SPONSORSHIP

APPEALS

Legal Services
Immigration and Refugee Board
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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	
Act	*Immigration Act*
IAB	Immigration Appeal Board (predecessor to Immigration and Refugee Board)
IAD	Immigration Appeal Division of the Immigration and Refugee Board/Appeal Division
IAD Rules	*Immigration Appeal Division Rules*
IRB/Board	Immigration and Refugee Board
Minister	Minister of Citizenship and Immigration
Regulations	*Immigration Regulations, 1978*

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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.

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<u>Disclaimer</u>

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.

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SPONSORSHIP APPEALS

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SPONSORSHIP APPEALS

I. INTRODUCTION

I.1. WHO MAY SPONSOR

The definition of "sponsor" which came into force on April 1, 1997,[1] 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[2] from the date of giving the undertaking until the sponsored relative is granted landing; or

- a Canadian citizen at least 19 years of age who is sponsoring a specified relative[3] 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.[4]

A sponsor must give an undertaking to the Minister on behalf of a sponsored relative (member of the family class).[5] A sponsor must meet certain requirements[6] to be authorized to 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.[7]

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[1] 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.

[2] 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. 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.

[3] A member of the family class referred to in section 6(3) of the Regulations.

[4] 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).

[5] Members of the family class are discussed in greater detail in chapter 7, "Relationship."

[6] See chapter 1, "Financial Refusals," for a more detailed discussion.

[7] 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,*

Under the former regulatory scheme, where both a sponsor and the sponsor's spouse had signed the undertaking,[8] 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.[9] It has yet to be decided whether the same concept applies under the current Regulations .[10]

I.2. WHO MAY BE SPONSORED

A member of the family class[11] 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.[12] The member of the family class may include dependants[13] in the application for landing. A member of the family class and accompanying dependants are eligible for immigrant visas provided the member of the family class and all dependants, whether accompanying or not, are admissible and otherwise meet the requirements of the *Immigration Act* and Regulations.[14] A visa officer may refuse an application for landing if members of the family class or dependants are inadmissible.

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supra, footnote 4; V*ijayasegar, supra*, footnote 4. 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.

[8] In *Woo, John v. M.C.I.* (IAD V95-01738), Boscariol, July 18, 1997, the sponsor's wife had not co-signed the undertaking therefore could not be considered a co-sponsor.

[9] *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.

[10] *M.C.I. v. Gill, Kushwinder Kaur* (F.C.A., no. A-705-97), Isaac, Linden, Sexton, January 26, 1999.

[11] Section 2(1) of the Regulations defines "member of the family class."

[12] *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).

[13] As defined in section 2(1) of the Regulations.

[14] 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.

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

In the event of a refusal[15] of a sponsored application for landing, the sponsor must be informed of the reasons for the refusal.[16] 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.[17] 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.[18]

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*.[19] It has sole and exclusive jurisdiction to hear and determine all questions of law and fact arising in relation to refusals of sponsored applications for landing,[20] including questions concerning its

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[15] 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); *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).

[16] See section 77(1) of the Act and the exception in section 77(2).

[17] 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 15. See also the discussion in chapter 7, "Relationship," section 7.4.5., "Dependant."

[18] Also referred to as "so-called equitable relief," or "h & c." This is the discretionary jurisdiction of the Appeal Division.

[19] 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.

[20] 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.

jurisdiction.[21] In its discretion, the Appeal Division may conduct hearings by videoconference, if it is a suitable medium in the circumstances.[22]

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.[23] A valid non-jurisdictional ground, however, may be overcome with the granting of special relief.

A sponsorship appeal to the Appeal Division is a hearing *de novo* in a broad sense.[24] 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.[25] As a general rule, the appeal is decided on the facts as they exist at the time of the hearing.[26] The Appeal Division errs if it neglects to explain why it prefers a sponsor's evidence to the conflicting evidence of a visa officer.[27]

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.[28] 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.[29] If the Appeal Division dismisses an appeal and a new application for landing is filed, refused and appealed again, if no new evidence is adduced at the second appeal, the appeal may be dismissed as an abuse of

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[21] *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.).

[22] *M.C.I. v. King, David Daniel* (IAD T98-07875), Aterman, May 27, 1999.

[23] *Garcia, Elsa v. M.E.I.* (I.A.B. 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979.

[24] *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.

[25] See section 69.4 (3)(c) of the Act.

[26] *Kahlon, supra*, footnote 24; the main exception being medical refusals. In this respect, see chapter 3, "Medical Refusals."

[27] *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.

[28] See section 77(4) of the Act.

[29] See section 77(5) of the Act.

process;[30] if new evidence is adduced, the second appeal may be dismissed for lack of jurisdiction using the doctrine of *res judicata*.[31] 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.[32]

The Appeal Division has no jurisdiction to reopen a sponsorship appeal for receipt of additional evidence.[33]

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.[34]

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[30] *Kaloti, Yaspal Singh v. M.C.I.* (F.C.A., no. A-526-98), Décary, Sexton, Evans, March 13, 2000.

[31] 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 14 (*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 brief discussion of res judicata at chapter 6, "Marriages and Engagements for Immigration Purposes," section 6.4., "Ascertaining Purpose and Intention: Timing."

[32] *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 discussion in chapter 9, "Compassionate or Humanitarian Considerations," section 9.1.4., "Effect of a Favourable Decision on Compassionate or Humanitarian Grounds."

[33] *Parmar, Satkar Kaur v. M.C.I.* (IAD V94-01466), Clark, March 18, 1999.

[34] See section 82.1(1) of the Act.

TABLE OF CASES: INTRODUCTION

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CHAPTER 1

1. FINANCIAL REFUSALS

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.[1]

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.[2]

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.[3] 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.[4] Additional criteria have been introduced which have the effect of preventing sponsorship in certain circumstances.[5]

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[1] For the full text of the Regulation, please refer to s.6(1)(b) of the Immigration Regulations, 1978.

[2] For the full text of the Regulation, please refer to s.6(2) of the Immigration Regulations, 1978.

[3] 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.

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

[5] 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.[6]

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.

1.1. "OLD REGULATIONS"[7]

1.1.1. Introduction

An undertaking[8] 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[...].[9]

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

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[6] ss. 5(2)(f) and 5(2)(h), Regulations.

[7] 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."

[8] Refer to chapter I, "Introduction," for a brief explanation of the sponsorship process.

[9] See subparagraph (a)(i) of the definition of "undertaking" for the applicable definition in the Province of Quebec.

[10] 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,

1.1.2. 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.[12]

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.[13]

1.1.3. 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.

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

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> (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).

[11] 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.

[12] *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, Lisseth Polillo v. M.C.I.* (IAD T95-01230), Boire, June 30, 1998.

[13] *Immigration Regulations, 1978*, section 6(3.1), (3.2), (3.3).

the low income cut-off (LICO) figures published by Statistics Canada.[14] 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.[15]

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:[16]

- 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.[17] Similarly,

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[14] *Immigration Regulations, 1978*, section 6(2).

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

[16] *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.

[17] 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, 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.

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.[18]

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.[19] While accommodation for the immigrants is a consideration, lack of accommodation in itself should not be a criterion used to dismiss the appeal.[20]

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.[21] 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.[22]

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.[23] The usual approach involves considering the sponsor's income on a calendar-year basis.[24] A drop in income is not necessarily fatal where there is an overall trend of employability and a reasonable explanation for the drop.[25]

1.1.4. What Income May Be Considered For Comparison Against The LICO

1.1.4.1. 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.[26]

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[18] *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.

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

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

[21] *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.).

[22] *Gosal, Jasvir Kaur v. M.E.I.* (IAD V93-02361), Ho, July 12, 1994.

[23] *Gill, Resham Singh v. M.E.I.* (IAD V93-02223), Clark, December 8, 1994.

[24] *Sekhon, Jaswinder Kaur v. M.C.I.* (IAD V93-01781), Ho, June 12, 1995.

[25] *Brar, Gurcharan Singh v. M.E.I.* (IAD V93-00593), Wlodyka, November 23, 1993.

[26] 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 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

Essentially, if the income is of a stable or continuing nature, it may be included as income.[27] It is gross salary that is considered.[28] 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.[29] 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.[30] 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.[31] R.R.S.P. contributions are not to be deducted from income, whether for an employed or self-employed sponsor.[32]

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.[33] 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.[34]

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 relation to the ability to fulfil the undertaking generally, where there was evidence that overtime would be available.[35]

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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.]

27 *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.

28 *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.

29 *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.

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

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

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

33 *Mohammed, supra,* footnote 15.

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

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

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.[36]

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.[37] 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.[38] In another case,[39] 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.[40] Payments from provincial or municipal sources for welfare assistance, in this case, mother's allowance, are not to be considered part of family income.[41]

1.1.4.2. 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.[42]

In *Bath*,[43] 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 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.

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

[37] *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.

[38] *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.

[39] *Madera, Nenette v. M.C.I.* (IAD V96-01369), Nee, March 25, 1998.

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

[41] *Usha, Ramadhar v. M.E.I.* (IAD T93-00078), Ahara, June 23, 1993.

[42] *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.

[43] *Bath, Satwant Kaur v. M.E.I.* (IAD V91-01006), Wlodyka, April 29, 1992.

However, in *Gosal*,[44] 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*[45] was distinguished because the sponsor in *Bath* was unable to meet the LICO even though she had been receiving considerable UI.[46]

In *Gill*,[47] 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.

1.1.5. Whose Income Can Be Included

1.1.5.1. 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.[48]

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.[49]

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[44] *Gosal, supra,* footnote 22.

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

[46] *Baring, Harwinder Kaur v. M.E.I.* (IAD V93-00614), Lam, Ho, Verma, August 10, 1994.

[47] *Gill, Resham Singh, supra*, footnote 23.

[48] *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.

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

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.[50] Other panels have also permitted co-sponsorships by siblings.[51]

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.[52]

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.[53] Nor was a sponsor's grandson entitled to be a co-sponsor.[54] 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.[55]

In *Seepall*,[56] 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

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[50] *Abuan, supra*, footnote 31.

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

[52] *Sekhon, supra*, footnote 24.

[53] *Brar, supra*, footnote 25.

[54] *Bath, supra*, footnote 43.

[55] *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.]

[56] *Seepall, Mavis Roslyn v. M.C.I.* (IAD T93-06999), Channan, November 9, 1994.

on *Johl*,[57] 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.[58]

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*,[59] 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.

1.1.5.2. 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,[60] unless they are eligible to sponsor the applicants in their own right.[61]

Although a sponsor's relatives may not be entitled to co-sponsor an undertaking, their offer of assistance can be a positive factor.[62] 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.[63]

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.[64]

In *Gandham*,[65] 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

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[57] *Johl, supra*, footnote 16.

[58] *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.).

[59] *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.).

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

[61] See the preceding section 1.1.5.1., "Meeting the LICO."

[62] *Brar, supra*, footnote 25.

[63] *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.

[64] *Sidhu, supra*, footnote 49.

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.

1.1.6. 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.[66] Also included are dependants of the principal applicant, even if those dependants are not coming to Canada.[67]

A common-law spouse is not included in the family unit.[68]

In *Lall*,[69] 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*,[70] 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

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[65] *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.

[66] *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.]

[67] 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."

[68] *Ramos, supra*, footnote 19.

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

[70] *Dhaliwal, Jagdish Singh, supra*, footnote 38.

evidence in *Dhaliwal* that the former spouse was not dependent on the sponsor, making her inclusion in the family unit unfair. In *Gill,*[71] 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.[72]

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.[73]

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.[74]

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.[75] 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 assessment of the sponsor's financial resources. The spouse had signed the sponsor's undertaking and financial evaluation.[76]

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;[77] however, an unborn child was not.[78]

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[71] *Gill, Varinderjit (Badesha) v. M.C.I.* (IAD V98-01629), Borst, March 19, 1999.

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

[73] *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.

[74] *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).

[75] *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.

[76] *Sekhon, supra,* footnote 24.

[77] *Abuan, supra,* footnote 31.

1.1.7. 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.[79]

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.[80] 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.[81]

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[82] (Column A) but in another case, in the smaller area of residence of Delta with a population of 100,000-499,999.[83]

Where the sponsor was living in Surrey, B.C., the population of Surrey, not Vancouver, was used.[84] However, since September 18, 1996, the Statistics Canada Census Metropolitan Area (CMA) table has been in use. In *Shoker*,[85] 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*,[86] 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

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

79 *Mavi, supra,* footnote 75.

80 *Gosal, supra,* footnote 22.

81 *Kainth, supra,* footnote 51.

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

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

84 *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.

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

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

degree of economic and social integration with that urban area."[87] On that basis, the Appeal Division concluded that Richmond, B.C., was in the CMA of Vancouver.[88] 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.[89]

1.2. "NEW REGULATIONS"[90]

1.2.1. Introduction

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

An undertaking[93] is defined in section 2(1) of the *Immigration Regulations, 1978* as:

> […]
>
> (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.[94]

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.

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87 *Ibid.,* at 7.

88 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.

89 *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.

90 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.

91 SOR/97-145.

92 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.

93 Refer to chapter I, "Introduction," for a brief explanation of the sponsorship process.

94 See subparagraph (a)(i) of the definition of "undertaking " for the applicable definition in the Province of Quebec.

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

1.2.2. Income And Financial Obligations

For the first time, income is defined. The definition "gross Canadian[97] income" includes business and investment income but excludes, notably, employment insurance benefits, social assistance (welfare) and child tax benefits.[98]

Financial obligations are also defined.[99] The definition includes business and investment expenses that are deductible under the *Income Tax Act*, but excludes payments on a first 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. Car insurance[100] and child care expenses[101] are not financial obligations. A financial obligation has been found to include income tax payments on arrears.[102]

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

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[95] This provision is discussed in more detail later.

[96] Set out *supra*, footnote 11.

[97] 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.]

[98] 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.

[99] 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.

[100] *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).

[101] *Luong, Van Cuong v. M.C.I.* (IAD T98-03247), Sangmuah, June 30, 1999.

[102] 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.

1.2.3. 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.[103] 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.[104]

1.2.4. Sponsorship Requirements

1.2.4.1. 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[105] that the sponsor

(a) meets the definition of sponsor; [106]

(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

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[103] *Immigration Regulations, 1978,* section 6(3).

[104] *Immigration Regulations, 1978,* section 6(3.2), (3.3).

[105] For the precise requirements, refer to section 5(2) of the Regulations.

[106] 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.

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.[107]

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.

1.2.4.2. 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 time period,[108] 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.[109] The *Johl*[110] factors are not relevant to the issue of the

legal validity of a financial refusal under the new Regulations.[111]

1.2.4.2.1. How the LICO is determined

1.2.4.2.1.1. 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

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[107] *Immigration Regulations, 1978,* section 5.1.

[108] *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.

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

[110] *Johl, supra,* footnote 16.

[111] *Dhillon, Ranjit Kaur, supra,* footnote 108.

- 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.

1.2.4.2.1.2. area of residence

The Regulations provide that it is the sponsor's area of residence that is to be used.[112] Refer to section 1.1.7., "Area Of Residence," which continues to be relevant to the new Regulations.

1.2.4.2.2. 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[113] 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.[114]

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.[115]

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[112] *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."

[113] See section 5(1) of the Regulations.

[114] 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.

[115] *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.,

1.2.4.2.3. 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.[116] This is not applicable in Quebec.[117]

1.2.5. 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;[118] 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.[119]

1.3. SECTION 19(1)(B) OF THE ACT

Section 19(1)(b)[120] of the *Immigration Act* is directed to the applicants for landing. It was

held in *Oliva*[121] 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

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"Introduction." A co-signing spouse must also enter into the agreement referred to in paragraph (h) of the same section.

[116] *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.

[117] *Immigration Regulations, 1978,* section 6(3.1).

[118] *Immigration Regulations, 1978,* sections 5(6), 6(3.4).

[119] *Immigration Regulations, 1978,* sections 5(7), 6(3.5).

[120] 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.

[121] *Oliva, Manuela Sipin v. M.E.I.* (I.A.B. 86-9299), Eglington, Warrington, Rotman, March 26, 1987.

assistance.[122] 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.[123]

In *Bui*,[124] 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).[125]

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.[126] 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.[127] The sponsor's ability to fulfil the undertaking is a relevant consideration in assessing

the adequacy of arrangements[128] but is not the only consideration.[129] If an applicant is or will be able or willing to support himself or herself,[130] or if adequate arrangements have been made for the

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[122] 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.

[123] *Bui, Thai Thi v. M.C.I.* (IAD V98-00178), Carver, June 23, 1999.

[124] *Ibid.*

[125] *Ibid.*, at 5.

[126] 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 123.

[127] See *Abdullah, Nizamudeed v. M.C.I.* (IAD T98-03265), Whist, MacAdam, Kalvin, 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.

[128] *Abdullah, ibid.*

[129] 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 127 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.

[130] 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.

applicant's care and support,[131] 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.[132]

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.[133] 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.[134]

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.[135] There may be one ground of refusal, as in *Virk*,[136] 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*[137] supported the construction that section 19(1)(b) of the Act was the sole ground of refusal.

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[131] 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.

[132] *Virk, Gurdeep Kaur v. M.E.I.* (I.A.B. 86-6137), Mawani, Chambers, Howard, March 29, 1987.

[133] *Oliva, supra,* footnote 121.

[134] *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.

[135] See, for example, *Samra, supra,* footnote 42, where the panel construed the refusal as comprising two separate grounds.

[136] *Virk, supra,* footnote 132.

[137] *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 127. 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.

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.[138]

In *Xu*[139], 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 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*.[140] 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.

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[138] *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.

[139] *Xu, Guang Hui v. M.C.I.* (F.C.T.D., no. IMM-6396-98), O'Keefe, April 13, 2000.

[140] *Le, Tai Manh v. M.C.I.* (IAD T99-04772), Whist, June 13, 2000.

1.4. 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.[141]

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 relative to collect social assistance is irrelevant[142] as is the fact that a sponsor offers his services in lieu of monetary restitution.[143]

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.[144]

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.[145]

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

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[141] *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.

[142] *Randhawa, Jasbir Singh, supra*, footnote 16; *Tayo, Helen Posada v. M.E.I.* (I.A.B. 87-6583), Arpin, Mawani, Gillanders, January 9, 1989.

[143] *Taghizadeh-Barazande, Parviz v. M.C.I.* (IAD T97-00073), D'Ignazio, January 20, 1998.

[144] *Assaf, Mohamad Abdallah v. M.E.I.* (IAD V92-01259), Wlodyka, October 28, 1993.

[145] *Chaudhary, Navid Iqbal v. M.E.I.* (I.A.B. 86-4144), Petryshyn, Wright, Rayburn, October 28, 1987.

restitution, the breach of the undertakings was continuing although the parents had died by the time of the hearing.[146]

1.5. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS[147]

1.5.1. "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[148] 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*[149] 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*[150] (per Member Townshend) has been applied: (1) the sponsor must present evidence that would create a desire to relieve the family's misfortunes; and (2) the evidence led must be weighed against the legal impediment which caused the refusal. The Trial Division of the Federal Court in *Kirpal*[151] 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*.[152]

Kirpal also addressed the issue of an individual exercise of special relief for each sponsored family member in an appeal.[153] 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.[154]

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[146] *Dhillon, Pal Singh v. M.E.I.* (IAD V93-01470), Verma, November 2, 1994.

[147] Refer to chapter 9, "Compassionate or Humanitarian Considerations," for more on the topic.

[148] *Mavi, supra*, footnote 75.

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

[150] *Romeo, Domenica v. M.E.I.* (IAD T89-01205), Sherman, Weisdorf, Townshend (dissenting), February 12, 1990.

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

[152] *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."

[153] In *Chauhan, ibid.*, the panel articulated its disagreement with *Kirpal* in this respect.

[154] 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.

Kirpal does not support an exercise of discretion which ignores the applicants' financial obligations for their non-accompanying dependants[155] or a reduction in the number of applicants for whom a sponsor is responsible in order to allow the sponsor to fulfil the undertaking.[156]

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.[157]

1.5.2. "New Regulations"

1.5.2.1. Current Financial Circumstances

A sponsor's current financial circumstances are relevant to the appeal on compassionate or humanitarian grounds.[158] At a hearing, the Appeal Division "[…] is entitled to consider contemporary matters which necessarily involve a consideration of changed circumstances when exercising its equitable jurisdiction."[159] The assessment is of the sponsor's income over the 12-month period preceding the date of the Appeal Division hearing[160] as compared with the applicable low income cut-off figure.[161]

1.5.2.1.1. LICO not met

Where a sponsor has not overcome the ground of inadmissibility because the LICO figure cannot be met, according to *Jugpall*,[162] the appropriate test for the exercise of special relief is as articulated in *Chirwa*.[163] In *Soroor*,[164] the *Chirwa* test was applied where the LICO was met only for seven of the 12 months preceding the appeal.

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[155] *Del Valle, supra,* footnote 73.

[156] *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.).

[157] *Bath, supra,* footnote 43.

[158] *Jugpall, supra,* footnote 109. The panel cited *Chauhan, supra,* footnote 152 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 108; *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.

[159] *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 109.

[160] This is in order to make the assessment consistent with the new Regulations which also adopt a 12-month time frame: *Luong, supra,* footnote 101.

[161] *Jugpall,* footnote 109.

[162] *Ibid.*

[163] *Chirwa, supra,* footnote 149. See section 1.5.1., "Old Regulations," for the *Chirwa* test.

In *Mendoza*,[165] 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*,[166] 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.

1.5.2.1.2. 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.[167] A different and lower threshold for granting special relief is appropriate where current circumstances reveal that the obstacle to admissibility has been overcome.[168] However, the changed financial circumstances of a sponsor do not, in and of themselves, constitute a basis for granting special relief.[169]

In *Tailor*,[170] 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.[171] The panel added that the present ability to meet the

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[164] *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 158, where *Chirwa* was the test given LICO was not met.

[165] *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.

[166] *Samra, Pargat Singh, supra,* footnote 158.

[167] *Jugpall, supra,* footnote 109.

[168] *Ibid.* In *Luong, supra,* footnote 101, at 2, the panel cited *Jugpall*'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.

[169] *Ibid.* See also *Dhillon, Ranjit Kaur, supra,* footnote 108, the panel holding that the present ability to meet LICO is not, by itself, determinative. 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.

[170] *Tailor, Jyotiben v. M.C.I.* (IAD V98-01828), Carver, June 15, 1999.

[171] 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.

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*,[172] 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*,[173] the panel cited *Jugpall* 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.

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.[174]

1.5.2.1.2.1. 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.[175] In *Luong*,[176] 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?[177]

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[172] *Banipal, Jaswinder Singh v. M.C.I.* (IAD T98-01522), MacAdam, June 4, 1999.

[173] *Lam, Maggie Hung* v. *M.C.I.* (IAD T99-05731), Kelley, April 14, 2000.

[174] *Chang, Kong v. M.C.I.* (IAD V98-03274), Carver, June 23, 1999. This principle was not applied in the circumstances of this case.

[175] *Jugpall, supra*, footnote 109.

[176] *Luong, supra*, footnote 101.

[177] *Ibid.*, at 6.

In *Jugpall*,[178] the positive factors included the sponsor's diligence and self-sacrifice, and the support of a cohesive extended family.

In *Singh (née Bangari)*,[179] 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.[180]

The Appeal Division in *Tailor*[181] 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 *Tatla*,[182] 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.

1.5.2.1.2.2. absence of negative factors

There should be no negative factors that would undermine any justification for granting special relief.[183] In *Be*[184] 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.

1.5.2.2. *Johl* Factors

It was held in *Jugpall*[185] that the additional factors set out in the *Johl*[186] 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.

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[178] *Jugpall, supra,* footnote 109.

[179] *Singh (née Bangari), supra,* footnote 168.

[180] As in *Jugpall, supra,* footnote 109, there were no negative factors identified.

[181] *Tailor, supra,* footnote 170.

[182] *Tatla, supra,* footnote 171.

[183] *Jugpall, supra,* footnote 109. 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 168.

[184] *Be, Huy Lang v. M.C.I.* (IAD T98-00530), Maziarz, September 22, 1999.

[185] *Ibid.*

[186] *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

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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, July 31, 1999).

The applicable provisions are found in section 19 of the *Immigration Act*.[1] 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). At this time, refusals based on these provisions are less common.

The criminal inadmissibility sections are outlined as follows:[2]

• criminality - conviction in Canada (maximum imprisonment 10 years or more).....	**s. 19(1)(c)**
• criminality - equivalent conviction outside Canada (maximum imprisonment 10 years or more)	**s. 19(1)(c.1)(i)**
• criminality - committed equivalent act outside Canada (maximum imprisonment 10 years or more)	**s. 19(1)(c.1)(ii)**
• criminality - membership in criminal organization	**s. 19(1)(c.2)**
• criminality - organized crime	**s. 19(1)(d)**
• subversion, espionage, terrorism, by individuals and members of a group	**ss. 19(1)(e), and (f)**
• acts of violence, by individuals and members of a group.....	**s. 19(1)(g)**

[1] 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.

[2] 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*.

• war criminals	**s. 19(1)(j)**
• 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.[3]

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)[4] 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

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[3] *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.).

[4] 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.

the appeal, the person must be within the inadmissible classes of section 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*[5], 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.[6] The Court of Appeal subsequently upheld the decision.[7]

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

2.3. EQUIVALENCY

Sections19(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:
>
> (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

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

[6] 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).

[7] *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.).

> 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.[8]

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**. 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**.

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[8] *M.C.I. v. Aguilar, Valentin Ogose,* (ADQML-98-00476), Turmel, December 10, 1998.

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), 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**.The standard of proof for the equivalency provisions is "reasonable grounds to believe" and not "beyond a reasonable doubt".[9] The standard of "reasonable grounds to believe" is less than a balance of probabilities.[10] The standard has been articulated as "a *bona fide* belief in a serious possibility based on credible evidence".[11]

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.[12] 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.[13] 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.[14]

If the Canadian offence used for equivalencing is unconstitutional then there can be no equivalent Canadian offence.[15] However, there is no obligation to consider the constitutionality of foreign criminal law.[16]

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[9] *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.).

[10] *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.).

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

[12] *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.).

[13] 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.

[14] *Legault: 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.).

[15] *Halm, supra*, footnote 9. 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.

[16] *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.

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

In *Brannson*,[17] 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*[18] provided some further guidance and said that there were three ways to establish equivalency:

> 1. by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences;
>
> 2. by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not;
>
> 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.[19] 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. [20] 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.[21] 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.[22]

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:

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

[18] *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.).

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

[20] *Choi*, supra, footnote 11.

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

[22] *Ibid.*

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

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

> Reliance on the concept of offences as *malum in se* to prove equivalency with provisions of our *Criminal Code*, is a device which should be resorted to by immigration authorities only when for very good reason [...] 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.[23]

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.[24] 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."[25]

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.[26]

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.[27]

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*.[28] In this case, the Federal Court – Trial Division had found that the availability of defences

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[23] *Dayan, supra,* footnote 21 at 578.

[24] *Brannson, supra,* footnote 17.

[25] *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.).

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

[27] *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.).

[28] *Li, Ronald Fook Shiu (F.C.A.), supra,* footnote 16.

is not an essential element of the equivalency test.[29] The Court of Appeal disagreed and said as follows:

> A comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences.[30]

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.

2.4. 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. 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).[31] Rehabilitation is a factor, however, which the Appeal Division can consider in the exercise of its discretionary jurisdiction.

The Minister can delegate the power to determine rehabilitation.[32] The Court has held, however, that the visa officer has no duty to question the reasonableness of the Minister's decision on rehabilitation even where, on the face of the record, the decision may be unreasonable.[33]

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[29] *Li, Ronald Fook Shiu (F.C.T.D.), supra,* footnote 16. *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.

[30] *Li, Ronald Fook Shiu (F.C.A.), supra,* footnote 16 at 252.

[31] *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.).

[32] 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, Eglington (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 31.

[33] *Leung, Chi Wah Anthony v. M.C.I.* (F.C.T.D., no. IMM-1061-97), Gibson, April 20, 1998.

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*[34], 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*[35], *Gill*[36] and *Dance*[37] 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?[38]

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.[39]

2.5. 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 that may be punishable under any Act of Parliament[40] 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.

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

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

[36] *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.

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

[38] In *Crawford, supra,* footnote 31 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.

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

[40] *Massie, Pia Yona v. M.C.I.* (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000. 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.

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.[41] 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.[42]

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 convicted of a summary offence.[43] In the case of a foreign hybrid offence, it is irrelevant whether the foreign conviction was obtained by indictment or summary procedure.[44]

2.6. SECTION 19(2)(b)(i)

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:

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[41] *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*.

[42] *Burgon, ibid.*, where the foreign jurisdiction was the United Kingdom.

[43] *Kai Lee v. Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 374 (C.A.). This case referred to earlier legislation which provided that a person was 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.

[44] *Potter v. Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 609 (C.A.).

(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.[45]

[45] *Alouache, Samir v. M.C.I.* (F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995. Reported: *Alouache v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 68 (F.C.T.D.). Affirmed on other grounds by *Alouache, Samir v. M.C.I.* (F.C.A., no. A-681-95), Strayer, Linden, Robertson, April 26, 1996. In this case, the applicant 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.

2.7. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

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

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.[46]

Where an applicant has been found inadmissible under section 19(1)(l), there is some debate as to whether compassionate and humanitarian considerations can be considered on an appeal from the refusal.[47]

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

[47] *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(l)(1) 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).

CHAPTER 2

TABLE OF CASES: CRIMINAL REFUSALS

CASES

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.[1]

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.[2] 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.[3]

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*.[4] 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.[5]

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.[6] For a more complete discussion of this issue, see chapter 9, "Compassionate or Humanitarian Considerations".

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1 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.

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

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

4 *Alam, supra,* footnote 2; *Khan, ibid.*

5 *Alam, supra,* footnote 2.

6 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.(l) No person shall be granted admission who is a member of any of the following classes:
>
> (a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,
>
> (i) they are or are likely to be a danger to public health or to public safety, or
>
> (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services.

The Federal Court of Appeal in *Yogeswaran*[7] 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

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. Lastly, there can be an overlap of purely "technical defects" and natural justice issues.

3.3.1. Technical Defects

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*,[8] tended to do so on purely technical grounds based on deficiencies in the refusal letter or the Medical Notification form. However, later decisions of the Court generally emphasized a less technical and more purposive approach which looked at whether the sponsor was informed of the case to be met and whether there was an expression of the opinion required under the *Immigration Act.*

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

[8] *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.

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.[9] 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.[10] 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.[11] The effect of section 77(5) of the *Immigration Act* was examined by the Federal Court in *King*.[12] 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.[13]

3.3.1.1. Defective Refusal Letter

Pursuant to section 77(l) 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.[14] However, the refusal letter should not be looked at in isolation from the record.[15] Section 77(1) of the Act can be complied with by setting out intelligible reasons in the record.[16]

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

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[9] 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.

[10] *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).

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

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

[13] 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.

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

[15] *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.).

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

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.[17]

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.[18] 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.[19] 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.[20] 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.[21] 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.[22]

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;[23] 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.[24]

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[17] *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.

[18] *Hiramen, supra,* footnote 8.

[19] *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.).

[20] *Bola, ibid*.

[21] *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.).

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

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

[24] *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.

A refusal based on an expired Medical Notification form is invalid,[25] 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.[26]

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.[27]

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.[28] 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.[29] 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.[30]

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.[31]

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.[32] What is necessary to comply with the duty of fairness will depend on the circumstances of each case.

The Federal Court has recognized an immigration officer's duty to act fairly. This duty of fairness was breached when an applicant was not given a fair opportunity to make submissions

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

[26] *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.

[27] *Pattar, supra*, footnote 19.

[28] *Parmar, supra*, footnote 19.

[29] *Ibid.*

[30] *Sihota, supra*, footnote 19.

[31] *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.

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

before the decision was made to refuse his son on medical grounds.[33] An immigration officer may also be under a duty to undertake further investigation or call for an updated medical examination.[34]

Visa officers routinely send a "fairness letter" inviting further medical evidence from applicants before a final decision on medical admissibility is made.[35] The Federal Court has been critical of the wording of some of the letters[36] 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.[37] 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.[38]

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.[39]

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.[40] The duty to consider the new medical evidence has been characterized by the Appeal Division as a legitimate expectation of the sponsor.[41]

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[33] *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.]

[34] *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.

[35] See the discussion in chapter 10, "Visa Officers and the Duty of Fairness", section 10.2.8., "Knowing Case to be Met and Opportunity to Respond." Earlier case-law established that the duty of fairness did not oblige an immigration officer to communicate relevant medical information to an applicant before making a decision: *Stefanska, Alicja Tunikowska v. M.E.I.* (F.C.T.D., no. T-1738-87), Pinard, February 17, 1988. Reported: *Stefanska v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm. L.R. (2d) 66 (F.C.T.D.). However, this case may be of doubtful authority in view of the current practices of immigration and medical officers.

[36] *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.

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

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

[39] *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.

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

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

The failure to avail oneself of the opportunity to make submissions (when given two months to do so) is not a breach of procedural fairness.[42]

The Federal Court in *Parmar*[43] 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."

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* [44] 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* [45] 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*,[46] 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;[47] if there has been a definite diagnosis, its correctness cannot be challenged.

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[42] *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.).

[43] *Parmar*, *supra*, footnote 19, at 7.

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

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

[46] *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.).

[47] *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.[48]

Certainty in prognosis is not required. The use of "long term" and "short term" in the prognosis is not vague.[49]

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.[50]

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.[51]

In *Mohamed*,[52] 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

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48 *Uppal, supra,* footnote 45; *Shanker, supra,* footnote 26.

49 *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.

50 *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.

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

52 *Mohamed, supra,* footnote 44.

> was given and relied on by the visa officer, the latter's refusal of the sponsored application was well founded.[53]

Reasonableness is a question of fact; thus it is incumbent on a sponsor to establish an evidentiary foundation to any such challenge.[54]

The Appeal Division should not assume that the medical officers' opinion is reasonable based only on an agreement that the medical condition exists.[55]

In assessing reasonableness, the Appeal Division should consider whether the medical officers applied the correct criteria in assessing an applicant.[56] 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.[57] 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.[58]

"Tests of admissibility must be relevant to the purpose and duration for which admission is sought."[59] It is unreasonable for the medical officers to assess a visitor based on the same criteria used to assess an immigrant.[60] 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.[61] The Appeal Division has applied this reasoning in a number of cases.[62] In *Wong*,[63] the Federal Court clarified the factors to be considered in the case of an applicant who was a dependant:

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[53] *Ibid*., at 98.

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

[55] *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.).

[56] *Ibid.*

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

[58] *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.).

[59] Adjudicator Leckie, quoted with approval by the Federal Court in *Ahir, supra*, footnote 51, at 1101. See also *Deol, supra*, footnote 55; *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.

[60] *Ahir, ibid.*

[61] *Ng, supra*, footnote 59; *Chu, supra*, footnote 59. See also *Deol, supra*, footnote 55, 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.

> The assessment of probable demands is to involve an analysis of whether, on the balance of probabilities having regard to all the circumstances, including, but not limited to, the severity of her condition, the degree and effectiveness of the support promised by her family, and her prospects for economic and personal physical self sufficiency, [she] will be cared for in her family home into the future. [64]

The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence[65] and failure to consider the factors stipulated in section 22 of the Regulations.[66] 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).[67]

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.[68] 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.[69]

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.[70]

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

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

[63] *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.).

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

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

[66] *Gao, supra*, footnote 33.

[67] See discussion of *Ismaili, supra*, footnote 32, at section 3.3.2.4., "Section 22 of the *Immigration Regulations, 1978*."

[68] *Hussain, supra*, footnote 42

[69] *Ajanee, supra*, footnote 57. See also *Ludwig, supra*, footnote 58; and *Tong, Kwan Wah v. M.C.I.* (F.C.T.D., no. IMM-2565-96), Heald, October 31, 1997.

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

[71] *Hussain, supra*, footnote 42.

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

Following cases like *Jiwanpuri*,[73] it appears that the 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. While section 10 of S.C. 1992, c. 49 will amend section 19(1)(a)(ii) to provide for a definition in the Regulations, that provision is not yet in force.

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.[74]

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.[75] 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.[76]

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.[77]

"Excessive demands" was held in *Jim*[78] to mean "more than what is normal or necessary." The Federal Court accepted "excessive demands" as meaning "unreasonable" or "beyond what the

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

[73] *Jiwanpuri, supra*, footnote 46

[74] *Deol, supra*, footnote 55.

[75] *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.

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

[77] *Grewal, Parminder Singh v. M.C.I.* (IAD V95-01266), Boscariol, September 2, 1997.

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

system reasonably provides to everyone."[79] The Federal Court applied this definition in *Ludwig*,[80] holding that

> […] the necessity of monitoring the applicant's health situation over a five-year period, the probability that the applicant's cancer would recur, and the applicant's reduced chances of a cure, would cause or might reasonably be expected to cause, demands on Canada's health or social services that would be more than "normal or necessary".[81]

In *Nyvlt*,[82] 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.[83]

Section 19(1)(a)(ii) of the 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.[84]

There should be some evidentiary basis for determining that an applicant's admission would cause or might reasonably be expected to cause excessive demands.[85] The fact that an applicant was found unfit, by reason of insanity, to stand trial for murder and had since, at all

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

[80] *Ludwig, supra*, footnote 58, at 14.

[81] See also *Ajanee, supra*, footnote 57, 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.

[82] *Nyvlt, Milan v. S.S.C.* (F.C.T.D., no. IMM-813-93), Reed, September 19, 1994. Reported: *Nyvlt v. Canada (Secretary of State)* (1994), 26 Imm. L.R. (2d) 95 (F.C.T.D.).

[83] See discussion of *Ismaili, supra*, footnote 32, in section 3.3.2.5., "Section 22 of the *Immigration Regulations, 1978*."

[84] *Ram, supra*, footnote 49.

[85] 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 where the panel comments on the sufficiency of the respondent's evidence.

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.[86] 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*.[87]

It is irrelevant that an applicant is wealthy and can afford to pay for special care. The Minister cannot impose as a term or condition of admission that the applicant waive all rights to social services.[88] "[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."[89] Nor is there a basis for binding the applicant and his family to reside in any specified part of Canada.[90]

The Appeal Division has dealt with an applicant's physical disability and its impact on the validity of a refusal. In *Rai*,[91] 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*,[92] 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.

A very recent Federal Court decision, has indirectly dealt with the notions of scarcity of services and cost. In *Rabang*[93], 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

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

87 *Burgon, supra,* footnote 50; *D'Costa Correia, supra,* footnote 75.

88 *Choi, supra,* footnote 78.

89 *Hussain, supra,* footnote 42, at 8.

90 *Ibid.*

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

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

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

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".

3.3.2.4. Mental Retardation[94] 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.[95] 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.[96]

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.[97]

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.[98]

The judges of the Trial Division deal only with the evidence before them which varies from case to case, therefore, none of them has yet decided whether the issue is cost or supply and demand of health and social services, or both, where, for example, the cost is high but there is a sufficient supply.

An opinion based on the need for special schooling, training and indefinite home care and supervision was found to be reasonable in *Choi*.[99] In *Jaferi*,[100] the daughter of an applicant was

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[94] The terminology adopted conforms to that used in the jurisprudence.

[95] *Deol, supra*, footnote 55; *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 62.

[96] *Sabater, supra*, footnote 95. See also *Poste, John Russell v. M.C.I.* (F.C.T.D., no. IMM-4601-96), Cullen, December 22, 1997; *Fei, supra*, footnote 36; and *Lau, Hing To v. M.C.I.* (F.C.T.D., no. IMM-4361-96), Pinard, April 17, 1998.

[97] *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.

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

[99] *Choi, supra*, footnote 78.

[100] *Jaferi, supra*, footnote 32.

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,*[101] the Federal Court found that the visa officer did not properly consider the issue of excessive demands as the evidence was that the applicant's son required a vitamin supplement at a cost of $12 per month and there was no waiting list at the special school he required. The cost of the special schooling was not canvassed as in *Jaferi*.[102]

In *Ma,*[103] it was held to be well established that specialized education is a "social service" within the meaning of the Act. In *Sabater,*[104] 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*[105] and in *Yogeswaran*[106] 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,*[107] 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."[108] The Federal Court has observed that the Appeal Division should not use stereotyping or irrelevant considerations in deciding whether to grant special relief.[109]

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.[110] Subsequently, section 22 of the *Immigration Regulations, 1978,* was held

[101] *Ismaili, supra,* footnote 32.

[102] *Jaferi, supra,* footnote 32.

[103] *Ma, supra,* footnote 36.

[104] *Sabater, supra,* footnote 95.

[105] *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.

[106] *Yogeswaran, supra,* footnote 6.

[107] *Deol, supra,* footnote 55.

[108] *Ibid.,* at 7.

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

[110] S.C. 1992, c. 49, s. 102(4).

to be partially *ultra vires* by the Federal Court in *Ismaili*.[111] The Court held that section 22 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*.[112] 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.[113]

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.[114]

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.[115] Generally, the reasonableness of a medical opinion is to be assessed at the time it was given and relied on by a visa officer.[116] Nevertheless, in making that assessment, the Appeal Division may rely on any relevant evidence adduced before it.[117] 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.[118]

Evidence as to an applicant's condition subsequent to the refusal has limited relevance to the legal validity of the refusal. In *Shanker*,[119] 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 officer's

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[111] *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.

[112] See, for example, *Jiwanpuri, supra*, footnote 46; and *Gao, supra*, footnote 33.

[113] *Sabater, supra*, footnote 95.

[114] *Lok, Siu Ling Winnie v. M.C.I.* (IAD T93-10404), Band, October 12, 1995.

[115] *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.).

[116] See, for example, *Jiwanpuri, supra*, footnote 46; *Gao, supra*, footnote 33; and *Mohamed, supra*, footnote 44.

[117] *Jiwanpuri, supra*, footnote 46.

[118] *Kahlon, supra*, footnote 115.

[119] *Shanker, supra*, footnote 26.

opinion was unreasonable at the time it was given and relied on by the visa officer.[120] It is not enough to simply show that the applicant is no longer suffering from the medical condition.[121]

3.4. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

A detailed discussion of this topic can be found in chapter 9, "Compassionate or Humanitarian Considerations."

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.[122] Improvement will be considered in favour of the sponsor (although a decision to grant special relief probably should not turn solely on this criterion),[123] while evidence that the condition is stable or has deteriorated may be considered against the sponsor.[124]

In *Szulikowski*,[125] 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*,[126] 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.

See 3.3.2.4 "Mental Retardation Cases", for treatment of the exercise of discretionary relief in cases of mental retardation.

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[120] *Jiwanpuri, supra*, footnote 46.

[121] *Mohamed, supra*, footnote 44.

[122] 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.

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

[124] *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.

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

[126] *Rai, supra*, footnote 91.

CHAPTER 3

TABLE OF CASES: MEDICAL REFUSALS

CASES

(addendum to Chapter 3 "Medical Refusals" of the Sponsorship Appeals Paper)

LEGAL VALIDITY ISSUES IN MEDICAL REFUSAL APPEALS: THE NEED FOR AN INDIVIDUALIZED ASSESSMENT.

Introduction

This commentary reflects the personal views of the author only[1]. It comments on an emerging trend of cases dealing with the requirement that the medical officers make an individualized assessment of an applicant before determining his/her admission would cause or might reasonably be expected to cause excessive demands on health or social services.

The Federal Court

Over the last number of years, the Federal Court has rendered a number of decisions, particularly with regard to mental or physical disabilities, requiring an individualized assessment of the applicant by the medical officers for their opinion to be held reasonable regarding excessive demands on health or social services.

In 1992, in *Deol*,[2] the Court admonished the medical officers for not taking into account the degree and severity of the mental disability in coming to the conclusion that the applicants' admission would cause excessive demands. The Court held that the IAD erred in not inquiring into the reasonableness of the medical officers' opinion. The IAD had assumed that the opinion of the medical officers was reasonable solely because they had agreed on the existence of mental retardation. MacGuigan, J.A., pointed out that mental retardation covers a broad spectrum and that stereotyping should be avoided. The medical officers must look at the degree of mental retardation and the probable consequences of that degree of retardation for excessive demands on government services.

Another landmark case in this area was the *Litt*[3] decision in 1995. In a case involving a quadriplegic applicant, the Court said that where the opinion of excessive demands is based on the potential failure of family support, there must be evidence as to the probability of such failure. *Litt* also confirmed *Deol* with respect to the necessity of determining degree and probable consequences of excessive demands.

In 1997, another group of Federal Court cases continued this line of analysis. In the *Poste*[4] decision[5], the Court held that the medical officers erred in not putting their minds

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[1] Sharon Silberstein, Professional Development Adviser, Professional Development Branch, IRB.
[2] *Deol v. Canada (Minister of Employment and Immigration)* (F.C.A., no. A-280-90), MacGuigan, Linden, Robertson, November 27, 1992 ; (1992), 18 Imm. L.R. (2d) 1 (F.C.A.)
[3] *Litt v. Canada (Minister of Citizenship and Immigration*) (F.C.T.D., no. IMM-2296-94), Rothstein, February 17, 1995; (1995), 26 Imm. L.R. (2d) 153 (F.C.T.D.)
[4] *Poste, John Russell v. M.C.I.* (F.C.T.D. no. IMM-4601-96), Cullen, December 22, 1997

CHAPTER 4

4. ADOPTIONS

Children who have been adopted by permanent residents or Canadian citizens may qualify as members of the family class[1] 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.[2]

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.(l) "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)
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> […]
>
> 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.(l) "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)

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[1] 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.

[2] 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[3]

(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*[4]

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*.[5] 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 the province and the foreign country have both 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[6] 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 province in

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[3] 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.

[4] For current information about the status of the Convention, you may visit its internet web site at <http://www.hcch.net>.

[5] SOR/97-146.

[6] *Ibid.*

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) [7] 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*[8] 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*,[9] 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.[10] The *Regulations* [11] 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."[12] 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

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7 *Ibid.*

8 *McDoom v. Minister of Manpower and Immigration*, [1978] 1 F.C. 323 (T.D.).

9 *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.).

10 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.

11 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.

12 See chapter 6, "Marriages and Engagements for Immigration Purposes."

amendments of February 1, 1993.[13] 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.[14] 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.[15] 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.[16]

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.

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[13] 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.).

[14] *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.

[15] *Gill, ibid.*; *Sharma, ibid.*; *Edrada, ibid.*

[16] 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.[17] 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*,[18] 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.[19]

De Guzman identified some of the factors used in assessing the genuineness of a relationship of parent and child as follows: [20]

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[17] 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.

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

[19] *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.

[20] *Ibid*., at 6.

(a) motivation of the adopting parent(s);[21]

(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;[22]

(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;[23]
- 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);

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[21] 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.

[22] 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.

[23] 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.

- 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;

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 intentions may not be a proper consideration.[24] 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,[25] 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.[26]

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).[27]

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

[25] 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.

[26] 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.

[27] *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

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 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.[28]

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,*[29] *Sharma*[30] and other case-law to the effect that the

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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.

[28] *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).

[29] *Gill, Banta Singh, supra,* footnote 14.

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.

The definition[31] reads as follows:

> 2.(1) "member of the family class", which respect to any sponsor means
>
> (g) any child under 19 years of age[32] 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,*[33] the Federal Court of Appeal dealt with the issue of

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30 *Sharma, Chaman Jit, supra*, footnote 14.

31 Formerly section 4(1) of the Regulations.

32 Changed from 13 years of age in 1993.

33 *Shaw, Estella v. M.E.I.* (F.C.A., no. A-94-89), Hugessen, Desjardins, Décary, September 18, 1991.

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).

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.[34] 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.[35] All these cases involved adoptions by a relative of the child.

In *Mann,*[36] 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*[37] 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."

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[34] *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*.

[35] *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).

[36] *Mann, Surjit Kaur v. M.C.I.* (IAD V96-00141), Clark, September 28, 1999.

[37] R.S.B.C. 1996, c.5.

In *Gill*,[38] 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 "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 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.[39] 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.[40] See Chapter 7, section 7.4.5. ("Dependant"), for an in-depth discussion of this issue.

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[38] *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.

[39] *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.

[40] *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.[41] For example, in the case of Indian adoptions, that evidence is usually the *Hindu Adoptions and Maintenance Act, 1956* (HAMA).[42]

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;[43]

- 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.[44]

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[41] 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.

[42] 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.

[43] See *Canada (Minister of Employment and Immigration) v. Sidhu*, [1993] 2 F.C. 483 (C.A.).

[44] 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;[45]
- "*in personam*": where the purpose of the action is only to affect the rights of the parties to the action *inter se* [between them];[46]
- "*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];[47]
- "deed of adoption": registered document purporting to establish the fact that an adoption has taken place.

4.6.1.2. Proof of Foreign Law[48]

The usual rule in Canada is that foreign law is a fact which must be pleaded and proved.[49] 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.[50]

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,[51] 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

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

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

[47] *Ibid.*

[48] See also *Weighing Evidence*, Legal Services, Immigration and Refugee Board, December 31, 1999.

[49] Castel, *supra*, footnote 44, 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.

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

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

reasonable interpretation where expert evidence respecting its meaning was lacking.[52] The Appeal Division has rejected arguments that it is not competent to interpret foreign law.[53]

Section 23 of the *Canada Evidence Act*[54] 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.[55]

Under general legal principles, if the foreign law is not proven, it is said that the court will simply apply the relevant local law.[56] 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.[57]

In *Ali*,[58] 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.[59]

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[52] *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.).

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

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

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

[56] Schiff, S., *Evidence in the Litigation Process*, 4th ed., vol. 2 (Toronto: Carswell, 1993), at 1056.

[57] McLeod, *supra*, footnote 46, at 39.

[58] *Ali, Abdul Rauf v. M.E.I.* (IAD V89-00266), Wlodyka (concurring), Singh, MacLeod, June 28, 1990.

[59] *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.[60] 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.[61]

For example, in *Siddiq*,[62] 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,*[63] where the alleged adoption was challenged on the basis that there was no provision for Christian adoptions under Pakistani laws. The sponsor attempted to prove the adoption by means of a "Declaration of Adoption", which was essentially an affidavit made by the natural parents giving their approval or consent to the adoption. In the absence of proof of a law in Pakistan allowing for adoption, the appeal was dismissed. The panel recognized the hardship created by the ruling and recommended that the Minister facilitate the admission of 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."[64]

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[60] 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 43, 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]."

[61] 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.

[62] *Siddiq, Mohammad v. M.E.I.* (I.A.B. 79-9088), Weselak, Davey, Teitelbaum, June 10, 1980. See also *Addow, Ali Hussein v. M.C.I.* (IAD T96-01171), D'Ignazio, October 15, 1997, for a case involving a purported Somalian adoption; and *Zenati, Entissar v. M.C.I.* (IAD M98-09459), Bourbonnais, September 17, 1999, for a case involving a purported Moroccan adoption.

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

[64] *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

In a much earlier case, *Lam*,[65] 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.[66]

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*:[67]

> 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*[68]. 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*,[69] a pre-*Taggar* decision, the Immigration Appeal Board was of the opinion that a foreign judgment, "even one in personam is final and conclusive on the merits [...] and can not be impeached for any error either of fact or of law."[70] 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

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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.

65 *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.

66 *Lit, ibid*., at 4.

67 Wlodyka, *supra*, footnote 11, at 46.

68 *Taggar, supra,* footnote 50.

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

70 *Ibid.*, at 14.

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.[71]

Sandhu was distinguished in *Brar*[72] 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.[73]

The majority of the panel determined that the declaratory judgment had no weight.[74] 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*,[75] 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.[76]

In *Sran*,[77] 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.

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[71] *Sandhu, Bachhitar Singh, supra,* footnote 69 was followed in *Patel, Ramesh Chandra v. M.E.I.* (I.A.B. 85-9738), Jew, Arkin, Tisshaw, April 15, 1988.

[72] *Brar, supra,* footnote 55.

[73] *Ibid.,* at 10.

[74] 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.

[75] *Atwal, ibid.*

[76] *Ibid.,* at 4.

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

This decision appears to reflect the current decision making of the Appeal Division in light of *Taggar*.[78]

An adoption deed may be presented as proof of the validity of an adoption. In *Aujla,*[79] 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[80] 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.[81]

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.[82] In *Dhillon,*[83] 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 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.[84]

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78 *Taggar, supra,* footnote 50.

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

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

81 *Aujla, supra,* footnote 79, 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.

82 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.

83 *Dhillon, Harnam Singh, supra,* footnote 80. 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.

84 *Dhillon, Harnam Singh, supra,* footnote 80, at 2.

In *Singh*,[85] 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.[86]

In *Seth*,[87] 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*,[88] 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*.

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,[89] which many Immigration Appeal Board decisions interpreted as having the effect of creating a parent and child relationship by operation of law.[90]

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

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[85] *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].

[86] *Ibid*., at 44.

[87] *Seth, supra,* footnote 41.

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

[89] 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 [...]

[90] See, for example, *Banga*, *supra*, footnote 13; *Sandhu, Gurcharan Singh v. M.E.I.* (I.A.B. 87-9066), Eglington, Teitelbaum, Sherman, November 13, 1987; and *Shergill, Kundan Singh v. M.E.I.* (I.A.B. 86-6108), Mawani, Gillanders, Singh, April 8, 1987. Reported: *Shergill v. Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 126 (I.A.B.). For a contrary view, see *Kalair, supra,* footnote 14.

parent and child relationship exists to satisfy the requirements of the *Regulations*. In *Sharma*,[91] 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.[92]

In *Rai*,[93] 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[94] to someone to act in his or her stead. The power of attorney gives the person named in 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.[95]

Another issue is whether a sponsor can give a power of attorney to the biological parent of the person to be adopted. In *Poonia*,[96] in dealing with the requirements of a giving and taking ceremony under Indian law, and after reviewing a number of Indian authorities, the Appeal

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[91] *Sharma, Chaman Jit, supra*, footnote 14.

[92] *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 85.

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

[94] *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."

[95] 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.

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

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).[97] 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*,[98] 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 only possible reason for nullifying an adoption under Indian law, misrepresentation, was not present in the case.[99]

In *Chu*,[100] 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*,[101] the panel identified the issues as follows: (1) "[...] whether the legal relationship of 'father' and 'daughter' survived the adoption [...]" and (2) "[...] whether the

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[97] 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.

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

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

[100] *Chu, supra*, footnote 59.

[101] *Sausa, Eleonor Rabelas v. M.C.I.* (IAD W94-00009), Wiebe, June 3, 1996.

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."[102]

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.[103]

With respect to the second issue, the panel first ruled, relying on *Lidder*, [104] 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*[105] 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*.[106] 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 determinative of the governing law [in this case, Manitoba]."[107] 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*,[108] 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

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[102] *Ibid.*, at 6. See also *Quindipan, Aurelio Jr. v. M.C.I.* (IAD T95-03321), Townshend, November 6, 1997.

[103] 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.

[104] *Lidder, supra*, footnote 27.

[105] *Sharma, Sudhir Kumar, supra*, footnote 98.

[106] *Chu, supra*, footnote 59.

[107] *Sausa, supra*, footnote 101, at 11.

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

biological mother but that application was refused. The evidence presented at the Appeal Division hearing showed that the adoption was void *ab initio;*[109] 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 [...].[110]

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*[111] 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 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

[109] 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.

[110] *Purba, supra,* footnote 108, at 8.

[111] *Sidhu, Jagdish Singh v. M.E.I.* (IAD M90-02200), Blumer, Durand, Angé, February 4, 1991.

> that the cause of the invalidity is contrary to Canadian public policy. [Footnotes omitted][112]

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.[113] In *Chahal,*[114] 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.[115]

In a different context, the Federal Court of Appeal, in *Li,*[116] dealt with an argument that an adjudicator considering the issue of equivalency must have regard to whether the procedures 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*[117] [... 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.[118]

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[112] *Sidhu, supra,* footnote 43, at 489-490. See also, *Seth, supra,* footnote 41.

[113] *Chahal, Gobinder Kaur v. M.E.I.* (IAD V89-00287), Mawani, Gillanders, Verma, October 6, 1989.

[114] *Ibid.*

[115] 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.

[116] *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.).

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

[118] *Li, supra,* footnote 116, at 257.

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*,[119] 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.[120] A different approach was followed in *Daley*,[121] 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,[122] 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.

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

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

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

[122] *Supra*, footnote 93.

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to the question of excessive demands as it related specifically to the applicant at hand. The Court found, to the contrary, that the evidence showed that the medical officers only considered the demands placed on social services by the mentally disabled in general. The Court held that "the medical officers have a duty to assess the circumstances of each individual that comes before them in their uniqueness... These would include the degree of family support and commitment to the individual, and the particular resources of the community."[6]

Generally, however, where the issue of individualized circumstances relate to the applicant's offer to pay for the services required, the Court has been unwilling to accept this argument.[7] It is usually accepted that in Canada there is universal health care and that once here, the applicant will have full access to those services.[8]

The Application of the Federal Court decisions at the IAD

Mental Disability Cases

The IAD has been applying the caselaw in this area consistently. Where the appellant is able to show that the medical officers' opinion did not take into account the degree and severity of the mental disability, the opinion is held to be unreasonable. Likewise, where the evidence before the IAD shows a failure to consider the issues of family support, or an individual assessment is not made as to the likelihood of the particular applicant to access the government services, the opinion is held to be unreasonable.[9]

A Summary of the Application of Individualized Assessment to Non-Mental Disability Cases

Several cases have now been brought before the IAD where the appellant argued the application of individualized assessment for conditions other than mental disability.

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[5] See also *Cabaldon, Antoio Quindipan v. M.C.I.* (F.C.T.D. no. IMM-3675-96), Wetston, January 15, 1998 for a similar analysis

[6] supra note 4 at paragraph 109

[7] *Jim v. Canada (Solicitor General)* (F.C.T.D., no. T-1977-92), Gibson, October 25, 1993; (1993), 22 Imm. L.R. (2d) 261 (F.C.T.D.)

[8] But note in *Wong, Ching Shin Henry v. M.C.I.* (F.C.T.D. no. IMM-3366-96), Reed, January 14, 1998, the Court notes the incongruity of not taking into account the applicant's ability to pay when the applicant is applying in the self-employed category and has been, other than the medical refusal, approved because of his financial resources and entrepreneurial experience. Likewise, in *Maschio, Michael John v. M.C.I.* (F.C.T.D. no. IMM-3354-96), Reed. November 14, 1997, the Court posed but did not answer the question of whether the personal circumstances of the applicant, in that case, the evidence of continued medical insurance coverage in the U.S. and the intent to obtain all future treatment in the U.S. were relevant to the issue of excessive demands.

[9] See, for example, *Ramlakhan, Dhrupatie (Nee Beetan) v. M.C.I.* (IAD T97-02144), Buchanan, March 31, 1999; *Tejobunarto, Lianggono v. M.C.I.* (IAD T97-00565), Boire, July 28, 1998; *Dhah, Tajinder v. M.C.I.* (IAD T98-00713), Kalvin, October 21, 1998

Where the medical officers' opinion relates to the need for family support, for example, in cases involving communication disorders or quadriplegia, the reasoning of the mental disability cases have been consistently applied.[10]

However, where the argument is expanded beyond those cases, the decisions of the Division have been less consistent.

In *Sidhu*,[11] the applicant suffered from kidney disease. The medical notification contained few details. The medical evidence before the IAD from both parties showed that the applicant was likely to require only steroid treatments. The member accepted the appellants' argument that kidney disease could be likened to mental retardation in that invoking the disease only without information regarding the degree or severity and without indication of how the diagnosis leads to excessive demands would, without further information, render the medical officers' opinion unreasonable. In fact, the evidence that was brought by the appellant was used to the benefit of the respondent to find the opinion reasonable. The panel noted that in a case where such further evidence was not forthcoming, the Minister in not providing the evidence, would run the risk of presenting a medical refusal on the basis of excessive demands with insufficient information to support the reasonableness of the conclusion. The panel made it clear that the Minister cannot, and should not, rely on the appellant to provide such information at all times. Although no information was provided by either party as to the cost or availability of medical services required by the applicant, the panel concluded that the medical opinion was reasonable. In reaching this conclusion the panel applied Jim[12] and used the information filed by the appellant.

In *Kumar*[13], a similar analysis was done. The condition of the applicant was coronary artery disease. The member accepted that it would be insufficient for the medical officers to simply name the condition without regard to the degree and severity of the condition. However, in this case as well, the IAD held that there was sufficient (although minimal) evidence of degree and severity provided by the medical officers and that the appellant had failed to provide evidence to support his argument. While the Minister did not provide information concerning the costs to the health care system that the applicant's medical condition would entail, the panel concluded that in applying *Jim*[14], investigative cardiac surgery falls within "anyone's definition" of "more than what is normal or necessary." The panel commented that

> The respondent ought to make a practice of providing at a minimum a statutory declaration from one of the reviewing medical officers attesting to the opinion reached, the basis for the opinion, and attaching to such declaration any documentary evidence relied upon to arrive at the opinion. Failure to do so could result in findings of

[10] See, for example, *Wahid, Gurbax Singh v. M.C.I.* (IAD T96-04717), Kitchener, January 21, 1998
[11] *Sidhu, Sarbjit Kaur (Natt) v. M.C.I.* (IAD V96-03444), Boscariol, October 2, 1998
[12] supra note 7
[13] *Kumar, Varinder v. M.C.I.* (IAD V97-03366), Boscariol, December 30, 1998
[14] supra note 7

> unreasonableness of conclusions of excessive demands in cases where the medical notification on its face fails to establish a link between the condition and the conclusion that admission would cause excessive demands.

In contrast, in the *Fok*[15] decision, a case involving renal insufficiency, the IAD distinguished *Deol* on the basis of the very different medical condition at issue in the appeal. The IAD found that whereas mental retardation is a highly individualized condition with a different impact on each individual affected by it, this is distinguishable from the more discrete illness of renal insufficiency which is progressive and generally leads to hospitalization, dialysis and transplant. While acknowledging that the medical officers were not very detailed in the specifics of what the applicant might eventually require and could not say that she would need a kidney transplant, the member found that the nature of this progressive disease was distinguishable from the more complex and variable condition of mental retardation and that the medical officers' opinion that her care and treatment would cause excessive demands was reasonable.

In the *Rai*[16] decision, a distinction was made between excessive demands on health services as opposed to excessive demands on social services. The applicant had post-polio paraparesis of the lower limbs. The medical officers' opinion was that she would require specialists' care and hospitalization, specialized transport and a variety of costly social services. With regard to the potential for specialized transport and the variety of social services, the IAD indicated that it would have had difficulty finding on the evidence before it a sufficient linkage between the applicant's condition and the issue of excessive demands. However, the refusal was held to be valid because of the potential for excessive demands on health services. Although there was evidence before the IAD that the applicant would not require hospitalization for surgical correction/improvement because she was reconciled to her disabilities, the IAD held that the willingness of the applicant to forgo recommended medical treatment cannot go to show the unreasonableness of the opinion. While acknowledging that medical treatment requires the consent of the individual patient, the IAD held that for the purposes of assessing excessive demands, the issue is the need or strong advisability of a medical procedure rather than the applicant's being reconciled to not having the procedure. No specific analysis of *Deol* or *Poste* was done by the IAD.

In *Sandhu*[17], the IAD faced related arguments with regard to an applicant with osteoarthritis of the knee. While the appellant did not frame his argument as directly linked to *Deol*, requiring an assessment of degree and severity, the thrust of one of his arguments was similar. The medical evidence brought by the appellant showed that the applicant would either not require a knee replacement or that it would not be required for a number of years (7-8 or 5-10). The IAD found sufficient probability in the medical

[15] *Fok, Chu Man v. M.C.I.* (IAD T98-03341), Hoare, September 7, 1999
[16] *Rai, Paramninder Singh v. M.C.I.* (IAD V97-00279), Carver, April 20, 1998
[17] *Sandhu, Kamaljit v. M.C.I.* (IAD T95-04933), Buchanan, April 16, 1999

officers' opinion and found it to be reasonable. Relying on the *Ram*[18] decision, the IAD held that there is no fixed period of time in which the excessive demand must occur.

In addition to an increase in cases involving osteoarthritis of the knee, the IAD has also dealt recently with several cases involving alcohol abuse. Appeals have been allowed[19] when the medical opinion was based on statements by the applicant regarding his drinking rather than based on medical evidence. While these cases have not been framed in the context of arguments regarding degree and severity and individual assessment, they are consistent with these themes. The mere fact of alcohol abuse cannot be said to cause excessive demands. There must be medical evidence with regard to the applicant being assessed. Informal discussions with members again reveal that further individualized assessment arguments are being raised in these cases. For example, the medical officers may indicate that the excessive demands will involve psychological counseling and the appellant brings evidence relating to the culture, age and personality of the applicant to counter that this individual applicant will not rely on those types of services.

Excessive Demands

The *Jim*[20] case holds that excessive demands means more than normal or necessary. Other particular aspects of the meaning of the term "excessive" is less clear. In the *Sandhu*[21] case, the argument was made as to whether osteoarthritis could be said to cause excessive demands when the evidence was that 80 to 90% of the population over 40 years of age have some evidence of osteoarthritis. The IAD found, however, that the evidence also showed that only a small portion of that population would require knee replacement surgery and therefore the demand on health services could be considered more than normal.[22]

Neither the Federal Court nor the IAD have squarely dealt with the question of whether excessive demands relates to cost, supply and demand, a combination of the two or what dollar figure of cost is excessive. Generally, the issues of cost and supply and demand are both dealt with in determining excessive demands. However, the Court has not given guidance in the event that the cost is prohibitive, but supply is sufficient, or vice versa.

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[18] *M.C.I. v. Ram, Venkat* (F.C.T.D. no. IMM-3381-95), McKeown, May 31, 1996

[19] *D'Costa Correira, John v. M.C.I.* (IAD T96-03318), Maziarz, February 27, 1998; *Dhillon, Sukwinder Kaur v. M.C.I.* (IAD T97-05307), Buchanan, February 25, 1999. See *also Somasundaram, Jeyasothy v. M.C.I.* (IAD T97-01866), Boire, September 23, 1999 where the refusal was upheld on the basis of medical evidence brought before the IAD.

[20] supra note 7

[21] supra note 17

[22] This decision predated the obiter in Gill[22], where Evans, J, stated that "the fact that many Canadians of Mr. Gill's age require a particular operation (such as, in this case, a knee replacement), and that some have to wait a long time to have it, or go to a hospital in the U.S., cannot justify a finding that the admission of a person who also needs this operation will impose excessive demands on the health service."

The IAD in *Szulikowski* [23]dealt with this type of scenario, finding that the cost of treating the applicant's heart condition was $25,000.00, but finding also that there was not a shortage in supply. Ultimately, the question as to whether this amounted to excessive demands was not decided and the case was allowed on discretionary grounds.

Section 22 of the Immigration Regulations, which has been found to be *ultra vires* with regard to the factors to be considered by the medical officers in determining excessive demands, can still be of guidance to members in considering the meaning of excessive demands. It is interesting to note that, while supply and demand factors are listed in section 22, cost is not a listed factor.

A very recent Federal Court decision, has indirectly dealt with the notions of scarcity of services and cost. In *Rabang*[24], 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. This case therefore provides some insight as to what evidence the medical officers should be reviewing in order to determine excessive demands. It is a continuation of the concept found in the mental disability cases of individualized assessment, in that the medical officers are not entitled to merely assume scarcity and cost of services, but must have specific evidence as it would relate to the individual applicant.

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[23] *Szulikowski, Myron Joseph (Mike) v. M.C.I.* (IAD V97-03154), Nee, August 13, 1998
[24] *Rabang, Ricardo Pablo v M.C.I.* (F.C.T.D., no. IMM-4576-98), Sharlow, November 29, 1999.

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).[1]

5.3.1. Formal Validity

In general, formal validity includes the nature of, and prerequisites for, a ceremony.[2] 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.[3]

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

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

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

3 *Lit, Jaswant Singh v. M.E.I.* (I.A.B. 76-6003), Scott, Benedetti, Legaré, May 30, 1978. For example, in *El Salfiti, Dina Khalil Abdel Karim v. M.E.I.* (IAD M93-08586), Durand, January 24, 1994, the Appeal Division found that the "marriage contract" was in fact a "preliminary" engagement contract under Kuwati law. For a discussion of whether marriages by telephone are valid, see *Shaheen, Shahnaz v. M.C.I.* (IAD T95-00090), Wright, February 20, 1997; 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.

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 contrary, it must be presumed that the foreign law purports to be exhaustive as to the defects that invalidate a marriage.[4] Depending on the applicable law, as proved, the absence of a ceremony may[5] or may not invalidate the marriage.[6] 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*.[7] 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.[8]

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.[9]

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.[10] In other words, registration constitutes *prima facie* evidence of the marriage and of the validity of the marriage[11]

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

5 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.

6 *Mann, Kirpal Singh v. M.E.I.* (I.A.B. 86-6008), Mawani, Gillanders, Wlodyka, April 14, 1987.

7 *Ahlwat, Balbir Singh v. M.E.I.* (IAD V91-00896), Wlodyka, Verma, Arpin, May 13, 1993.

8 *M.C.I. v. Subala, Josephine* (F.C.T.D., no. IMM-3164-96), Rothstein, July 22, 1997.

9 *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).

10 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.

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

until a court of competent jurisdiction rules otherwise[12] or "until compelling evidence is adduced to show that the marriage was not duly solemnized prior to its registration".[13]

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.[14]

5.3.3. Declaratory judgments

Little weight may be given to an *ex parte* judgment *in personam*[15] 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.[16]

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.[17]

5.3.4. Essential Validity

Essential validity includes matters relating to consent to marry, existing prior marriage,[18] prohibited degrees of relationship[19] and non-consummation of the marriage.[20]

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 spouses) or Canadian domestic law (the law of their intended matrimonial home) that should be applied.

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

[13] *Parmar, supra,* footnote 11, at 15.

[14] *Lotay, Harjit Kaur v. M.E.I.* (I.A.D. T89-03205), Ariemma, Townshend, Bell, April 18, 1990.

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

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

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

[18] 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; and *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.

[19] 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*.

[20] McLeod, *supra,* footnote 2, at 256.

While the Federal Court of Appeal sanctioned the application of the law of the intended matrimonial home in the *Narwal*[21] 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".[22]

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.[23]

5.4. EXEMPTION FROM STRICT COMPLIANCE WITH LAW

In cases involving the application of foreign law such as the *Hindu Marriage Act, 1955*, it may be alleged that custom or usage exempts the purported spouses, who fall within the prohibited degrees of relationship, from strict compliance with that *Act*. However, where the sponsor claims to be the spouse of the applicant by reason of an exemption to the law based on custom or usage, the sponsor has the onus of clearly proving its existence.[24] 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.[25] The testimony of an expert witness,[26] even a transcript of the testimony of an expert witness in another hearing,[27] 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.[28]

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

[22] *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.).

[23] *Ibid.*

[24] *Canada (Minister of Employment and Immigration) v. Taggar*, [1989] 3 F.C. 576.

[25] *Ibid.*

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

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

[28] *Lotay, supra*, footnote 14.

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.[29]

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 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.[30]

[29] *Punia, Bulwant Singh v. M.E.I.* (I.A.D. V92-01594), Gillanders, July 27, 1993.

[30] *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

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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."[1] A spouse must be caught by both prongs of the test to be excluded from the family class.[2] To successfully challenge a

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[1] *Horbas v. Canada (Minister of Employment and Immigration),* [1985] 2 F.C. 359 (T.D.), at 369.

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

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.

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;[3] therefore, the onus is on the sponsor to prove that the applicant is not caught by section 4(3).[4] Additional evidence which was not before the immigration or visa officer may be taken into account on appeal.[5]

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.[6] 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.[7] An adverse inference may be drawn where an applicant could give relevant evidence but fails to do so.[8]

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).[9]

Evidence relevant to the primary purpose for the marriage can also be relevant to the assessment of intention to reside permanently with the sponsor.[10]

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

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

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

5 *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.).

6 *Bisla, supra*, footnote 4. 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, 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.

7 *Heera, supra*, footnote 3.

8 *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.

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

10 *Bisla, supra*, footnote 4; *Meelu, Beant Singh v. M.C.I.* (F.C.T.D., no. IMM-841-99), Gibson, January 7, 2000.

erred and the refusal is invalid as a result.[11] However, this approach is now questionable in light of *Kahlon*,[12] 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.[13] Thus, not meeting either requirement can result in a refusal.

The intentions of both sponsor and applicant must be ascertained,[14] 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.[15]

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 spouse."[16] 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.

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[11] *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.).

[12] *Kahlon, supra*, footnote 5.

[13] *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, Eglington, September 16, 1986; *Sandhu, Daljit Kaur v. M.E.I.* (I.A.B. 87-6347), Mawani, October 20, 1987.

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

[15] *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 6.

[16] *Horbas, supra*, footnote 1, at 368.

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.[17]

6.3.2. Previous attempts by applicant to gain admission to Canada

Relevant, though not conclusive,[18] is the applicant's history of previous attempts to gain admission to Canada.[19] 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*.[20]

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.[21]

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.[22]

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

[18] *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 13. 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.

[19] 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.

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

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

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

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.[23]

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.[24]

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[25] and the presence of members of both families at engagement and marriage ceremonies.[26]

6.3.5.4. Financial support and exchange of gifts

In relation to certain cultural contexts, the exchange of gifts[27] and financial

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[23] *Sandhu, Daljit Kaur, supra,* footnote 13; *Bhangal, Baljit Singh v. M.E.I.* (IAD W90-00173), Goodspeed, December 6, 1991. In *Basi, Navjot Singh v. M.C.I.* (IAD V95-00664), Lam, July 4, 1996, an adverse inference was drawn from the applicant's lack of knowledge of the sponsor's education on the basis that in arranged marriages, the educational level of prospective spouses is an important criterion of compatibility.

[24] 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).

[25] *Sandhu, Corazon Dalmacio Campos, supra,* footnote 18.

[26] *Chaikosky, supra,* footnote 24, 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.

[27] *Sandhu,Corazon Dalmacio Campos, supra,* footnote 18.

support[28] 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."[29] However, if there is no satisfactory explanation for the delay, it may be significant.[30]

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.[31]

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:[32]

> 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:[33]

> 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).

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[28] *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.).

[29] *Sandhu, Daljit Kaur, supra,* footnote 13, at 7-8.

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

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

[32] *Sandhu, Corazon Dalmacio Campos, supra*, footnote 18, at 5-6.

[33] *Brar, Kuljit Singh, supra*, footnote 8, at 5.

In deciding upon the validity of refusals where incompatibility has been alleged, differences in religion,[34] education and language,[35] and age[36] 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.[37]

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.[38]

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.[39] Subsequent

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[34] See, for example, *Sandhu, Corazon Dalmacio Campos, supra*, footnote 18, 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.

[35] 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.

[36] 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.

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

[38] 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.

[39] 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 9, 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

evidence may be examined in order to determine the intention at the time of the marriage.[40]

In *Kaloti,*[41] 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.

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.[42] The Appeal Division has also focused on future intentions, with past conduct as an indicator of an applicant's future intentions.[43] 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.[44]

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

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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) [...]".

[40] *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.

[41] *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 40, 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, Jasmail 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).

[42] *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.

[43] *Bath, supra*, footnote 15; affirmed in *Bath, supra*, footnote 6.

[44] 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."

discretion beyond its jurisdiction over members of the family class.[45] 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..[46] 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.

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,[47] 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).[48]

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.[49]

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[45] *Garcia, Elsa v. M.E.I.* (I.A.B. 79-9013), Weselak, Benedetti, Teitelbaum, October 18, 1979.

[46] *Chaikosky, supra*, footnote 24.

[47] *Dyal, Rapinderjit Kaur v. M.E.I.* (I.A.B. 87-6066), Wlodyka, Anderson, Gillanders, April 25, 1988; *Bhangal, supra*, footnote 23; *Shergill, Gurdawar Singh v. M.C.I.* (IAD V94-00986), McIsaac, November 30, 1995.

[48] 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.

[49] *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.

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.[50] 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*,[51] is that the initial application by a fiancé(e) is to be dealt with entirely without reference to a subsequent marriage.[52]

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.[53]

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.[54]

As summarized by the Appeal Division:[55]

> [...] in the Board's opinion, the decision in *Kahlon*[56] 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

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[50] *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.

[51] *Kaur, supra*, footnote 50.

[52] *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.

[53] *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.).

[54] See, for example, *Mann, Paramjit Kaur v. M.E.I.* (IAD V89-00516), Chambers, Gillanders, Verma, March 20, 1990; *Bhandhal, supra*, footnote 52.

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

[56] *Kahlon, supra*, footnote 5, where it was held that a hearing of an appeal by the Immigration Appeal Board is a hearing *de novo* in a broad sense.

> 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.[57] 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.[58]

6.6.7. Converting spousal application to fiancé(e) application

In unique circumstances,[59] and generally with the consent of counsel for the Minister, the Appeal Division has "converted" a spousal application to that of a fiancé(e).[60] 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.

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[57] *Khella, supra,* footnote 52. 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.

[58] *Gill, Manjeet Singh, supra,* footnote 55. 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.

[59] Usually where a sponsor and applicant genuinely believe they are validly married but later discover there is a defect in regard to the marriage.

[60] *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.

CHAPTER 6

TABLE OF CASES: MARRIAGES AND ENGAGEMENTS FOR IMMIGRATION PURPOSES

CASES

CHAPTER 7

7. RELATIONSHIP

7.1. GENERALLY

A permanent resident or a Canadian citizen[1] may sponsor the application for permanent residence (application for landing) of a member of the family class.[2]

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[3] to Canada with them.[4] 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*,[5] 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.

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1 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."

2 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.

3 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).

4 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.

5 *Gill, Balwant Singh v. M.C.I.* (IAD V96-00795), Boscariol, February 4, 1998.

In *Tomy*,[6] 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*,[7] 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,[8] the sponsor may appeal that refusal to the Immigration Appeal Division.[9] 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."[10] 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.[11]

In *Savehilaghi*,[12] 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,[13] section 9(2)(a)(ii) of the Regulations [14] 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 reference to , and therefore no

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6 *Tomy, Teresa v. M.C.I.* (IAD T96-05836), Kalvin, March 16, 1998.

7 *Buttar, Jasvir Singh v. M.C.I.* (IAD V96-02982), Boscariol, March 23, 1998.

8 Pursuant to section 77(1) of the Act.

9 Pursuant to section 77(3) of the Act.

10 Section 2(l) of the Regulations, *supra*, footnote 3.

11 Pursuant to section 6(1)(a) of the Regulations, subject to the exceptions set out in section 6(5)(a) of the Regulations.

12 *Savehilaghi, Hasan v. M.C.I.* (IAD T97-02047), Kalvin, June 4, 1998.

13 *Zadorojnyi, Alexandre v. M.C.I.* (IAD V98-03484), Singh, September 16, 1999.

14 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.

exception for, runaways or persons unwilling to comply or to be included in the application for permanent residence.[15]

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. 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,
>
> (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,

[15] *Johnson, Ann Marie v. M.C.I.* (IAD T98-00316), Boire, November 18, 1998.

(ii) who is a permanent resident, or
(iii) whose application for landing the sponsor may otherwise sponsor.

The following persons are excluded from the family class:

(a) the applicant's spouse,[16]

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,[17]

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.

(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."[18]

(d) a person who is adopted, or is intended to be adopted,

where the adoption is not in accordance with the *Convention on Protection of Children and Co-operation in respect of Intercountry Adoption*,[19] 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[20]

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.[21] The opting-out provision was revoked on March 27, 1992 by SOR/92-101.

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[16] Pursuant to section 4(2) of the Regulations.

[17] *Ibid.*

[18] 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."

[19] For a more detailed discussion, see chapter 4, "Adoptions."

[20] Section 4(3.1) of the Regulations. This provision came into force on November 11, 1998. (SOR98/544)

[21] *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.).

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. In making this decision, it must determine certain jurisdictional facts.[22]

For example, in *Malik*,[23] 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*,[24] 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*,[25] 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,[26] 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 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*, [27] 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.[28] 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*,[29] 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

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[22] *Ibid*.

[23] *Malik, Mohammad F. v. M.C.I.* (IAD T94-05689), Kalvin, January 21, 1998.

[24] *Cheng (Zheng), Run De v. M.C.I.* (IAD T97-00078), Kitchener, January 21, 1998.

[25] *Johal, Sarabjit Kaur v. M.C.I.* (IAD V95-01029), Boscariol, May 21, 1997.

[26] *Iyamu, Lucky Ukponahunsi v. M.C.I.* (IAD T98-02216), Kelley, September 16, 1999.

[27] *Sheriff, supra,* footnote 21.

[28] *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), Eglington, Warrington, Rotman, March 27, 1987; *Mangat, Harpreet Kaur v. M.C.I.* (IAD V95-02807), Boscariol, July 18, 1997; and *Sandhawalia, Baljit Kaur v. M.C.I.* (IAD V95-01730), Boscariol, March 26, 1997.

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*. This can be contrasted with the situation in *Koon*[30], 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.[31] For example, in *Bans*,[32] 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."

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*[33] and the Federal Court decisions of *McDoom*,[34] *Kahlon*,[35] and *Lidder*[36] 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.[37] However, such

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[29] *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.).

[30] *Koon, Chun Wah v. M.C.I.* (IAD T97-05159), Wales, October 1, 1999.

[31] Section 77(3)(b) of the Act provides for an appeal on compassionate or humanitarian grounds.

[32] *Bans, Hari v. M.C.I.* (IAD V96-00986), Singh, March 11, 1997.

[33] R.S.C. 1985, c. I-21.

[34] *McDoom v. Canada (Minister of Manpower and Immigration),* [1978] 1 F.C. 323 (C.A.).

[35] *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.).

[36] *Canada (Minister of Employment and Immigration) v. Lidder*, [1992] 2 F.C. 621; 16 Imm. L.R. (2d) 241 (C.A.).

[37] 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,

applications are still subject to amendments made to other provisions of the Regulations, after that date.[38]

In *Mascardo*,[39] 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*,[40] the panel applied the then current definition.

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.[41] "Dependent son"[42] and "dependent daughter"[43] replaced "unmarried son" and "unmarried daughter,"[44] 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.[45]

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

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(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.

38 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.

39 *Mascardo, Angelina Gelera v. M.E.I.* (IAD T92-07718), Ahara, April 23, 1993.

40 *Kahlon, supra,* footnote 35.

41 SOR/92-101.

42 The definition is found in section 2(l) of the Regulations.

43 *Ibid*. The definition is quoted in full at section 7.4.2.1., "Definitions."

44 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.

45 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 38 (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 38 (F.C.T.D.).

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,[46] 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[47] to raisethe age by which an applicant must have been adopted from 13 years[48] to 19 years.[49] This change came into effect in conjunction with amendments to the definition of "adopted".[50] 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.[51]

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[46] SOR/93-44.

[47] SOR/93-44.

[48] 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.

[49] 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.

[50] For a more detailed discussion on determining whether the applicant has been "adopted," see chapter 4, "Adoptions."

[51] 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.

7.3.2.1. *Kahlon*

In *Kahlon*,[52] 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.

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.[53] The Federal Court in *Kahlon* did not need to consider those provisions, as the changes benefited the applicants. In *McDoom*,[54] 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.[55]

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.[56] 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.

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[52] *Kahlon, supra,* footnote 35.

[53] 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.

[54] *McDoom, supra,* footnote 34.

[55] See *Jimenez, supra,* footnote 45, 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 38 (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 38 (F.C.T.D.).

[56] *Lidder, supra,* footnote 36.

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.[57]

7.3.2.4. Other Case-law

In a few decisions, the Federal Court does not appear to have considered section 11 of SOR/92-101 or section 6(6)[58] of the Regulations in reaching its decision.[59]

In one decision,[60] 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

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[57] 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 the undertaking and the applications were filed after March 27, 1992, and the Court only makes reference to *Lidder* in determining the applicable law.

[58] See section 7.4.2.2., "Timing."

[59] In *San Luis* and *Nikolova*, *supra*, footnote 57, 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.

[60] *M.C.I. v. Jimenez, Emilia* (F.C.T.D., no. IMM-415-95), Teitelbaum, October 23, 1995.

filed prior to March 27, 1992. This position is consistently taken by the Appeal Division. The Court disagreed, stating:

> …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 15th 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. [61]

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."[62] "Unmarried" was defined, prior to March 27, 1992, as "[...] not married and has never been married."[63] This determination is a factual one based on the evidence presented to the Appeal Division in each case.[64]

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,
>
> (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

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[61] *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".*

[62] See *Jimenez, Pedro Lucas, supra*, footnote 45 and *Dular, supra*, footnote 38 (I.A.D.).

[63] On March 27,1992, the definition of "unmarried" was revoked.

[64] 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.

(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)[65] of the Regulations should also be considered.

The current definitions of "daughter" and "son" are as follows:[66]

"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.

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,[67] 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.

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[65] See section 7.4.2.2., "Timing".

[66] Section 2(1) of the Regulations. Refer also to section 7.3., "Timing," regarding the appropriate version of the definitions to be used.

[67] Note that the definition of "unmarried" was revoked on March 27, 1992. Previously it was defined as " [...] not married and has never been married."

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.[68]

The Federal Court seems to have come to the same conclusion in *Yep*.[69] 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*[70], the Appeal decision declined to follow *Balanay* [71] 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,*[72] 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

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[68] *Balanay, Dina Barreras v. M.C.I.* (IAD T96-03362), Townshend, June 11, 1998.

[69] *Yep, Zhi Tong v. M.C.I.* (F.C.T.D., no. IMM-4377-96), Muldoon, July 23, 1998.

[70] *Kanchan, Ramkoomarie v. M.C.I.* (IAD T99-06129), D'Ignazio, February 24, 2000.

[71] *Balanay, supra,* footnote 68.

[72] *Kaur, Dalbir v. M.C.I.* (IAD T96-01560), Boire, July 8, 1998.

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,*[73] 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*[74] and *Yep*[75]. Whether or not the 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.[76] Similarly, in *Tewg,*[77] 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 Regulationswhich 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

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[73] *Soto, Hugo Alejandro v. M.C.I.* (IAD V97-02822), Carver, December 30, 1998.

[74] *Supra*, footnote 68.

[75] *Supra*, footnote 69.

[76] *Sanchez, Lino v. M.C.I.* (IAD T94-02722), Ariemma, October 27, 1995.

[77] *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.

the basis that the sponsor should not be penalized by the failure of immigration officials to assist her.[78]

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.[79]

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.[80] In addition, she/he must have been continuously enrolled and in attendance since reaching 19 years of age,[81] 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.[82]

In *Szikora-Rehak*,[83] 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,[84] 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*,[85] 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

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[78] *Brown, Phillippa Patrice v. M.C.I.* (IAD T93-11210), Leousis, June 28, 1996.

[79] See, for example, *Casinathan, Anandarajan v. M.C.I.* (IAD T94-00402), Hopkins, October 19, 1994; and *Layal, Harbhajan Singh v. M.C.I.* (IAD T93-12919), Muzzi, September 15, 1995.

[80] Section 6(6) of the Regulations. But see *Balanay, supra*, footnote 68.

[81] See *Kaur, Dalbir, supra*, footnote 72, regarding the application of section 2(7) of the Regulations where the applicant was not in school on turning 19.

[82] *Marikar, Fathuma Hooriya v. M.C.I.* (IAD T94-00362), Muzzi, July 17, 1995.

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

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

[85] *Tiri, Felicitas v. M.C.I.* (IAD T96-02148), Hoare, April 22, 1998.

received regular financial assistance from the sponsor. The applicant was held to be a "dependent son."

In *Huang*,[86] 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*,[87] 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.[88] In another,[89] 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*,[90] 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 answer questions about his courses and referred to handwriten notes. The panel put greater weight on the corroborative evidence, in particular, a transcript document, to find the applicant was a "dependent son".

7.4.2.3.1. In *Hu*[91], 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

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

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

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

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

[90] *Huang, Mei Yu v. M.C.I.* (IAD V97-03817), Carver, August 31, 1999.

[91] *Hu, Run Ai (Yen Oil Chow) v. M.C.I.* (F.C.T.D., no. IMM-6829-98), Lemieux, March 2, 2000.

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.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.[92]

The Federal Court recently considered the interpretation of section 2(7) of the Regulations in *Rochester*[93]. 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 allowed in section 2(7), the aggregrate did. As the Appeal Division committed no reviewable error with respect to either period, the application for judicial review was dismissed.

In *Yep,*[94] 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*,[95]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)

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[92] 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).

[93] *Rochester, Cislyn Bernice Kerr v. M.C.I.* (F.C.T.D., no. IMM-3203-98), Evans, July 8, 1999.

[94] *Supra*, footnote 68.

[95] *Patel, Kamlesh Kumar v. M.C.I.* (F.C.T.D., no. IMM-2678), McKeown, April 21, 1999.

assists in interpreting section 2(1), the Federal Court made no finding on whether the applicant had pursued a course of studies.

This issue has arisen in the Appeal Division as well but it cannot be said there is a consistent approach. For example,in *Kaur*,[96] 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*,[97] 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*[98] 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.[99] In addition, the principles of statutory interpretation derived from the case-law[100] continue to apply where they are not inconsistent with the *Interpretation Act*.[101]

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.

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96 *Kaur, Paramjeet v. M.C.I.* (IAD T94-02007), Wright, May 19, 1995.

97 *Anapolis, Perpetua v. M.C.I.* (IAD T95-07959), Hoare, July 18, 1997.

98 R.S.C. 1985, c. I-21.

99 Section 3(1) of the *Interpretation Act*.

100 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).

101 Section 3(3) of the *Interpretation Act*.

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.[102]

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.[103] 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.[104]

The failure to gain admission to an educational institution has been considered to be unanticipated and thus an interruption in the program of studies.[105] Also, the cancellation of a course that resulted in a voluntary withdrawal has also been considered to be an unexpected interruption.[106] Further, the Appeal Division has held that the reason for the interruption is not relevant.[107]

Both enrollment and attendance must be established. The failure to attend, even if enrolled, is a failure to attend continuously.[108] 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.[109]

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[102] *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.

[103] *Kanchan, supra,* footnote 70.

[104] *Walczak, ibid.; Estoesta, ibid.*

[105] *Walczak, supra,* footnote 102.

[106] *Estoesta, supra,* footnote 102.

[107] *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 79 (re school closure due to civil war, strife, natural disaster).

[108] *Estoesta, supra,* footnote 102.

[109] *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."

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.[110]

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." [111] While this is not a clear statement, it seems to follow the qualitative line of jurisprudence.

There is now divergent jurisprudence in the Federal Court with respect to this matter. In *Patel,*[112] the Court commented, in obiter, that 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*[113] 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*'[114] 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 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

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[110] *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.)

[111] *Chowdhury, Saifur Rahman et al. v. M.C.I.* (F.C.T.D., no. IMM-828-98), Pinard, April 16, 1999, at paragraph 9.

[112] *Patel, Chinubhai Madhavlal v. M.C.I.* (F.C.T.D., no. IMM-829-98), Tremblay-Lamer, October 5, 1998.

[113] *Ibid.*

[114] *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.

essential that the applicant's enrollment and attendance be as a full-time student.[115] The Appeal Division has held that what constitutes full-time studies is a question of fact.[116] 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*,[117] 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*,[118] 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*.[119] 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.[120]

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.[121] 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

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[115] *Khaira, supra,* footnote 110.

[116] *Bernabe, Marieline J. v. M.C.I.* (IAD V95-00471), Boscariol, March 18, 1997. See *Rochester, supra*, footnote 93, 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.

[117] *Supra,* footnote 92.

[118] *Tiri, supra,* footnote 85.

[119] *Huang, Su-Jian, supra,* footnote 86.

[120] *Khaira, supra,* footnote 110.

[121] *Walczak, supra,* footnote 102; *Casinathan, supra,* footnote 79.

her graduation from high school was to be counted in calculating the one-year period. If she had been accepted, then that break would have become part of the educational program.[122]

The Appeal Division has not taken a consistent approach to calculating this period.

In *Walczak*,[123] 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*,[124] 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*,[125] 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 *Siyan*,[126] 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.[127]

In *Dhaliwal*,[128] 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 from

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[122] *Walczak, supra,* footnote 102.

[123] *Walczak, supra,* footnote 102.

[124] *Estoesta, supra,* footnote 102.

[125] *Flores, Victoria v. M.C.I.* (IAD V94-01641), Singh, July 18, 1996.

[126] *Siyan, 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.

[127] 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."

[128] *Dhaliwal, supra,* footnote 102.

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.[129]

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."[130]

In *Balanay*,[131] 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.[132] In *Tomy*,[133] 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 thatrequires recognition or accreditation by government. In *Chandiwala*,[134] 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*,[135] 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.

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[129] *Siyan, supra,* footnote 126

[130] *Walczak, supra,* footnote 102; *Casinathan, supra,* footnote 79; *Marikar, supra,* footnote 82.

[131] *Balanay, supra,* footnote 68.

[132] See, for example, *Layal, supra,* footnote 79, 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 79, where the Appeal Division refers to a "recognized" educational institute; however, it was not necessary to address that issue in reaching the decision.

[133] *Tomy, supra,* footnote 6**.**

[134] *Chandiwala, Firdous Jahan v. M.C.I.* (IAD T95-04450), Boire, September 17, 1997.

[135] *Patel, supra,* footnote 95.

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."[136]

"Physical disability" includes a hearing disability.[137] Amputation of the left leg below the knee following a motor vehicle accident is a physical disability.[138]

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.[139]

In *Khan*,[140] 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*,[141]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 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*,[142]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

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[136] *Kaur, Manjit v. M.C.I.* (F.C.T.D., no. IMM-5844-93), MacKay, May 19, 1995.

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

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

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

[140] *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".

[141] *Arastehpour, Mohammad Ali v. M.C.I.* (F.C.T.D., no. IMM-4328-96), MacKay, August 31, 1999.

[142] *Huang, Wing Dang, supra,* footnote 138.

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,*[143] 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,*[144] 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."

7.4.4. "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 (iv) of the *Regulations*, which allowed the "opting out" of dependants who were 21 years or older, were revoked.[145] 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.[146] 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.[147]

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

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

[145] 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.

[146] *Supra*, footnote 37.

[147] See *Jimenez, Pedro Lucas, supra*, footnote 45, 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,*

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.[148]

In *Dosanjh,*[149]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*[150] 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,*[151] 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,*[152] the panel concluded that an application could be split, and 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*[153] 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*[154], 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

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supra, footnote 38 (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 38 (F.C.T.D.).

[148] *Bailon, supra*, footnote 28; *Chow, supra*, footnote 28. See also, for example, *Singh, Tarsam v. M.C.I.* (IAD T93-12275), Bartley, November 9, 1995.

[149] *Dosanjh, Sarbjit Kaur v. M.C.I.* (IAD V96-00240), Clark, November 24, 1997.

[150] *Mundi v. Canada (Minister of Employment and Immigration),* [1986] 1 F.C. 182 (C.A.).

[151] *Parmar, Tarsem Singh v. M.C.I.* (IAD T95-02914), Aterman, June 25, 1996.

[152] *Mundi, supra*, footnote 150.

[153] *Bailon, supra*, footnote 28.

[154] *Cai, Raymond W. v. M.C.I.* (IAD W98-00108), Kelley, January 4, 2000.

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.[155]

This should be distinguished from the situation where one of the dependants is found to be inadmissible rather than ineligible as a dependant.[156] 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.[157]

[155] *Mundi, supra*, footnote 150.

[156] *Gharu, Kuldip Kaur v. M.E.I.* (F.C.A., no. A-29-86), Pratte, Urie, MacGuigan, June 16, 1988.

[157] *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

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)[1] 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(l) of the *Immigration Act:*

> *"immigrant"* means a person who seeks landing[2]
>
> *"landing"* means lawful permission to establish permanent residence in Canada[3]

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."[4] Generally, the intention of the applicant will become evident during the visa officer's interview with the applicant in the statements made by the applicant in answer to the visa officer's questioning. Other times, the finding of no intention will be based on the applicant's failure to

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1 R.S.C. 1985, c. I-2.

2 *Ibid.*

3 As enacted by S.C. 1992, c. 49, s. 1(3).

4 *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.).

pursue all of the steps involved in the application process.[5] 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.[6]

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.[7] Nevertheless, "permanently" has the opposite

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[5] 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.

[6] 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.

[7] *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.

meaning of "temporarily", and an applicant must not be seeking admission to Canada for a short, fixed period of time for a temporary purpose.[8]

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.[9] 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*."[10]

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[11] and the retention of assets abroad.[12]

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[8] 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.

[9] 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.

[10] *Sarwar, supra*, footnote 7.

[11] *Deol, Dilbag Singh v. M.E.I.* (I.A.B. 80-6012), Campbell, Hlady, Howard, February 11, 1981.

[12] *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 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.

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.[13] 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."[14]

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*,[15] 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.[16] 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. For example, in *Ampoma*,[17] the majority applied *Kahlon* and held that intention must be assessed at the time of the hearing. The dissenting member specifically refused to follow the decision in *Patel.*[18]

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[13] *Aquino, Edmar v. M.E.I.* (I.A.B. 86-9403), Eglington, Weisdorf, Ahara, August 13, 1986.

[14] *Ruhani, supra*, footnote 12.

[15] *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.).

[16] *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.

[17] *Ampoma, Eric Sackey v. M.E.I.* (IAD W91-00008), Gillanders, Verma, Wlodyka (dissenting), February 10, 1992. Reported: *Ampoma v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 219 (IAD).

[18] See also *Dhandwar, supra*, footnote 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 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,

In *Quadri,*[19] 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.[20] 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.[21]

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.[22]

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

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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".

[19] *Quadri, Fatai Abiodun v. S.S.C.* (IAD T93-12576), Hopkins, September 30, 1994.

[20] *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.).

[21] See, for example, *Sall, Kashmir Kaur v. M.E.I.* (IAD V92-01785), Arpin, July 27, 1993.

[22] 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.[23] 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.[24]

In *Datoc*,[25] 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*.[26] 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*,[27] 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;[28] 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.

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[23] 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.

[24] 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.

[25] *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.

[26] *Pangli, supra,* footnote 20. For a fuller discussion of fairness, see chapter 10, "Visa Officers and the Duty of Fairness".

[27] *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".

[28] 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.[29]

[29] See, for example, *Rodriguez, Meliton v. M.E.I.* (IAD T91-00107), Weisdorf, Fatsis, Ariemma, August 8, 1991, where the panel applied *Pangli* and held that if at the interview the applicant indicated a desire to come to Canada as a visitor, the choice of a visitor visa rather than a permanent resident visa should have been put to her; there was no evidence that such a choice had been given to the applicant; *Merius, Ronald v. M.E.I.* (IAD M93-05810), Angé, June 13, 1994; and *Quadri, supra,* footnote 19.

CHAPTER 8

TABLE OF CASES: "NOT AN IMMIGRANT"

CASES

CHAPTER 9

9. COMPASSIONATE OR HUMANITARIAN CONSIDERATIONS

9.1. GENERALLY[1]

As one of the two grounds of appeal from a sponsorship refusal,[2] 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.[3]

9.1.1. Definition

Historically, "compassionate or humanitarian considerations" have been looked at compendiously rather than discretely. The following definitions were given in *Chirwa*:[4]

> […] "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*.
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> [...]
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> […] "humanitarianism" [is defined] as "regard for the interests of mankind, benevolence."

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1 Reference may be made to other chapters which have a section on compassionate or humanitarian considerations for more on the subject.

2 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:
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> [...]
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> (b) on the ground that there exist compassionate or humanitarian considerations that warrant the granting of special relief.

3 *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.

4 *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.[5] 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*,[6] "[…] 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.[7]

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*.[8]

In *Lutchman*,[9] 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, or biased outlooks. What are these objective elements, and what weight each carries, can only be determined by the facts of each case. [10]

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5 *Mundi v. Canada (Minister of Employment and Immigration),* [1986] 1 F.C. 182 (C.A.).

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

7 *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.

8 *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.

9 *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.).

10 *Ibid.*, at 4-5.

According to one decision of the Federal Court, *Kirpal*,[11] 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 decisions that pre-date *Kirpal*,[12] 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.[13]

In response to *Kirpal*, some panels of the Appeal Division have discontinued "weighing" the legal impediment against the compassionate or humanitarian factors in an appeal. But they continue to factor in the legal impediment in exercising discretion. Other panels have simply declined to follow *Kirpal*.[14] The latter position is exemplified in *Jugpall*[15] which 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.
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> […]

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

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

[13] *Lutchman, supra*, footnote 9, at 5.

[14] *Chauhan, supra*, footnote 12; *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.

[15] *Jugpall, Sukhjeewan Singh v. M.C.I.* (IAD T98-00716), Aterman, Goodman, Townshend, April 12, 1999, at 9-11; 17-18.

> 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.
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> […]
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> In the context of cases where Parliament's concerns with admissibility have been met, it may not be necessary to look for overwhelming circumstances in order to grant special relief. The values of quick and fair adjudication would not be served by forcing the appellant to start the sponsorship process all over again […].

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

> There must be positive factors independent of [the obstacle to admissibility] which move the decision-maker to conclude that it would be unfair to require the appellant to start the whole sponsorship process all over again.[16]

As well, there should be no negative factors which would undermine any justification for granting special relief.[17]

The *Chirwa*[18] 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.[19]

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"[20] 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.[21]

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16 *Ibid.*, at 18.

17 *Ibid.*

18 *Chirwa, supra,* footnote 4.

19 *Jugpall, supra,* footnote 15.

20 The definition appears in section 2(1) of the *Immigration Regulations, 1978.*

21 *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 […]".[22] 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,[23] it usually comes to a uniform conclusion for all applicants on the question of whether special relief is warranted.[24]

9.1.3.1. « Splitting »

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.[25] 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.[26] 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.[27] 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.

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[22] *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.

[23] See, however, *Chauhan, supra,* footnote 12, where the panel articulated its disagreement with *Kirpal* in this respect.

[24] 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.

[25] *Mundi, supra,* footnote 5.

[26] 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.

[27] 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.[28] 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.[29] 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,*[30] 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,[31] 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 sponsorship applications, it is not, without more, sufficient to warrant special relief.[32] Marriage to a Canadian citizen does not, in itself, create any entitlement to special relief.[33]

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

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

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

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

[32] *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

There is a distinction between achieving family unification and facilitating the reunion of the sponsor with close relatives from abroad.[34] 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.[35]

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,[36] the Appeal Division may grant special relief to enable the applicants to proceed to Canada without the relative.[37] However, the circumstances relating to the relative may have some bearing on the exercise of discretion,[38] and to this extent an exception to the general rule exists.

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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.

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

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

[35] *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.

[36] Due to the operation of section 6(1)(a) of the *Immigration Regulations, 1978.*

[37] *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.

[38] *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 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.

Where there is more than one ground of refusal, different considerations go to the discretionary jurisdiction with respect to each ground.[39]

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.[40]

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.[41]

The Appeal Division has considered the exercise of special relief to alleviate an anomaly in the law.[42]

The Appeal Division has held that the doctrine of res judicata applies to a decision regarding compassionate and humanitarian considerations.[43]

Evidence of country conditions and hardship to the applicant in that country is admissible in assessing compassionate and humanitarian considerations in section 77 appeals.[44]

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.[45] 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.[46]

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[39] *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.

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

[41] *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*.

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

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

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

[45] *Baker, supra,* footnote 8.

[46] *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.

9.4. CONSIDERATIONS FOR SPECIAL RELIEF

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
- the relationship of the sponsor to the applicant(s)
- the reason(s) for the sponsorship
- the strength of the relationship between the applicant(s) and the sponsor[47]
- the situation of the sponsor in Canada[48]
- the past conduct of the sponsor[49]
- the situation of the applicant(s) abroad, including hardship[50]
- the ease of travel for the sponsor/applicant(s)
- the existence of family or other support for the applicant(s) abroad[51]
- the existence of family or other support for the sponsor in Canada
- the existence of cultural duties to one another[52]

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

[48] *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.

[49] *Lai, supra*, footnote 41. 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.

[50] *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.

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

- the financial burden on the sponsor from having the applicant(s) abroad
- the financial dependency of the applicant(s) on the sponsor

9.4.2. Medical Inadmissibility

- whether there is evidence of an improved medical condition at the time of the appeal[53]
- whether there are likely to be inordinate demands on Canadian services (health/social)[54]
- the relative availability of health services to the applicant(s), in Canada and abroad[55]
- the cost of treatment of the medical condition[56]
- the availability of family support in Canada[57]
- the psychological dependencies of the applicant(s) on the sponsor[58]
- 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[59]
- whether there is evidence of remorse[60]
- the seriousness of the offences[61]

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[52] *Sotoodeh, supra,* footnote 32.

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

[54] *Sooknanan, Lochan v. M.C.I.* (F.C.T.D., no. IMM-1213-97), Gibson, February 27, 1998; *Dutt, supra,* footnote 50.

[55] *Dutt, ibid.*

[56] *Valdes, supra,* footnote 32; *Che Tse, David Kwai v. S.S.C.* (F.C.T.D., no. IMM-2645-93), McKeown, December 15, 1993.

[57] *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.

[58] *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*.

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

[60] *Khan, supra,* footnote 39.

- evidence of good character[62]
- the length of time since the offence(s) and absence of further trouble with the law[63]
- evidence of criminal history, future prospects and risk of future danger to the public[64]

9.4.4. Financial Refusals

See the discussion in chapter 1, "Financial Refusals," section 1.5., "Compassionate or Humanitarian Considerations."

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[61] *Ibid.*

[62] *Ibid.*

[63] *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.

[64] *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

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.[1] 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?[2]

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.[3] 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.

In *Baker*,[4] the Supreme Court identified some factors relevant to determining the requirements of the duty of fairness according to the circumstances. They are:

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1 *Cardinal v. Director of Kent Institution*, [1985] 2 S.C.R. 643.

2 *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, at 631.

3 *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.

4 *Baker, supra*, footnote 3.

- 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.[5] 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.[6]

10.2.3. Use of Extrinsic Evidence

Extrinsic evidence means evidence of which an applicant is unaware because it comes from an outside source.[7] An immigration officer should provide an applicant with an opportunity to

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[5] *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.).

[6] 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).

[7] *Dasent, Maria Jackie v. M.C.I.* (F.C.T.D., no. IMM-5386-93), Rothstein, December 8, 1994.

comment upon extrinsic evidence.[8] 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.[9]

Information obtained from a spouse in a separate interview is not regarded as extrinsic evidence to which an applicant must be allowed to respond.[10] 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.[11]

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.[12] Failure to share a document with an applicant may deny him a meaningful opportunity to present his case fully and fairly.[13]

10.2.4. Providing Opportunity to Demonstrate Rehabilitation

In the case-law decided before the *Immigration Act* was amended in 1995,[14] 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 the

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[8] *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.

[9] *Shah, supra,* footnote 3, at 2.

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

[11] *Ramdelall, Nandrani v. M.C.I.* (F.C.T.D., no. IMM-4112-97), Wetston, August 28, 1998.

[12] *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.

[13] *Haghighi, Nima v. M.C.I.* (F.C.T.D., no. IMM-4780-98), Gibson, September 8, 1999. The Court relied on *Baker, supra,* footnote 3 in reaching its conclusion.

[14] By Bill C-44 (S.C. 1995, c. 15; in force July 10, 1995).

Governor in Council, to demonstrate rehabilitation.[15] The visa officer's only responsibility was to ascertain that there was no certificate of rehabilitation on the applicant's file.[16]

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.[17]

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.[18]

The Immigration Appeal Board has recognized that the duty to act fairly includes a duty to proceed within a reasonable time,[19] and relief has been granted where administrative delays have had the effect of disqualifying an applicant.[20] 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.[21] And as held in *Gill*:[22]

> 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 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

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15 *Symmonds, Lorraine Shirley v. M.E.I.* (IAD V91-00440), MacLeod, Wlodyka, Verma, February 25, 1992.

16 *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.

17 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.

18 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.

19 *Jones, Violet Eugenia v. M.E.I.* (I.A.B. 87-10538), Sherman, Weisdorf, Rotman, March 28, 1988.

20 *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.

21 *Kaushal, Sushma Kumari v. M.E.I.* (I.A.B. 86-9045), Eglington, Warrington, Rotman, March 27, 1987.

22 *Gill v. Canada (Minister of Employment and Immigration)*, [1984] 2 F.C. 1025 (C.A.), at 1028-1029.

> 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.[23] The doctrine means that if a public body expressly or impliedly undertakes to follow a certain procedure, it may be held to its undertaking.[24] However, the doctrine is restricted to procedural matters and cannot be used to override a statutory requirement.[25]

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.[26]

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.[27]

There is no apprehension of bias where an immigration officer deals with an applicant on two separate occasions in respect of two different matters,[28] or deals with the applications of two related spousal applicants.[29] Greater care must be taken where both matters in issue are the same and involve final decisions.[30]

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.[31]

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[23] 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.

[24] 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.

[25] 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, Velitchka* (F.C.T.D., no. IMM-16-95), Wetston, October 10, 1995.

[26] *Chan, Wah Fong v. M.C.I.* (F.C.T.D., no. IMM-4330-98), Muldoon, August 11, 1999.

[27] *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities*, [1992] 1 S.C.R. 623.

[28] *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.).

[29] *Mohamed, Ismail v. M.C.I.* (IAD M98-05434), Bourbonnais, June 8, 1999.

[30] *Arthur, Gertrude v. M.E.I.* (F.C.A., no. A-991-90), MacGuigan, Linden, Gray, November 2, 1992.

[31] *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

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.[32] Where the interviewing officer was not the one to sign the refusal letter, yet the officer who did refuse made an independent decision based on the evidence, there was no breach of fairness.[33]

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.[34]

10.2.8. Knowing Case to be Met and Opportunity to Respond

In *Muliadi*,[35] 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,[36] and to advise the applicant of any concerns and provide an opportunity to respond before making a decision.[37] Basically, where concerns are raised as a

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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.

[32] *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.

[33] *Brar, Pritam Singh v. M.E.I.* (IAD V92-00108), Verma, Wlodyka, Gillanders, July 14, 1993.

[34] *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.

[35] *Muliadi v. Canada (Minister of Employment and Immigration),* [1986] 2 F.C. 205 (C.A.).

[36] *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.

[37] *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,*

result of new information, significant in leading a decision-maker to decide against an applicant, they should be put to the applicant.[38] Withholding material in the absence of compelling reasons, such as national security, results in unfairness towards an applicant.[39]

Offering an opportunity to respond includes an obligation to allow a reasonable time to do so.[40]

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;[41] and for an officer to fail to clarify a contradiction between documents submitted by an applicant and his statements at interview[42] or a contradiction regarding an applicant's employment status.[43]

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.[44] 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.[45] 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.[46] However,

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supra, footnote 31, 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.

38 *Zheng, Tiantong v. M.C.I.* (F.C.T.D., no. IMM-1982-98), Reed, August 27, 1999.

39 *Dee, Dewey Go v. M.C.I.* (F.C.T.D., no. IMM-1050-99), MacKay, February 18, 2000.

40 *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.

41 *M.E.I. v. Yang, Li* (F.C.A., no. A-169-89), Mahoney, Urie, Stone, May 22, 1990.

42 *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.

43 *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.).

44 *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.).

45 See the discussion in chapter 3, "Medical Refusals", section 3.3.1.3., "Duty of Fairness Owed by Visa and Medical Officers."

46 *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

where a fairness letter left an applicant totally in the dark as to what issues he should respond to, the practice could be regarded as unfair.[47] 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.[48] 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.[49]

10.2.9. Interpretation at the Interview

Lack of adequate interpretation has been held to constitute a breach of fairness.[50]

10.2.10. Other Procedural Matters

In *Tham,*[51] the refusal letter had been issued before the interview with the applicant. The Federal Court of Appeal, affirming the Immigration Appeal Board's decision,[52] held that the refusal was premature and a breach of the duty of fairness implicit in the Act and Regulations.[53]

The duty of fairness in administrative law normally only requires reasons be given on request.[54] However, in *Baker*[55] 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.

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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.

47 *Fei, Wan Chen v. M.C.I.* (F.C.T.D., no. IMM-741-96), Heald, June 30, 1997.

48 *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 46.

49 *Wong, Ching Shin Henry, supra,* footnote 46.

50 *Mistry, Ratilal v. M.E.I.* (IAD T93-09237), Bell, February 25, 1994.

51 *Tham: M.E.I. v. Tham, Aurora Kok* (F.C.A., no. A-756-86), Hugessen, Marceau, Urie, September 19, 1986.

52 *Tham, Aurora Kok v. M.E.I.* (I.A.B. 83-6793), Suppa, Benedetti, Hlady, May 24, 1985.

53 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.

54 *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.

55 *Baker, supra,* footnote 3. In the particular case, the immigration officer's notes were held to constitute sufficient reasons.

There is no obligation, on a request for a compassionate or humanitarian exemption, to conduct an oral hearing.[56] However, if the Department agrees to an interview, it has to conduct it fairly,[57] including giving reasonable notice of the interview date.[58]

A visa officer has jurisdiction to reconsider a decision.[59]

There is no right to counsel at an interview with a visa officer.[60] 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.[61] Bypassing counsel and contacting an applicant directly to obtain information to deny a claim is a breach of fairness.[62]

There does not exist a general discretion in visa officers to grant an adjournment arising by analogy from powers granted to administrative tribunals[63] or to extend a time limit prescribed by regulation.[64]

10.3. REMEDIES FOR BREACH OF FAIRNESS

10.3.1. Jurisdictional Questions

The decisions of the Federal Court of Appeal in *Porter*,[65] *Pangli*[66] and *Tham*[67] support the view that the Appeal Division may take jurisdiction to address fairness issues.

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[56] *Baker, supra*, footnote 3. 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).

[57] *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.).

[58] *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.).

[59] *Chan, supra*, footnote 34 (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).

[60] *Chan, supra*, footnote 34.

[61] *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.

[62] *Hussein, Safia Ahmed v. M.C.I.* (F.C.T.D., no. IMM-5151-98), Pelletier, December 20, 1999.

[63] *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.).

[64] *Bensalah, Lekrim v. M.C.I.* (F.C.T.D., no. IMM-4907-98), Pinard, August 13, 1999.

[65] *Porter, supra*, footnote 20.

In terms of the jurisdiction of the Appeal Division to cure procedural defects, *Kaushal*[68] 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.[69]

10.3.2. Options

In the event of a breach of either type at issue in *Pangli*,[70] (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.[71] The denial of natural justice vitiates the whole proceeding, and according to *Chandler*,[72] a tribunal is bound to start afresh in order to cure the defect in such circumstances.[73] The Appeal Division has relied on *Newfoundland Telephone Co. Ltd*.[74] in concluding the visa officer's decision in these circumstances is void.

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.[75] 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.[76]

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[66] *Pangli, supra,* footnote 5.

[67] *Tham, supra,* footnote 50.

[68] *Kaushal, supra,* footnote 21.

[69] 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."

[70] *Pangli, supra,* footnote 5.

[71] 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.

[72] *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

[73] *Dhaliwal, Balwinder Kaur, supra*, footnote 32. 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.

[74] *Newfoundland Telephone Co. Ltd., supra,* footnote 27.

[75] *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 recent 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.

[76] 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

In *Gill*,[77] relying on *Kahlon*,[78] 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.[79]

In *Atwal*,[80] 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.[81] In *Mistry*,[82] 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 record and at the hearing.[83] 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.[84]

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.[85]

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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.

77 *Gill, Paramjit Kaur v. S.S.C.* (IAD T93-09697), Hopkins, August 25, 1994.

78 *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.).

79 *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.

80 *Atwal, Lakhbir Kaur v. M.E.I.* (IAD V88-00152), MacLeod, Singh, Chambers, May 12, 1989.

81 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.

82 *Mistry*, *supra*, footnote 50.

83 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.

84 *Samra, Avtar Kaur v. M.E.I.* (IAD V90-01073), Tisshaw, Wlodyka, Chu, September 23, 1991.

85 *Symmonds, supra*, footnote 15; *Dhaliwal, Jagdish Kaur, supra*, footnote 16.

Less frequently, the Appeal Division has allowed an appeal solely on the basis that some fundamental breach of fairness has occurred.[86] This approach finds support in decisions such as *Tham*.[87] In *Cheema*,[88] 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.[89] However, the Supreme Court of Canada has introduced an exception to this principle.[90] 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.[91]

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. Such an application would not appear to preclude a concurrent appeal to the Appeal Division from the same decision of the visa officer.[92]

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[86] 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.

[87] *Tham, supra,* footnote 52; affirmed in *Tham, supra,* footnote 51.

[88] *Cheema, supra,* footnote 75.

[89] *Cardinal, supra,* footnote 1.

[90] *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

[91] 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).

[92] *Khakoo, supra,* footnote 31.

CHAPTER 10

TABLE OF CASES: VISA OFFICERS AND THE DUTY OF FAIRNESS

CASES

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.[1] There is no basis

[1] *Vega, Miguel Jesus v. M.E.I.* (F.C.A., no. A-261-82), Pratte, Urie, Le Dain, February 15, 1983.

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.[2] 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.[3] 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*.[4] 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.[5] 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.[6]

11.5. DISCRETIONARY JURISDICTION

The case of *Kaur v. M.E.I.*[7] 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."[8] 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.*[9] 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 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.

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2 *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.).

3 *Ibid.*

4 *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.).

5 *Wright, Norma v. M.C.I.* (IAD T95-03227), Wright, April 30, 1996.

6 *Kaur, Manjit v. M.C.I.* (IAD T96-01365), Hoare, February 5, 1998.

7 *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.).

8 *Ibid.* at 3.

9 *Gomes, Maria da Conceicao v. M.E.I.* (IAD T90-03939), Weisdorf, Fatsis, Townshend (concurring), December 21, 1990.

Most recently, this approach by the Appeal Division was challenged in *Kainth*.[10] 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.[11] Marceau, J.A. reviewed his own judgment in *Kaur*[12] 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)[13] 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*,[14] (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.

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[10] *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.).

[11] *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.).

[12] *Kaur, Narinder, supra*, footnote 7.

[13] 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.

[14] *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