, footnote 146

<sup>150</sup> *Walczak, supra*, footnote 112; *Casinathan, supra*, footnote 88; *Marikar, supra*, footnote 91.

<sup>151</sup> *Balanay, supra*, footnote 76.

<sup>152</sup> See, for example, *Loyal, supra*, footnote 88, where the evidence did not establish that the institutions were not genuine (India College and the Universal Medical Institute of Electro Homeopathy). See also *Casinathan, supra*, footnote 88, where the Appeal Division refers to a "recognized" educational institute; however, it was not necessary to address that issue in reaching the decision.

<sup>153</sup> *Tomy, supra*, footnote 6.

<sup>154</sup> *Chandiwala, Firdous Jahan v. M.C.I.* (IAD T95-04450), Boire, September 17, 1997.

<sup>155</sup> *Patel, supra*, footnote 104.

association, a higher degree of scrutiny is required to determine if the quality of the institution meets reasonable standards.<sup>156</sup>

#### 7.4.2.4. Physical or Mental Disability

Paragraph (c) of the definition of “dependent daughter” (and “dependent son”) sets out three requirements, all of which must be met: (1) the daughter (son) must be “wholly or substantially financially supported by her parents;” (2) “determined by a medical officer to be suffering from a physical or mental disability;” and (3) “determined by an immigration officer [...] to be incapable of supporting herself by reason of such disability.”<sup>157</sup>

“Physical disability” includes a hearing disability.<sup>158</sup> Amputation of the left leg below the knee following a motor vehicle accident is a physical disability.<sup>159</sup>

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.<sup>160</sup>

In *Khan*,<sup>161</sup> the applicant was a deaf mute. The Appeal Division held that section 6(6) required the applicant to meet the requirements of paragraph c) 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 found within paragraph c) will lead to the result of medical inadmissibility.

In contrast, in *Arastehpour*,<sup>162</sup> 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 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

---

<sup>156</sup> *Desai, supra*, footnote 105.

<sup>157</sup> *Kaur, Manjit v. M.C.I.* (F.C.T.D., no. IMM-5844-93), MacKay, May 19, 1995.

<sup>158</sup> *Haroun, Stanley v. M.C.I.* (IAD V94-00129), Singh, August 29, 1994.

<sup>159</sup> *Huang, Wing Dang v. M.C.I.* (IAD V97-03836), Baker, June 4, 1999.

<sup>160</sup> *Arafat, Khaled v. M.C.I.* (IAD T94-02413), Hopkins, January 17, 1995.

<sup>161</sup> *Khan, Seema Aziz v. M.C.I.* (IAD M97-03209), Lamarche, June 4, 1999. For a further discussion of medical inadmissibility, see Chapter 3, “Medical Refusals”.

<sup>162</sup> *Arastehpour, Mohammad Ali v. M.C.I.* (F.C.T.D., no. IMM-4328-96), MacKay, August 31, 1999.

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 be open to lead evidence regarding the son's prospects in Canada.

In *Huang*,<sup>163</sup> 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*,<sup>164</sup> 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*,<sup>165</sup> 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 mental 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 applicants' ability to earn a living. They were reliant on the sponsor for financial support and were dependent daughters.

### **7.4.3. "Spouse"**

See chapter 5, "Foreign Marriages" and chapter 6, "Marriages and Engagements for Immigration Purposes."

#### **7.4.3.1. "Timing"**

Whether the applicant is a member of the family class is to be determined as of the date of the application, or at least the date of the refusal, not the date of the appeal.<sup>166</sup>

### **7.4.4. "Fiancé"**

See chapter 6, "Marriages and Engagements for Immigration Purposes."

### **7.4.5. "Dependant"**

The definition of "dependant" was amended on March 27, 1992 to incorporate the definitions of "dependent son" and "dependent daughter." In addition, sections 6(5)(a)(iii) and

---

<sup>163</sup> *Huang, Wing Dang, supra*, footnote 159.

<sup>164</sup> *Teja, Ajit Singh v. M.C.I.* (IAD V94-01205), Singh, June 30, 1997.

<sup>165</sup> *Ramdhanie (Dipchand), Asha v. M.C.I.* (IAD T95-06314), Townshend, September 18, 1998.

<sup>166</sup> *Kaleyegira, Kasim Ali v. M.C.I.* (IAD V99-01758), Cochran, August 14, 2001.

(iv) of the *Regulations*, which allowed the “opting out” of dependants who were 21 years or older, were revoked.<sup>167</sup> Pursuant to section 11 of the amending instrument (SOR/92-101), the former regulations continue to apply to those applications where the undertaking has been filed before March 27, 1992.<sup>168</sup> The Appeal Division, in applying section 11, has narrowed its application to the changes made by SOR/92-101, in that applicants are still affected by, and able to benefit from, certain favourable amendments made to the *Regulations* after that date.<sup>169</sup>

A “dependant” is not a “member of the family class” unless the dependant also comes within the definition of “member of the family class.” Where the application for landing made by the member of the family class has not been refused, and only the application for landing made by the alleged dependant has been refused, there is no jurisdiction to hear the appeal. A sponsor only has a right of appeal from the refusal of an application by a member of the family class, not from the refusal to include in the application an alleged dependant of such a member.<sup>170</sup>

In *Dosanjh*,<sup>171</sup> a letter from the visa officer advised that the son was not a dependent son and that a declaration to exclude him would have to be completed to continue with the processing of the application. The declaration was not made and nothing further was heard from the visa office. The only issue was whether or not there had been a refusal of the application made by the sponsor’s father, a member of the family class. The panel referred to *Mundi*<sup>172</sup> as establishing that there is no legal basis to refuse visas to a principal applicant and other eligible dependants because one of the applicants who is claimed to be a dependant is not a dependant (ineligible). In this case, there was no implied or constructive refusal of the father’s application although the processing of the father’s application had ceased, and thus there was no right of appeal.

In *Parmar*,<sup>173</sup> the principal applicant, the father, had been told to delete two daughters from the application but he declined to do so. The parents and third daughter underwent medicals and received visas. A standard form refusal letter regarding the two daughters was issued to the sponsor. The panel held that the refusal letter did not create a right of appeal to the Appeal Division. Following *Mundi*,<sup>174</sup> the panel concluded that an application could be split, and

---

<sup>167</sup> In order to be “opted-out” of the application, the dependant had to be over 20 years of age, and the applicant, the dependant or the sponsor had to declare in writing that the dependant did not intend to immigrate to Canada. Where a dependant had been “opted-out”, the visa officer did not have to assess the admissibility of the dependant nor could a visa be issued to the dependant as an accompanying dependant.

<sup>168</sup> *Supra*, footnote 42.

<sup>169</sup> See *Jimenez, Pedro Lucas, supra*, footnote 50, where the Appeal Division held the relevant definitions to be “unmarried son” and the subsequent more favourable definition of “son.” To the same effect, see *Dular, supra*, footnote 43 (I.A.D.). On judicial review, the Federal Court agreed with the panel’s determination as to which regulations were applicable: see *Dular, supra*, footnote 43 (F.C.T.D.).

<sup>170</sup> *Bailon, supra*, footnote 32; *Chow, supra*, footnote 32. See also, for example, *Singh, Tarsam v. M.C.I.* (IAD T93-12275), Bartley, November 9, 1995 and *Chieu, Yen Nai v. M.C.I.* (IAD MA1-05338), Lamarche, October 4, 2001.

<sup>171</sup> *Dosanjh, Sarbjit Kaur v. M.C.I.* (IAD V96-00240), Clark, November 24, 1997.

<sup>172</sup> *Mundi v. Canada (Minister of Employment and Immigration)*, [1986] 1 F.C. 182 (C.A.).

<sup>173</sup> *Parmar, Tarsem Singh v. M.C.I.* (IAD T95-02914), Aterman, June 25, 1996.

<sup>174</sup> *Mundi, supra*, footnote 172.



the ineligibility of an alleged dependant was not a bar to the admission of any members of the family class and other admissible dependants. The panel also relied on *Bailon*<sup>175</sup> to conclude that when the splitting of an application has occurred and any members of the family class and eligible dependants have been issued visas, there is no right of appeal to the Appeal Division in respect of an ineligible applicant who is claimed to be a dependant, as there has been no refusal of an application for landing made by a member of the family class.

In *Cai*<sup>176</sup>, the Minister brought a motion before the Appeal Division to dismiss the appeal for lack of jurisdiction. The deletion of the sister from the application of the mother was made on the basis that she was no longer a dependent daughter. The appellant argued that the deletion was a constructive refusal of the mother's application, despite the fact that the mother had been issued a visa and had taken up residence in Canada. The law is clear that the Appeal Division does not have the jurisdiction to consider whether the deletion was made in error, this relief must be sought in the Federal Court. The appellant's interpretation of the Act and Regulations would require the Appeal Division to assume jurisdiction it does not have. In summary, on appeal to the Appeal Division, any applicants who are found not to be dependants may be "split" from the application, and the appeal allowed with regard to the other applicants.<sup>177</sup>

This should be distinguished from the situation where one of the dependants is found to be inadmissible rather than ineligible as a dependant.<sup>178</sup> Thus, where an application was refused because the sponsor's mother's husband was inadmissible, having been previously deported from Canada, the inadmissibility of the husband, a dependant of the mother, rendered the mother inadmissible as well.<sup>179</sup>

---

<sup>175</sup> *Bailon, supra*, footnote 32.

<sup>176</sup> *Cai, Raymond W. v. M.C.I.* (IAD W98-00108), Kelley, January 4, 2000.

<sup>177</sup> *Mundi, supra*, footnote 172.

<sup>178</sup> *Gharu, Kuldip Kaur v. M.E.I.* (F.C.A., no. A-29-86), Pratte, Urie, MacGuigan, June 16, 1988.

<sup>179</sup> *Rai, Kulwinder Kaur v. M.C.I.* (IAD T94-04965), Muzzi, April 24, 1997. Section 6(1)(a) of the *Regulations* precludes the visa officer from issuing the mother a visa. For the text of section 6(1)(a) of the *Regulations*, see *supra*, footnote 4.

## CHAPTER 7

### TABLE OF CASES: RELATIONSHIP

#### CASES

<i>Abraham, Adam Ahmed v. M.E.I.</i> (IAD T92-09223), Fatsis, November 16, 1993.....	7-12
<i>Alexander, Margaret Leuth v. M.C.I.</i> (IAD V99-03966), Mattu, April 26, 2001.....	7-5
<i>Ali, Akram v. M.C.I.</i> (IAD T93-12274), Teitelbaum, June 2, 1994.....	7-18
<i>Anapolis, Perpetua v. M.C.I.</i> (IAD T95-07959), Hoare, July 18, 1997.....	7-20
<i>Arafat, Khaled v. M.C.I.</i> (IAD T94-02413), Hopkins, January 17, 1995.....	7-28
<i>Arastehpour, Mohammad Ali v. M.C.I.</i> (F.C.T.D., no. IMM-4328-96), MacKay, August 31, 1999.....	7-28
<i>Bailon, Leonila Catillo v. M.E.I.</i> (F.C.A., no. A-783-85), Hugessen, Urie, MacGuigan, June 16, 1986.....	7-6, 7-30
<i>Bains, Sohan Singh v. M.C.I.</i> (IAD V95-01233), Singh, April 14, 1997.....	7-17
<i>Balanay, Dina Barreras v. M.C.I.</i> (IAD T96-03362), Townshend, June 11, 1998.....	7-14, 7-15, 7-16, 7-19, 7-26
<i>Balasrishnan, Vasantha Mallika Devi et al v. M.C.I.</i> (F.C.T.D., no. IMM-117-99), Campbell, October 8, 1999.....	7-22
<i>Bans, Hari v. M.C.I.</i> (IAD V96-00986), Singh, March 11, 1997.....	7-6
<i>Bath, Ragbir Singh v. M.C.I.</i> (IAD V95-01993), Lam, December 8, 1997. Reported: <i>Bath v. Canada (Minister of Citizenship and Immigration)</i> (1997), 42 Imm. L.R. (2d) 182 (I.A.D.).....	7-6
<i>Bernabe, Marieline J. v. M.C.I.</i> (IAD V95-00471), Boscariol, March 18, 1997.....	7-24
<i>Bola, Ravinder Singh v. M.C.I.</i> (F.C.T.D., no. IMM-4532-00), Campbell, June 25, 2002; 2002 FCT 716.....	7-23, 7-24
<i>Brown, Phillippa Patrice v. M.C.I.</i> (IAD T93-11210), Leousis, June 28, 1996.....	7-16
<i>Buttar, Jasvir Singh v. M.C.I.</i> (IAD V96-02982), Boscariol, March 23, 1998.....	7-2
<i>Cai, Raymond W. v. M.C.I.</i> (IAD W98-00108), Kelley, January 4, 2000.....	7-30
<i>Casinathan, Anandarajan v. M.C.I.</i> , (IAD T94-00402), Hopkins, October 19, 1994.....	7-16, 7-21, 7-26, 7-27
<i>Chandiwala, Firdous Jahan v. M.C.I.</i> (IAD T95-04450), Boire, September 17, 1997.....	7-27
<i>Chang, Shun Ching v. M.C.I.</i> (IAD V95-01743), Singh, June 16, 1997.....	7-16
<i>Chen, Cui Ying v. M.C.I.</i> (F.C.T.D., no. IMM-470-99), Sharlow, August 29, 2000.....	7-23
<i>Cheng (Zheng), Run De v. M.C.I.</i> (IAD T97-00078), Kitchener, January 21, 1998.....	7-5
<i>Chieu, Yen Nai v. M.C.I.</i> (IAD MA1-05338), Lamarche, October 4, 2001.....	7-30
<i>Chow, Sau Fa v. M.C.I.</i> (F.C.T.D., no. IMM-5200-97), Reed, July 29, 1998.....	7-6, 7-30
<i>Chowdhury, Saifur Rahman et al. v. M.C.I.</i> (F.C.T.D., no. IMM-828-98), Pinard, April 16, 1999.....	7-22
<i>Desai, Abrar Ahmed Gulammohmed v. M.C.I.</i> (F.C.T.D., no. IMM-1248-00), McKeown, November 5, 2001; 2001 FCT 1204.....	7-19
<i>Dhaliwal, Jaswinder Singh v. M.C.I.</i> (IAD T95-01900), Aterman, April 1, 1997.....	7-20, 7-26

<i>Dhami, Tarlochan Singh v. M.C.I.</i> (F.C.T.D., no. IMM-1528-00) Dawson, July 18, 2001 .....	7-22
<i>Dosanjh, Sarbjit Kaur v. M.C.I.</i> (IAD V96-00240), Clark, November 24, 1997 .....	7-30
<i>Dular, Shiu v. M.C.I.</i> (IAD V93-02409), Boscariol, May 24, 2000 (reasons signed June 5, 2000).....	7-9
<i>Dular, Shiu v. M.C.I.</i> (IAD V93-02409), Ho, Lam, Verma, February 22, 1996 .....	7-7, 7-8, 7-10, 7-12, 7-29
<i>Dular: M.C.I. v. Dular, Shiu</i> (F.C.T.D., no. IMM-984-96), Wetston, October 21, 1997.....	7-7, 7-8, 7-10, 7-29
<i>Eshete, Hanna Belyna v. M.C.I.</i> (F.C.T.D., no. IMM-3610-00), McKeown, February 2, 2001.....	7-3
<i>Estoesta, Samuel E. v. M.C.I.</i> (IAD W94-00069/W94-00070), Wiebe, May 30, 1995.....	7-20, 7-21, 7-25
<i>Flores, Victoria v. M.C.I.</i> (IAD V94-01641), Singh, July 18, 1996.....	7-26
<i>Fu: M.C.I. v. Fu, Yu Lan</i> (F.C.T.D., no. IMM-2386-99), Rouleau, June 27, 1999 .....	7-15
<i>Garrido, Elvira T. v. M.C.I.</i> (IAD V94-00993), Ho, September 7, 1995 .....	7-21
<i>Gharu, Kuldip Kaur v. M.E.I.</i> (F.C.A., no. A-29-86), Pratte, Urie, MacGuigan, June 16, 1988.....	7-31
<i>Gill, Balwant Singh v. M.C.I.</i> (IAD V96-00795), Boscariol, February 4, 1998 .....	7-1
<i>Haroun, Stanley v. M.C.I.</i> (IAD V94-00129), Singh, August 29, 1994.....	7-27
<i>Hu, Run Ai (Yen Oil Chow) v. M.C.I.</i> (F.C.T.D., no. IMM-6829-98), Lemieux, March 2, 2000 .....	7-18
<i>Huang, Mei Yu v. M.C.I.</i> (IAD V97-03817), Carver, August 31, 1999.....	7-18
<i>Huang, Su-Juan v. M.C.I.</i> (IAD V97-02369), Carver, August 21, 1998.....	7-17, 7-25
<i>Huang, Wing Dang v. M.C.I.</i> (IAD V97-03836), Baker, June 4, 1999 .....	7-27, 7-28
<i>Iyamu, Lucky Ukponahunsi v. M.C.I.</i> (IAD T98-02216), Kelley, September 16, 1999 .....	7-6
<i>Jammeh, Kebba v. M.C.I.</i> (IAD T99-07601), Whist, March 27, 2001 .....	7-15
<i>Jimenez, Pedro Lucas v. M.E.I.</i> (IAD V91-01572), Wlodyka, Gillanders, MacLeod, February 24, 1993. Reported: <i>Jimenez v. Canada (Minister of Employment and Immigration)</i> (1993), 19 Imm. L.R. (2d) 124 (I.A.D.).....	7-8, 7-10, 7-12, 7-29
<i>Jimenez: M.C.I. v. Jimenez, Emilia</i> (F.C.T.D., no. IMM-415-95), Teitelbaum, October 23, 1995.....	7-11
<i>Johal, Sarabjit Kaur v. M.C.I.</i> (IAD V95-01029), Boscariol, May 21, 1997.....	7-5
<i>Johnson, Ann Marie v. M.C.I.</i> (IAD T98-00316), Boire, November 18, 1998.....	7-3
<i>Kahlon, Darshan Singh v. M.E.I.</i> (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: <i>Kahlon v. Canada (Minister of Employment and Immigration)</i> (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).....	7-7, 7-9
<i>Kaleyegira, Kasim Ali v. M.C.I.</i> (IAD V99-01758), Cochran, August 14, 2001.....	7-29
<i>Kanchan, Ramkoomarie v. M.C.I.</i> (IAD T99-06129), D'Ignazio, February 24, 2000 .....	7-15, 7-21
<i>Kaur, Dalbir v. M.C.I.</i> (IAD T96-01560), Boire, July 8, 1998.....	7-15, 7-17
<i>Kaur, Manjit v. M.C.I.</i> (F.C.T.D., no. IMM-5844-93), MacKay, May 19, 1995.....	7-27
<i>Kaur, Paramjeet v. M.C.I.</i> (IAD T94-02007), Wright, May 19, 1995 .....	7-19
<i>Kaushal, Sushma Kumari v. M.E.I.</i> (I.A.B. 86-09045), Eglington, Warrington, Rotman, March 27, 1987.....	7-6
<i>Khaira, Amandeep Singh v. M.C.I.</i> (F.C.T.D., no. IMM-3378-95), Gibson, November 12, 1996.....	7-22, 7-24, 7-25
<i>Khan, Idrees Azmatullah v. M.E.I.</i> (IAD V92-01293), Gillanders, MacLeod, Verma, March 4, 1993.....	7-12
<i>Khan, Seema Aziz v. M.C.I.</i> (IAD M97-03209), Lamarche, June 4, 1999 .....	7-28

<i>Khella, Gian Singh v. M.C.I.</i> (IAD V95-00416), Dossa, April 24, 1997.....	7-26
<i>Koon, Chun Wah v. M.C.I.</i> (IAD T97-05159), Wales, October 1, 1999 .....	7-6
<i>Loyal, Harbhajan Singh v. M.C.I.</i> (IAD T93-12919), Muzzi, September 15, 1995 .....	7-16, 7-27
<i>Lidder: Canada (Minister of Employment and Immigration) v. Lidder</i> , [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.).....	7-7, 7-10
<i>M.A.O. v. M.C.I.</i> (IAD T99-14852), Hoare, January 18, 2002 .....	7-13
<i>Mahmood, Zia v. M.C.I.</i> (F.C.T.D., no. IMM-4616-99), Evans, August 23, 2000.....	7-11
<i>Malik, Mohammad F. v. M.C.I.</i> (IAD T94-05689), Calvin, January 21, 1998.....	7-5
<i>Malkana, Charanjit Singh v. M.C.I.</i> (F.C.T.D., no. IMM-3377-95), Gibson, December 18, 1996. Reported: <i>Malkana v. Canada (Minister of Citizenship and Immigration)</i> (1996), 37 Imm. L.R. (2d) 288 (F.C.T.D.).....	7-22
<i>Mangat, Harpreet Kaur v. M.C.I.</i> (IAD V95-02807), Boscariol, July 18, 1997 .....	7-6
<i>Marikar, Fathuma Hooriya v. M.C.I.</i> (IAD T94-00362), Muzzi, July 17, 1995.....	7-17, 7-26
<i>Mascardo, Angelina Gelera v. M.E.I.</i> (IAD T92-07718), Ahara, April 23, 1993 .....	7-7
<i>McDoom v. Canada (Minister of Manpower and Immigration)</i> , [1978] 1 F.C. 323 (C.A.).....	7-7, 7-10
<i>Mir-Hussaini, Seyed-Hasan v. M.C.I.</i> (F.C.T.D., no. IMM-5208-00), MacKay, March 22, 2002.....	7-24
<i>Mlinarich, Cecilia Lucy v. M.C.I.</i> (IAD T99-04979), Buchanan, September 22, 2000.....	7-4
<i>Mouait, Zoubida v. M.C.I.</i> (IAD V98-04334), Cochran, Mattu, Baker, August 14, 2000.....	7-12
<i>Mundi v. Canada (Minister of Employment and Immigration)</i> , [1986] 1 F.C. 182 (C.A.).....	7-30, 7-31
<i>Nenadic, Miroslav v. M.C.I.</i> (VA1-03824), Boscariol, September 18, 2002.....	7-4
<i>Nikolova: M.C.I. v. Nikolova, Velitchka</i> (F.C.T.D., no. IMM-16-95), Wetston, October 10, 1995.....	7-11
<i>Parmar, Tarsem Singh v. M.C.I.</i> (IAD T95-02914), Aterman, June 25, 1996 .....	7-30
<i>Parsur, Tenzin Tashi v. M.C.I.</i> (IAD V95-01362), Singh, October 17, 1996.....	7-21
<i>Patel, Chinubhai Madhavlal v. M.C.I.</i> (F.C.T.D., no. IMM-829-98), Tremblay-Lamer, October 5, 1998.....	7-22
<i>Patel, Kamlesh Kumar v. M.C.I.</i> (F.C.T.D., no. IMM-2678), McKeown, April 21, 1999 .....	7-19, 7-27
<i>Popov, Oleg Zinovevich v. M.C.I.</i> (IAD T97-05162), Aterman, November 26, 1998.....	7-17
<i>Rai, Kulwinder Kaur v. M.C.I.</i> (IAD T94-04965), Muzzi, April 24, 1997.....	7-31
<i>Ramdhania (Dipchand), Asha v. M.C.I.</i> (IAD T95-06314), Townshend, September 18, 1998.....	7-28
<i>Rochester, Cislyn Bernice Kerr v. M.C.I.</i> (F.C.T.D., no. IMM-3203-98), Evans, July 8, 1999 .....	7-19, 7-24
<i>San Luis: M.C.I. v. San Luis, Luzviminda Peralta</i> (F.C.T.D., no. IMM-5054-94), Dubé, July 6, 1995.....	7-11
<i>Sanchez, Lino v. M.C.I.</i> (IAD T94-02722), Ariemma, October 27, 1995.....	7-16
<i>Sandhawaliala, Baljit Kaur v. M.C.I.</i> (IAD V95-01730), Boscariol, March 26, 1997.....	7-6
<i>Sandhu: M.C.I. v. Sandhu, Jagwinder Singh</i> (F.C.A., no. A-63-01), Sexton, Strayer, Sharlow, February 28, 2002; 2002 FCA 79 .....	7-22
<i>Sangha, Jaswinder Kaur v. M.C.I.</i> (IAD V95-02919), Singh, February 24, 1998 .....	7-18
<i>Savehilaghi, Hasan v. M.C.I.</i> (IAD T97-02047), Calvin, June 4, 1998 .....	7-2

<i>Sharma, Sukh Rajni v. M.C.I.</i> (F.C.T.D., no. IMM-388-01), Rothstein, August 23, 2002; 2002 FCT 906.....	7-23
<i>Sheriff, Sithi Zehra v. M.E.I.</i> (F.C.A., no. A-152-93), Strayer, Linden, McDonald, November 2, 1995. Reported: <i>Sheriff v. Canada (Minister of Employment and Immigration)</i> (1995), 31 Imm. L.R. (2d) 246 (F.C.A.).....	7-5, 7-6
<i>Singh, Ajmer v. M.C.I.</i> (IAD TA0-03130), Sangmuah, July 4, 2001.....	7-4
<i>Singh, Tarsam v. M.C.I.</i> (IAD T93-12275), Bartley, November 9, 1995.....	7-30
<i>Siyani, Surinder Singh v. M.C.I.</i> (IAD V94-00514), McIsaac, July 23, 1996.....	7-26
<i>Soto, Hugo Alejandro v. M.C.I.</i> (IAD V97-02822), Carver, December 30, 1998.....	7-15
<i>Szikora-Rehak, Terezia v. M.C.I.</i> (IAD V97-01559), Jackson, April 24, 1998.....	7-17
<i>Takhar, Tarlochan Singh v. M.C.I.</i> (F.C.T.D., no. IMM-2747-00), McKeown, June 8, 2001.....	7-22
<i>Teja, Ajit Singh v. M.C.I.</i> (IAD V94-01205), Singh, June 30, 1997.....	7-28
<i>Tewg, Jun-Yen v. M.C.I.</i> (F.C.T.D., no. IMM-4760-96), Rouleau, January 26, 1998.....	7-16
<i>Tiri, Felicitas v. M.C.I.</i> (IAD T96-02148), Hoare, April 22, 1998.....	7-17, 7-24
<i>Tomy, Teresa v. M.C.I.</i> (IAD T96-05836), Calvin, March 16, 1998.....	7-2, 7-27
<i>Tran, Vu Son v. M.C.I.</i> (F.C.T.D. no., IMM-850-00), Rothstein, August 20, 2001.....	7-24
<i>Voronych, Anatoli v. M.C.I.</i> (IAD TA0-04441), Whist, March 27, 2001.....	7-15
<i>Walczak, Henry v. S.S.C.</i> (IAD T93-12927), Aterman, August 3, 1994.....	7-20, 7-21, 7-25, 7-26
<i>Yep, Zhi Tong v. M.C.I.</i> (F.C.T.D., no. IMM-4377-96), Muldoon, July 23, 1998.....	7-15, 7-16
<i>Zadorojnyi, Alexandre v. M.C.I.</i> (IAD V98-03484), Singh, September 16, 1999.....	7-2

# CHAPTER 8

## Table of Contents

<b>8. “NOT AN IMMIGRANT”</b> .....	<b>8-1</b>
<b>8.1. DEFINITIONS</b> .....	<b>8-1</b>
<b>8.2. INTENTION</b> .....	<b>8-1</b>
8.2.1. Meaning of “permanently” .....	8-2
8.2.2. Motivation .....	8-4
8.2.3. Timing .....	8-4
<b>8.3. JURISDICTION</b> .....	<b>8-5</b>
<b>8.4. FAIRNESS</b> .....	<b>8-6</b>

## CHAPTER 8

### 8. “NOT AN IMMIGRANT”

#### 8.1. DEFINITIONS

Where a sponsored application for permanent residence is refused on the basis that the applicant is not an immigrant, the applicant is found to be part of the inadmissible class of persons described in section 19(2)(d)<sup>1</sup> of the *Immigration Act*:

19.(2) No immigrant and, except as provided in subsection (3), no visitor shall be granted admission if the immigrant or visitor is a member of any of the following classes:

(d) persons who cannot or do not fulfil or comply with any of the conditions or requirements of this Act or the regulations or any orders or directions lawfully made or given under this Act or the regulations.

The following relevant definitions are found in section 2(1) of the *Immigration Act*:

“immigrant” means a person who seeks landing<sup>2</sup>

“landing” means lawful permission to establish permanent residence in Canada<sup>3</sup>

Therefore, where the visa officer is of the opinion that the applicant does not have the requisite intention to reside permanently in Canada, the visa officer may refuse to approve the application for permanent residence on the basis that the applicant is not an immigrant as defined in the *Immigration Act*.

#### 8.2. 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.”<sup>4</sup> 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

---

<sup>1</sup> R.S.C. 1985, c. I-2.

<sup>2</sup> *Ibid.*

<sup>3</sup> As enacted by S.C. 1992, c. 49, s. 1(3).

<sup>4</sup> *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.).

applicant's failure to pursue all of the steps involved in the application process.<sup>5</sup> 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.<sup>6</sup>

### 8.2.1. 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.<sup>7</sup> Nevertheless, “permanently” has the

---

<sup>5</sup> 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.

<sup>6</sup> 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 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 5; 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.

<sup>7</sup> *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.



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.<sup>8</sup>

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 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.<sup>9</sup> 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*.”<sup>10</sup>

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<sup>11</sup> and the retention of assets abroad.<sup>12</sup>

---

<sup>8</sup> 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.

<sup>9</sup> See for example: *Shergill, supra*, footnote 6; *Patel, Mohamed, supra*, footnote 6; *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).

<sup>10</sup> *Sarwar, supra*, footnote 7. *Ha, Byung Joon v. M.C.I.* (IAD TA0-04969), Sangmuah, October 3, 2001 (reasons signed January 8, 2002).

<sup>11</sup> *Deol, Dilbag Singh v. M.E.I.* (I.A.B. 80-6012), Campbell, Hlady, Howard, February 11, 1981.

<sup>12</sup> *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 8, 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

### 8.2.2. 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.<sup>13</sup> For example, the 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."<sup>14</sup>

### 8.2.3. 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*,<sup>15</sup> the Federal Court of Appeal held that the Immigration Appeal Board had to decide the appeal before it 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.<sup>16</sup> However, more recently, 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<sup>17</sup> in *Ampoma*,<sup>18</sup> 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*.<sup>19</sup>

---

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.

<sup>13</sup> *Aquino, Edmar v. M.E.I.* (I.A.B. 86-9403), Eglington, Weisdorf, Ahara, August 13, 1986.

<sup>14</sup> *Ruhani, supra*, footnote 12.

<sup>15</sup> *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.).

<sup>16</sup> *Patel, Manjulaben v. M.E.I.* (IAD T89-03915), Townshend, Weisdorf, Chu, April 20, 1990 (leave to appeal refused July 16, 1990); see *infra*, section 8.3, 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.

<sup>17</sup> *Gnanapragasam, Dominic Gnanase v. M.C.I.* (IAD T99-11000), Whist, December 4, 2000.

<sup>18</sup> *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).

<sup>19</sup> See also *Dhandwar, supra*, footnote 9; *Randhawa, Baljeet Singh v. M.C.I.* (IAD V95-01361), Lam, July 23, 1996; and the dissenting reasons in *Uddin, supra*, footnote 16. 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

In *Quadri*,<sup>20</sup> the 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 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.

### 8.3. JURISDICTION

The Appeal Division has held that whether or not such a refusal is valid in law is a matter which goes to the panel's jurisdiction.<sup>21</sup> The panel will allow the appeal in law if it finds that the refusal is not valid in law, in that the sponsor has proven that the applicant is indeed an immigrant because the applicant does have the requisite intention to reside permanently in Canada. If the appeal is allowed in law, the panel may also exercise its discretionary jurisdiction and allow the appeal on compassionate or humanitarian grounds.<sup>22</sup>

However, if the sponsor has not proven that the applicant has the requisite intention to reside permanently in Canada, this leads to the inference that the applicant is not seeking "landing" as defined in the *Immigration Act*. The Appeal Division has held that in these circumstances, the applicant has not made an application for landing, therefore the Appeal Division has no jurisdiction in the matter pursuant to section 77 of the *Immigration Act*, and accordingly the appeal has been dismissed for lack of jurisdiction.<sup>23</sup>

There has been some conflicting case-law on the issue of the exercise of discretionary jurisdiction where the panel has found that the refusal was valid in law. Where the Appeal Division has found that it has no jurisdiction, it has been held that the panel cannot exercise its discretionary jurisdiction, even if it found that sufficient compassionate or humanitarian

---

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 6, 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 9, 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".

<sup>20</sup> *Quadri, Fatai Abiodun v. S.S.C.* (IAD T93-12576), Hopkins, September 30, 1994.

<sup>21</sup> *Patel, Manjulaben*, *supra*, footnote 16. But see *Pangli, Amarjit Kaur v. M.E.I.* (I.A.B. 84-6228), Anderson, Chambers, Howard, April 28, 1986, where the Board held that this was not a jurisdictional question, but a question of whether or not the applicant was within an inadmissible class; reversed on other grounds by *Pangli, Amarjit Kaur v. M.E.I.* (F.C.A., no. A-597-86), Heald, Urie, Desjardins, November 12, 1987. Reported: *Pangli v. Canada (Minister of Employment and Immigration)* (1987), 4 Imm. L.R. (2d) 266 (F.C.A.).

<sup>22</sup> See, for example, *Sall, Kashmir Kaur v. M.E.I.* (IAD V92-01785), Arpin, July 27, 1993.

<sup>23</sup> See, for example, *Singh, Malkiat v. M.E.I.* (IAD T93-02753), Weisdorf, June 16, 1993; *Saroya*, *supra*, footnote 5; *Kamara*, *supra*, footnote 9; *Brown*, *supra*, footnote 9; and *Goindi*, *supra*, footnote 5; *Wiredu*, *supra*, footnote 8; and *Dhandwar*, *supra*, footnote 9.

considerations existed to warrant the granting of special relief.<sup>24</sup> On the other hand, where the issue of jurisdiction did not arise, some panels have granted special relief where the refusal was found to be valid in law.<sup>25</sup>

In *Datoc*,<sup>26</sup> the Immigration Appeal Board held that as the issue of whether the applicant was an immigrant was jurisdictional in nature, it need not be raised as a ground of refusal.

#### 8.4. 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 fundamental justice, namely the denial of a fair hearing; such an argument is based on the decision in *Pangli*.<sup>27</sup> 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*,<sup>28</sup> the 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;<sup>29</sup> 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.

---

<sup>24</sup> See, for example, *Niles, Hyacinth v. M.E.I.* (I.A.B. 82-9966), Benedetti, Suppa, Tisshaw, September 17, 1984; *Molice, supra*, footnote 9; and *Sarwar, supra*, footnote 7, where, as the panel found the refusal to be valid in law, it held that it had no jurisdiction to entertain compassionate or humanitarian considerations, and the appeal was dismissed for lack of jurisdiction.

<sup>25</sup> See, for example, *Al-Yafie, Omar Hussein v. M.E.I.* (I.A.B. 86-1642), Lefebvre, Morgan, Arsenault, October 1, 1987, where the Board exercised its discretionary jurisdiction after concluding that the visa officer had correctly refused the application on the ground that the applicant was not an immigrant; and *Jeudi, Liliane v. M.E.I.* (IAD M92-11211), Angé, June 30, 1993, where the Appeal Division exercised its discretionary jurisdiction without apparently examining whether the refusal was valid in law.

<sup>26</sup> *Datoc, Evelyn v. M.E.I.* (I.A.B. 83-9238), D. Davey, Suppa, Tisshaw, December 17, 1984; followed by the Appeal Division in *Kamara, supra*, footnote 9.

<sup>27</sup> *Pangli, supra*, footnote 21. For a fuller discussion of fairness, see chapter 10, "Visa Officers and the Duty of Fairness".

<sup>28</sup> *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".

<sup>29</sup> This principle was applied in *Gill, Rajwinder Kaur v. M.E.I.* (IAD V91-00898), Arpin, July 26, 1993.

*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.<sup>30</sup>

---

<sup>30</sup> 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 20 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 signed it without an actual intention to abandon Canada as his place of permanent residence.

## CHAPTER 8

### TABLE OF CASES: “NOT AN IMMIGRANT”

#### CASES

<i>Al-Yafie, Omar Hussein v. M.E.I.</i> (I.A.B. 86-1642), Lefebvre, Morgan, Arsenault, October 1, 1987.....	8-6
<i>Ampoma, Eric Sackey v. M.E.I.</i> (IAD W91-00008), Gillanders, Verma, Wlodyka (dissenting), February 10, 1992. Reported: <i>Ampoma v. Canada (Minister of Employment and Immigration)</i> (1992), 17 Imm. L.R. (2d) 219 (IAD).....	8-4
<i>Aquino, Edmar v. M.E.I.</i> (I.A.B. 86-9403), Eglington, Weisdorf, Ahara, August 13, 1986.....	8-4
<i>Brown, Earlyn v. M.C.I.</i> (IAD T93-09712), Ramnarine, August 17, 1994.....	8-3, 8-5
<i>Cherfaoui, Azzedine Dino v. M.C.I.</i> , (IAD MA1-01747), Beauchemin, February 11, 2002 (reasons signed February 13, 2002).....	8-3
<i>Datoc, Evelyn v. M.E.I.</i> (I.A.B. 83-9238), D. Davey, Suppa, Tisshaw, December 17, 1984.....	8-6
<i>Deol, Dilbag Singh v. M.E.I.</i> (I.A.B. 80-6012), Campbell, Hlady, Howard, February 11, 1981.....	8-3
<i>Dhandwar, Jatinder Kaur v. M.C.I.</i> (IAD T96-01977), Bartley, June 6, 1997.....	8-3, 8-4, 8-5
<i>Dhaul, Paramjit Kaur v. M.E.I.</i> (I.A.B. 86-6004), Chambers, March 5, 1987.....	8-2
<i>Dhiman, Jasvir Kaur v. M.C.I.</i> (IAD V95-00675), McIsaac, May 27, 1996.....	8-3
<i>Dory, Roosevelt v. M.C.I.</i> (IAD M94-03745), Angé, December 19, 1995.....	8-6
<i>Gill, Harbans Kaur v. M.C.I.</i> (IAD V92-00694), Lam, March 27, 1996.....	8-3, 8-4
<i>Gill, Jagjit Singh v. M.C.I.</i> (IAD V95-00365), McIsaac, May 8, 1997.....	8-2
<i>Gill, Rajwinder Kaur v. M.E.I.</i> (IAD V91-00898), Arpin, July 26, 1993.....	8-6
<i>Gill, Shivinder Kaur v. M.C.I.</i> (IAD T94-06519), Wright, May 16, 1995.....	8-3
<i>Gnanapragasam, Dominic Gnanase v. M.C.I.</i> (IAD T99-11000), Whist, December 4, 2000.....	8-4
<i>Goindi, Surendra Singh v. M.C.I.</i> (IAD T93-10856), Aterman, December 13, 1994.....	8-2, 8-5
<i>Gough: M.C.I. v. Gough, Glen Patrick</i> (IAD TA0-1561), MacAdam, March 26, 2001.....	8-7
<i>Ha, Byung Joon v. M.C.I.</i> (IAD TA0-04969), Sangmuah, October 3, 2001 (reasons signed January 8, 2002).....	8-3
<i>Jeudi, Liliane v. M.E.I.</i> (IAD M92-11211), Angé, June 30, 1993.....	8-6
<i>Kahlon, Darshan Singh v. M.E.I.</i> (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: <i>Kahlon v. Canada (Minister of Employment and Immigration)</i> (1989), 7 Imm. L.R. (2d) 91 (F.C.A.).....	8-4
<i>Kala, Bhupinder Kaur v. M.E.I.</i> (IAD T92-09579), Arpin, Townshend, Fatsis, May 18, 1993.....	8-3
<i>Kamara, Abass Bai Mohamed v. M.E.I.</i> (IAD W91-00092), Arpin, February 24, 1994.....	8-3, 8-5, 8-6
<i>Kan, Chak Pan v. M.E.I.</i> (F.C.T.D., no. T-2977-91), Muldoon, March 19, 1992. Reported: <i>Kan v.</i> <i>Canada (Minister of Employment and Immigration)</i> (1992), 17 Imm. L.R. (2d) 206 (F.C.T.D.).....	8-1
<i>Khanna, Sadhana Kumari v. M.C.I.</i> (IAD T96-01555), Wright, June 3, 1996.....	8-4
<i>Lalli, Kulwinder v. M.C.I.</i> (IAD V94-01439), Lam, November 20, 1995.....	8-3
<i>Mahil, Tarlochan v. M.E.I.</i> (IAD T92-08178), Weisdorf, Townshend, Ahara, May 18, 1993.....	8-3
<i>Mallik, Azim v. M.C.I.</i> (IAD T94-04692), Aterman, September 8, 1995.....	8-4

<i>Merius, Ronald v. M.E.I.</i> (IAD M93-05810), Angé, June 13, 1994.....	8-7
<i>Mirza, Shahid Parvez v. M.E.I.</i> (I.A.B. 86-9081), Teitelbaum, Weisdorf, Townshend, December 1, 1986.....	8-3
<i>Molice, Antoine Anel v. M.E.I.</i> (IAD M93-07976), Durand, March 22, 1994.....	8-3, 8-6
<i>Niles, Hyacinth v. M.E.I.</i> (I.A.B. 82-9966), Benedetti, Suppa, Tisshaw, September 17, 1984.....	8-6
<i>Pacampara, Enrique Pandong v. M.E.I.</i> (I.A.B. 85-9684), Ariemma, Arkin, De Morais, April 10, 1987.....	8-3
<i>Pangli, Amarjit Kaur v. M.E.I.</i> (F.C.A., no. A-597-86), Heald, Urie, Desjardins, November 12, 1987. Reported: <i>Pangli v. Canada (Minister of Employment and Immigration)</i> (1987), 4 Imm. L.R. (2d) 266 (F.C.A.).....	8-5, 8-6
<i>Pangli, Amarjit Kaur v. M.E.I.</i> (I.A.B. 84-6228), Anderson, Chambers, Howard, April 28, 1986.....	8-5
<i>Patel, Manjulaben v. M.E.I.</i> (IAD T89-03915), Townshend, Weisdorf, Chu, April 20, 1990.....	8-4, 8-5
<i>Patel, Mohamed v. M.E.I.</i> (IAD T91-03124), Weisdorf, Ahara, Fatsis, April 15, 1993.....	8-2, 8-3
<i>Quadri, Fatai Abiodun v. S.S.C.</i> (IAD T93-12576), Hopkins, September 30, 1994.....	8-5, 8-7
<i>Rahman, Mohibur v. M.C.I.</i> (IAD M94-05434), Angé, March 3, 1995.....	8-6
<i>Randhawa, Baljeet Singh v. M.C.I.</i> (IAD V95-01361), Lam, July 23, 1996.....	8-4
<i>Rodriguez, Meliton v. M.E.I.</i> (IAD T91-00107), Weisdorf, Fatsis, Ariemma, August 8, 1991.....	8-7
<i>Ruhani, Zahida v. M.C.I.</i> (IAD T92-07177), Teitelbaum, Muzzi, Band, March 8, 1995.....	8-3, 8-4
<i>Sall, Kashmir Kaur v. M.E.I.</i> (IAD V92-01785), Arpin, July 27, 1993.....	8-5
<i>Sanghera, Avtar Singh v. M.C.I.</i> (IAD V93-02360), Singh, July 22, 1994.....	8-4
<i>Sanghera, Charan Singh v. M.E.I.</i> (IAD V93-00595), Verma, December 9, 1993.....	8-4
<i>Sanghera, Rajwinder Kular v. M.C.I.</i> (IAD V96-01527), Clark, February 17, 1998.....	8-2
<i>Saroya, Kuljeet Kaur v. M.E.I.</i> (IAD V92-01880), Verma, September 21, 1993.....	8-2, 8-5
<i>Sarwar, Abida Shaheen v. M.C.I.</i> (IAD T93-11195), Ariemma, Leousis, Muzzi, April 24, 1995.....	8-2, 8-3, 8-6
<i>Shergill, Sohan Singh v. M.E.I.</i> (IAD T92-05406), Weisdorf, Chu, Ahara, February 8, 1993.....	8-2, 8-3
<i>Sian, Malkit Kaur v. M.C.I.</i> (IAD V95-00955), McIsaac, January 20, 1997.....	8-6
<i>Sidhu, Gurdev Singh v. M.E.I.</i> (IAD V92-01678), Singh, November 17, 1993.....	8-2, 8-4
<i>Singh, Malkiat v. M.E.I.</i> (IAD T93-02753), Weisdorf, June 16, 1993.....	8-5
<i>Toor, Joginder Singh v. M.E.I.</i> (F.C.A., no. A-310-82), Thurlow, Heald, Verchere, February 15, 1983. Reported: <i>Re Toor and Canada (Minister of Employment and Immigration)</i> (1983), 144 D.L.R. (3d) 554, QL [1983] F.C.J. 114 (F.C.A.).....	8-2
<i>Uddin, Mohammed Moin v. M.E.I.</i> (IAD T91-02394), Chu, Ahara, Fatsis (dissenting), August 28, 1992.....	8-4
<i>Villanueva, Antonio Ordonez v. M.E.I.</i> (I.A.B. 85-9741), Benedetti, Weisdorf, Bell, November 12, 1986.....	8-2
<i>Wiredu, Alex v. M.C.I.</i> (IAD T97-00727), Muzzi, December 8, 1997.....	8-3, 8-5

# CHAPTER 9

## Table of Contents

<b>9. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS</b> .....	<b>9-1</b>
<b>9.1. GENERALLY</b> .....	<b>9-1</b>
9.1.1. Definition .....	9-1
9.1.2. Exercise Of Discretionary Jurisdiction.....	9-2
9.1.3. Who May Benefit From Special Relief .....	9-5
9.1.3.1. « Splitting and Deleting » .....	9-6
9.1.4. Effect Of A Favourable Decision On Compassionate Or Humanitarian Grounds .....	9-7
<b>9.2. EVIDENCE</b> .....	<b>9-7</b>
9.2.1. Burden Of Proof .....	9-7
9.2.2. Evidence Existing At The Time Of The Appeal.....	9-7
<b>9.3. GENERAL PRINCIPLES</b> .....	<b>9-7</b>
<b>9.4. CONSIDERATIONS FOR SPECIAL RELIEF</b> .....	<b>9-11</b>
9.4.1. Generally Applicable.....	9-11
9.4.2. Medical Inadmissibility .....	9-13
9.4.3. Criminal Inadmissibility .....	9-13
9.4.4. Financial Refusals .....	9-14



## CHAPTER 9

### 9. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

#### 9.1. GENERALLY<sup>1</sup>

As one of the two grounds of appeal from a sponsorship refusal,<sup>2</sup> the consideration of compassionate or humanitarian grounds permits the sponsor to adduce evidence of a compassionate or humanitarian nature sufficient to warrant the granting of special relief. This jurisdiction of the Appeal Division involves the exercise of discretion. It is open to the Appeal Division to allow an appeal on both legal grounds and on the ground that there exist compassionate or humanitarian considerations warranting special relief, although special relief is usually granted after a refusal is found to be valid in law. It should be pointed out that “compassionate or humanitarian considerations” are not “all the circumstances of the case,” the latter grounds applying in respect of an appeal against a removal order.<sup>3</sup>

##### 9.1.1. Definition

Historically, “compassionate or humanitarian considerations” have been looked at compendiously rather than discretely. The following definitions were given in *Chirwa*:<sup>4</sup>

[...] “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.”

---

<sup>1</sup> Reference may be made to other chapters which have a section on compassionate or humanitarian considerations for more on the subject.

<sup>2</sup> Section 77(3)(b) of the *Immigration Act* provides:

77.(3) Subject to subsections (3.01), (3.02) and (3.1), a Canadian citizen or permanent resident who has sponsored an application for landing that is refused pursuant to subsection (1) may appeal to the Appeal Division on either or both of the following grounds:

[...]

(b) on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

<sup>3</sup> *Warner, Newton George v. M.E.I.* (I.A.B. 85-9421), Eglington (dissenting), Rotman, Warrington, April 27, 1987. There is no jurisprudence at the Federal Court level on the difference between “all the circumstances of the case” and “humanitarian or compassionate considerations”: *Nagularajah, Sathiyaseelan v. M.C.I.* (F.C.T.D., no. IMM-3732-98), Sharlow, July 7, 1999.

<sup>4</sup> *Chirwa v. Canada (Minister of Manpower and Immigration)* (1970), 4 I.A.C. 338 (I.A.B.), at 350.

### 9.1.2. Exercise Of Discretionary Jurisdiction

The jurisdiction of the Appeal Division to grant special relief is loosely referred to as its “equitable” jurisdiction. It is not, strictly speaking, equitable, for none of the equitable doctrines, such as the “clean hands” doctrine or laches, apply.<sup>5</sup> In *Dimacali-Victoria* the Federal Court said:

[...] 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*,<sup>6</sup> “[...] 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.<sup>7</sup>

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*.<sup>8</sup>

In *Lutchman*,<sup>9</sup> 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,

---

<sup>5</sup> *Mundi v. Canada (Minister of Employment and Immigration)*, [1986] 1 F.C. 182 (C.A.). Yet a different view, regarding the applicability of the “clean hands” doctrine before the Appeal Division, was expressed in *Abdul, Shaheen Hanif v. M.C.I.* (T99-05070), Hoare, September 20, 2000.

<sup>6</sup> *Shah, Syed v. M.E.I.* (F.C.A, no. A-617-92), Hugessen, MacGuigan, Linden, June 24, 1994.

<sup>7</sup> *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 to set aside the Appeal Division’s decision.

<sup>8</sup> *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.

<sup>9</sup> *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.<sup>10</sup>

According to one decision of the Federal Court, *Kirpal*,<sup>11</sup> the Appeal Division errs if it “weighs” the legal impediment to admissibility against the strength of the humanitarian or compassionate factors present in an appeal. However, in a subsequent case, the Federal Court expressed its doubts regarding the validity of the *Kirpal*<sup>12</sup> decision.<sup>13</sup> In decisions that pre-date *Kirpal*,<sup>14</sup> the Federal Court of Appeal sanctioned consideration of the legal impediment in the exercise of the Appeal Division’s discretion. The approach taken by the Appeal Division pre-*Kirpal* 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.<sup>15</sup>

In response to *Kirpal*,<sup>16</sup> some panels of the Appeal Division had discontinued “weighing” the legal impediment against the compassionate or humanitarian factors in an appeal, but they continued to factor in the legal impediment in exercising discretion. In order for the Appeal Division to grant special relief, it required that there be positive factors over and above the ability to surmount the obstacle to admissibility. The Federal Court upheld this latter approach in *Dang*.<sup>17</sup> Where panels<sup>18</sup> have simply declined to follow *Kirpal*,<sup>19</sup> however unless *Kirpal*<sup>20</sup> is

---

<sup>10</sup> *Ibid.*, at 4-5.

<sup>11</sup> *Kirpal v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 352 (T.D.).

<sup>12</sup> *Ibid.*

<sup>13</sup> *Sandhu, Rajwant Singh v. M.C.I.* (F.C.T.D. no., IMM-2939-99), McKeown, August 31, 2000. [Judicial review of T95-04456, Whist, Boire, Sangmuah, May 26, 1999.]

<sup>14</sup> These decisions are canvassed in *Chauhan, Gurpreet K. v. M.C.I.* (IAD T95-06533), Townshend, June 11, 1997.

<sup>15</sup> *Lutchman, supra*, footnote 9, at 5.

<sup>16</sup> *Kirpal, supra*, footnote 11

<sup>17</sup> *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].

<sup>18</sup> *Chauhan, supra*, footnote 14; *Bhargava, Usha v. M.C.I.* (IAD T96-00335), Aterman, June 23, 1997; *Sandhu, Rajwant Singh v. M.C.I.* (IAD T95-04456), Whist, Boire, Sangmuah, May 26, 1999.

<sup>19</sup> *Kirpal, supra*, footnote 11.

<sup>20</sup> *Kirpal, supra*, footnote 11.

distinguished or the panel cites a higher court decision, the Federal Court has held that, on the basis of *stare decisis*, the Appeal Division erred.<sup>21</sup>

(...)the IAD is bound to follow Trial division decisions on point unless they are distinguished or based on decisions of the Federal Court of Appeal or Supreme Court of Canada. ...Although *Chauhan* does consider Federal Court of Appeal jurisprudence, there is no specific reference to this by this panel in their reasons and furthermore the reference to *Jugpall* is based on the facts in that case.

*Jugpall*<sup>22</sup> 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 [...].

[...]

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 [...].

---

<sup>21</sup> *Sandhu, supra*, footnote 13

<sup>22</sup> *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*, *supra*, footnote 17 where the panel adopted the reasoning in *Jugpall* and the Court found that the panel IAD did not err in law when it allowed the appeal on H&C grounds.

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.<sup>23</sup>

As well, there should be no negative factors which would undermine any justification for granting special relief.<sup>24</sup>

In other cases, where the panel has allegedly weighed the legal impediment against the compassionate or humanitarian considerations, the Federal Court has distinguished *Kirpal* by stating that, in the cases before them, there has been full consideration of proper compassionate and humanitarian factors<sup>25</sup>. Further, in noting that the Federal Court's standard of review for conclusions related to the Appeal Division's exercise of its discretionary jurisdiction is "patently unreasonable" the conclusions of the Appeal Division have been upheld, even where "at worst, one irrelevant factor, was considered" and "where one irrelevant consideration was factored in." In *Nawaratnam*<sup>26</sup>, the Court specifically cited *Chauhan*<sup>27</sup> with approval and noted that caselaw from the Federal Court of Appeal implicitly accepts that the IAD can weigh the legal impediment against the H&C factors.

The *Chirwa*<sup>28</sup> standard applies where the initial ground of inadmissibility has not in substance been overcome. A different and lower threshold for granting special relief is appropriate where current circumstances reveal that the obstacle to admissibility has been met.<sup>29</sup>

### 9.1.3. Who May Benefit From Special Relief

Special relief may only be granted in respect of members of the family class. In other words, the applicants must first be determined to come within the definition of "member of the family class"<sup>30</sup> or to qualify as dependants of a member of the family class. To proceed otherwise would have the effect of expanding the family class beyond its prescribed limits.<sup>31</sup>

---

<sup>23</sup> *Ibid.*, at 18.

<sup>24</sup> *Ibid.*

<sup>25</sup> *M.C.I. v. Owens, Kathleen* (F.C.T.D., no. IMM-5658-99), Dawson, October 11, 2000. [Judicial review of IAD V98-02014, Carver, November 4, 1999]. *Nawaratnam, Karunakaran v. M.C.I.* (F.C.T.D., no. IMM-5686-00), Blais, August 30, 2001. [Judicial review of IAD T99-07274, Hoare, September 26, 2000.].

<sup>26</sup> *Ibid.*

<sup>27</sup> *Chauhan, supra*, footnote 14.

<sup>28</sup> *Chirwa, supra*, footnote 4.

<sup>29</sup> *Jugpall, supra*, footnote 22.

<sup>30</sup> The definition appears in section 2(1) of the *Immigration Regulations, 1978*.

<sup>31</sup> *Singh, Donna Marie v. M.E.I.* (I.A.B. 78-9088), Weselak, Petrie, Tremblay, August 23, 1978.

In *Kirpal*, the Federal Court 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 [...]”.<sup>32</sup> 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 individual assessments,<sup>33</sup> it usually comes to a uniform conclusion for all applicants on the question of whether special relief is warranted.<sup>34</sup>

### 9.1.3.1. « Splitting and Deleting »

Where the Appeal Division finds that an individual listed on an application does not qualify as a member of the family class or as a dependant, the ineligible applicant is “split” or deleted from the application. The admissibility of the remaining applicants is unaffected by the deletion.<sup>35</sup> The appeal could also be allowed on compassionate or humanitarian grounds for these remaining applicants, if warranted, although this would not be necessary for the appeal to succeed.

Applications can also be “split” where they involve two or more members of the family class who are not dependants in relation to each other. One example is a sponsor’s daughter and his spouse, where the daughter is not related to the spouse. A ground of refusal relating to the daughter would not affect the spouse because neither is a dependant of the other.<sup>36</sup> The appeal would be allowed in respect of the spouse, in effect, “splitting” her application from the daughter’s application. The appeal in respect of the daughter would be dealt with separately, and if the ground of refusal were valid, the appeal could only succeed if discretionary relief were granted.

The same would not hold true if the sponsor’s daughter were also the spouse’s daughter. If the daughter were inadmissible, the spouse would also be inadmissible because the daughter is her dependant.<sup>37</sup> There could be no “splitting” of the spouse’s application and, if the ground of refusal were valid, discretionary relief would be necessary for the appeal in respect of both applicants to succeed.

---

<sup>32</sup> *Kirpal*, *supra*, footnote 11, 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.

<sup>33</sup> See, however, *Chauhan*, *supra*, footnote 14, where the panel articulated its disagreement with *Kirpal* in this respect.

<sup>34</sup> 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.

<sup>35</sup> *Mundi*, *supra*, footnote 5.

<sup>36</sup> Under section 6(1)(a) of the *Immigration Regulations, 1978*, a visa officer may issue a visa to each member of the family class who is admissible as long as their dependants are also admissible.

<sup>37</sup> Due to the operation of section 6(1)(a) of the *Immigration Regulations, 1978*.

#### **9.1.4. Effect Of A Favourable Decision On Compassionate Or Humanitarian Grounds**

A decision in the sponsor's favour on compassionate or humanitarian grounds blankets and thus overcomes the ground of inadmissibility.<sup>38</sup> The blanketing effect is in relation to the particular ground that was before the Appeal Division. This means that when the application is returned to the visa officer to be further processed, if the officer discovers another reason for refusing the application, there is nothing to preclude a second refusal. The Appeal Division's earlier decision granting special relief relates only to the matter that was before it at the time. Thus the Appeal Division may, on a subsequent appeal, on the facts then existing, decide that the granting of special relief is not warranted.<sup>39</sup> The earlier decision granting special relief may be revisited and the doctrine of *res judicata* does not apply.

### **9.2. EVIDENCE**

#### **9.2.1. 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.

#### **9.2.2. 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 Appeal Division makes its decision. In *Gill*,<sup>40</sup> 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.

### **9.3. GENERAL PRINCIPLES**

It has been held that the sponsor's circumstances are at least as important as those of the applicants, if not paramount,<sup>41</sup> on an appeal on compassionate or humanitarian grounds.

The policy objective set out in section 3(c) of the *Immigration Act*, to facilitate the reunion in Canada of Canadian citizens and permanent residents with their close relatives from abroad, informs the exercise of discretionary relief. However, since it is the basis for all

---

<sup>38</sup> *Mangat, Parminder Singh v. M.E.I.* (F.C.T.D., no. T-153-85), Strayer, February 25, 1985.

<sup>39</sup> *Wong, Kam v. M.E.I.* (I.A.B. 83-6438), Davey, Hlady, Howard, March 7, 1984.

<sup>40</sup> *M.E.I. v. Gill, Hardeep Kaur* (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991, at 6-7.

<sup>41</sup> *Johl, Baljinder Kaur v. M.E.I.* (I.A.B. 85-4006), Eglington, Arpin, Wright, January 26, 1987.

sponsorship applications, it is not, without more, sufficient to warrant special relief.<sup>42</sup> Marriage to a Canadian citizen does not, in itself, create any entitlement to special relief.<sup>43</sup>

There is a distinction between achieving family unification and facilitating the reunion of the sponsor with close relatives from abroad.<sup>44</sup> 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.<sup>45</sup>

A sponsor may make arrangements for an inadmissible relative (member of the family class or dependant) to be left behind in the home country and ask the Appeal Division to allow the appeal in respect of the remaining applicants who have applied to come to Canada. Although the relative's inadmissibility has the effect of prohibiting the issuance of visas to the applicants,<sup>46</sup> the Appeal Division may grant special relief to enable the applicants to proceed to Canada without the relative.<sup>47</sup> However, the circumstances relating to the relative may have some bearing on the exercise of discretion,<sup>48</sup> and to this extent an exception to the general rule exists.

---

<sup>42</sup> *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.

<sup>43</sup> *Singh, Rosina v. M.E.I.* (I.A.B. 83-6483), Anderson, Chambers, Voorhees, December 31, 1984.

<sup>44</sup> *Mohamed v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 90 (C.A.).

<sup>45</sup> *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.

<sup>46</sup> Due to the operation of section 6(1)(a) of the *Immigration Regulations, 1978*.

<sup>47</sup> *Fleurima, Marie Lourdes Margareth v. M.E.I.* (I.A.B. 85-1358), Tremblay, Durand, Blumer (dissenting), November 28, 1986. In another case, the Appeal Division allowed an appeal for the sponsor's father, sister and brother on compassionate or humanitarian grounds; the medically inadmissible mother was to stay behind in India to be cared for by her son. The mother and father had been living separate lives for 15 years and the mother did not want to come to Canada: *Augustine, Thankamma v. M.C.I.* (IAD V94-00311), Verma, April 26, 1996.

<sup>48</sup> *Singh, Nirbhe v. M.C.I.* (IAD V96-00985), Jackson, December 15, 1997. There was insufficient reason to grant special relief where there was a physical and emotional dependency on the applicants on the part of the



Where there is more than one ground of refusal, different considerations go to the discretionary jurisdiction with respect to each ground.<sup>49</sup>

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 compassionate or humanitarian factor.<sup>50</sup>

The policy objective set out in section 3(i) of the *Immigration Act*, to maintain and protect the health, safety and good order of Canadian society, can guide discretion.<sup>51</sup>

The Appeal Division has considered the exercise of special relief to alleviate an anomaly in the law.<sup>52</sup>

The Appeal Division has held that the doctrine of *res judicata* applies to a decision regarding compassionate and humanitarian considerations.<sup>53</sup>

Evidence of country conditions and hardship to the applicant in that country is admissible in assessing compassionate and humanitarian considerations in section 77 appeals.<sup>54</sup> The Supreme Court of Canada, relying on the *Convention on the Rights of the Child*, has held that failure to give serious weight and consideration to the interests of an applicant's children may constitute an unreasonable exercise of discretion.<sup>55</sup> The Federal Court of Appeal<sup>56</sup> noted that the Federal Court Trial Division's interpretation of *Baker* had been both a "process" approach and a "substantive" approach. The Federal Court of Appeal clarified the law concerning the application of *Baker* by answering the following three certified questions:

---

sponsor's brother who was to be left behind. See also *Singh, Ranjit Kaur v. M.C.I.* (IAD V96-02448), Singh, February 10, 1999, where the needs of the medically inadmissible relative were given precedence.

<sup>49</sup> *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. Compassionate or humanitarian considerations regarding the financial ground were insufficient to warrant special relief.

<sup>50</sup> *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), Eglinton, Goodspeed, Vidal, September 15, 1986, the proposition that money considerations could never be humanitarian or compassionate considerations was rejected.

<sup>51</sup> *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*.

<sup>52</sup> *Mtanos, 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.

<sup>53</sup> *Nyame, Daniel v. M.C.I.* (IAD T98-09032), Buchanan, December 31, 1999.

<sup>54</sup> *Alaguthrai, Suboshini v. M.C.I.* (IAD T97-01964), Kelley, December 8, 1999.

<sup>55</sup> *Baker, supra*, footnote 8.

<sup>56</sup> *Legault, Alexander Henri v. M.C.I.* (F.C.A., no. A-255-01), Richard, Décary, Noël, March 25, 2002; 2002 FCA 125 [Appeal from (F.C.T.D., no. IMM-4742-99), Nadon, April 11, 2001].

1. Question: Is the mere mention of the children sufficient to fulfil the requirements of *Baker*?

Answer: No. 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.

2. Did *Baker* create a prima facie presumption that the children's best interests should prevail, subject only to the gravest countervailing grounds?

Answer: No. *Baker* does not create a prima facie presumption that the children's best interests should prevail, subject only to the gravest countervailing grounds. In his question, Justice Nadon refers to the "children's best interests". This expression is oftentimes encountered in *Baker*, but to the extent that it could be understood to mean that the interests of the children are superior to other interests, it can cause the agent to believe that this factor is, before all others, more important, which in light of *Suresh*<sup>57</sup> and in the absence of clear legislative or regulatory limitations stating otherwise, cannot be the case. It would be better to use the expression "children's interests".

3. Is the fact that an applicant under subsection 114(2) of the Immigration Act faces an outstanding indictment for serious offences in a foreign country one of those "other considerations" of "other reasons" mentioned in paragraph 75 in *Baker* which might outweigh the children's best interests?"

Answer: I would answer that the Minister can take into account the actions, past and present, of the person that requests the exception.

In a subsequent case<sup>58</sup>, the Federal Court found that the Immigration assessment was superficial. It found that where important evidence is not mentioned specifically, a negative inference from the silence may be made. In this case, the Court held that the sole documentary evidence was not considered and little was known about the children, their psychological make-up, their position and needs, and the true impact of the return to Ecuador. It noted that the Immigration Officer failed to take advantage of the opportunity presented by the availability of the minor Applicants at the second interview. As a result, it concluded that the "H&C decision is flawed".

Other cases, while pre-dating *Legault*<sup>59</sup>, may still be instructive. In *Anthony*<sup>60</sup>, the Court found that the Immigration Officer's decision was not "attentive or sensitive" to the

---

<sup>57</sup> *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1.

<sup>58</sup> *Vasquez, Maria Del Carmen Mier v. M.C.I.* (F.C.T.D., no. IMM-2226-01), Campbell, April 10, 2002; 2002 FCT 413.

<sup>59</sup> *Legault, supra*, footnote 56.

<sup>60</sup> *Anthony, Lucretia v. M.C.I.* (F.C.T.D., no. IMM-1043-01), Campbell, November 28, 2001; 2001 FCT 1310. This case arose as an application for judicial review of an Immigration Officer's refusal of the application for an exemption under s. 114(2) of the *Immigration Act*. See too *Bassan, Sukdev v. M.C.I.* (F.C.T.D., no. IMM-3751-00), McKeown, July 3, 2001 and *Qureshi, Mohammad v. M.C.I.* (F.C.T.D., no. IMM-277-00), Evans,

interests of the applicant's Canadian born child in that the Immigration Officer did not consider the quality of life or potential hardships the child would face in St. Lucia. In another case, also an application for permission to apply for permanent residence from within Canada on humanitarian and compassionate grounds, the Court held that the failure of the Immigration Officer to take into account the children's inability to speak the Tamil language is an error<sup>61</sup>. In *Wu*<sup>62</sup>, the Court held that while the Immigration Officer properly turned her mind to the interests of the child, she erred by importing irrelevant criteria into her analysis. Specifically, the Immigration Officer's extremely high standard was unreasonable in that the suffering should not have to be "life-threatening" in order for humanitarian and compassionate considerations to apply. By judging the child's medical condition according to the standard of whether it was "life threatening", she effectively minimized the interests of the child. In other cases, the Court has held that it is not open to the Immigration Officer to simply leave the issue of what is in the best interests of the applicants' children to the applicants to decide.<sup>63</sup>

#### **9.4. CONSIDERATIONS FOR SPECIAL RELIEF**

The Appeal Division has taken account of article 3(1) of the *Convention on the Rights of the Child* which provides that in all actions concerning children, the best interests of the child shall be a primary consideration.<sup>64</sup>

In addition to the general principles set out above, the following are some considerations for the exercise of discretionary relief.

##### **9.4.1. Generally Applicable**

- the objective in section 3(c) of the *Immigration Act*, to facilitate the reunion of the sponsor with close relatives from abroad
- nature and degree of legal impediment
- the relationship of the sponsor to the applicant(s)
- the reason(s) for the sponsorship

---

August 25, 2000 wherein the Courts found the considerations to the best interests of the Canadian born children insufficient.

<sup>61</sup> *Gurunathan, Mutusamy v. M.C.I.* (F.C.T.D., no. IMM-6368-00), McKeown, October 24, 2001; 2001 FCT 1155.

<sup>62</sup> *Wu, Yu Ying v. M.C.I.* (F.C.T.D., no. IMM-5652-00), Campbell, November 20, 2001; 2001 FCT 1274.

<sup>63</sup> *Naredo, Fernando Arduengo v. M.C.I.* (F.C.T.D., no. IMM-4126-99), Gibson, August 3, 2000. Followed in *Mulholland, Patricia Grace v. M.C.I.* (F.C.T.D., no. IMM-1439-00), Blanchard, June 6, 2001.

<sup>64</sup> *Mendere, Lemlem Tedros v. M.C.I.* (IAD W97-00061), MacAdam, February 24, 1999. In assessing compassionate or humanitarian considerations, the panel concluded that it was not in the best interests of the applicants to live with the sponsor in her current circumstances.

- the strength of the relationship between the applicant(s) and the sponsor<sup>65</sup>
- the situation of the sponsor in Canada<sup>66</sup>
- the past conduct of the sponsor<sup>67</sup>
- the situation of the applicant(s) abroad, including hardship<sup>68</sup>
- the ease of travel for the sponsor/applicant(s)
- the existence of family or other support for the applicant(s) abroad<sup>69</sup>
- the existence of family or other support for the sponsor in Canada
- the existence of cultural duties to one another<sup>70</sup>
- 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<sup>71</sup>

---

<sup>65</sup> *Wong, Philip Sai Chak v. M.E.I.* (IAD T91-05637), Chu, Fatsis, Ahara, November 5, 1992.

<sup>66</sup> *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.

<sup>67</sup> *Lai, supra*, footnote 51. 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 *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.

<sup>68</sup> *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.

<sup>69</sup> *Baldwin, Ellen v. M.E.I.* (IAD T91-01664), Chu, Arpin, Fatsis, June 30, 1992.

<sup>70</sup> *Sotoodeh, supra*, footnote 42.

<sup>71</sup> *Zaraket, Zahra v. M.C.I.* (IAD M99-06909), Fortin, October 10, 2000.

#### 9.4.2. Medical Inadmissibility<sup>72</sup>

- whether there is evidence of an improved medical condition at the time of the appeal<sup>73</sup> and current status of same if not an improvement
- whether there are likely to be inordinate demands on Canadian services (health/social)<sup>74</sup>
- the relative availability of health services to the applicant(s), in Canada and abroad<sup>75</sup>
- the cost of treatment of the medical condition<sup>76</sup>
- the availability of family support in Canada<sup>77</sup>
- the psychological dependencies of the applicant(s) on the sponsor<sup>78</sup>
- the objective in section 3(i) of the Act, to maintain and protect the health, safety and good order of Canadian society

#### 9.4.3. Criminal Inadmissibility

- whether there is evidence of rehabilitation<sup>79</sup>
- whether there is evidence of remorse<sup>80</sup>
- the seriousness of the offences<sup>81</sup>

---

<sup>72</sup> See Chapter 3 for full discussion of Medical Refusals.

<sup>73</sup> *Hu, Jenkin Ching-Kim v. M.C.I.* (IAD V92-01452), Ho, March 30, 1995.

<sup>74</sup> *Sooknanan, Lochan v. M.C.I.* (F.C.T.D., no. IMM-1213-97), Gibson, February 27, 1998; *Dutt, supra*, footnote 68.

<sup>75</sup> *Dutt, ibid.*

<sup>76</sup> *Valdes, supra*, footnote 42; *Che Tse, David Kwai v. S.S.C.* (F.C.T.D., no. IMM-2645-93), McKeown, December 15, 1993.

<sup>77</sup> *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.

<sup>78</sup> *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*.

<sup>79</sup> *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.

<sup>80</sup> *Khan, supra*, footnote 49.

<sup>81</sup> *Ibid.*

- evidence of good character<sup>82</sup>
- the length of time since the offence(s) and absence of further trouble with the law<sup>83</sup>
- evidence of criminal history, future prospects and risk of future danger to the public<sup>84</sup>

#### **9.4.4. Financial Refusals**

See the discussion in chapter 1, “Financial Refusals,” section 1.6., “Compassionate or Humanitarian Considerations.”

---

<sup>82</sup> *Ibid.*

<sup>83</sup> *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.

<sup>84</sup> *Nagularajah, supra*, footnote 3. This decision arose in the context of a removal order appeal so may not exactly fit the sponsorship context.

## CHAPTER 9

### TABLE OF CASES: COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

#### CASES

<i>Abdul, Shaheen Hanif v. M.C.I.</i> (T99-05070), Hoare, September 20, 2000 .....	9-2
<i>Ahmed, Muhammad Jamail v. M.E.I.</i> (I.A.B. 85-6238), Anderson, November 18, 1986 .....	9-8
<i>Alaguthrai, Suboshini v. M.C.I.</i> (IAD T97-01964), Kelley, December 8, 1999 .....	9-9
<i>Anthony, Lucretia v. M.C.I.</i> (F.C.T.D., no. IMM-1043-01), Campbell, November 28, 2001; 2001 FCT 1310 .....	9-10
<i>Au, Chui Wan Fanny v. M.C.I.</i> (IAD T94-05868), Muzzi, March 13, 1996 .....	9-14
<i>Augustine, Thankamma v. M.C.I.</i> (IAD V94-00311), Verma, April 26, 1996 .....	9-8
<i>Bagri, Sharinder Singh v. M.C.I.</i> (IAD V96-02022), Borst, May 9, 1999 .....	9-8
<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 S.C.R. 817 .....	9-2, 9-9
<i>Baldwin, Ellen v. M.E.I.</i> (IAD T91-01664), Chu, Arpin, Fatsis, June 30, 1992 .....	9-12
<i>Bassan, Sukdev v. M.C.I.</i> (F.C.T.D., no. IMM-3751-00), McKeown, July 3, 2001 .....	9-10
<i>Bhargava, Usha v. M.C.I.</i> (IAD T96-00335), Aterman, June 23, 1997 .....	9-3
<i>Budhu, Pooran Deonaraine v. M.C.I.</i> (F.C.T.D., no. IMM-272-97), Reed, March 20, 1998 .....	9-2
<i>Burgon: M.E.I. v. Burgon, David Ross</i> (F.C.A., no. A-17-90), MacGuigan, Linden, Mahoney (concurring in the result), February 22, 1991. Reported: <i>Canada (Minister of Employment and Immigration) v. Burgon</i> (1991), 13 Imm. L.R. (2d) 102 (F.C.A.) .....	9-8
<i>Chauhan, Gurpreet K. v. M.C.I.</i> (IAD T95-06533), Townshend, June 11, 1997 .....	9-3, 9-6
<i>Che Tse, David Kwai v. S.S.C.</i> (F.C.T.D., no. IMM-2645-93), McKeown, December 15, 1993 .....	9-13
<i>Chirwa v. Canada (Minister of Manpower and Immigration)</i> (1970), 4 I.A.C. 338 (I.A.B.) .....	9-1, 9-5
<i>Colterjohn, David Ian v. M.C.I.</i> (IAD V96-00808), Jackson, March 11, 1998 .....	9-13
<i>Dang: M.C.I. v. Dang, Thi Kim Anh</i> (F.C.T.D., no. IMM-3113-99), Dawson, July 20, 2000 .....	9-3
<i>Deol, Daljeet Singh v. M.E.I.</i> (F.C.A., no. A-280-90), MacGuigan, Linden, Robertson, November 27, 1992. Reported: <i>Deol v. Canada (Minister of Employment and Immigration)</i> (1992), 18 Imm. L.R. (2d) 1 (F.C.A.) .....	9-13
<i>Dimacali-Victoria, April Grace Mary v. M.C.I.</i> (F.C.T.D., no. IMM-3323-96), Gibson, August 29, 1997 .....	9-2
<i>Doan, Hop Duc v. M.E.I.</i> (I.A.B. 86-4145), Eglinton, Goodspeed, Vidal, September 15, 1986 .....	9-9
<i>Dosanjh, Balbir Kaur v. M.C.I.</i> (IAD V95-00550), McIsaac, July 31, 1997 .....	9-6
<i>Dutt, John Ravindra v. M.E.I.</i> (IAD V90-01637), Chu, Wlodyka, Tisshaw, July 22, 1991 .....	9-12, 9-13
<i>Fleurima, Marie Lourdes Margareth v. M.E.I.</i> (I.A.B. 85-1358), Tremblay, Durand, Blumer (dissenting), November 28, 1986 .....	9-8
<i>Fu, Chun-Fai William v. M.C.I.</i> (IAD T94-04088), Townshend, March 19, 1996 .....	9-14
<i>Gill: M.E.I. v. Gill, Hardeep Kaur</i> (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991 .....	9-7

<i>Gurunathan, Mutusamy v. M.C.I.</i> (F.C.T.D., no. IMM-6368-00), McKeown, October 24, 2001; 2001 FCT 1155 .....	9-11
<i>Hu, Jenkin Ching-Kim v. M.C.I.</i> (IAD V92-01452), Ho, March 30, 1995 .....	9-13
<i>Hylton, Claudine Ruth v. M.E.I.</i> (I.A.B. 86-9807), Arkin, Suppa, Ariemma, March 17, 1987 .....	9-8
<i>Jagpal, Sawandeep Kaur v. M.C.I.</i> (IAD V96-00243), Singh, June 15, 1998.....	9-6
<i>Jean, Marie Béatrice v. M.E.I.</i> (IAD M93-05594), Durand, September 9, 1993 .....	9-12
<i>Johl, Baljinder Kaur v. M.E.I.</i> (I.A.B. 85-4006), Eglington, Arpin, Wright, January 26, 1987.....	9-7
<i>Judge, Mahan Singh v. M.E.I.</i> (I.A.B. 80-6239), Campbell, Hlady, Howard, March 13, 1981 .....	9-9
<i>Jugpall, Sukhjeevan Singh v. M.C.I.</i> (IAD T98-00716), Aterman, Goodman, Townshend, April 12, 1999.....	9-4, 9-5
<i>Kadri, Darwish Mohamad v. M.C.I.</i> (IAD V97-02769), Boscariol, August 4, 1998 .....	9-8
<i>Khan, Roshina v. M.C.I.</i> (IAD V97-03369), Carver, November 13, 1998 .....	9-9, 9-13
<i>Kirpal v. Canada (Minister of Citizenship and Immigration)</i> , [1997] 1 F.C. 352 (T.D.) .....	9-3, 9-6
<i>Lai, Gia Hung v. M.E.I.</i> (IAD V92-01455), Wlodyka, Singh (dissenting in part), Verma, November 12, 1993.....	9-9, 9-12
<i>Lakhdar, Ahmed v. M.C.I.</i> (IAD M96-13690), Lamarche, February 13, 1998.....	9-13
<i>Lawler, Valerie Ann v. M.C.I.</i> (IAD T95-03411), Band, February 23, 1996.....	9-12
<i>Legault, Alexander Henri v. M.C.I.</i> (F.C.A., no. A-255-01), Richard, Décary, Noël, March 25, 2002; 2002 FCA 125 .....	9-9
<i>Luong, Chinh Van v. M.E.I.</i> (IAD V92-01963), Clark, July 5, 1994.....	9-13
<i>Lutchman, Umintra v. M.E.I.</i> (I.A.B. 88-35755), Ariemma, Townshend, Bell, January 10, 1989. Reported: <i>Lutchman v. Canada (Minister of Employment and Immigration)</i> (1989), 12 Imm. L.R. (2d) 224 (I.A.B.) .....	9-2, 9-3
<i>Mangat, Parminder Singh v. M.E.I.</i> (F.C.T.D., no. T-153-85), Strayer, February 25, 1985 .....	9-7
<i>Mendere, Lemlem Tedros v. M.C.I.</i> (IAD W97-00061), MacAdam, February 24, 1999.....	9-11
<i>Mohamed v. Canada (Minister of Employment and Immigration)</i> , [1986] 3 F.C. 90 (C.A.) .....	9-8
<i>Mtanos, Johnny Kaissar v. M.C.I.</i> (IAD T95-02534), Townshend, May 8, 1996 .....	9-9
<i>Mulholland, Patricia Grace v. M.C.I.</i> (F.C.T.D., no. IMM-1439-00), Blanchard, June 6, 2001 .....	9-11
<i>Mundi v. Canada (Minister of Employment and Immigration)</i> , [1986] 1 F.C. 182 (C.A.).....	9-2, 9-6
<i>Nagularajah, Sathiyaseelan v. M.C.I.</i> (F.C.T.D., no. IMM-3732-98), Sharlow, July 7, 1999 .....	9-1, 9-14
<i>Naredo, Fernando Arduengo v. M.C.I.</i> (F.C.T.D., no. IMM-4126-99), Gibson, August 3, 2000.....	9-11
<i>Nawaratnam, Karunakaran v. M.C.I.</i> (F.C.T.D., no. IMM-5686-00), Blais, August 30, 2001 .....	9-5
<i>Nyame, Daniel v. M.C.I.</i> (IAD T98-09032), Buchanan, December 31, 1999.....	9-9
<i>Owens: M.C.I. v. Owens, Kathleen</i> (F.C.T.D., no. IMM-5658-99), Dawson, October 11, 2000 .....	9-5
<i>Parel, Belinda v. M.C.I.</i> (IAD W97-00112), Boire, June 23, 1999 .....	9-12
<i>Parmar, Hargurjodh v. M.E.I.</i> (IAD T92-03914), Townshend, September 16, 1993 .....	9-13
<i>Perry, Ivelaw Barrington v. M.C.I.</i> (IAD V94-01575), Ho, November 1, 1995 .....	9-13
<i>Qureshi, Mohammad v. M.C.I.</i> (F.C.T.D., no. IMM-277-00), Evans, August 25, 2000 .....	9-10
<i>Rupert, Constance Elizabeth v. M.E.I.</i> (I.A.B. 85-6191), Mawani, Singh, Ariemma, May 22, 1987 .....	9-8



<i>Sandhu, Rajwant Singh v. M.C.I.</i> (F.C.T.D. no., IMM-2939-99), McKeown, August 31, 2000.....	9-3
<i>Sandhu, Rajwant Singh v. M.C.I.</i> (IAD T95-04456), Whist, Boire, Sangmuah, May 26, 1999.....	9-3
<i>Saskin, Atif v. M.C.I.</i> (IAD T96-03348), Maziarz, January 30, 1998.....	9-12
<i>Shah, Syed v. M.E.I.</i> (F.C.A, no. A-617-92), Hugessen, MacGuigan, Linden, June 24, 1994.....	9-2
<i>Singh, Donna Marie v. M.E.I.</i> (I.A.B. 78-9088), Weselak, Petrie, Tremblay, August 23, 1978.....	9-5
<i>Singh, Nirbhe v. M.C.I.</i> (IAD V96-00985), Jackson, December 15, 1997.....	9-8
<i>Singh, Ranjit Kaur v. M.C.I.</i> (IAD V96-02448), Singh, February 10, 1999.....	9-8
<i>Singh, Rosina v. M.E.I.</i> (I.A.B. 83-6483), Anderson, Chambers, Voorhees, December 31, 1984.....	9-8
<i>Sooknanan, Lochan v. M.C.I.</i> (F.C.T.D., no. IMM-1213-97), Gibson, February 27, 1998.....	9-13
<i>Sotoodeh, Isheo v. M.E.I.</i> (IAD T91-00153), Fatsis, Chu (concurring), Bell (dissenting), July 22, 1991.....	9-8, 9-12
<i>Suresh v. Canada (Minister of Citizenship and Immigration)</i> , [2002] S.C.J. No. 3, 2002 SCC 1.....	9-10
<i>Taghizadeh-Barazande, Parviz v. M.C.I.</i> (IAD T97-00073), D’Ignazio, January 20, 1998.....	9-8
<i>Thamber, Avtar Singh v. M.C.I.</i> (F.C.T.D., no. IMM-2407-00), McKeown, March 12, 2001.....	9-13
<i>Tzemanakis v. M.E.I.</i> (1970), 8 I.A.C. 156 (I.A.B.).....	9-12
<i>Valdes, Juan Gonzalo Lasa v. M.E.I.</i> (IAD V90-01517), Wlodyka, Chambers, Gillanders, January 21, 1992.....	9-8, 9-13
<i>Vasquez, Maria Del Carmen Mier v. M.C.I.</i> (F.C.T.D., no. IMM-2226-01), Campbell, April 10, 2002; 2002 FCT 413.....	9-10
<i>Warner, Newton George v. M.E.I.</i> (I.A.B. 85-9421), Eglinton (dissenting), Rotman, Warrington, April 27, 1987.....	9-1
<i>Wong, Kam v. M.E.I.</i> (I.A.B. 83-6438), Davey, Hlady, Howard, March 7, 1984.....	9-7
<i>Wong, Philip Sai Chak v. M.E.I.</i> (IAD T91-05637), Chu, Fatsis, Ahara, November 5, 1992.....	9-12
<i>Wu, Yu Ying v. M.C.I.</i> (F.C.T.D., no. IMM-5652-00), Campbell, November 20, 2001; 2001 FCT 1274.....	9-11
<i>Zaraket, Zahra v. M.C.I.</i> (IAD M99-06909), Fortin, October 10, 2000.....	9-12

# CHAPTER 10

## Table of Contents

<b>10. VISA OFFICERS AND THE DUTY OF FAIRNESS</b> .....	<b>10-1</b>
<b>10.1. INTRODUCTION</b> .....	<b>10-1</b>
<b>10.2. CONTENT OF THE DUTY OF FAIRNESS</b> .....	<b>10-1</b>
10.2.1. Generally .....	10-1
10.2.2. Conflicting Statements at the Interview .....	10-2
10.2.3. Use of Extrinsic Evidence .....	10-2
10.2.4. Providing Opportunity to Demonstrate Rehabilitation .....	10-3
10.2.5. Delay, Legitimate Expectations, Estoppel .....	10-4
10.2.6. Bias .....	10-5
10.2.7. He Who Decides Must Hear .....	10-6
10.2.8. Knowing Case to be Met and Opportunity to Respond .....	10-7
10.2.9. Interpretation at the Interview .....	10-9
10.2.10. Other Procedural Matters .....	10-9
10.2.11. Jurisdictional Questions .....	10-11
10.2.12. Options .....	10-11

## CHAPTER 10

### 10. VISA OFFICERS AND THE DUTY OF FAIRNESS

#### 10.1. INTRODUCTION

There is, as a general common law principle, a duty of procedural fairness resting on every public authority making an administrative decision which affects the rights, privileges or interests of an individual.<sup>1</sup> The content of the duty of fairness in application to individual cases will vary according to the circumstances of each case. In the final analysis, the simple question to be answered is: Did the decision-maker, on the facts of the particular case, act fairly toward the person claiming to be aggrieved?<sup>2</sup>

The decision making of immigration officers and visa officers (immigration officers stationed outside Canada) is examined in this chapter in order to illustrate fairness principles.

#### 10.2. CONTENT OF THE DUTY OF FAIRNESS

##### 10.2.1. Generally

Much of the Federal Court jurisprudence on the subject of procedural fairness deals with decisions on applications for exemption, on compassionate or humanitarian grounds, from certain requirements of the *Immigration Act*. The decision to grant or deny a request for exemption is a discretionary one.

Where an immigration officer considering an application for exemption does not err in law or proceed on some wrong or improper principle, acts with an open mind without unduly fettering her discretion, and gives the applicant an opportunity to respond to any concerns with respect to the application, the officer has discharged her duty fairly.<sup>3</sup> This also accurately states the duty of procedural fairness applicable to the processing of sponsored applications for landing, which may come before the Appeal Division following a visa or immigration officer's refusal of the application.

---

<sup>1</sup> *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

<sup>2</sup> *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at 631.

<sup>3</sup> *Hunter-Freeth, Eileen v. M.C.I.* (F.C.T.D., no. IMM-1795-95), Nadon, February 7, 1996. The requirements of fairness in processing requests for exemption have been characterized as minimal in *Shah, Syed v. M.E.I.* (F.C.A., no. A-617-92), Hugessen, MacGuigan, Linden, June 24, 1994. However, the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 disapproved of *Shah's* characterization of the duty of fairness as "minimal", in holding that the circumstances require a full and fair consideration of the issues, and the applicant must have a meaningful opportunity to present relevant evidence and have it fully and fairly considered. Evidence of the best interests of the child is to be accorded significant weight: *Baker, Agneta v. M.C.I.* (F.C.T.D., no. IMM-1154-00), McKeown, April 23, 2001.

In *Baker*,<sup>4</sup> the Supreme Court identified some factors relevant to determining the requirements of the duty of fairness according to the circumstances. They are:

- 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.

Essentially, the question is whether, considering all the circumstances, those whose interests were affected had a meaningful opportunity to present their case fully and fairly.

### 10.2.2. Conflicting Statements at the Interview

A visa officer has a duty to clear up a direct conflict in two statements sworn by an applicant on the same day regarding the applicant's intention to reside permanently in Canada.<sup>5</sup> This duty was articulated in *Pangli*, where the Federal Court of Appeal invoked the *Canadian Bill of Rights* to afford the sponsor a fair hearing in accordance with the principles of fundamental justice. Relying on the authority of *Pangli*, the Appeal Division has set aside visa officers' refusals.<sup>6</sup>

### 10.2.3. Use of Extrinsic Evidence

Extrinsic evidence means evidence of which an applicant is unaware because it comes from an outside source.<sup>7</sup> An immigration officer should provide an applicant with an opportunity

---

<sup>4</sup> *Baker, supra*, footnote 3.

<sup>5</sup> *Pangli, Amarjit Kaur v. M.E.I.* (F.C.A., no. A-597-86), Heald, Urie, Desjardins, November 12, 1987. Reported: *Pangli v. Canada (Minister of Employment and Immigration)* (1987), 4 Imm. L.R. (2d) 266 (F.C.A.).

<sup>6</sup> See *Rodriguez, Meliton v. M.E.I.* (IAD T91-00107), Weisdorf, Fatsis, Ariemma, August 8, 1991; *Merius, Ronald v. M.E.I.* (IAD M93-05810), Angé, June 13, 1994; *Biney, Alexander v. M.C.I.* (IAD M93-10425), Angé, September 27, 1994; and *Kaura, Surinder Kaur v. M.E.I.* (IAD M92-10114), Blumer, February 1, 1994. However, in *Patel, Manjulaben v. M.E.I.* (IAD T89-03915), Townshend, Weisdorf, Chu, April 20, 1991, *Pangli* was distinguished, and the panel relied on *Brar v. Canada (Minister of Employment and Immigration)*, [1985] 1 F.C. 914 (C.A.) to conclude that a sponsor cannot invoke section 2(e) of the *Canadian Bill of Rights* (the right to a fair hearing) because the refusal does not involve a determination of the sponsor's rights (at least where the refusal results from the inability of the applicant, not the sponsor, to meet the statutory requirements).

<sup>7</sup> *Dasent, Maria Jackie v. M.C.I.* (F.C.T.D., no. IMM-5386-93), Rothstein, December 8, 1994.

to comment upon extrinsic evidence.<sup>8</sup> The Federal Court of Appeal has outlined the officer's obligations in these terms:

The officer is not required to put before the applicant any tentative conclusions she may be drawing from the material before her, not even as to apparent contradictions that concern her. Of course, if she is going to rely on extrinsic evidence, not brought forward by the applicant, she must give him a chance to respond to such evidence.<sup>9</sup>

Information obtained from a spouse in a separate interview is not regarded as extrinsic evidence to which an applicant must be allowed to respond.<sup>10</sup> Therefore, any discrepancies in the spouses' accounts may be taken into consideration without putting the discrepancies to the spouses for an explanation.

Adequate notice has to be given to respond to extrinsic evidence.<sup>11</sup>

An immigration officer is not required to disclose public source documents on general country conditions which are available when an applicant makes submissions to the officer. Public documents which become available after the filing of submissions should be disclosed where they are novel, significant and may affect the decision.<sup>12</sup> Failure to share a document with an applicant may deny him a meaningful opportunity to present his case fully and fairly.<sup>13</sup>

#### **10.2.4. Providing Opportunity to Demonstrate Rehabilitation**

In the case-law decided before the *Immigration Act* was amended in 1995,<sup>14</sup> there was no obligation imposed on visa officers to inform an applicant of the opportunity to demonstrate rehabilitation before refusing the applicant under the criminal inadmissibility provisions of the Act. Nor was a visa officer obliged to await the outcome of an applicant's request, submitted to

---

<sup>8</sup> *Lovo, Julio Machado v. M.C.I.* (F.C.T.D., no. IMM-2694-94), MacKay, September 22, 1995. In *Maire, Beata Jolanta v. M.C.I.* (F.C.T.D., no. IMM-5420-98), Sharlow, July 28, 1999, the officer's decision was set aside for reliance on extrinsic evidence in the form of notes of various officials regarding the applicant.

<sup>9</sup> *Shah, supra*, footnote 3, at 2.

<sup>10</sup> *M.C.I. v. Dasent, Maria Jackie* (F.C.A., no. A-18-95), Strayer, Linden, McDonald, January 18, 1996.

<sup>11</sup> *Randelall, Nandrani v. M.C.I.* (F.C.T.D., no. IMM-4112-97), Wetston, August 28, 1998.

<sup>12</sup> *Mancia, Pedro Benjamin Orellano v. M.C.I.* (F.C.A., no. A-75-97), Décary, Stone, Robertson, May 1, 1998. This decision was rendered in the context of a post-determination review of a failed refugee claimant. See also *Farshid-Ghazi, Seyyed v. M.C.I.* (F.C.T.D., no. IMM-377-97), Richard, February 12, 1998, the Court holding that where an immigration officer relies on publicly available evidence that is not commonly available or commonly consulted, it should be disclosed.

<sup>13</sup> *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407 (C.A.) (failure to disclose content of risk assessment at h & c interview). The Court relied on *Baker, supra*, footnote 3 and set out what factors need to be considered in determining whether disclosure is required. See also *Bhagwandass v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 3 (C.A.) (requiring disclosure of documents supporting Minister's danger opinion).

<sup>14</sup> By Bill C-44 (S.C. 1995, c. 15; in force July 10, 1995).

the Governor in Council, to demonstrate rehabilitation.<sup>15</sup> The visa officer's only responsibility was to ascertain that there was no certificate of rehabilitation on the applicant's file.<sup>16</sup>

Since the 1995 amendments, the Minister decides on rehabilitation in all cases and the Governor in Council is no longer involved. Since the Minister now makes the decision on rehabilitation, a duty on the part of the visa officer to inform an applicant of this avenue of redress may emerge.<sup>17</sup>

### 10.2.5. Delay, Legitimate Expectations, Estoppel

The Federal Court has held that fairness requires that an applicant receive a timely decision. What that means will vary with the circumstances of each case.<sup>18</sup>

The Immigration Appeal Board has recognized that the duty to act fairly includes a duty to proceed within a reasonable time,<sup>19</sup> and relief has been granted where administrative delays have had the effect of disqualifying an applicant.<sup>20</sup> But the case-law is conflicting on this issue. An earlier case held that delay is not such unfairness as to render a visa officer's decision a nullity.<sup>21</sup> And as held in *Gill*:<sup>22</sup>

This is not, however, to say that the Government can, by simple inaction, defeat rights which were clearly intended to be granted. It may well be that the recently discovered administrative duty to act fairly encompasses a duty

---

<sup>15</sup> *Symmonds, Lorraine Shirley v. M.E.I.* (IAD V91-00440), MacLeod, Wlodyka, Verma, February 25, 1992.

<sup>16</sup> *Dhaliwal, Jagdish Kaur v. M.E.I.* (IAD V91-01669), MacLeod, Wlodyka, Singh, March 29, 1993; relying on *M.E.I. v. Gill, Hardeep Kaur* (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991. See also *Wong, Yuen-Lun v. M.C.I.* (F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995, holding that the burden is on an applicant to demonstrate rehabilitation.

<sup>17</sup> Bill C-44 amended section 121 of the Act to allow the Minister to delegate the decision-making authority on rehabilitation. The Minister's authority has been delegated, among others, to program managers of visa offices, to grant approval of rehabilitation under section 19(2)(a.1) of the Act (see Delegation Instrument I-53, dated July 20, 1995). See also the discussion in chapter 2, "Criminal Refusals," section 2.4.

<sup>18</sup> For example, the Federal Court held in *Singh, Gurmit v. M.C.I.* (F.C.T.D., no. IMM-4962-94), Simpson, December 21, 1995 that the more than two year delay between the interview and notification of the decision was unacceptable in the circumstances and for this and other reasons, set aside the visa officer's decision. However, the Federal Court in *Chong, Chor Shan v. M.C.I.* (F.C.T.D., no. IMM-4038-00), McKeown, December 4, 2001; 2001 FCT 1335 distinguished *Singh* and found that while there was delay in assigning an experienced visa officer to conduct background checks on suspected Triad members, it was necessary to complete the background checks and it did not constitute unreasonable delay. That case started in 1994 and the applicant was requested in 1996 to provide certain information and no decision was made for four years subsequent to that request.

<sup>19</sup> *Jones, Violet Eugenia v. M.E.I.* (I.A.B. 87-10538), Sherman, Weisdorf, Rotman, March 28, 1988.

<sup>20</sup> *M.E.I. v. Porter, Kathleen* (F.C.A., no. A-353-87), Hugessen, MacGuigan, Desjardins, April 14, 1988; *Chaudhari, Nusrat Jahan v. M.E.I.* (I.A.B. 86-1436), Brown, Julien, Blumer, February 22, 1988. Reported: *Chaudhari v. Canada (Minister of Employment and Immigration)* (1988), 5 Imm. L.R. (2d) 177 (I.A.B.); *Persaud, Cyril v. M.E.I.* (IAD T92-00690), Arpin, Goodspeed, Rayburn, April 20, 1993.

<sup>21</sup> *Kaushal, Sushma Kumari v. M.E.I.* (I.A.B. 86-9045), Eglington, Warrington, Rotman, March 27, 1987.

<sup>22</sup> *Gill v. Canada (Minister of Employment and Immigration)*, [1984] 2 F.C. 1025 (C.A.), at 1028-1029.

not unreasonably to delay to act; or, put positively, that the procedural duty to act fairly includes a duty to proceed within a reasonable time. It does not by any means follow, however, that the breach of such a duty would give rise to the setting aside of the tardy action when it is finally taken. The remedy surely is to compel timely action rather than to annul one that, though untimely, may otherwise be correct.

The doctrine of legitimate expectations has been invoked on occasion in the immigration context.<sup>23</sup> The doctrine means that if a public body expressly or impliedly undertakes to follow a certain procedure, it may be held to its undertaking.<sup>24</sup> However, the doctrine is restricted to procedural matters and cannot be used to override a statutory requirement.<sup>25</sup>

Estoppel has been applied in the context of a visa officer's decision regarding an applicant who relied on an immigration official's advice to her detriment.<sup>26</sup>

### 10.2.6. Bias

If a reasonable apprehension of bias is made out, it is impossible to have had a fair hearing. The hearing and any subsequent decision are void.<sup>27</sup>

There is no apprehension of bias where an immigration officer deals with an applicant on two separate occasions in respect of two different matters,<sup>28</sup> or deals with the applications of two

---

<sup>23</sup> In *Baker, supra*, footnote 3, the Supreme Court of Canada held that the *Convention on the Rights of the Child* did not give rise to a legitimate expectation regarding the applicant's request for compassionate or humanitarian exemption.

<sup>24</sup> For example, "legitimate expectations" has been applied to require the Minister to consider a person's refugee claim after such consideration had been promised: *M.E.I. v. Bendahmane, Mokhtar* (F.C.A., no. A-84-87), Hugessen, Desjardins, Marceau, April 10, 1989. See also *Martins, Oluwatoyin Joseph v. M.C.I.* (F.C.T.D., no. IMM-4849-00), Campbell, February 21, 2002; 2002 FCT 189; *Badejo, Olayemi Anne v. M.C.I.* (F.C.T.D., no. IMM-1341-00), O'Keefe, November 30, 2000 (undertaking to write letter was breached). However, the publication and distribution of the Handbook on behalf of the Minister does not give rise to a legitimate expectation that an applicant can rely on the Handbook without requesting material that might modify it in a manner relevant to his application: *Park, Soung II v. M.C.I.* (F.C.A., no. A-708-00), Malone, Linden, Noël, October 19, 2001; 2001 FCA 313. Appeal from (F.C.T.D., no. IMM-2788-99), Gibson, November 2, 2000.

<sup>25</sup> For example, a statutory requirement regarding age: *Canada (Minister of Employment and Immigration) v. Lidder*, [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.); *M.C.I. v. Nikolova, Veliuchka* (F.C.T.D., no. IMM-16-95), Wetston, October 10, 1995.

<sup>26</sup> *Chan, Wah Fong v. M.C.I.* (F.C.T.D., no. IMM-4330-98), Muldoon, August 11, 1999.

<sup>27</sup> *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623.

<sup>28</sup> *Idemudia, Andrew Osaretin v. M.E.I.* (F.C.T.D., no. IMM-3277-93), Rothstein, June 30, 1993. Reported: *Idemudia v. Canada (Minister of Employment and Immigration)* (1993), 19 Imm. L.R. (2d) 267 (F.C.T.D.).

related spousal applicants.<sup>29</sup> Greater care must be taken where both matters in issue are the same and involve final decisions.<sup>30</sup>

A visa officer is not obligated to follow caselaw that is most favorable to an applicant.<sup>31</sup>

Bad faith, abuse of discretion or improper conduct on the part of an immigration officer will lead to the quashing of the officer's decision.<sup>32</sup>

### 10.2.7. He Who Decides Must Hear

It is a denial of a sponsor's right to be afforded a fair hearing in accordance with the principles of fundamental justice if one visa officer interviews the applicant and a different officer refuses the application.<sup>33</sup> Where the interviewing officer was not the one to sign the

---

<sup>29</sup> *Mohamed, Ismail v. M.C.I.* (IAD M98-05434), Bourbonnais, June 8, 1999.

<sup>30</sup> *Arthur, Gertrude v. M.E.I.* (F.C.A., no. A-991-90), MacGuigan, Linden, Gray, November 2, 1992. There was no reasonable fear of partiality where an officer conducted two risk assessments concerning the applicants: *Qureshi, Azra Batool v. M.C.I.* (F.C.T.D., no. IMM-5093-99), Tremblay-Lamer, August 18, 2000.

<sup>31</sup> *Dhami, Tarlochan Singh v. M.C.I.*, (F.C.T.D., no. IMM-1528-00), Dawson, July 18, 2001.

<sup>32</sup> *So, King-Sing v. M.E.I.* (F.C.T.D., no. IMM-7542-93), Rouleau, March 22, 1995. However, questioning the applicants in a cold manner and accusing them of living on the government's money was not sufficient to create a reasonable apprehension of bias: *Khakoo, Gulshan M. v. M.C.I.* (F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995. Neither was an officer's suspicion that an applicant may be a courier parent: *Kapadia, Muhammad Yakub v. M.C.I.* (F.C.T.D., no. IMM-1649-96), McGillis, December 12, 1996; or a strong opposition to false claims: *Mengesha, Samuel v. M.C.I.* (F.C.T.D., no. IMM-3272-98), Nadon, August 31, 1999. On the other hand, a generalized criticism of the breathing habits of an ethnic group gave rise to an apprehension of bias: *Zhao, Qin v. M.C.I.* (F.C.T.D., no. IMM-4384-98), Pinard, June 8, 1999, as did stereotyping and lack of an open mind: *Baker, supra*, footnote 3; *Yuan, Liping v. M.C.I.* (F.C.T.D., no. IMM-3792-00), Kelen, December 11, 2001.

<sup>33</sup> *Pangli, supra*, footnote 5. *Pangli* was followed in *Dhaliwal, Balwinder Kaur v. M.E.I.* (IAD V91-01893), Wlodyka, Gillanders, Verma, January 7, 1993; and *Pierre-Paul, Jean-Pierre v. M.C.I.* (IAD M93-09745), Durand, July 14, 1994. With regard to an application to an immigration officer for compassionate/humanitarian consideration, the fact that one officer conducted the interview and her superior made the decision did not breach the principle of "he who hears must decide": *Burgin, Rachel Tessa v. M.C.I.* (F.C.T.D., no. IMM-1370-96), Noël, January 15, 1997. To the same effect, see *Ho, Hat v. M.C.I.* (F.C.T.D., no. IMM-516-98). Sharlow, August 18, 1999, distinguishing *Braganza, Margaret Mary v. M.C.I.* (F.C.T.D., no. IMM-2222-97), Muldoon, April 14, 1998. There is no duty to hold a hearing in these circumstances and it is not a breach of fairness for the visa officer to interview and recommend and the program manager to make the final decision. Although there might be circumstances in which one officer interviews and another officer refuses without there being a denial of fairness, where the case involved a sponsorship of a family member, the interview was an important factor in the officer's decision and it was unfair for the refusing officer to have regard to facts that emerged during the interview which was conducted by another officer: *Gueye, Baboye v. M.C.I.* (IAD M99-09302), Fortin, September 12, 2000 (reasons signed September 20, 2000). However, where the officer did not simply accept the interviewing officer's recommendation but made an independent decision on the evidence, there was no denial of natural justice: *Mercado, Junilo Bonsol v. M.C.I.* (IAD V99-01911), Workun, July 7, 2000. It is open to the Appeal Division to conclude that an officer's decision is weakened by the fact that it was based on third party observations: *M.C.I. v. Davydenko, Anna* (F.C.T.D., no IMM-1482-00), Pinard, March 30, 2001.



refusal letter, yet the officer who did refuse made an independent decision based on the evidence, there was no breach of fairness.<sup>34</sup>

It is permissible for a visa officer to receive and weigh information from other sources provided the officer arrives at an independent conclusion regarding an applicant's admissibility.<sup>35</sup>

### 10.2.8. Knowing Case to be Met and Opportunity to Respond

In *Muliadi*,<sup>36</sup> the Federal Court of Appeal held that a visa officer's decision, based on material which had not been presented to the applicant, and which he had not been given an opportunity to refute, was procedurally unfair. As a general proposition, a visa officer must provide an applicant with an opportunity to refute evidence in the officer's possession which is relied on by the officer in denying a visa,<sup>37</sup> and to advise the applicant of any concerns and provide an opportunity to respond before making a decision.<sup>38</sup> Where a visa officer adopts her own specific standard or test for interpreting documentary evidence from the originator of the records, the officer should provide an opportunity for the applicant to comment on the standard or test proposed, before a decision is made.<sup>39</sup>

Basically, where concerns are raised as a result of new information, significant in leading a decision-maker to decide against an applicant, they should be put to the applicant.<sup>40</sup>

---

<sup>34</sup> *Brar, Pritam Singh v. M.E.I.* (IAD V92-00108), Verma, Wlodyka, Gillanders, July 14, 1993.

<sup>35</sup> *Chan v. Canada (Minister of Citizenship and Immigration)*, [1996] 3 F.C. 349 (T.D.). For example, it is not unfair to consult the notes and rejection letter of a previous visa officer: *Ahmed, Mohammed v. M.C.I.* (F.C.T.D., no. IMM-2828-98), Tremblay-Lamer, April 16, 1999, or to consult with a colleague about a case: *Song, Nian Shen v. M.C.I.* (F.C.T.D., no. IMM-115-98), Tremblay-Lamer, October 5, 1998. However, it was a breach of fairness for the deciding officer to have unduly relied on the interview notes of another officer: *Patel, Chinubhai Madhavlal v. M.C.I.* (F.C.T.D., no. IMM-829-98), Tremblay-Lamer, October 5, 1998.

<sup>36</sup> *Muliadi v. Canada (Minister of Employment and Immigration)*, [1986] 2 F.C. 205 (C.A.).

<sup>37</sup> *Gill, Jhanda Singh v. M.E.I.* (F.C.T.D., no. T-501-90), Jerome, March 20, 1990. See *Wang, Tianming v. M.C.I.* (F.C.T.D., no. IMM-6828-98), Pelletier, August 20, 1999 for a review of the case-law dealing with the question of when an applicant is entitled to be confronted with a discrepancy. Anonymous letters prejudicial to an applicant should be disclosed: *Redman, Barbara Engreed v. M.C.I.* (F.C.T.D., no. IMM-5109-97), Rothstein, October 23, 1998.

<sup>38</sup> *Tam, Patrick v. M.C.I.* (F.C.T.D., no. IMM-3276-95), Rouleau, September 16, 1996. Reported: *Tam v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 207 (F.C.T.D.). In *Khakoo, supra*, footnote 32, there was no onus on the officer to notify the applicants that social assistance was potentially a source of concern as they should have been prepared to deal with it at the interview without special notice. There is no obligation to inform an applicant of negative impressions as they arise, particularly concerning some aspect which is not amenable to change, such as personal suitability or language ability: *Savin, Valeria v. M.C.I.* (F.C.T.D., no. IMM-4712-94), Cullen, October 11, 1995. Reported: *Savin v. Canada (Minister of Citizenship and Immigration)* (1995), 35 Imm. L.R. (2d) 122 (F.C.T.D.). However, there may be a duty to explore whether other documentation establishes the relationship in question, where a promised document cannot be furnished: *Lai, Gui Sheng v. M.C.I.* (F.C.T.D., no. IMM-3229-98), Lemieux, September 16, 1999.

<sup>39</sup> *Mir-Hussaini, Seyed-Hasan v. M.C.I.* (F.C.T.D., no. IMM-5208-00), MacKay, March 22, 2002; 2002 FCT 291.

<sup>40</sup> *Zheng, Tiantong v. M.C.I.* (F.C.T.D., no. IMM-1982-98), Reed, August 27, 1999.

Withholding material in the absence of compelling reasons, such as national security, results in unfairness towards an applicant.<sup>41</sup>

Offering an opportunity to respond includes an obligation to allow a reasonable time to do so.<sup>42</sup>

It is a breach of fairness for a visa officer to decide an applicant's case before the applicant is given an opportunity to supply documentary evidence requested by the officer,<sup>43</sup> and for an officer to fail to clarify a contradiction between documents submitted by an applicant and his statements at interview<sup>44</sup> or a contradiction regarding an applicant's employment status.<sup>45</sup> It is not unreasonable to rely on experience of a high level of fraud at a visa post to raise suspicions about the authenticity of documents.<sup>46</sup>

Similarly, fairness was denied when an applicant was not given a fair opportunity to make submissions before the decision to refuse his son on medical grounds.<sup>47</sup> In this respect, the current practice is for visa officers to send a "fairness letter" inviting further medical evidence from applicants before a final decision on medical admissibility is made.<sup>48</sup> Although preferable for a visa officer to ask an applicant for information on both the medical condition and excessive demands on health or social services, the fact that the officer asked only for further information on the medical condition in the fairness letter was not a breach of procedural fairness.<sup>49</sup> However, where a fairness letter left an applicant totally in the dark as to what issues he should

---

<sup>41</sup> *Dee, Dewey Go v. M.C.I.* (F.C.T.D., no. IMM-1050-99), MacKay, February 18, 2000. See too *Chong, supra*, footnote 18.

<sup>42</sup> *Tam, Mi Yee v. M.C.I.* (F.C.T.D., no. IMM-5138-94), Simpson, October 25, 1995. Reported: *Tam v. Canada (Minister of Citizenship and Immigration)* (1995), 35 Imm. L.R. (2d) 201 (F.C.T.D.); *Gill, Bhajan Singh v. M.C.I.* (F.C.T.D., no. IMM-1116-98), McGillis, February 17, 1999.

<sup>43</sup> *M.E.I. v. Yang, Li* (F.C.A., no. A-169-89), Mahoney, Urie, Stone, May 22, 1990.

<sup>44</sup> *Dhesi, Gurdev Singh v. M.C.I.* (F.C.T.D., no. IMM-3008-95), Dubé, January 8, 1997. The duty of fairness does not require the officer to ask specific questions (whether the applicant had ever been refused a visa was sufficient): *Zhang, Fang v. M.C.I.* (F.C.T.D., no. IMM-4179-98), Tremblay-Lamer, March 18, 1999.

<sup>45</sup> *Paik, Oon-Gil v. M.C.I.* (F.C.T.D., no. IMM-611-95), Jerome, September 13, 1996. Reported: *Paik v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 52 (F.C.T.D.).

<sup>46</sup> *Tran, Vu Son v. M.C.I.* (F.C.T.D., no. IMM-850-00), Rothstein, August 20, 2001. But the officer may not simply reject the documents' authenticity without examining the actual documents submitted.

<sup>47</sup> *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.).

<sup>48</sup> See the discussion in chapter 3, "Medical Refusals", section 3.3.1.3., "Duty of Fairness Owed by Visa and Medical Officers."

<sup>49</sup> *Yogeswaran, Thiyagarajah v. M.C.I.* (F.C.T.D., no. IMM-1505-96), McKeown, April 17, 1997. In *Wong, Ching Shin Henry v. M.C.I.* (F.C.T.D., no. IMM-3366-96), Reed, January 14, 1998, the Court commented that the fairness letter should have provided for the submission of information concerning the excessive demand aspect of the medical opinion. However, in *Koudriachov, Valentine v. M.C.I.* (F.C.T.D., no. IMM-1218-98), Evans, September 3, 1999, *Wong* was distinguished; there was nothing to prevent the applicant from responding on the "excessive demand" issue since the fairness letter set out the services that might be required.

respond to, the practice could be regarded as unfair.<sup>50</sup> Similarly, where the fairness letter failed to disclose the criteria used by the medical officers and the nature of the excessive demands involved, there was a breach of fairness.<sup>51</sup> In addition, non-disclosure of information requested by an applicant's counsel concerning the basis on which a medical opinion has been rendered is likewise a breach of fairness.<sup>52</sup>

## 10.2.9. Interpretation at the Interview

Lack of adequate interpretation has been held to constitute a breach of fairness.<sup>53</sup>

## 10.2.10. Other Procedural Matters

In *Tham*,<sup>54</sup> the refusal letter had been issued before the interview with the applicant. The Federal Court of Appeal, affirming the Immigration Appeal Board's decision,<sup>55</sup> held that the refusal was premature and a breach of the duty of fairness implicit in the Act and Regulations.<sup>56</sup>

The duty of fairness in administrative law normally only requires reasons be given on request.<sup>57</sup> However, in *Baker*<sup>58</sup> it was held that on a compassionate or humanitarian request for exemption, reasons are required because of the profound importance of the decision to those affected. The decision and reasons do not have to be released contemporaneously.<sup>59</sup>

---

<sup>50</sup> *Fei, Wan Chen v. M.C.I.* (F.C.T.D., no. IMM-741-96), Heald, June 30, 1997.

<sup>51</sup> *Li, Leung Lun v. M.C.I.* (F.C.T.D., no. IMM-466-96), Tremblay-Lamer, September 30, 1998. See also *Maschio, Michael John v. M.C.I.* (F.C.T.D., no. IMM-3354-96), Reed, November 14, 1997 (applicant unaware of criteria being applied to assess his medical condition and no fairness letter sent with respect to a second medical notification). *Maschio* was distinguished in *Koudriachov, supra*, footnote 49.

<sup>52</sup> *Wong, Ching Shin Henry, supra*, footnote 49.

<sup>53</sup> *Mistry, Ratilal v. M.E.I.* (IAD T93-09237), Bell, February 25, 1994.

<sup>54</sup> *Tham: M.E.I. v. Tham, Aurora Kok* (F.C.A., no. A-756-86), Hugessen, Marceau, Urie, September 19, 1986.

<sup>55</sup> *Tham, Aurora Kok v. M.E.I.* (I.A.B. 83-6793), Suppa, Benedetti, Hlady, May 24, 1985.

<sup>56</sup> See also *Xu, Tong v. M.C.I.* (F.C.T.D., no. IMM-4988-98), Gibson, July 28, 1999, where the preparation of a rejection letter in advance of the interview was seen as a fettering of discretion giving rise to a reasonable apprehension of bias.

<sup>57</sup> *Liang, Jian v. M.C.I.* (F.C.T.D., no. IMM-3014-98), Evans, August 17, 1999. The Court found that no such request had been made, therefore, there was no breach of fairness; and in the alternative, the record would satisfy a fair-minded person why the particular request for exemption on compassionate or humanitarian grounds was refused. See however *Santos, Natalia Duque v. M.C.I.* (F.C.T.D., no. IMM-4990-00), Lutfy, April 30, 2002; 2002 FCT 494 (form letter so general as to have no meaning for the applicant). Reasons are not required to be as detailed as would be expected of an administrative tribunal rendering a decision after an adjudicative hearing: *Ozdemir, Murtaza v. M.C.I.* (F.C.A., no. A-604-00), Evans, Rothstein, Malone, November 1, 2001; 2001 FCA 331 (not required to comment on case specific documents).

<sup>58</sup> *Baker, supra*, footnote 3. In the particular case, the immigration officer's notes were held to constitute sufficient reasons.

<sup>59</sup> *Viches, Nelly v. M.C.I.* (F.C.T.D., no. IMM-6436-00), McKeown, December 12, 2001; 2001 FCT 1366; *Fonseka, Mario Antonio v. M.C.I.* (F.C.T.D., no. IMM-33-00), Rothstein, October 18, 2000.

There is no obligation, on a request for a compassionate or humanitarian exemption, to conduct an oral hearing.<sup>60</sup> However, if the Department agrees to an interview, it has to conduct it fairly,<sup>61</sup> including giving reasonable notice of the interview date.<sup>62</sup>

A visa officer has jurisdiction to reconsider a decision<sup>63</sup> and is not *functus officio* once a decision to issue an immigrant visa is made.<sup>64</sup>

The concept of *res judicata* does not apply on the assessment of a subsequent application for permanent residence.<sup>65</sup>

There is no right to counsel at an interview with a visa officer.<sup>66</sup> However, when applicants are invited to have counsel present at their interview, implicit in the invitation is the assumption that counsel will be able to speak on their behalf and it is a breach of natural justice to deny counsel the right to take part.<sup>67</sup> Bypassing counsel and contacting an applicant directly to obtain information to deny a claim is a breach of fairness.<sup>68</sup>

---

<sup>60</sup> *Baker, supra*, footnote 3; *Stephen, Lau Ting Ming v. M.C.I.* (F.C.T.D., no. IMM-5953-00), Blanchard, November 15, 2001. See also *Silion, Loredana v. M.C.I.* (F.C.T.D., no. IMM-5288-98), MacKay, August 18, 1999 (no requirement for personal interview of employment authorization applicant).

<sup>61</sup> *Kaur, Harwinder-Pal v. M.E.I.* (F.C.T.D., no. T-1852-87), Cullen, September 15, 1987. Reported: *Kaur v. Canada (Minister of Employment and Immigration)* (1987), 5 Imm. L.R. (2d) 148 (F.C.T.D.).

<sup>62</sup> *Nguyen, Luong Manh v. M.C.I.* (F.C.T.D., no. IMM-3538-94), Gibson, October 6, 1995. Reported: *Nguyen v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 46 (F.C.T.D.). The officer may opt not to conduct the interview via teleconference or at a place in Canada: *Scislowicz, Renata v. M.C.I.* (F.C.T.D., no. IMM-3528-98), Heneghan, June 22, 2000.

<sup>63</sup> *Chan, supra*, footnote 35 (revoking visas where new information comes to light). To the same effect, see *Tchassovnikov, Igor v. M.C.I.* (F.C.T.D., no. IMM-5335-97), Campbell, July 31, 1998 (reconsideration of eligibility); *Nouranidoust v. Canada (Minister of Citizenship and Immigration)*, [2000] 1 F.C. 123 (T.D.) (reconsideration of landing under Deferred Removal Orders Class (DROC) regulations where the applicant submitted new evidence); and *Islam, Khondaker Rezaul v. M.C.I.* (F.C.T.D., no. IMM-22-99), Lemieux, December 23, 1999 (independent applicant); *Kheiri, Shokoofeh v. M.C.I.* (F.C.T.D., no. IMM-4178-99), Linden, August 29, 2000 (re-opening to extend effective date of visa avoids unduly technical and unnecessarily formal approach).

<sup>64</sup> *Park, Jong In v. M.C.I.* (F.C.A., no. A-85-98), Strayer, Isaac, Evans, May 24, 2001.

<sup>65</sup> *Yung, Mei-Hing v. M.C.I.* (F.C.T.D., no. IMM-2753-99), Reed, June 19, 2000.

<sup>66</sup> *Chan, supra*, footnote 35. Thus, there was no breach of fairness where counsel was asked to leave the interview: *Cheema, Iqbal Singh v. M.C.I.* (F.C.T.D., no. IMM-2187-01), Gibson, June 4, 2002; 2002 FCT 638.

<sup>67</sup> *Qi, E. Guang v. M.C.I.* (F.C.T.D., no. IMM-469-95), Reed, December 5, 1995. Reported: *Qi v. Canada (Minister of Citizenship and Immigration)* (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.). While it was improper in the circumstances for the immigration office not to have notified the applicant's lawyer's office of the applicant's interview date, there was no breach of fairness as a result: *Kam, Chi Keung v. M.C.I.* (F.C.T.D., no. IMM-1643-95), McKeown, May 29, 1996.

<sup>68</sup> *Hussein, Safia Ahmed v. M.C.I.* (F.C.T.D., no. IMM-5151-98), Pelletier, December 20, 1999.

There does not exist a general discretion in visa officers to grant an adjournment arising by analogy from powers granted to administrative tribunals<sup>69</sup> or to extend a time limit prescribed by regulation.<sup>70</sup>

## REMEDIES FOR BREACH OF FAIRNESS

### 10.2.11. Jurisdictional Questions

The decisions of the Federal Court of Appeal in *Porter*,<sup>71</sup> *Pangli*<sup>72</sup> and *Tham*<sup>73</sup> support the view that the Appeal Division may take jurisdiction to address fairness issues.

In terms of the jurisdiction of the Appeal Division to cure procedural defects, *Kaushal*<sup>74</sup> holds that the Appeal Division has no powers equivalent to *certiorari* to quash for excess of jurisdiction, but can conclude there has been such unfairness as to render a visa officer's decision a nullity.<sup>75</sup>

### 10.2.12. Options

In the event of a breach of either type at issue in *Pangli*,<sup>76</sup> (i.e., the officer conducting the interview was not the officer who refused; or there was a conflict in two statements sworn the same day by an applicant), the Appeal Division has, generally speaking, followed *Pangli* and allowed the appeal.<sup>77</sup> The denial of natural justice vitiates the whole proceeding, and according to *Chandler*,<sup>78</sup> a tribunal is bound to start afresh in order to cure the defect in such circumstances.<sup>79</sup> The Appeal Division has relied on *Newfoundland Telephone Co. Ltd.*<sup>80</sup> in concluding the visa officer's decision in these circumstances is void.

---

<sup>69</sup> *Bhajan, Hari v. M.C.I.* (F.C.T.D., no. IMM-899-95), Simpson, March 26, 1996. Reported: *Bhajan v. Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm. L.R. (2d) 189 (F.C.T.D.).

<sup>70</sup> *Bensalah, Lekrim v. M.C.I.* (F.C.T.D., no. IMM-4907-98), Pinard, August 13, 1999.

<sup>71</sup> *Porter, supra*, footnote 20.

<sup>72</sup> *Pangli, supra*, footnote 5.

<sup>73</sup> *Tham, supra*, footnote 54.

<sup>74</sup> *Kaushal, supra*, footnote 21.

<sup>75</sup> However, holding a visa officer's decision a nullity due to unfairness is not the prevalent approach, as can be seen in section 10.3.2., "Options."

<sup>76</sup> *Pangli, supra*, footnote 5.

<sup>77</sup> See, for example, *Muli, Surinderpal Singh v. M.E.I.* (IAD V92-01376), Wlodyka, December 2, 1993. However, in *Sian, Malkit Kaur v. M.C.I.* (IAD V95-00955), McIsaac, January 20, 1997, the panel went on to consider the merits of the appeal, concluded that the applicants were immigrants and accordingly allowed the appeal.

<sup>78</sup> *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

<sup>79</sup> *Dhaliwal, Balwinder Kaur, supra*, footnote 33. A lack of fairness in the process is sufficient to set the impugned decision aside without the necessity of establishing actual prejudice to the applicant: *Kane v. U.B.C.*, [1980] 1 S.C.R. 1105.

However, for other situations which *Pangli* did not directly address involving a denial of fairness in the sponsorship process, the cases favour the *de novo* approach.<sup>81</sup> The hearing before the Appeal Division is a *de novo* hearing in a broad sense and the appeal is decided on all the evidence adduced at the hearing and on the facts as they exist at the time. Hence, any lack of fairness which may have occurred at an earlier stage in the processing of an application can be cured through the Appeal Division's full hearing process.<sup>82</sup>

In *Gill*,<sup>83</sup> relying on *Kahlon*,<sup>84</sup> the Appeal Division decided the appeal on all the evidence notwithstanding its finding of breach of due process in the financial assessment of a sponsor. In another case, the Appeal Division looked at prejudice in concluding the sponsor had not been prejudiced and would have every opportunity to address the conflicting evidence in question at the Appeal Division hearing.<sup>85</sup>

In *Atwal*,<sup>86</sup> the alleged breach was a lack of interview by the visa officer. The appeal hearing was held to cure any procedural defect.

In some instances, the Appeal Division has given evidence which is "tainted" by unfairness little weight or no weight.<sup>87</sup> In *Mistry*,<sup>88</sup> the *de novo* approach was adopted where the interview had been unfair due to inadequate interpretation. The panel decided the case by excluding the "tainted" evidence from the interview and relying on the other evidence in the

---

<sup>80</sup> *Newfoundland Telephone Co. Ltd.*, *supra*, footnote 27.

<sup>81</sup> *S.G.C. v. Dhillon, Karam Singh* (F.C.T.D., no. A-88-93), Rouleau, August 25, 1993; reversing *Dhillon, Karam Singh v. M.E.I.* (IAD V91-00881), Wlodyka, Gillanders, Verma, October 23, 1992. For other examples of the *de novo* approach, see *Grant, Retinella v. M.C.I.* (IAD T98-02495), Buchanan, September 10, 1999; and *Cheema, Gurdial Kaur v. M.C.I.* (IAD V97-01319), Carver, October 6, 1998.

<sup>82</sup> Where the visa officer had already arrived at his decision to refuse before the interview and before all relevant information had been submitted, which was a denial of natural justice, nevertheless, the hearing *de novo* was proceeded with: *Feng, Li Yuan v. M.C.I.* (IAD T98-01390), D'Ignazio, January 21, 1999. For case-law which stands for the proposition that an appeal hearing which is tantamount to a new trial cures any lack of natural justice at a lower level, see: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561; and *Posluns v. Toronto Stock Exchange*, [1968] S.C.R. 330.

<sup>83</sup> *Gill, Paramjit Kaur v. S.S.C.* (IAD T93-09697), Hopkins, August 25, 1994.

<sup>84</sup> *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.).

<sup>85</sup> *Basi, Sukhdev Kaur v. M.E.I.* (IAD V87-6043), Mawani, Chambers, Gillanders, March 20, 1989. See also *Jassal, Surinder Singh v. M.E.I.* (IAD V91-01400), Gillanders, Wlodyka, Verma, March 7, 1993, where the Appeal Division remarked on the sponsor's possession of the appeal record months before the hearing, clearly making him aware of the case to be met.

<sup>86</sup> *Atwal, Lakhbir Kaur v. M.E.I.* (IAD V88-00152), MacLeod, Singh, Chambers, May 12, 1989.

<sup>87</sup> In this connection, see *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75, where the Supreme Court of Canada held that the National Parole Board would be under a duty to exclude unreliable information, such as information extracted by torture, for it would be manifestly unfair for the Board to act on this kind of information.

<sup>88</sup> *Mistry, supra*, footnote 53.

record and at the hearing.<sup>89</sup> In another case, having concluded that procedural fairness required the immigration officer to ask for an explanation of certain discrepancies, the Appeal Division gave no weight to the statement of the officer.<sup>90</sup>

The introduction of evidence at the hearing that the Governor in Council had determined the applicant was rehabilitated could have remedied any procedural unfairness in relation to the question of rehabilitation which may have occurred during the visa officer's processing of the application.<sup>91</sup> The "thin file" policy adopted in the processing of some applications for permanent residence may not provide sufficient information to know the case to meet, but the hearing on the merits before the Appeal Division cures any breach of fairness.<sup>92</sup> Less frequently, the Appeal Division has allowed an appeal solely on the basis that some fundamental breach of fairness has occurred.<sup>93</sup> This approach finds support in decisions such as *Tham*.<sup>94</sup> In *Cheema*,<sup>95</sup> the Appeal Division held that a visa officer's refusal should not be set aside unless the Appeal Division is satisfied that the alleged breach of natural justice by the visa officer has compromised the sponsor's right to a full and fair *de novo* hearing before it.

The usual consequence of a denial of fairness is to render the resulting decision invalid.<sup>96</sup> However, the Supreme Court of Canada has introduced an exception to this principle.<sup>97</sup> 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.<sup>98</sup>

---

<sup>89</sup> See also *Gill, Samarjit Kaur v. M.E.I.* (IAD V93-00023), Singh, Clark, Ho, August 24, 1994, the Appeal Division holding that the *de novo* hearing would cure the procedural unfairness caused by lack of proper interpretation at the visa interview.

<sup>90</sup> *Samra, Avtar Kaur v. M.E.I.* (IAD V90-01073), Tisshaw, Wlodyka, Chu, September 23, 1991.

<sup>91</sup> *Symmonds, supra*, footnote 15; *Dhaliwal, Jagdish Kaur, supra*, footnote 16.

<sup>92</sup> *Valle, Carlos Arno v. M.C.I.* (IAD VA0-01218), Clark, May 28, 2001; *Tu, Hue Mai v. M.C.I.* (IAD VA0-01083), Boscariol, February 28, 2001.

<sup>93</sup> See, for example, *Kaushik, Uma v. M.C.I.* (IAD W94-00003), Wiebe, October 18, 1994. See also *Singh, Narinder Pal v. M.C.I.* (IAD T97-04679), D'Ignazio, September 27, 1999, in which the panel held that the sponsor had a legitimate expectation that certain new medical information would be duly considered; where it was not, on this technical ground involving breach of natural justice, the appeal was allowed in law.

<sup>94</sup> *Tham, supra*, footnote 55; affirmed in *Tham, supra*, footnote 54.

<sup>95</sup> *Cheema, supra*, footnote 81.

<sup>96</sup> *Cardinal, supra*, footnote 1.

<sup>97</sup> *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

<sup>98</sup> See, for example, *Osaloun, Ebenezer Taiwo v. M.C.I.* (F.C.T.D., no. IMM-3649-95), Rothstein, June 25, 1996 (judicial review dismissed in reliance on *Mobil Oil*, where evidence unfairly excluded would have had no bearing on the tribunal's decision); *Sebai, Mustafa v. M.C.I.* (F.C.T.D., no. IMM-4565-98), Sharlow, October 12, 1999 (no purpose would be served by remitting matter for reconsideration); and *Nikolova, supra*, footnote 25 (Appeal Division's decision set aside for breach of natural justice; but, following *Mobil Oil*, not returned for rehearing because the merits of the case were such that it would be hopeless); *Ali, Nawal El v. M.C.I.* (F.C.T.D., no. IMM-3327-00), Dawson, April 27, 2001 (breach did not affect final decision of tribunal).

An application for judicial review under section 82.1(2) of the Act may be pursued as a remedy to quash a visa officer's decision for procedural unfairness.<sup>99</sup> Such an application would not appear to preclude a concurrent appeal to the Appeal Division from the same decision of the visa officer.<sup>100</sup>

---

<sup>99</sup> The standard of review of a visa officer's decision is reasonableness simpliciter: *Li, Quanyi v. M.C.I.* (F.C.T.D., no. IMM-3018-00), Teitelbaum, July 5, 2001; *Cheema, supra*, footnote 66. Unless the visa officer acts in bad faith, breaches natural justice requirements or fails to consider relevant evidence the Court should not intervene: *Mir-Hussaini, supra*, footnote 39.

<sup>100</sup> *Khakoo, supra*, footnote 32.



## CHAPTER 10

### TABLE OF CASES: VISA OFFICERS AND THE DUTY OF FAIRNESS

#### CASES

<i>Ahmed, Mohammed v. M.C.I.</i> (F.C.T.D., no. IMM-2828-98), Tremblay-Lamer, April 16, 1999 .....	10-7
<i>Ali, Nawal El v. M.C.I.</i> (F.C.T.D., no. IMM-3327-00), Dawson, April 27, 2001 .....	10-13
<i>Arthur, Gertrude v. M.E.I.</i> (F.C.A., no. A-991-90), MacGuigan, Linden, Gray, November 2, 1992.....	10-6
<i>Atwal, Lakhbir Kaur v. M.E.I.</i> (IAD V88-00152), MacLeod, Singh, Chambers, May 12, 1989.....	10-12
<i>Badejo, Olayemi Anne v. M.C.I.</i> (F.C.T.D., no. IMM-1341-00), O'Keefe, November 30, 2000.....	10-5
<i>Baker v. Canada (Minister of Citizenship and Immigration)</i> , [1999] 2 S.C.R. 817 10-1, 10-2, 10-5, 10-6, 10-9, 10-10	
<i>Baker, Agneta v. M.C.I.</i> (F.C.T.D., no. IMM-1154-00), McKeown, April 23, 2001 .....	10-1
<i>Basi, Sukhdev Kaur v. M.E.I.</i> (IAD V87-6043), Mawani, Chambers, Gillanders, March 20, 1989.....	10-12
<i>Bendahmane: M.E.I. v. Bendahmane, Mokhtar</i> (F.C.A., no. A-84-87), Hugessen, Desjardins, Marceau, April 10, 1989. ....	10-5
<i>Bensalah, Lekrim v. M.C.I.</i> (F.C.T.D., no. IMM-4907-98), Pinard, August 13, 1999 .....	10-11
<i>Bhagwandass v. Canada (Minister of Citizenship and Immigration)</i> , [2001] 3 F.C. 3 (C.A.) (requiring disclosure of documents supporting Minister's danger opinion).....	10-3
<i>Bhajan, Hari v. M.C.I.</i> (F.C.T.D., no. IMM-899-95), Simpson, March 26, 1996. Reported: <i>Bhajan v. Canada (Minister of Citizenship and Immigration)</i> (1996), 34 Imm. L.R. (2d) 189 (F.C.T.D.).....	10-11
<i>Biney, Alexander v. M.C.I.</i> (IAD M93-10425), Angé, September 27, 1994.....	10-2
<i>Braganza, Margaret Mary v. M.C.I.</i> (F.C.T.D., no. IMM-2222-97), Muldoon, April 14, 1998 .....	10-6
<i>Brar v. Canada (Minister of Employment and Immigration)</i> , [1985] 1 F.C. 914 (C.A.).....	10-2
<i>Brar, Pritam Singh v. M.E.I.</i> (IAD V92-00108), Verma, Wlodyka, Gillanders, July 14, 1993. ....	10-7
<i>Burgin, Rachel Tessa v. M.C.I.</i> (F.C.T.D., no. IMM-1370-96), Noël, January 15, 1997 .....	10-6
<i>Cardinal v. Director of Kent Institution</i> , [1985] 2 S.C.R. 643 .....	10-1, 10-13
<i>Chan v. Canada (Minister of Citizenship and Immigration)</i> , [1996] 3 F.C. 349 (T.D.).....	10-7, 10-10
<i>Chan, Wah Fong v. M.C.I.</i> (F.C.T.D., no. IMM-4330-98), Muldoon, August 11, 1999.....	10-5
<i>Chandler v. Alberta Association of Architects</i> , [1989] 2 S.C.R. 848.....	10-11
<i>Chaudhari, Nusrat Jahan v. M.E.I.</i> (I.A.B. M86-1436), Brown, Julien, Blumer, February 22, 1988. Reported: <i>Chaudhari v. Canada (Minister of Employment and Immigration)</i> (1988), 5 Imm. L.R. (2d) 177 (I.A.B.); .....	10-4
<i>Cheema, Gurdial Kaur v. M.C.I.</i> (IAD V97-01319), Carver, October 6, 1998.....	10-12, 10-13
<i>Cheema, Iqbal Singh v. M.C.I.</i> (F.C.T.D., no. IMM-2187-01), Gibson, June 4, 2002; 2002 FCT 638.....	10-10
<i>Chong, Chor Shan v. M.C.I.</i> (F.C.T.D., no. IMM-4038-00), McKeown, December 4, 2001; 2001 FCT 1335 .....	10-4
<i>Dasent, Maria Jackie v. M.C.I.</i> (F.C.T.D., no. IMM-5386-93), Rothstein, December 8, 1994.....	10-2

<i>Dasent: M.C.I. v. Dasent, Maria Jackie</i> (F.C.A., no. A-18-95), Strayer, Linden, McDonald, January 18, 1996.....	10-3
<i>Davydenko: M.C.I. v. Davydenko, Anna</i> (F.C.T.D., no IMM-1482-00), Pinard, March 30, 2001.....	10-6
<i>Dee, Dewey Go v. M.C.I.</i> (F.C.T.D., no. IMM-1050-99), MacKay, February 18, 2000.....	10-8
<i>Dhaliwal, Balwinder Kaur v. M.E.I.</i> (IAD V91-01893), Wlodyka, Gillanders, Verma, January 7, 1993.....	10-6, 10-11
<i>Dhaliwal, Jagdish Kaur v. M.E.I.</i> (IAD V91-01669), MacLeod, Wlodyka, Singh, March 29, 1993.....	10-4, 10-13
<i>Dhami, Tarlochan Singh v. M.C.I.</i> , (F.C.T.D., no. IMM-1528-00), Dawson, July 18, 2001.....	10-6
<i>Dhesi, Gurdev Singh v. M.C.I.</i> (F.C.T.D., no. IMM-3008-95), Dubé, January 8, 1997.....	10-8
<i>Dhillon, Karam Singh v. M.E.I.</i> (IAD V91-00881), Wlodyka, Gillanders, Verma, October 23, 1992.....	10-12
<i>Dhillon: S.G.C. v. Dhillon, Karam Singh</i> (F.C.T.D., no. A-88-93), Rouleau, August 25, 1993.....	10-12
<i>Farshid-Ghazi, Seyyed v. M.C.I.</i> (F.C.T.D., no. IMM-377-97), Richard, February 12, 1998.....	10-3
<i>Fei, Wan Chen v. M.C.I.</i> (F.C.T.D., no. IMM-741-96), Heald, June 30, 1997.....	10-9
<i>Feng, Li Yuan v. M.C.I.</i> (IAD T98-01390), D’Ignazio, January 21, 1999.....	10-12
<i>Fonseka, Mario Antonio v. M.C.I.</i> (F.C.T.D., no. IMM-33-00), Rothstein, October 18, 2000.....	10-9
<i>Gao, Yude v. M.E.I.</i> (F.C.T.D., no. T-980-92), Dubé, February 8, 1993. Reported: <i>Gao v. Canada</i> ( <i>Minister of Employment and Immigration</i> ) (1993), 18 Imm. L.R. (2d) 306 (F.C.T.D.).....	10-8
<i>Gill v. Canada (Minister of Employment and Immigration)</i> , [1984] 2 F.C. 1025 (C.A.).....	10-4
<i>Gill, Bhajan Singh v. M.C.I.</i> (F.C.T.D., no. IMM-1116-98), McGillis, February 17, 1999.....	10-8
<i>Gill, Jhanda Singh v. M.E.I.</i> (F.C.T.D., no. T-501-90), Jerome, March 20, 1990.....	10-7
<i>Gill, Paramjit Kaur v. S.S.C.</i> (IAD T93-09697), Hopkins, August 25, 1994.....	10-12
<i>Gill, Samarjit Kaur v. M.E.I.</i> (IAD V93-00023), Singh, Clark, Ho, August 24, 1994.....	10-13
<i>Gill: M.E.I. v. Gill, Hardeep Kaur</i> (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991.....	10-4
<i>Grant, Retinella v. M.C.I.</i> (IAD T98-02495), Buchanan, September 10, 1999.....	10-12
<i>Gueye, Baboye v. M.C.I.</i> (IAD M99-09302), Fortin, September 12, 2000 (reasons signed September 20, 2000).....	10-6
<i>Haghighi v. Canada (Minister of Citizenship and Immigration)</i> , [2000] 4 F.C. 407 (C.A.).....	10-3
<i>Harelkin v. University of Regina</i> , [1979] 2 S.C.R. 561.....	10-12
<i>Ho, Hat v. M.C.I.</i> (F.C.T.D., no. IMM-516-98). Sharlow, August 18, 1999.....	10-6
<i>Hunter-Freeth, Eileen v. M.C.I.</i> (F.C.T.D., no. IMM-1795-95), Nadon, February 7, 1996.....	10-1
<i>Hussein, Safia Ahmed v. M.C.I.</i> (F.C.T.D., no. IMM-5151-98), Pelletier, December 20, 1999.....	10-10
<i>Idemudia, Andrew Osaretin v. M.E.I.</i> (F.C.T.D., no. IMM-3277-93), Rothstein, June 30, 1993. Reported: <i>Idemudia v. Canada (Minister of Employment and Immigration)</i> (1993), 19 Imm. L.R. (2d) 267 (F.C.T.D.).....	10-5
<i>Islam, Khondaker Rezaul v. M.C.I.</i> (F.C.T.D., no. IMM-22-99), Lemieux, December 23, 1999.....	10-10
<i>Jassal, Surinder Singh v. M.E.I.</i> (IAD V91-01400), Gillanders, Wlodyka, Verma, March 7, 1993.....	10-12
<i>Jones, Violet Eugenia v. M.E.I.</i> (I.A.B. 87-10538), Sherman, Weisdorf, Rotman, March 28, 1988.....	10-4

<i>Kahlon, Darshan Singh v. M.E.I.</i> (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: <i>Kahlon v. Canada (Minister of Employment and Immigration)</i> (1989), 7 Imm. L.R. (2d) 91 (F.C.A.) .....	10-12
<i>Kam, Chi Keung v. M.C.I.</i> (F.C.T.D., no. IMM-1643-95), McKeown, May 29, 1996.....	10-10
<i>Kane v. U.B.C.</i> , [1980] 1 S.C.R. 1105 .....	10-11
<i>Kapadia, Muhammad Yakub v. M.C.I.</i> (F.C.T.D., no. IMM-1649-96), McGillis, December 12, 1996.....	10-6
<i>Kaur, Harwinder-Pal v. M.E.I.</i> (F.C.T.D., no. T-1852-87), Cullen, September 15, 1987. Reported: <i>Kaur v. Canada (Minister of Employment and Immigration)</i> (1987), 5 Imm. L.R. (2d) 148 (F.C.T.D.).....	10-10
<i>Kaura, Surinder Kaur v. M.E.I.</i> (IAD M92-10114), Blumer, February 1, 1994. ....	10-2
<i>Kaushal, Sushma Kumari v. M.E.I.</i> (I.A.B. 86-9045), Eglington, Warrington, Rotman, March 27, 1987.....	10-4, 10-11
<i>Kaushik, Uma v. M.C.I.</i> (IAD W94-00003), Wiebe, October 18, 1994 .....	10-13
<i>Khakoo, Gulshan M. v. M.C.I.</i> (F.C.T.D., no. IMM-358-95), Gibson, November 15, 1995.....	10-6, 10-7, 10-14
<i>Kheiri, Shokoofeh v. M.C.I.</i> (F.C.T.D., no. IMM-4178-99), Linden, August 29, 2000.....	10-10
<i>Koudriachov, Valentine v. M.C.I.</i> (F.C.T.D., no. IMM-1218-98), Evans, September 3, 1999.....	10-8, 10-9
<i>Lai, Gui Sheng v. M.C.I.</i> (F.C.T.D., no. IMM-3229-98), Lemieux, September 16, 1999 .....	10-7
<i>Li, Leung Lun v. M.C.I.</i> (F.C.T.D., no. IMM-466-96), Tremblay-Lamer, September 30, 1998.....	10-9
<i>Li, Quanyi v. M.C.I.</i> (F.C.T.D., no. IMM-3018-00), Teitelbaum, July 5, 2001.....	10-14
<i>Liang, Jian v. M.C.I.</i> (F.C.T.D., no. IMM-3014-98), Evans, August 17, 1999 .....	10-9
<i>Lidder: Canada (Minister of Employment and Immigration) v. Lidder</i> , [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.).....	10-5
<i>Lovo, Julio Machado v. M.C.I.</i> (F.C.T.D., no. IMM-2694-94), MacKay, September 22, 1995.....	10-3
<i>Maire, Beata Jolanta v. M.C.I.</i> (F.C.T.D., no. IMM-5420-98), Sharlow, July 28, 1999.....	10-3
<i>Mancia, Pedro Benjamin Orellano v. M.C.I.</i> (F.C.A., no. A-75-97), Décary, Stone, Robertson, May 1, 1998 .....	10-3
<i>Martineau v. Matsqui Institution Disciplinary Board</i> , [1980] 1 S.C.R. 602. ....	10-1
<i>Martins, Oluwatoyin Joseph v. M.C.I.</i> (F.C.T.D., no. IMM-4849-00), Campbell, February 21, 2002; 2002 FCT 189 .....	10-5
<i>Maschio, Michael John v. M.C.I.</i> (F.C.T.D., no. IMM-3354-96), Reed, November 14, 1997.....	10-9
<i>Mengesha, Samuel v. M.C.I.</i> (F.C.T.D., no. IMM-3272-98), Nadon, August 31, 1999 .....	10-6
<i>Mercado, Junilo Bonsol v. M.C.I.</i> (IAD V99-01911), Workun, July 7, 2000 .....	10-6
<i>Merius, Ronald v. M.E.I.</i> (IAD M93-05810), Angé, June 13, 1994. ....	10-2
<i>Mir-Hussaini, Seyed-Hasan v. M.C.I.</i> (F.C.T.D., no. IMM-5208-00), MacKay, March 22, 2002; 2002 FCT 291 .....	10-7
<i>Mistry, Ratilal v. M.E.I.</i> (IAD T93-09237), Bell, February 25, 1994.....	10-9, 10-12
<i>Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board</i> , [1994] 1 S.C.R. 202. ....	10-13
<i>Mohamed, Ismail v. M.C.I.</i> (IAD M98-05434), Bourbonnais, June 8, 1999 .....	10-6
<i>Mooring v. Canada (National Parole Board)</i> , [1996] 1 S.C.R. 75.....	10-12

<i>Muli, Surinderpal Singh v. M.E.I.</i> (IAD V92-01376), Wlodyka, December 2, 1993.....	10-11
<i>Muliadi v. Canada (Minister of Employment and Immigration)</i> , [1986] 2 F.C. 205 (C.A.).....	10-7
<i>Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities</i> , [1992] 1 S.C.R. 623.....	10-5, 10-11
<i>Nguyen, Luong Manh v. M.C.I.</i> (F.C.T.D., no. IMM-3538-94), Gibson, October 6, 1995. Reported: <i>Nguyen v. Canada (Minister of Citizenship and Immigration)</i> (1995), 31 Imm. L.R. (2d) 46 (F.C.T.D.).....	10-10
<i>Nikolova: M.C.I. v. Nikolova, Velitchka</i> (F.C.T.D., no. IMM-16-95), Wetston, October 10, 1995.....	10-5, 10-13
<i>Nouranidoust v. Canada (Minister of Citizenship and Immigration)</i> , [2000] 1 F.C. 123 (T.D.).....	10-10
<i>Osaloun, Ebenezer Taiwo v. M.C.I.</i> (F.C.T.D., no. IMM-3649-95), Rothstein, June 25, 1996.....	10-13
<i>Ozdemir, Murtaza v. M.C.I.</i> (F.C.A., no. A-604-00), Evans, Rothstein, Malone, November 1, 2001; 2001 FCA 331.....	10-9
<i>Paik, Oon-Gil v. M.C.I.</i> (F.C.T.D., no. IMM-611-95), Jerome, September 13, 1996. Reported: <i>Paik v. Canada (Minister of Citizenship and Immigration)</i> (1996), 35 Imm. L.R. (2d) 52 (F.C.T.D.).....	10-8
<i>Pangli, Amarjit Kaur v. M.E.I.</i> (F.C.A., no. A-597-86), Heald, Urie, Desjardins, November 12, 1987. Reported: <i>Pangli v. Canada (Minister of Employment and Immigration)</i> (1987), 4 Imm. L.R. (2d) 266 (F.C.A.).....	10-2, 10-6, 10-11
<i>Park, Jong In v. M.C.I.</i> (F.C.A., no. A-85-98), Strayer, Isaac, Evans, May 24, 2001.....	10-10
<i>Park, Soung II v. M.C.I.</i> (F.C.A., no. A-708-00), Malone, Linden, Noël, October 19, 2001; 2001 FCA 313.....	10-5
<i>Patel, Chimubhai Madhavlal v. M.C.I.</i> (F.C.T.D., no. IMM-829-98), Tremblay-Lamer, October 5, 1998.....	10-7
<i>Patel, Manjulaben v. M.E.I.</i> (IAD T89-03915), Townshend, Weisdorf, Chu, April 20, 1991.....	10-2
<i>Persaud, Cyril v. M.E.I.</i> (IAD T92-00690), Arpin, Goodspeed, Rayburn, April 20, 1993.....	10-4
<i>Pierre-Paul, Jean-Pierre v. M.C.I.</i> (IAD M93-09745), Durand, July 14, 1994.....	10-6
<i>Porter: M.E.I. v. Porter, Kathleen</i> (F.C.A., no. A-353-87), Hugessen, MacGuigan, Desjardins, April 14, 1988.....	10-4, 10-11
<i>Posluns v. Toronto Stock Exchange</i> , [1968] S.C.R. 330.....	10-12
<i>Qi, E. Guang v. M.C.I.</i> (F.C.T.D., no. IMM-469-95), Reed, December 5, 1995. Reported: <i>Qi v. Canada (Minister of Citizenship and Immigration)</i> (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.).....	10-10
<i>Qureshi, Azra Batool v. M.C.I.</i> (F.C.T.D., no. IMM-5093-99), Tremblay-Lamer, August 18, 2000.....	10-6
<i>Ramdelall, Nandrani v. M.C.I.</i> (F.C.T.D., no. IMM-4112-97), Wetston, August 28, 1998.....	10-3
<i>Redman, Barbara Engreed v. M.C.I.</i> (F.C.T.D., no. IMM-5109-97), Rothstein, October 23, 1998.....	10-7
<i>Rodriguez, Meliton v. M.E.I.</i> (IAD T91-00107), Weisdorf, Fatsis, Ariemma, August 8, 1991.....	10-2
<i>Samra, Avtar Kaur v. M.E.I.</i> (IAD V90-01073), Tisshaw, Wlodyka, Chu, September 23, 1991.....	10-13
<i>Santos, Natalia Duque v. M.C.I.</i> (F.C.T.D., no. IMM-4990-00), Lutfy, April 30, 2002; 2002 FCT 494.....	10-9
<i>Savin, Valeria v. M.C.I.</i> (F.C.T.D., no. IMM-4712-94), Cullen, October 11, 1995. Reported: <i>Savin v. Canada (Minister of Citizenship and Immigration)</i> (1995), 35 Imm. L.R. (2d) 122 (F.C.T.D.).....	10-7
<i>Scislowicz, Renata v. M.C.I.</i> (F.C.T.D., no. IMM-3528-98), Heneghan, June 22, 2000.....	10-10

<i>Sebai, Mustafa v. M.C.I.</i> (F.C.T.D., no. IMM-4565-98), Sharlow, October 12, 1999 .....	10-13
<i>Shah, Syed v. M.E.I.</i> (F.C.A., no. A-617-92), Hugessen, MacGuigan, Linden, June 24, 1994. ....	10-1, 10-3
<i>Sian, Malkit Kaur v. M.C.I.</i> (IAD V95-00955), McIsaac, January 20, 1997 .....	10-11
<i>Silion, Loredana v. M.C.I.</i> (F.C.T.D., no. IMM-5288-98), MacKay, August 18, 1999 .....	10-10
<i>Singh, Gurmit v. M.C.I.</i> (F.C.T.D., no. IMM-4962-94), Simpson, December 21, 1995.....	10-4
<i>Singh, Narinder Pal v. M.C.I.</i> (IAD T97-04679), D’Ignazio, September 27, 1999 .....	10-13
<i>So, King-Sing v. M.E.I.</i> (F.C.T.D., no. IMM-7542-93), Rouleau, March 22, 1995 .....	10-6
<i>Song, Nian Shen v. M.C.I.</i> (F.C.T.D., no. IMM-115-98), Tremblay-Lamer, October 5, 1998 .....	10-7
<i>Stephen, Lau Ting Ming v. M.C.I.</i> (F.C.T.D., no. IMM-5953-00), Blanchard, November 15, 2001 .....	10-10
<i>Symmonds, Lorraine Shirley v. M.E.I.</i> (IAD V91-00440), MacLeod, Wlodyka, Verma, February 25, 1992. ....	10-4, 10-13
<i>Tam, Mi Yee v. M.C.I.</i> (F.C.T.D., no. IMM-5138-94), Simpson, October 25, 1995. Reported: <i>Tam</i> <i>v. Canada (Minister of Citizenship and Immigration)</i> (1995), 35 Imm. L.R. (2d) 201 (F.C.T.D.).....	10-8
<i>Tam, Patrick v. M.C.I.</i> (F.C.T.D., no. IMM-3276-95), Rouleau, September 16, 1996. Reported: <i>Tam v. Canada (Minister of Citizenship and Immigration)</i> (1996), 35 Imm. L.R. (2d) 207 (F.C.T.D.).....	10-7
<i>Tchassovnikov, Igor v. M.C.I.</i> (F.C.T.D., no. IMM-5335-97), Campbell, July 31, 1998 .....	10-10
<i>Tham, Aurora Kok v. M.E.I.</i> (I.A.B. 83-6793), Suppa, Benedetti, Hlady, May 24, 1985 .....	10-9, 10-11, 10-13
<i>Tham: M.E.I. v. Tham, Aurora Kok</i> (F.C.A., no. A-756-86), Hugessen, Marceau, Urie, September 19, 1986.....	10-9, 10-13
<i>Tran, Vu Son v. M.C.I.</i> (F.C.T.D., no. IMM-850-00), Rothstein, August 20, 2001 .....	10-8
<i>Tu, Hue Mai v. M.C.I.</i> (IAD VA0-01083), Boscarior, February 28, 2001.....	10-13
<i>Valle, Carlos Arno v. M.C.I.</i> (IAD VA0-01218), Clark, May 28, 2001 .....	10-13
<i>Viches, Nelly v. M.C.I.</i> (F.C.T.D., no. IMM-6436-00), McKeown, December 12, 2001; 2001 FCT 1366.....	10-9
<i>Wang, Tianming v. M.C.I.</i> (F.C.T.D., no. IMM-6828-98), Pelletier, August 20, 1999 .....	10-7
<i>Wong, Ching Shin Henry v. M.C.I.</i> (F.C.T.D., no. IMM-3366-96), Reed, January 14, 1998.....	10-8, 10-9
<i>Wong, Yuen-Lun v. M.C.I.</i> (F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995. ....	10-4
<i>Xu, Tong v. M.C.I.</i> (F.C.T.D., no. IMM-4988-98), Gibson, July 28, 1999.....	10-9
<i>Yang: M.E.I. v. Yang, Li</i> (F.C.A., no. A-169-89), Mahoney, Urie, Stone, May 22, 1990. ....	10-8
<i>Yogeswaran, Thiyagarajah v. M.C.I.</i> (F.C.T.D., no. IMM-1505-96), McKeown, April 17, 1997.....	10-8
<i>Yuan, Liping v. M.C.I.</i> (F.C.T.D., no. IMM-3792-00), Kelen, December 11, 2001 .....	10-6
<i>Yung, Mei-Hing v. M.C.I.</i> (F.C.T.D., no. IMM-2753-99), Reed, June 19, 2000 .....	10-10
<i>Zhang, Fang v. M.C.I.</i> (F.C.T.D., no. IMM-4179-98), Tremblay-Lamer, March 18, 1999 .....	10-8
<i>Zhao, Qin v. M.C.I.</i> (F.C.T.D., no. IMM-4384-98), Pinard, June 8, 1999.....	10-6
<i>Zheng, Tiantong v. M.C.I.</i> (F.C.T.D., no. IMM-1982-98), Reed, August 27, 1999 .....	10-7

# CHAPTER 11

## Table of Contents

<b>11. CONSENT OF MINISTER TO RETURN</b> -----	<b>11-1</b>
<b>11.1. GENERALLY</b> -----	<b>11-1</b>
<b>11.2. STATUTORY PROVISIONS</b> -----	<b>11-1</b>
<b>11.3. APPEAL RIGHTS</b> -----	<b>11-1</b>
<b>11.4. LEGAL VALIDITY</b> -----	<b>11-1</b>
<b>11.5. DISCRETIONARY JURISDICTION</b> -----	<b>11-2</b>

## CHAPTER 11

### 11. CONSENT OF MINISTER TO RETURN

#### 11.1. GENERALLY

An application for permanent residence made by a member of the family class can be refused if the applicant is inadmissible to Canada. Section 19 of the *Immigration Act* lists the various classes of inadmissibility. One class so defined consists of persons who have been previously deported from Canada and who require the written consent of the Minister to come into Canada. The Minister may exercise his or her discretion to issue a consent upon application by the affected person, who may be an immigrant or a visitor.

#### 11.2. STATUTORY PROVISIONS

Section 19(1)(i) and section 55(1) of the *Immigration Act* contain the following relevant provisions:

19.(1) No person shall be granted admission who is a member of any of the following classes:

(i) persons who, pursuant to section 55, are required to obtain the consent of the Minister to come into Canada but are seeking to come into Canada without having obtained such consent;

55.(1) Subject to section 56, where a deportation order is made against a person, the person shall not, after he is removed from or otherwise leaves Canada, come into Canada without the written consent of the Minister unless an appeal from the order has been allowed.

#### 11.3. APPEAL RIGHTS

Section 77 of the *Immigration Act* allows a Canadian citizen or permanent resident of Canada whose sponsored application of a member of the family class has been refused to appeal to the Appeal Division on either or both of the following grounds:

- (a) any ground that involves a question of law or fact, or mixed law and fact; and
- (b) the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

#### 11.4. LEGAL VALIDITY

As most sponsorship appeals do not challenge the legal validity of a refusal based on this ground and are based solely on the Appeal Division's discretionary jurisdiction, there is little jurisprudence which directly comments on legal validity. A few references can, however, be

mentioned. The consent of the Minister must be express and cannot be implied.<sup>1</sup> There is no basis in law for the proposition that an applicant should not have to pursue the Minister's consent until the applicant is aware whether or not, but for the lack of consent, his application for landing would otherwise be approved.<sup>2</sup> There is no basis in law for the assumption that a visa officer would, in the course of considering an application, seek the Minister's consent on an applicant's behalf.<sup>3</sup> Applications for a Minister's permit and a Governor-in-Council exemption are not requests for the consent required by section 55(1) of the *Immigration Act*.<sup>4</sup> Where an applicant had left Canada without confirming his departure as required by section 32.01 of the *Immigration Act*, the departure order was deemed to be a deportation order and the applicant was consequently required to obtain the Minister's consent to return to Canada.<sup>5</sup> A visa refusal was held to be valid although the visa officer had failed to specifically cite section 19(1)(i) in the refusal letter: the visa officer had cited section 55 in the narrative and section 19(1)(i) is premised on the effect of section 55.<sup>6</sup>

### 11.5. DISCRETIONARY JURISDICTION

The case of *Kaur v. M.E.I.*<sup>7</sup> involved the refusal of an immigrant visa to an applicant, the spouse of the sponsor, after the visa officer concluded that the applicant had not obtained the necessary written consent of the Minister to come into Canada. The Appeal Division upheld the officer's decision and purported to assess whether there existed sufficient humanitarian or compassionate grounds "which would have warranted the granting of special relief needed to overcome the deportation order and absence of the Minister's written consent."<sup>8</sup> The Federal Court of Appeal ruled that the Appeal Division's humanitarian or compassionate jurisdiction could not overcome the failure of an applicant, who had previously been deported, to obtain the written consent of the Minister to come into Canada.

This case was distinguished by the Appeal Division in *Gomes v. M.E.I.*<sup>9</sup> on the basis that in *Kaur*, the applicant had been found not to be a member of the family class (the visa officer had also refused the application because the marriage was not shown to be valid). Therefore, the discretionary jurisdiction of the Appeal Division could not be exercised. Since *Gomes*, the

---

<sup>1</sup> *Vega, Miguel Jesus v. M.E.I.* (F.C.A., no. A-261-82), Pratte, Urie, Le Dain, February 15, 1983.

<sup>2</sup> *Bridgemohan, Gangaram v. M.C.I.* (F.C.T.D., no. IMM-784-95), Gibson, November 2, 1995. Reported: *Bridgemohan v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 110 (F.C.T.D.).

<sup>3</sup> *Ibid.*

<sup>4</sup> *Davis, Courtney v. M.E.I.* (F.C.A., no. A-498-89), Mahoney, Urie, Stone, May 24, 1990. Reported: *Davis v. Canada (Minister of Employment and Immigration)* (1990), 11 Imm. L.R. (2d) 143 (F.C.A.).

<sup>5</sup> *Wright, Norma v. M.C.I.* (IAD T95-03227), Wright, April 30, 1996.

<sup>6</sup> *Kaur, Manjit v. M.C.I.* (IAD T96-01365), Hoare, February 5, 1998.

<sup>7</sup> *Kaur, Narinder v. M.E.I.* (F.C.A., no. A-405-89), Marceau, Desjardins, Linden, October 11, 1990. Reported: *Kaur v. Canada (Minister of Employment and Immigration)* (1990), 12 Imm. L.R. (2d) 1 (F.C.A.).

<sup>8</sup> *Ibid.* at 3.

<sup>9</sup> *Gomes, Maria da Conceicao v. M.E.I.* (IAD T90-03939), Weisdorf, Fatsis, Townshend (concurring), December 21, 1990.



Appeal Division has generally continued to hold that it has discretionary jurisdiction to grant special relief in respect of a member of the family class whose application for permanent residence has been refused because of lack of the Minister's consent to return to Canada.

Most recently, this approach by the Appeal Division was challenged in *Kainth*.<sup>10</sup> In this case, it was held that the discretionary jurisdiction of the Appeal Division is broad enough to override the requirement in section 55 for the Minister's consent. The Federal Court – Trial Division went on to explain that the Minister's consent was only one of several requirements which the Appeal Division could waive under its discretionary jurisdiction.

The Court of Appeal upheld the decision.<sup>11</sup> Marceau, J.A. reviewed his own judgment in *Kaur*<sup>12</sup> and decided to disavow the position adopted in *Kaur* for two reasons.

First, the limitation on the Appeal Division's jurisdiction imposed by *Kaur* had no clear support in the legislation. The requirement that a person previously deported obtain the written consent of the Minister before entering Canada was a requirement of the *Immigration Act* and therefore gave rise to an appeal to the Appeal Division.

Second, the Court reviewed the Appeal Division's exclusive jurisdiction to hear and determine questions of jurisdiction pursuant to section 69.4(2)<sup>13</sup> of the *Immigration Act*. Where the Appeal Division makes a finding in relation to its own jurisdiction, such a determination should not be disturbed by a reviewing Court as long as support can be found for the determination in the wording of the legislation. In this case, such support was found to exist.

The Appeal Division can therefore continue to consider the granting of special relief in sponsorship appeals where the ground of refusal of the sponsored application for permanent residence is the failure of the previously deported applicant to obtain the written consent of the Minister to come into Canada.

According to the Federal Court – Trial Division decision in *Kirpal*,<sup>14</sup> (1) the application for special relief is to be considered separately in respect of each applicant mentioned in the application for permanent residence and a uniform result need not be obtained for all applicants; and (2) there is to be no weighing of the ground of inadmissibility against the compassionate or humanitarian considerations.

---

<sup>10</sup> *S.G.C. v. Kainth, Kermjit Kaur* (F.C.T.D., no. IMM-1354-93), Joyal, October 12, 1993. Reported: *Canada (Solicitor General) v. Kainth* (1994), 11 Imm. L.R.(2d) 114 (F.C.T.D.).

<sup>11</sup> *S.G.C. v. Kainth, Kermjit Kaur* (F.C.A., no. A-34-94), Marceau, MacGuigan, Robertson, June 10, 1994. Reported: *Canada (Solicitor General) v. Kainth* (1994), 26 Imm L.R. (2d) 226 (F.C.A.).

<sup>12</sup> *Kaur, Narinder, supra*, footnote 7.

<sup>13</sup> Section 69.4(2) provides:

69.4(2) The Appeal Division has, in respect of appeals made pursuant to sections 70, 71 and 77, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to the making of a removal order or the refusal to approve an application for landing made by a member of the family class.

<sup>14</sup> *Kirpal v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 352 (T.D.).

## CHAPTER 11

### TABLE OF CASES: CONSENT OF MINISTER TO RETURN

#### CASES

<i>Bridgemohan, Gangaram v. M.C.I.</i> (F.C.T.D., no. IMM-784-95), Gibson, November 2, 1995. Reported: <i>Bridgemohan v. Canada (Minister of Citizenship and Immigration)</i> (1995), 31 Imm. L.R. (2d) 110 (F.C.T.D.).....	11-2
<i>Davis, Courtney v. M.E.I.</i> (F.C.A., no. A-498-89), Mahoney, Urie, Stone, May 24, 1990. Reported: <i>Davis v. Canada (Minister of Employment and Immigration)</i> (1990), 11 Imm. L.R. (2d) 143 (F.C.A.).....	11-2
<i>Gomes, Maria da Conceicao v. M.E.I.</i> (IAD T90-03939), Weisdorf, Fatsis, Townshend (concurring), December 21, 1990. ....	11-2
<i>Kainth: S.G.C. v. Kainth, Kermjit Kaur</i> (F.C.A., no. A-34-94), Marceau, MacGuigan, Robertson, June 10, 1994. Reported: <i>Canada (Solicitor General) v. Kainth</i> (1994), 26 Imm L.R. (2d) 226 (F.C.A.).....	11-3
<i>Kainth: S.G.C. v. Kainth, Kermjit Kaur</i> (F.C.T.D., no. IMM-1354-93), Joyal, October 12, 1993. Reported: <i>Canada (Solicitor General) v. Kainth</i> (1994), 11 Imm. L.R.(2d) 114 (F.C.T.D.).....	11-3
<i>Kaur, Manjit v. M.C.I.</i> (IAD T96-01365), Hoare, February 5, 1998.....	11-2
<i>Kaur, Narinder v. M.E.I.</i> (F.C.A., no. A-405-89), Marceau, Desjardins, Linden, October 11, 1990. Reported: <i>Kaur v. Canada (Minister of Employment and Immigration)</i> (1990), 12 Imm. L.R. (2d) 1 (F.C.A.).....	11-2, 11-3
<i>Kirpal v. Canada (Minister of Citizenship and Immigration)</i> , [1997] 1 F.C. 352 (T.D.).....	11-3
<i>Vega, Miguel Jesus v. M.E.I.</i> (F.C.A., no. A-261-82), Pratte, Urie, Le Dain, February 15, 1983.....	11-2
<i>Wright, Norma v. M.C.I.</i> (IAD T95-03227), Wright, April 30, 1996.....	11-2



**MEMORANDUM NOTE DE SERVICE**

**To/à**

IAD Members / Commissaires  
de la SAI

**From/de**

Krista Daley  
General Counsel/Director, Legal  
Services  
Avocate générale/Directrice,  
Services juridiques

Classification
File / Dossier Spon_memo.doc
Originator / Auteur Michael Park
Supervisor / Surveillant Philippa Wall
Date 2002-07-02

**Subject/Objet**

***Sponsorship Appeals / Appels en matière de parrainage***

Attached please find the revised *Sponsorship Appeals* paper, dated July 1, 2002, prepared by Legal Services. This work is intended to assist decision-makers of the IAD.

The paper is reviewed annually to determine whether it requires updating. We want to be sure that it meets your needs. If you have any comments about the format or the content of this work, please forward them to Michael Park, Legal Services, Vancouver.

**In updating your binder containing the *Sponsorship Appeals* paper, please be sure to remove the entire contents and insert this revision at the appropriate tabs.**

As is the case with all major reference works produced by Legal Services, this work is available through INTRANET and the IRB website, and you may find electronic search capabilities will facilitate your use of this work.

Vous trouverez ci-joint le document intitulé *Appels en matière de parrainage*, préparé par les Services juridiques et mis à jour en date du 1<sup>er</sup> juillet 2002. Ce document vise à aider les décideurs de la SAI.

Tous les ans, nous faisons un examen de ce document pour déterminer si une mise à jour s'avère nécessaire. Nous voulons être certains qu'il répond à vos besoins. Si vous avez des commentaires à faire sur sa disposition ou sur son contenu, faites-les parvenir à Michael Park, Services juridiques, Vancouver.

**Veillez remplacer en entier le contenu de votre reliure du document *Appels en matière de parrainage* par la version revue et corrigée à insérer dans les onglets correspondants.**

À l'instar de tous les principaux documents de référence produits par les Services juridiques, celui-ci est versé sur Intranet et sur le site Web de la CISR, où des outils de recherche électronique vous en faciliteront l'utilisation.

<<original signé par K. Daley>>

Krista Daley



**MEMORANDUM NOTE DE SERVICE**

**To/à**

All IAD Members /  
Commissaires de la SAI

**From/de**

Michael Park, Legal  
Adviser/conseiller juridique  
Coordinator of the Paper/  
coordonnateur du document

**Subject / Objet**

Classification
File / Dossier Spon_authors.doc
Originator / Auteur Michael Park
Supervisor / Surveillant Philippa Wall
Date 01.07.02

*Sponsorship Appeals / Appels en matière de parrainage*

The following people worked on the chapters as listed:

Le nom des auteurs de chaque chapitre du document figure ci-dessous :

Introduction – Philippa Wall  
Chapter 1, Financial Refusals – Linda Koch  
Chapter 2, Criminal Refusals – Lori Disenhouse  
Chapter 3, Medical Refusals – David Schwartz  
Chapter 4, Foreign Adoptions – Patricia Auron & Lori Disenhouse  
Chapter 5, Foreign Marriages – Patricia Auron  
Chapter 6, Marriages and Engagements of Convenience – Philippa Wall & Lori Disenhouse  
Chapter 7, Relationship – Shirley Novak  
Chapter 8, "Not an Immigrant" – Linda Koch  
Chapter 9, Compassionate or Humanitarian Considerations – Lori Disenhouse  
Chapter 10, Visa Officers and the Duty of Fairness – Philippa Wall  
Chapter 11, Consent of Minister to Return – David Schwartz

Introduction – Philippa Wall  
Chapitre 1, Refus pour des raisons d'ordre financier – Linda Koch  
Chapitre 2, Refus pour des raisons d'ordre criminel – Lori Disenhouse  
Chapitre 3, Refus pour des raisons médicales – David Schwartz  
Chapitre 4, Adoptions à l'étranger – Patricia Auron & Lori Disenhouse  
Chapitre 5, Mariages contractés à l'étranger – Patricia Auron  
Chapitre 6, Mariages et fiançailles de convenance – Philippa Wall & Lori Disenhouse  
Chapitre 7, Lien de parenté – Shirley Novak  
Chapitre 8, « Pas un immigrant » – Linda Koch  
Chapitre 9, Raisons d'ordre humanitaire – Lori Disenhouse  
Chapitre 10, Les agents des visas et l'obligation d'agir équitablement – Philippa Wall  
Chapitre 11, Autorisation ministérielle pour revenir au Canada – David Schwartz

Michael Park