

Federal Court



Cour fédérale

Date: 20091223

Docket: IMM-2643-09

Citation: 2009 FC 1303

Ottawa, Ontario, December 23, 2009

Present: The Honourable Mr. Justice Boivin

BETWEEN:

**NISAR AHMED
YASMEEN AHMED**

Applicants

and

**MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), against a decision dated March 29, 2009, by an immigration officer (the officer), refusing the applicants' application for permanent residence based on humanitarian and compassionate considerations (H&C application) under subsection 25(1) of the Act.

Issue

[2] The only issue here is whether the immigration officer erred in fact and in law in rejecting the applicants' H&C application and concluding that they would not face unusual and undeserved or disproportionate hardship if they had to file their application for permanent residence from Pakistan.

Factual background

[3] The 59-year-old male applicant, Nisar Ahmed, and his spouse, the 53-year-old female applicant, Yasmeen Ahmed, have experienced family problems since the death of Mr. Ahmed's father in 1970. The applicants attributed problems at that time to Hafeez Ahmed, Mr. Ahmed's brother, who opposed the applicants' marriage in 1972. The applicants married nonetheless and left Pakistan for Kuwait. Mr. Ahmed left in 1973, and Mrs. Ahmed in 1975. Mr. Ahmed adds that, around 1996, Hafeez wanted to arrange forced marriages between his own children and those of the applicants. Hafeez allegedly even threatened them over the telephone after their arrival in Canada. Mr. Ahmed states that he is also worried for his children's safety.

[4] The applicants lived in Kuwait until 1988 (or 1992 according to the information) and moved to the United States. They did not seek asylum in the United States.

[5] The applicants made a claim for refugee protection in Canada on March 1, 2003, with their son Numan Ahmed Shaikh and daughter Iram Nisar Shaikh. The children are not included in this application: Numan was sponsored by his wife, and his application is pending, whereas Iram has been a permanent resident in Canada since November 22, 2007. The officer

nevertheless considered the two children's presence in Canada in his analysis. The applicants also have a son in the United States.

[6] On October 23, 2003, the Refugee Protection Division (RPD) rejected the applicants' claim for refugee protection. On February 2, 2004, the Federal Court dismissed the application for leave and for judicial review of the RPD's decision.

[7] On September 1, 2006, the applicants submitted a pre-removal risk assessment (PRRA) application.

[8] On December 11, 2006, the applicants submitted their H&C application.

[9] On March 31, 2009, the officer rejected the applicants' PRRA and H&C applications.

[10] On May 25, 2009, the applicants filed an application for leave and for judicial review against the officer's decision on humanitarian and compassionate considerations.

Impugned decision

[11] In the immigration officer's opinion, the applicants would not face unusual, undeserved or disproportionate hardship if they were to file their application for permanent residence in Pakistan.

[12] The applicants' claim for refugee protection was rejected in October 2003, but they nevertheless decided to remain in Canada without status. The officer notes that the applicants did not stay in Canada because of circumstances beyond their control, since they both had valid passports when their application was rejected.

[13] The officer concluded that the applicants were well established in Canada. The notices of assessment submitted show that Mr. Ahmed has successfully integrated into the workforce and that Mrs. Ahmed has held various jobs since 2006. The officer notes that the applicants are able to support themselves without relying on government assistance. As the applicants spent 15 years in the United States and 6 in Canada, the officer acknowledges that both are fluent in English, one of the two official languages in Canada.

[14] The officer recognizes that the applicants have volunteered or participated in community activities, but their involvement with various organizations does not establish that they would face unusual and undeserved or disproportionate hardship were they to file their application from outside of Canada.

[15] In the officer's view, that the applicants lived for 10 to 15 years in the United States and 15 to 20 years in Kuwait cannot be considered to be a humanitarian and compassionate ground characterizing their integration in Canada. Even though the applicants lived most of their lives outside of Pakistan, it is nevertheless their country of citizenship, and they have rights and obligations associated with that country.

[16] The officer recognizes that the applicants are seeking to reunite their family, as they have a daughter who is a permanent resident in Canada and a son who is likely to become one soon. These two children had claimed refugee protection with their parents in 2003. However, the purpose of a request for an exemption in an H&C application is to establish whether the applicants would face unusual and undeserved or disproportionate hardship were they to return to Pakistan to file an application. Refusing the application would separate the applicants from their children, but the officer notes that the children could sponsor the applicants under section 116 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations).

[17] The applicants lived for a number of years abroad without obtaining legal status, be it in Kuwait or the United States. Their immigration file reveals that they want to settle in Canada for economic reasons, and, in the officer's opinion, they have the option of filing an application for permanent residence from abroad to join their family members in Canada or elsewhere.

[18] The immigration officer also considered Khan Aayan Ahmed, the applicants' grandson, who was born in the United States in 2007, since the best interests of the child must be taken into account under subsection 25(1) of the Act. The child's best interests do not outweigh the other factors related to the case, but they must be given particular attention (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358). The officer recognizes that refusing the exemption would separate the grandparents from their grandson, but the applicants have not established that such a separation would cause them or their grandson

unusual and undeserved or disproportionate hardship. Given Khan's young age, the officer is of the view that the effects on him are not determinative at this time.

[19] The officer also recognizes the presence of many other members of the applicants' family in Canada. While these family ties are not in issue, these are interested parties, and the officer attaches more weight to the presence of brothers and sisters in Pakistan than to that of cousins in Canada. The officer also notes that the applicants' immediate family members in Pakistan will be able to support them temporarily on their return.

[20] Despite the family problems alleged in their Personal Information Form (PIF), the applicants did not seek asylum in the United States, even though they stayed there for over 10 years and allege that the problems date back to 1970. The officer is of the opinion that such behaviour is inconsistent with that of persons fearing for their lives or safety. The applicants had more than 10 years to legalize their status in the United States but did not do so. The officer attaches no weight to family members' affidavits reiterating that the applicants were forced to flee Pakistan for their lives in the 1970s. The officer gave considerable weight to the RPD's determination that the claim for refugee protection was not credible because of omissions noted between the port of entry notes and the PIF.

[21] The officer acknowledged the numerous problems in Pakistan, referring to the documentary evidence, in particular the U.S. Department of State's 2008 report and information from BBC News. The officer noted that recent events involving the assassination of Benazir Bhutto in a suicide attack on December 27, 2007, and President Musharraf's resignation in

August 2008 cannot be ignored when analyzing the current situation in Pakistan. However, in the immigration agent's opinion, the entire population of Pakistan is affected by these events, and they are not an objectively identifiable personalized risk for the applicants' lives or safety.

[22] In the officer's view, the applicants did not establish that these are problems that are personal to them. The alleged risks to their children are no longer valid, since the children are already established in Canada or the United States. Despite positive elements, there are insufficient humanitarian and compassionate grounds to approve this request for an exemption under subsection 25(1) of the Act.

Relevant legislation

[23] The relevant provisions are set out in Schedule A at the end of this document.

Standard of review

[24] The standard of review of a decision made under subsection 25(1) of the Act on the basis of humanitarian and compassionate considerations is reasonableness (*Barzegaran v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 681, 170 A.C.W.S. (3d) 611, at paras. 15-20; *Zambrano v. Canada (Minister of Citizenship and Immigration)*, 2008 CF 481, 326 F.T.R. 17, at para. 31).

[25] The assessment of the reasonableness of a decision is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. The decision must fall within a range of possible, acceptable outcomes which are defensible in

respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

Applicants' submissions

[26] The applicants submit that the officer's decision is wrong in law because it is inconsistent with the May 12, 2008, Operational Manual on immigrant applications in Canada made on humanitarian or compassionate grounds. In particular, the officer failed to follow sections 11.1, 11.2, 12.1, 12.2 and 12.4 of the Operational Manual and thereby made an unreasonable decision. The officer did not take into consideration the applicants' degree of establishment and family reunification, and improperly assessed the risk factor.

Respondent's submissions

[27] The H&C decision-making process is a highly discretionary one that considers whether a special grant of an exemption is warranted (*Doumbouya v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1186, 325 F.T.R. 186, at para. 6). The respondent notes that the hardship that is inherent in having to leave Canada is not enough (*Doumbouya* at para. 10).

[28] The respondent submits that the officer was right to attach only relative weight to these two factors, as case law reveals that this Court has repeatedly refused to intervene when the issue is actually the weight assigned to various factors by an immigration officer (*Williams v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1474, 154 A.C.W.S. (3d) 689).

Analysis

[29] It is well established that those who wish to obtain status as a permanent resident in Canada must apply for such status from outside of Canada. However, subsection 25(1) of the Act states that the Minister has the discretion to exempt a foreign national from any criterion or obligation provided for in the Act and grant the foreign national permanent resident status if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national.

[30] Here, the immigration officer considered all of the evidence on the record, and the reasons given by the officer are justified and understandable. It was open to the officer to conclude that there is insufficient evidence on file to show that the applicants would face unusual and undeserved or disproportionate hardship if they had to submit their application for permanent residence from outside of Canada. It should be noted that, in order to succeed, the onus is on applicants submitting H&C applications to establish that they satisfy the conditions (*Owusu v. Canada (Minister of Citizenship and Immigration)*, [2003] 3 F.C. 172, 2003 FCT 94).

[31] It is not for the Court to reweigh the evidence before the immigration officer. Counsel for the applicants relied on their relationship with family members in Canada. In his decision, the officer considered family reunification and even suggested that the applicants' children could sponsor their parents. The officer took into account the best interests of the applicants' children and grandson. It was also open to the officer to prefer certain documentary evidence to other sources in his analysis of current problems in Pakistan. Furthermore, in the Court's opinion, the officer reasonably concluded that the applicants' behaviour in not seeking protection during their

10-year stay in the United States is inconsistent with that of persons fearing for their lives and safety.

[32] Even though the evidence shows that the applicants are quite well established, it was open to the officer to examine establishment as but one factor among others to consider in the H&C application (*Nazim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 125, 137 A.C.W.S. (3d) 405). Moreover, it is settled law that the degree of establishment in and of itself is not determinative of an H&C application (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, 340 F.T.R. 29). This is also true in the case of family reunification (*Williams v. Canada (M.C.I.)*, 2006 FC 1474, *Manjit Singh v. Canada (M.C.I.)*, 2009 FC 11, *Klais v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 785).

[33] Even though the applicants have been in Canada for six (6) years, the Court notes that the record does not establish that their presence in Canada is related to circumstances beyond their control. By staying in Canada, the applicants made a decision, the consequences of which they must now face, and the Court is of the opinion that they cannot be rewarded for having accumulated time in Canada (*Manjit Singh*).

[34] In this case, counsel for the applicants essentially argued that the officer should have assigned more weight to one element than to another. On reading the immigration officer's decision, the Court is of the view that the officer analyzed the evidence and weighed all of the relevant factors as a whole. In that sense, the Court adopts Justice Martineau's comments in *Williams* at paragraph 7:

The weight to be attached or assigned to particular factors or indicators of attachment is discretionary. On a standard of reasonableness, a reviewing court must examine the evidence to determine whether any reasons support the impugned decision. Therefore, it is not our role to re-examine the weight given to the different H&C factors by the Immigration Officer.

[35] At the hearing, counsel for the applicants contended that, contrary to the respondent's submissions, the applicants had indeed claimed asylum in the United States. However, the decision of the Refugee Protection Division (RPD) dated September 2, 2003, that put in issue the applicants' credibility indicates that the applicants had in fact taken steps but only upon being notified of their removal:

The claimant's lack of credibility is also reinforced by his failure to claim refugee status in the U.S. The claimant testified that he and his family stayed in the U.S. illegally, alleging a fear of return to Pakistan. Yet, they only requested a hearing at the U.S. Immigration Court when they were served with a notice to appear for removal proceedings on February 5, 2003.

[36] The immigration officer's conclusion that the applicants' situation did not allow him to grant them an exemption from the requirement of having to submit an application for permanent residence from outside of Canada was justified and intelligible, and falls within a range of possible, acceptable outcomes.

[37] The parties did not propose a question for certification, and no question arises on this record.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is certified.

“Richard Boivin”

Judge

Certified true translation

Tu-Quynh Trinh

Schedule A – Relevant Legislation

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

Humanitarian and
compassionate considerations

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.

12. (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

Séjour pour motif d'ordre
humanitaire

25. (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.

12. (1) La sélection des étrangers de la catégorie « regroupement familial » se fait en fonction de la relation qu'ils ont avec un citoyen canadien ou un résident permanent, à titre d'époux, de conjoint de fait, d'enfant ou de père ou mère ou à titre d'autre membre de la famille prévu par règlement.

13. (1) A Canadian citizen or permanent resident may, subject to the regulations, sponsor a foreign national who is a member of the family class.

13. (1) Tout citoyen canadien et tout résident permanent peuvent, sous réserve des règlements, parrainer l'étranger de la catégorie « regroupement familial ».

Immigration and Refugee Protection Regulations, SOR/2002-227:

PART 7
FAMILY CLASSES
Division 1
Family Class

Family class

116. For the purposes of subsection 12(1) of the Act, the family class is hereby prescribed as a class of persons who may become permanent residents on the basis of the requirements of this Division.

Member

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

- (a) the sponsor's spouse, common-law partner or conjugal partner;
- (b) a dependent child of the sponsor;
- (c) the sponsor's mother or father;
- (d) the mother or father of the sponsor's mother or father;

PARTIE 7
REGROUPEMENTS
FAMILIAUX
Section 1

Regroupement familial

Catégorie

116. Pour l'application du paragraphe 12(1) de la Loi, la catégorie du regroupement familial est une catégorie réglementaire de personnes qui peuvent devenir résidents permanents sur le fondement des exigences prévues à la présente section.

Regroupement familial

117. (1) Appartiennent à la catégorie du regroupement familial du fait de la relation qu'ils ont avec le répondant les étrangers suivants:

- a) son époux, conjoint de fait ou partenaire conjugal;
- b) ses enfants à charge;
- c) ses parents;
- d) les parents de l'un ou l'autre de ses parents;

- | | |
|---|---|
| (e) [Repealed, SOR/2005-61, s. 3] | e) [Abrogé, DORS/2005-61, art. 3] |
| (f) a person whose parents are deceased, who is under 18 years of age, who is not a spouse or common-law partner and who is | f) s'ils sont âgés de moins de dix-huit ans, si leurs parents sont décédés et s'ils n'ont pas d'époux ni de conjoint de fait: |
| (i) a child of the sponsor's mother or father, | (i) les enfants de l'un ou l'autre des parents du répondant, |
| (ii) a child of a child of the sponsor's mother or father, or | (ii) les enfants des enfants de l'un ou l'autre de ses parents, |
| (iii) a child of the sponsor's child; | (iii) les enfants de ses enfants; |
| (g) a person under 18 years of age whom the sponsor intends to adopt in Canada if | g) la personne âgée de moins de dix-huit ans que le répondant veut adopter au Canada, si les conditions suivantes sont réunies: |
| (i) the adoption is not primarily for the purpose of acquiring any privilege or status under the Act, | (i) l'adoption ne vise pas principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi, |
| (ii) where the adoption is an international adoption and the country in which the person resides and their province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have approved the adoption in writing as conforming to that Convention, and | (ii) s'il s'agit d'une adoption internationale et que le pays où la personne réside et la province de destination sont parties à la Convention sur l'adoption, les autorités compétentes de ce pays et celles de cette province ont déclaré, par écrit, qu'elles estimaient que l'adoption était conforme à cette convention, |
| (iii) where the adoption is an international adoption and either the country in which the person resides or the person's | (iii) s'il s'agit d'une adoption internationale et que le pays où |

province of intended destination is not a party to the Hague Convention on Adoption

la personne réside ou la province de destination n'est pas partie à la Convention sur l'adoption:

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

(A) la personne a été placée en vue de son adoption dans ce pays ou peut par ailleurs y être légitimement adoptée et rien n'indique que l'adoption projetée a pour objet la traite de l'enfant ou la réalisation d'un gain indu au sens de cette convention,

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

(B) les autorités compétentes de la province de destination ont déclaré, par écrit, qu'elles ne s'opposaient pas à l'adoption;

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

h) tout autre membre de sa parenté, sans égard à son âge, à défaut d'époux, de conjoint de fait, de partenaire conjugal, d'enfant, de parents, de membre de sa famille qui est l'enfant de l'un ou l'autre de ses parents, de membre de sa famille qui est l'enfant d'un enfant de l'un ou l'autre de ses parents, de parents de l'un ou l'autre de ses parents ou de membre de sa famille qui est l'enfant de l'un ou l'autre des parents de l'un ou l'autre de ses parents, qui est:

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

(i) soit un citoyen canadien, un Indien ou un résident permanent,

(ii) whose application to enter

and remain in Canada as a permanent resident the sponsor may otherwise sponsor.

Adoption — under 18

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

Best interests of the child

(3) The adoption referred to in subsection (2) is considered to be in the best interests of a child if it took place under the following circumstances:

(a) a competent authority has conducted or approved a home study of the adoptive parents;

(b) before the adoption, the child's parents gave their free and informed consent to the child's adoption;

(c) the adoption created a genuine parent-child relationship;

(d) the adoption was in accordance with the laws of the place where the adoption

(ii) soit une personne susceptible de voir sa demande d'entrée et de séjour au Canada à titre de résident permanent par ailleurs parrainée par le répondant.

Adoption: moins de dix-huit ans

(2) N'est pas considéré comme appartenant à la catégorie du regroupement familial du fait de sa relation avec le répondant l'étranger qui, ayant fait l'objet d'une adoption alors qu'il était âgé de moins de dix-huit ans, est l'enfant adoptif de ce dernier, à moins que l'adoption n'ait eu lieu dans l'intérêt supérieur de l'enfant au sens de la Convention sur l'adoption.

Intérêt supérieur de l'enfant

(3) L'adoption visée au paragraphe (2) a eu lieu dans l'intérêt supérieur de l'enfant si les conditions suivantes sont réunies:

a) des autorités compétentes ont fait ou ont approuvé une étude du milieu familial des parents adoptifs;

b) les parents de l'enfant ont, avant l'adoption, donné un consentement véritable et éclairé à l'adoption de l'enfant;

c) l'adoption a créé un véritable lien affectif parent-enfant entre l'adopté et l'adoptant;

took place;

(e) the adoption was in accordance with the laws of the sponsor's place of residence and, if the sponsor resided in Canada at the time the adoption took place, the competent authority of the child's province of intended destination has stated in writing that it does not object to the adoption;

(f) if the adoption is an international adoption and the country in which the adoption took place and the child's province of intended destination are parties to the Hague Convention on Adoption, the competent authority of the country and of the province have stated in writing that they approve the adoption as conforming to that Convention; and

(g) if the adoption is an international adoption and either the country in which the adoption took place or the child's province of intended destination is not a party to the Hague Convention on Adoption, there is no evidence that the adoption is for the purpose of child trafficking or undue gain within the meaning of that Convention.

Adoption — over 18

(4) A foreign national who is the adopted child of a sponsor and whose adoption took place when the child was 18 years of

d) l'adoption était, au moment où elle a été faite, conforme au droit applicable là où elle a eu lieu;

e) l'adoption est conforme aux lois du lieu de résidence du répondant et, si celui-ci résidait au Canada au moment de l'adoption, les autorités compétentes de la province de destination ont déclaré par écrit qu'elle ne s'y opposaient pas;

f) s'il s'agit d'une adoption internationale et que le pays où l'adoption a eu lieu et la province de destination sont parties à la Convention sur l'adoption, les autorités compétentes de ce pays et celles de cette province ont déclaré par écrit qu'elles estimaient que l'adoption était conforme à cette convention;

g) s'il s'agit d'une adoption internationale et que le pays où l'adoption a eu lieu ou la province de destination ne sont pas parties à la Convention sur l'adoption, rien n'indique que l'adoption projetée a pour objet la traite de l'enfant ou la réalisation d'un gain indu au sens de cette convention.

Adoption: dix-huit ans ou plus

(4) N'est pas considéré comme

age or older shall not be considered a member of the family class by virtue of that adoption unless it took place under the following circumstances:

(a) the adoption was in accordance with the laws of the place where the adoption took place and, if the sponsor resided in Canada at the time of the adoption, the adoption was in accordance with the laws of the province where the sponsor then resided, if any, that applied in respect of the adoption of a child 18 years of age or older;

(b) a genuine parent-child relationship exists at the time of the adoption and existed before the child reached the age of 18; and

(c) the adoption is not primarily for the purpose of acquiring a status or privilege under the Act.

(5) and (6) [Repealed, SOR/2005-61, s. 3]

Provincial statement

(7) If a statement referred to in clause (1)(g)(iii)(B) or paragraph (3)(e) or (f) has been provided to an officer by the foreign national's province of intended destination, that statement is, except in the case of an adoption where the adoption is primarily for the purpose of acquiring a status or privilege under the Act,

appartenant à la catégorie du regroupement familial du fait de sa relation avec le répondant l'étranger qui, ayant fait l'objet d'une adoption alors qu'il était âgé de dix-huit ans ou plus, est l'enfant adoptif de ce dernier, à moins que les conditions suivantes ne soient réunies:

a) l'adoption était, au moment où elle a été faite, conforme au droit applicable là où elle a eu lieu et, si le répondant résidait au Canada à ce moment-là, elle était conforme au droit de la province de résidence de celui-ci applicable à l'adoption d'un enfant de dix-huit ans ou plus;

b) un véritable lien affectif parent-enfant entre l'adopté et l'adoptant existait avant que l'adopté n'ait atteint l'âge de dix-huit ans;

c) l'adoption ne vise pas principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

(5) et (6) [Abrogés, DORS/2005-61, art. 3]

Déclaration de la province

(7) Sauf si l'adoption vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi, la déclaration visée à la division (1)(g)(iii)(B) ou aux alinéas (3)e) ou f) fournie par la

conclusive evidence that the foreign national meets the following applicable requirements:

(a) [Repealed, SOR/2005-61, s. 3]

(b) in the case of a person referred to in paragraph (1)(g), the requirements set out in clause (1)(g)(iii)(A); and

(c) in the case of a person referred to in paragraph (1)(b) who is an adopted child described in subsection (2), the requirements set out in paragraphs (3)(a) to (e) and (g).

New evidence

(8) If, after the statement referred to in subsection (7) is provided to the officer, the officer receives evidence that the foreign national does not meet the applicable requirements set out in paragraph (7)(b) or (c) for becoming a member of the family class, the processing of their application shall be suspended until the officer provides that evidence to the province and the province confirms or revises its statement.

Excluded relationships

(9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if

province de destination à un agent à l'égard d'un étranger constitue une preuve concluante que ce dernier remplit les conditions suivantes:

a) [Abrogé, DORS/2005-61, art. 3]

b) dans le cas de la personne visée à l'alinéa (1)g), les conditions prévues à la division (1)g)(iii)(A);

c) dans le cas de la personne visée à l'alinéa (1)b) qui est l'enfant adoptif mentionné au paragraphe (2), les conditions prévues à l'un des alinéas (3)a) à e) et g).

Nouveaux éléments de preuve

(8) Si, après avoir reçu la déclaration visée au paragraphe (7), l'agent reçoit de nouveaux éléments de preuve établissant que l'étranger ne remplit pas les conditions visées aux alinéas (7)b) ou c), selon le cas, de sorte qu'il n'appartient pas à la catégorie du regroupement familial, l'examen de la demande de ce dernier est suspendu jusqu'à ce que l'agent fournisse ces éléments de preuve à la province et que celle-ci confirme ou modifie sa déclaration.

Restrictions

(9) Ne sont pas considérées

- (a) the foreign national is the sponsor's spouse, common-law partner or conjugal partner and is under 16 years of age;
- (b) the foreign national is the sponsor's spouse, common-law partner or conjugal partner, the sponsor has an existing sponsorship undertaking in respect of a spouse, common-law partner or conjugal partner and the period referred to in subsection 132(1) in respect of that undertaking has not ended;
- (c) the foreign national is the sponsor's spouse and
- (i) the sponsor or the foreign national was, at the time of their marriage, the spouse of another person, or
- (ii) the sponsor has lived separate and apart from the foreign national for at least one year and
- (A) the sponsor is the common-law partner of another person or the conjugal partner of another foreign national, or
- (B) the foreign national is the common-law partner of another person or the conjugal partner of another sponsor; or
- (d) subject to subsection (10), the sponsor previously made an application for permanent residence and became a
- comme appartenant à la catégorie du regroupement familial du fait de leur relation avec le répondant les personnes suivantes:
- a) l'époux, le conjoint de fait ou le partenaire conjugal du répondant s'il est âgé de moins de seize ans;
- b) l'époux, le conjoint de fait ou le partenaire conjugal du répondant si celui-ci a déjà pris un engagement de parrainage à l'égard d'un époux, d'un conjoint de fait ou d'un partenaire conjugal et que la période prévue au paragraphe 132(1) à l'égard de cet engagement n'a pas pris fin;
- c) l'époux du répondant, si, selon le cas:
- (i) le répondant ou cet époux étaient, au moment de leur mariage, l'époux d'un tiers,
- (ii) le répondant a vécu séparément de cet époux pendant au moins un an et, selon le cas:
- (A) le répondant est le conjoint de fait d'une autre personne ou le partenaire conjugal d'un autre étranger,
- (B) cet époux est le conjoint de fait d'une autre personne ou le partenaire conjugal d'un autre répondant;
- d) sous réserve du paragraphe

permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

Exception

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

Application of par. (9)(d)

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

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

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

Definition of "former Act"

(12) In subsection (10), "former Act" has the same

(10), dans le cas où le répondant est devenu résident permanent à la suite d'une demande à cet effet, l'étranger qui, à l'époque où cette demande a été faite, était un membre de la famille du répondant n'accompagnant pas ce dernier et n'a pas fait l'objet d'un contrôle.

Exception

(10) Sous réserve du paragraphe (11), l'alinéa (9)d ne s'applique pas à l'étranger qui y est visé et qui n'a pas fait l'objet d'un contrôle parce qu'un agent a décidé que le contrôle n'était pas exigé par la Loi ou l'ancienne loi, selon le cas.

Application de l'alinéa (9)d

(11) L'alinéa (9)d s'applique à l'étranger visé au paragraphe (10) si un agent arrive à la conclusion que, à l'époque où la demande visée à cet alinéa a été faite:

a) ou bien le répondant a été informé que l'étranger pouvait faire l'objet d'un contrôle et il pouvait faire en sorte que ce dernier soit disponible, mais il ne l'a pas fait, ou l'étranger ne s'est pas présenté au contrôle;

b) ou bien l'étranger était l'époux du répondant, vivait séparément de lui et n'a pas fait l'objet d'un contrôle.

Définition de « ancienne loi »

meaning as in section 187 of the Act.

Medical condition

118. A foreign national who is an adopted dependent child or is a person referred to in paragraph 117(1)(f) or (g) shall not be issued a permanent resident visa as a member of the family class unless the sponsor has provided a statement in writing confirming that they have obtained information with respect to the medical condition of the child or of the person referred to in that paragraph.

Withdrawal of sponsorship application

119. A decision shall not be made on an application for a permanent resident visa by a member of the family class if the sponsor withdraws their sponsorship application in respect of that member.

Approved sponsorship application

120. For the purposes of Part 5,

(a) a permanent resident visa shall not be issued to a foreign national who makes an application as a member of the family class or to their accompanying family members unless a sponsorship undertaking in respect of the foreign national and those family members is in effect; and

(12) Au paragraphe (10), « ancienne loi » s'entend au sens de l'article 187 de la Loi.

État de santé

118. Le visa de résident permanent ne peut être délivré au titre de la catégorie du regroupement familial à l'étranger qui est un enfant à charge adoptif ou qui est visé aux alinéas 117(1)f) ou g) que si le répondant fournit un document écrit confirmant qu'il a obtenu des renseignements concernant l'état de santé de l'étranger.

Retrait de la demande de parrainage

119. Il n'est pas statué sur la demande de visa de résident permanent au titre de la catégorie du regroupement familial si la demande de parrainage a été retirée à l'égard de l'intéressé.

Parrainage

120. Pour l'application de la partie 5, l'engagement de parrainage doit être valide à l'égard de l'étranger qui présente une demande au titre de la catégorie du regroupement familial et à l'égard des membres de sa famille qui l'accompagnent, à la fois:

a) au moment où le visa est délivré;

(b) a foreign national who makes an application as a member of the family class and their accompanying family members shall not become permanent residents unless a sponsorship undertaking in respect of the foreign national and those family members is in effect and the sponsor who gave that undertaking still meets the requirements of section 133 and, if applicable, section 137.

Requirements

121. The requirements with respect to a person who is a member of the family class or a family member of a member of the family class who makes an application under Division 6 of Part 5 are the following:

(a) the person is a family member of the applicant or of the sponsor both at the time the application is made and, without taking into account whether the person has attained 22 years of age, at the time of the determination of the application;

(b) [Repealed, SOR/2004-167, s. 42]

Requirements for accompanying family members

122. A foreign national who is an accompanying family member of a person who makes an application as a

b) au moment où l'étranger et les membres de sa famille qui l'accompagnent deviennent résidents permanents, à condition que le répondant qui s'est engagé satisfasse toujours aux exigences de l'article 133 et, le cas échéant, de l'article 137.

Exigences

121. Les exigences applicables à l'égard de la personne appartenant à la catégorie du regroupement familial ou des membres de sa famille qui présentent une demande au titre de la section 6 de la partie 5 sont les suivantes:

a) l'intéressé doit être un membre de la famille du demandeur ou du répondant au moment où la demande est faite et, qu'il ait atteint l'âge de vingt-deux ans ou non, au moment où il est statué sur la demande.

b) [Abrogé, DORS/2004-167, art. 42]

Exigences applicables aux membres de la famille qui accompagnent le demandeur

122. L'étranger qui est un membre de la famille et qui accompagne la personne qui présente une demande au titre de la catégorie du regroupement familial devient

member of the family class shall become a permanent resident if, following an examination, it is established that

(a) the person who made the application has become a permanent resident; and

(b) the family member is not inadmissible.

résident permanent si, à l'issue d'un contrôle, les éléments ci-après sont établis:

a) la personne qui présente la demande est devenue résident permanent;

b) il n'est pas interdit de territoire.

IP 5 Operational Manual – Immigrant Applications in Canada made on Humanitarian or

Compassionate Grounds:

11.1. Procedural fairness

Officers must follow procedural fairness in making their decisions. Officers should:

- carefully consider all the information before them;
- inform the applicant when considering extrinsic information, giving the applicant a chance to respond;
- request any additional information needed;
- weigh all the facts according to their degree of importance;
- separate facts which favour a finding of hardship from those that do not; and
- consider the objectives of the Act.

Officers may discuss cases with their colleagues and supervisor to share ideas. However, officers must make their own decisions based on

11.1. Équité procédurale

L'agent doit prendre ses décisions dans le respect de l'équité procédurale, c'est-à-dire:

- tenir soigneusement compte de tous les renseignements dont il dispose;
- informer le demandeur quand il tient compte de renseignements extrinsèques pour donner à celui-ci la possibilité de répondre;
- demander tout renseignement supplémentaire nécessaire;
- soupeser tous les faits selon leur importance;
- distinguer les faits qui appuient l'existence de difficultés de ceux qui ne l'appuient pas;
- tenir compte des objectifs de la *Loi*.

L'agent peut discuter du cas avec ses collègues et son

the facts before them. More information is available in Appendix A - Administrative law principles.

superviseur pour échanger des idées, mais il doit prendre sa propre décision en se fondant sur les faits dont il dispose. De plus amples renseignements se trouvent à l'appendice A – Principes de droit administratif.

11.2. Prolonged stay or inability to leave has led to establishment

There is no hard and fast rule relating to the period of time in Canada but it is expected that a significant degree of establishment would take several years to achieve.

Officers should consider the following factors:

- Are the circumstances that led to the applicant remaining in Canada of significant duration and beyond their control?
- Is there a significant degree of establishment in Canada (see Section 11.3 below)?
- Is, or was, the applicant the subject of a temporary suspension of removal (TSR)?
- To what degree has the applicant cooperated with the Department, particularly with regard to travel documents?
- Did the applicant wilfully lose or destroy travel documents? (Where no valid travel or identity document has been provided, contact the local Removals Unit to determine whether this is due to an applicant's unwillingness to complete a passport

11.2. Séjour prolongé ou incapacité de partir menant à l'établissement

Il n'y a pas de règle absolue sur le temps qu'il faut avoir passé au Canada pour y être bien établi, mais cela devrait prendre plusieurs années.

L'agent doit tenir compte des facteurs suivants:

- Les circonstances qui ont amené le demandeur à rester au Canada ont-elles duré longtemps et sont-elles indépendantes de sa volonté?
- Existe-t-il un degré important d'établissement au Canada (voir la section 11.3 ci-dessous)?
- Le demandeur est-il ou était-il visé par une suspension temporaire des renvois (STR)?
- Dans quelle mesure le demandeur a-t-il coopéré avec le Ministère, surtout en ce qui concerne les titres de voyage?
- Le demandeur a-t-il volontairement perdu ou détruit ses titres de voyage? (Quand aucun titre de voyage ou aucune pièce d'identité valide n'a été fourni, il faut communiquer avec l'unité locale des renvois pour déterminer si cela est dû au fait

application.)

Also refer to Section 5.16 for relevant information on this topic.

12.1. Factors to consider regarding the applicant and their relatives

For applicants with family relationships, the following factors should also be considered:

- whether the applicant could have been a member of the family class had they applied outside Canada; and
- whether a sponsorship was submitted and approved. If so, this is a factor among all of the others that may be considered favourable. Still, lack of a sponsorship does not mean that the exemption request should be refused (see Section 12.2 below).

Factors related to country of origin

- an applicant's links with their country of origin (e.g. the amount of time they resided in their country of origin, their ability to speak the language, return visits since their arrival in Canada and family members remaining in the country of origin); and
- family members' link(s) to the applicant's country of origin, if applicable (e.g. the amount of time spent in applicant's country of origin,

que le demandeur n'a pas voulu remplir une demande de passeport.)

Voir également la section 5.16 pour des renseignements pertinents à ce sujet.

12.1. Facteurs dont il faut tenir compte au sujet du demandeur et des membres de sa parenté

Pour les demandeurs avec liens de parenté, les facteurs suivants doivent également être pris en considération:

- Le demandeur aurait-il pu être un membre de la catégorie du regroupement familial s'il avait présenté sa demande à l'étranger?
- Une demande de parrainage a-t-elle été présentée et approuvée? Dans l'affirmative, il s'agit d'un facteur parmi tous les autres pouvant être considérés comme favorables. Toutefois, l'absence d'un répondant ne signifie pas qu'il faut refuser la demande de dispense (voir la section 12.2 ci-dessous).

Facteurs liés au pays d'origine

- Les liens du demandeur avec son pays d'origine (p. ex. la durée de résidence dans le pays d'origine, la capacité de parler la langue, les visites de retour depuis l'arrivée au Canada, les membres de la famille qui restent dans le pays d'origine).
- Les liens des membres de la

their ability to speak language of the applicant's country of origin, other family members in the applicant's country of origin).

Factors related to current immigration or citizenship status

- the current immigration or citizenship status of each member of the family;
- the applicant's immigration status at the time the family links were formed (i.e. status at the time of marriage, of having children, etc.); and
- if applicant's immigration status was lost after the family links were formed, what was the original status and under what circumstances was the status lost.

Factors related to links with family members

- the effective links with family members (children, spouse, parents, siblings, etc.) in terms of an ongoing relationship as opposed to a simple biological fact of relationship;
- an applicant's place of residence in relation to the family members, particularly their children;
- any previous period of separation (what was the duration and the reason?);
- court order in relation to

famille avec le pays d'origine du demandeur, s'il y a lieu (p. ex. le temps passé dans le pays d'origine du demandeur, la capacité de parler la langue du pays d'origine du demandeur, les autres membres de la famille dans le pays d'origine du demandeur).

Facteurs liés au statut d'immigrant ou de citoyen actuel

- Le statut d'immigrant ou de citoyen actuel de chaque membre de la famille.
- Le statut d'immigrant du demandeur au moment où les liens de parenté ont été formés (p. ex., le statut au moment du mariage, de la naissance des enfants, etc.).
- Si le demandeur a perdu son statut d'immigrant après la formation des liens de parenté, quel était le statut original et dans quelles circonstances a-t-il été perdu?

Facteurs liés aux liens avec les membres de la famille

- Les liens réels avec les membres de la famille (enfants, époux, parents, fratrie, etc.), c.-à-d. les relations actuelles par opposition à la simple parenté biologique.
- Le lieu de résidence du demandeur par rapport à celui des membres de sa famille, surtout de ses enfants.
- Toute période antérieure de séparation (la durée et le motif).
- Une ordonnance de la cour

custody arrangements, if applicable;

- if applicant is the non-custodial parent, have they been exercising their visitation rights;
- information indicated in the family court documents about the family's circumstances;
- the degree of psychological/emotional support in relation to other family members;
- whether the family will have the option of being together in another country or be able to maintain contact; and
- the impact on family members, especially children, if the applicant is removed.

12.2. No sponsorship included in the application

Where an H&C application based on reunification of relatives or applicants with family relationships is not supported by a sponsorship, officers should:

- give the applicant an opportunity to have the sponsorship forms completed or to explain why there is no sponsorship; and
- make the Stage 1 assessment when all the relevant facts are available.

In these cases, officer should consider:

- the reason for the lack of sponsorship (ensuring that it is

par rapport aux arrangements visant la garde, s'il y a lieu.

- Si le demandeur est le parent qui n'a pas la garde, a-t-il exercé son droit de visite?
- Qu'indiquent les documents déposés au tribunal de la famille à propos du contexte familial?
- Le degré de soutien psychologique/affectif par rapport aux autres membres de la famille.
- La famille a-t-elle la possibilité d'être réunie dans un autre pays ou de maintenir le contact?
- L'incidence sur les membres de la famille, surtout sur les enfants, du renvoi éventuel du demandeur.

12.2. Aucune demande de parrainage jointe à la demande

Quand une demande CH fondée sur la réunification des membres de la famille ou sur la présence de liens de parenté n'est pas appuyée par une demande de parrainage, l'agent doit:

- donner au demandeur la possibilité de faire remplir la demande de parrainage ou d'expliquer pourquoi il n'y a pas de parrainage;
- procéder à l'évaluation de l'étape 1 quand tous les faits pertinents sont disponibles.

Dans ces situations, l'agent doit examiner:

not due to lack of information or an oversight on the part of the prospective sponsor). Lack of sponsorship usually falls into one of the three following categories:

- ◆ sponsor unwilling to submit sponsorship;
 - ◆ sponsor self-screened out due to ineligibility; and
 - ◆ sponsorship submitted but refused due to ineligibility of the sponsor.
- whether the reason for lack of sponsorship impacts on any H&C aspects of the application.

Principal applicant is a child yet no sponsorship was included

In addition to the factors outlined above, officers should consider:

- proof of relationship;
- the best interest of the child (see Section 5.14); and
- how custody agreements or court decisions, if any, affect the H&C application.

12.4. Sponsorship of children

Officers should consider the following factors when the principal applicant is a minor being sponsored:

- proof of relationship to the sponsor;

- le motif de l'absence de parrainage (vérifier que ce n'est pas à cause d'un manque d'information ou d'un oubli de la part du répondant éventuel).

L'absence de parrainage s'explique habituellement par l'un des trois motifs suivants:

- ◆ le répondant ne veut pas présenter de demande de parrainage;
 - ◆ le répondant s'est éliminé lui-même parce qu'il n'avait pas le droit de parrainer;
 - ◆ la demande de parrainage a été présentée, mais refusée parce que le répondant n'était pas admissible;
- si le motif de l'absence de parrainage influe sur l'une ou l'autre des circonstances d'ordre humanitaire de la demande.

Le demandeur principal est un enfant et pourtant aucune demande de parrainage n'a été jointe

Outre les facteurs exposés ci-dessus, l'agent doit examiner:

- la preuve du lien de parenté;
- l'intérêt supérieur de l'enfant (voir la section 5.14);
- comment les arrangements visant la garde ou la décision du tribunal, s'il y a lieu, influent sur la demande CH.

12.4. Parrainage d'enfants

L'agent doit tenir compte des facteurs suivants quand le demandeur principal est un mineur qui est parrainé:

- la preuve du lien avec le répondant;

- the best interest of the child; and
- how custody agreements or court decisions, if any, affect the H&C application.

**Adoption of convenience –
Known or suspected**

For information on adoptions of convenience, see Sections 5.8 and 7.8 of OP 3.

- l'intérêt supérieur de l'enfant;
- l'incidence des arrangements visant la garde ou des décisions judiciaires, s'il y a lieu, sur la demande CH.

**Adoption de complaisance –
Connue ou soupçonnée**

Pour des renseignements sur les adoptions de complaisance, voir les sections 5.8 et 7.8 de l'OP 3.

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

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