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The Citizenship & Immigration Law IRPA: Theory vs Practice

La Conférence en droit de l'Immigration et de la citoyenneté LIPR : de la théorie à la pratique

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Update on Family-based and Humanitarian and Compassionate Cases
- Law, Policy and Practice -

Family and Humanitarian & Compassionate Panel

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I. INTRODUCTION

Family Class immigration has been a significant part of Citizenship and Immigration policy for well over three decades. With the introduction of the *Immigration and Refugee Protection Act (IRPA)*, last June it appeared that family class immigration to Canada would have increased prominence. However, while the class has been expanded, the subsequent narrow interpretation of the new Humanitarian & Compassionate ("H&C") program mitigates the impact of the legislative changes.

II. The FAMILY CLASS PROGRAM

Section 3 of the *IRPA* states that one of its objectives: "is to see that families are reunited in Canada". Subsection 12(1) provides that foreign nationals may be selected as members of the Family Class on the basis of the relationship to a Canadian citizen or permanent resident.

The Family Class has been expanded to include a common-law partner, conjugal partner, and dependent children. Specifically excluded from the Family Class are fiancées. However, by amending the definition of the Family Class, the immigration program now provides for the equal treatment under the law of common-law couples of the same or opposite sex.

For spouses and common-law partners in Canada, the *Regulations* have created an In-Canada landing class for sponsored spouses, common-law partners and their dependent children (conjugal partners may not be processed for landing from within Canada). This permits family members who fall within the In-Canada landing class to be processed within Canada eliminating the necessity of filing an application for permanent residence status by the sponsored family member at a Canadian Visa Office abroad. In theory, this change should eliminate the necessity of families to be apart for long periods of time - thus promoting an *IRPA* objective.

The *IRPA* regulations do not set out processing goals for Family Class applications. Processing goals for Family Class applications are found within the Operation Manuals and maintain that spouses, common-law or conjugal partners and dependent children should have the highest priority in processing. Other Family Class members do not fall within the operational priorities.

A. Statutory Requirements and Restrictions

Members of the Family Class

Members of the Family Class are set out at subsection 117(1) of the *Immigration Regulations*. They include a:

- Spouse;
- Common-law or conjugal partner;
- Dependent child including a child adopted overseas;

- Father or mother;
- Grandparent;
- Orphan under 18 if sibling, niece or nephew or grandchild of sponsor;
- Child under 18 adopted in Canada;
- One relative if there is no member of the Family Class who is a Canada citizen, native Indian, or permanent resident or who could be sponsored.

No foreign national shall be considered a spouse, common-law partner, a conjugal partner, or an adopted child of the person if the above-noted relationship is not genuine or was entered into primarily for the purpose of acquiring any status or privilege under the *Act* or *Regulations*. (R4)

Dependent Children

The Regulations also broaden the definition of a dependent child.

R2(b)(i) defines "dependent child" as children under 22 years of age (increased from 19 years), who are not a spouse or in a common-law relationship at the time of sponsorship and at the time the immigration visa is issued, and when they arrive in Canada.

R2(b)(ii) indicates that children over the age of 22 may be considered dependent children if they have been financially dependent on their parents since before the age of 22 or if the child became a spouse or common-law partner before the age of 22, and since becoming a spouse or common law-partner - and, since before the age of 22 or since becoming a spouse or common-law partner, as the case may be, have been a full time student.

In order to qualify as a student the child must since before turning 22, be a student continuously enrolled in and attending a post-secondary institution that is accredited by the relevant government authority, and is actively pursuing a course of academic, professional or vocational training on a full-time basis. Note that Visa Officers may question applicants about their education at an interview to determine whether or not the person is a full-time student. The decision of the Federal Court of Appeal in *Sandhu* v. *Canada (Minister of Citizenship and Immigration)* (2002), 211 D.L.R. (4th) 567 makes it quite clear that Visa Officers can make qualitative assessments in their determination of whether or not a person is a full-time student.

R2(b)(iii) confirms that children 22 years of age or older who have been dependent substantially on the financial support of the parent(s) since before the age of 22 and are unable to be financially self-supporting due to a physical or mental condition, may also be considered dependent children.

The increase in the age of a dependent child has allowed children to remain with their families regardless of their activities if under 22 years of age. This change resolves a problem that arose in the past in countries that have mandatory military service upon turning 18 years of age. In such cases these children were not allowed to be included in the Family Class. *IRPA* now allows for these children to be members of the Family Class as long as the military service ends prior to the child turning 22 years of age.

It appears from the Immigration Manual on Overseas Processing that the lock-in for age is based on the day that the responsible Case Processing Centre receives a sponsorship application. The lock-in date is a reference point used to freeze certain factors for the

purpose of processing applications. However, as *IRPA* allows the Governor in Council to apply changes in regulations to applications already submitted, applications may be negatively affected notwithstanding the lock-in date.

Common-Law or Conjugal Partner

The traditional definition of spouses has been expanded to include same sex couples as well as common-law and conjugal partners.

Common-law partners can now be sponsored and are included in the Family Class. A Common-law partner in relation to a person is an individual who is cohabiting with the person in a conjugal relationship, having so co-habited for at least one year. Even persons who are separated, but not divorced may be considered common-law partners provided their marriage has broken down and they have cohabited with the common-law partner for at least one year.

An individual can be sponsored as a conjugal partner if that person is residing outside of Canada and the sponsor has maintained with that person a conjugal relationship for at least a one-year period. Cohabitation is not a requirement for a conjugal relationship. Conjugal partners are similar to common-law partners; however, they have not yet merged their households to the same extent, as they have not been able to cohabit continuously and permanently. The applicant must be able to explain why the couple has not been able to cohabit continuously for one year.

The key elements to identifying these relationships can be demonstrated through documentation that establishes a mutual commitment to a shared life to the exclusion of other conjugal relationships. The Overseas Processing Manual for Processing Members of the Family Class has attempted to set our characteristics that should be present in all conjugal relationships:

- Mutual commitment to a shared life;
- Exclusivity – cannot be in more than one conjugal relationship at a time;
- Intimacy – commitment to sexual exclusivity;
- Interdependence – physically, emotionally, financially, socially;
- Permanence – long –term, genuine and continuing relationship;
- Present themselves as a couple ("here's my other half
- Regarded by others as partners;
- Caring for children together (if there are children).

Assessment of these relationships is fact-based and as such the onus is on the applicant to prove the facts in support the relationship. The practitioner should therefore provide the names of these friends and family; the details of the communication between the couple; frequency of visits to each other; whether or not financial support is sent to the applicant and whether or not either partner has ever been in a common-law or conjugal relationship before in his or her submission.

Excluded Relationships

Sponsors must be cognisant of the length of sponsorship agreement that they have entered into on behalf of a Family Class member. Sponsors of spouses, common-law partners or conjugal partners who have existing undertakings outstanding for a former spouse, common-law partner or conjugal partner are excluded from entering into a new

sponsorship undertaking until the period of the previous undertaking has lapsed. [R117(9)(b), R125(b)]. This applies to both Canadian citizens and permanent residents who wish to sponsor a family member.

A second excluded group of people from the Family Class are those whom the sponsor chose not to list when applying for permanent residence status or who were not examined. Thus, if a sponsor previously made an application for permanent residence, became a permanent resident and, at the time of that application, had dependants who were non-accompanying family members who were not examined they cannot be included as a member of the Family Class. [R117(9)(d)]

A third excluded group includes foreign nationals who are the sponsor's spouse, common-law partner or conjugal partner but are under 16 years of age.[R117(9)(a)]

Sponsors

A sponsor is a Canadian citizen or permanent resident who is at least 18 years who has filed an application to sponsor a member of the Family Class or a member of the spouse or common-law partner in Canada class. [R130(1)] Under *IRPA* the age of a sponsor has been reduced from 19 to 18 years of age.

A sponsor, who is a Canadian citizen and does not reside in Canada, may still sponsor the application of a foreign national pursuant to the Family Class provided that the sponsor will reside in Canada when the foreign national becomes a permanent resident. [R130(2)] Sponsors must provide evidence that they will reside in Canada after the member of the Family Class becomes a permanent resident. Acceptable evidence may include one or more of the following:

- Letter from employer relocating the sponsor to Canada;
- Letter of acceptance to a Canadian educational institution;
- Proof of having purchased a home in Canada.

Sponsorship by Canadian citizens living abroad must be submitted to the central processing centre in Mississauga, in Canada and not to the visa office.

Bars to Sponsorship

Sponsors are not eligible to sponsor if they are subject to any of the bars found within R133. R133(1)(e) now prevents individuals from being sponsors who have been convicted of sexual offences or of offences relating to family violence. A sponsor convicted of a sexual offence or an offence involving family violence cannot sponsor unless five years have passed since completion of the sentence or a Pardon has been granted.

For convictions outside of Canada, prospective sponsors must show that at least five years have expired since completion of the sentence, that they have been rehabilitated or that there has been an acquittal. [R133(3)]

If the prospective sponsor is in receipt of social assistance other than for a disability, this will also bar him or her from being a sponsor. The sponsor may be eligible once social assistance is discontinued. Note however, that this bar to sponsor may be waived for humanitarian and compassionate reasons.

A prospective sponsor is ineligible if detained in a penitentiary, jail, reformatory or prison. As well, where the prospective sponsor is in default of any previous undertaking submitted or support obligations ordered by a court he or she is ineligible to sponsor.

If during the sponsorship process the sponsor becomes subject to an application for revocation of citizenship, has a report written against him pursuant to *IRPA* or is charged with the commission of an offence punishable by a maximum term of imprisonment of at least 10 years, the sponsorship application will be suspended pending a final determination.

Financial Requirements

The ability of the sponsor to meet the minimum income requirements is mandatory unless the sponsor is sponsoring a spouse, common-law partner, or conjugal partner or a dependent child where the child has no dependent children of their own. [R133(4)]

The sponsor's income must meet the minimum necessary income requirements as identified by Statistics Canada in their Low Income Cut Off levels period. Sponsors will have to provide their latest Notice of Assessment from the Canada Customs and Revenue Agency. If such notice is not available, then the sponsor will have to provide evidence that they meet the applicable minimum income for the 12-month period immediately preceding the date of the sponsorship application.

Misrepresentation

S40 of the *IRPA* introduces a new provision with respect to misrepresentation. If a permanent resident sponsor misrepresents a material fact on their application to sponsor, they may fall within the scope of section 40. As a result, the foreign national who is being sponsored may be found inadmissible and the sponsor, who is a permanent resident, could be removed from Canada. Canadian citizens who misrepresent can on conviction be fined to $100,000 Canadian dollars or imprisoned for a term of not more than 5 years.

Length of Undertaking

The sponsor's undertaking becomes effective from the day the sponsored family member enters Canada until the end of the specified period of the undertaking. The duration of the undertaking varies depending on the person who is being sponsored. For all spouses, common-law partners and conjugal partners the term of the undertaking is for three years from the date of the foreign national becoming a permanent resident. For dependent children of sponsors or of sponsors' spouses, common-law partners or conjugal partners, the undertaking is for a period of 10 years or age 25 whichever comes first from the date of becoming a permanent resident. Thus, sponsors who enter into agreements for a dependent child under 15 will be responsible for the undertaking for a period of 10 years, while the sponsorship of a dependent 20 years will last only five years.

Appeal Rights

Sponsors have appeal rights if the permanent resident visa is refused for Family Class applicants. However, there is no right of appeal under section 64 if an applicant is inadmissible on grounds of security or violating human rights or international rights. Furthermore, an applicant for permanent residence pursuant to the Family Class who

was refused on grounds of misrepresentation does not have appeal rights unless the applicant is the spouse, common-law partner or child of the sponsor.

Adoption

Under *IRPA* the intent of the Family Class program with respect to adoptions has been defined much stricter to ensure that the best interests of the child are protected. In Canada, adoption and child welfare falls within provincial and territorial jurisdiction. As such *IRPA* has attempted to integrate provincial responsibilities for this matter within immigration procedures. In addition, Canada is a signatory to the *Hague Convention on Protection of Children and Cooperation* in respect of Inter-Country Adoption. The Hague Convention on adoption applies to immigration cases in which both Canada and a child's country of residence are signatories. In such cases, there are specific requirements that must be met that may effect immigration processing.

Where the *Hague Convention on Adoption* does not apply, an adoption must have been undertaken in accordance with the intent and spirit of the Hague Convention on adoption. What this means is that there must be no evidence of child trafficking or that there was undue gain in the process (a child was sold or that improper financial gain took place). [R117(3)(g)]

In defining the "Best interests of the Child" *IRPA* has set out procedures to ensure that the best interests of the child are protected. They include the following:

- a competent authority has conducted or approved a home study of the adoptive parents;
- before the adoption, the child's parents gave their free and informed consent to the child's adoption;
- the adoption creates a genuine parent-child relationship;
- the adoption was in accordance with the laws of the place where the adoption took place;
- the adoption was in accordance with the laws of the sponsor's place of residence and, if the sponsor resided in Canada at the time 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;
- if the Hague Convention applies, compliance is rec

As provincial approvals may be necessary it is important to check with the provincial authority for adoption prior to initiating any type of adoption process. For example, in Ontario it is an offence for an Ontario resident to leave the province to adopt internationally or finalize an international adoption without making an application to adopt with a licensed international adoption agency. If the procedures pursuant to Ontario laws are not followed the province will not issue a letter to support the adoption, which will not allow immigration officials to process the application.

As with all applications, Immigration Officers must be satisfied that the adoption was not undertaken primarily in order to gain access to Canada. There must be no evidence that could make a reasonably prudent person conclude that an adoption was of convenience and is not *bona fide*.

IRPA also allows for the sponsorship of children who are adopted after reaching the age of 18. There are only 3 conditions in such cases which are:

- the adoption must be in accordance with the laws of the place where it took place;
- a genuine parent-child relationship must have been established BEFORE the applicant turned 18 years of age and continues to exist; and
- the adoption was not undertaken primarily in order to enter Canada. [R117(4)]

Health Grounds, Medical Inadmissibility

As per S.38(1) (a) (b) and(c) of *IRPA*, foreign nationals are inadmissible on health grounds if their health condition is,

- likely to be a danger to public health;
- likely to be a danger to public safety;
- might reasonably be expected to cause excessive demand on health or social services.

If an individual however is determined to be a member of the Family Class and to be the spouse, common-law partner or child of a sponsor within the meaning of the *Regulations*, then they are exempted from meeting the health grounds due to excessive demand on health and social services. This is a new provision within *IRPA* and is consistent with its stated objectives.

B. The Application Process

The application process, including the initial application forms and the destination where applications are filed, differ depending on who is being sponsored, whether or not the sponsored family member is in Canada or abroad, and if in Canada, their status in the country.

Spouse or Common-law Partner in Canada Class

Spouses or common-law partners of Canadian citizens or [illegible]ent residents who are living together in Canada are eligible to apply in this cl[illegible]ote however that the applicant must have legal temporary residence status as a visitor, worker, or student.

The processing in Canada of spouses or common-law partners and their dependent children requires the filing of joint applications. A "Joint Application" involves the simultaneous filing of both a sponsorship application (IMM 1344A), and a permanent resident application (IMM 0008). The Case Processing Centre in Vegreville, Alberta, is responsible for processing applications filed pursuant to the Spouse or Common-law Partner in Canada Class.

Processing of the application will only commence when the Case Processing Centre in Vegreville has received both applications completed and signed with the appropriate processing fees. As indicated in R10, applications must also include all information and documents required by the Regulations, as well as any other evidenced required by the Act. The 'required supporting documentation is identified in the sponsorship and permanent resident application packages.

Approval in Principal

CPC-Vegreville is charged with assessing the sponsors' eligibility to sponsor and making a determination concerning the application for permanent residence. Applications requiring further investigation will be forwarded to a local CIC office for final decision. Once an individual is approved in principal as a member of the In-Canada Family Class, they may apply for a work permit or study permit while their application for permanent residence status continues to be processed.

Spouses, Common-Law partners, Conjugal Partners and Dependent Children Outside of Canada

The "Joint Application" process is also applicable when a Canadian citizen or permanent resident is sponsoring a spouse, common-law partner, conjugal partner and/or a dependent child residing outside of Canada.

In such instances, however, the application to sponsor (IMM 1344A), the permanent resident application (IMM 0008), all supporting documentation and the requisite fee must be filed at the Case Processing Centre in Mississauga. After rendering a decision with respect to the sponsorship application, CPC-Mississauga will forward the application for permanent residence with the supporting documentation to the appropriate visa office for further processing.

Other Members of the Family Class

Sponsorship applications for all other family members involve filing the completed application to sponsor (IMM 1344A), all supporting documentation and appropriate fee at the Case Processing Centre in Mississauga. Following the approval of the sponsorship application a permanent resident application package will be sent to the sponsor. Within 12 months of the positive sponsorship decision, the sponsored relative abroad must forward the completed application for permanent residence with all requisite documentation to the appropriate visa office.

Assessing the Permanent Residence Application

In assessing the permanent residence application, the Immigration Officer will want to insure that the relationship between the sponsor and spouse, common-law or conjugal partner is genuine and/or that the dependent child falls within the definition provided in the *Regulations*.

Establishing the Relationship

Citizenship and Immigration Canada, pursuant to Regulation 4 must be satisfied that the relationship is not one of convenience. The following documentation may assist in demonstrating the genuinous of the relationship between the sponsor and spouse, common-law or conjugal partner:

- Family memberships, medical plans, documentation from institutions that indicates recognition as a couple;
- Marriage certificate, wedding invitations, commitment ceremony certificate, domestic partnership certificate;

- Joint ownership of possessions, joint utility bills, lease/rental agreement, joint mortgage/loan documents, property title, joint bank statements or credit cards;
- Correspondence addressed to either or both parties at the same address;
- Documents showing travel together, long distance phone bills, letters;
- Insurance policies (documents naming the partner as a beneficiary), wills, powers of attorney;
- Significant photographs throughout the term of the relationship;
- Statements of support from family members, employers, religious leaders, bank managers, etc.

Additional information concerning the following is also useful:

- Duration of the relationship and how the partners met;
- Long term planning involved in the relationship;
- The knowledge each has of the other's background and family situation; and
- History of marital or other relationships.

Establishing Full Time Student and Financial Dependency

Significant documentation must be submitted to establish that a child over the age of 22 falls within the definition of a dependent child.

Documentation evidencing that a child over 22 is a full-time student may include:

- Letter from university or college indicating program of study, confirming that the program is full-time and specifying the duration of time the individual has been enrolled in the program;
- Copy of course curriculum or university/college brochure;
- Copy of transcripts; and
- Tuition receipts.

Documentation to establish that a child over 22 is substantially supported by his or her parent(s) may include:

- Letters from education institution confirming that the parents have paid all or most tuition and other costs;
- Copies of cancelled cheques in the parents name for tuition or room and board;
- Bank letter confirming that parents have consistently transferred money to child's account.

III. HUMANITARIAN AND COMPASSIONTE CASES

Unlike the family based provisions of *IRPA*, in considering an H&C application, bear in mind that the H&C process is highly discretionary. S25(1) of *IRPA* is the legislative authority for H&C cases. It sets out in broad language, the Ministerial discretion required to overcome situations where an applicant is inadmissible or does not meet the requirements of the *Act*. Immigration Manual IP 5 states that "this discretion should not be seen as conflicting with other parts of the *Act* or *Regulations* but rather as a complementary provision enhancing the attainment of objectives of the *Act*". In reminding Officers of the balance between discretion and consistency the Manual also states that: "the legislation does not provide any explanation or guidance about what

constitutes humanitarian and compassionate grounds. Delegated persons have full authority to make this decision".

Applicants, and their counsel, determine what they feel are the most compelling circumstances to put forward. For the purposes of an H&C application, the applicant's written submissions should therefore be comprehensive containing all of the information in support of the case. As officers are instructed to weigh all the relevant evidence in making their decision, the practitioner should therefore be prepared to present as many facts and supporting documentation as can benefit the applicant's position.

A. Statutory Requirements And Restrictions

S.25(1) of the *IRPA* allows for the assessment of applications who are seeking an exemption from the permanent resident visa requirement and an exemption from certain requirements for becoming a permanent resident of Canada. R66 requires that a request made by a foreign national under S.25(1) be in writing, be accompanied by an application to remain in Canada, or in the case of a foreign national outside of Canada, an application for a permanent Resident visa.

Applicants clearly bear the onus of satisfying the decision-maker that their personal circumstances are such that the hardship of having to obtain a permanent resident visa from outside of Canada would be 1.) unusual and undeserved or ii.) disproportionate. At the crux of the H&C Application is the establishment of "unusual or undeserved" hardship: 'unusual' in that it is not contemplated in the Act and 'undeserved' in that it is typically beyond the applicant's control. Where this threshold is not met, applicants and their counsel can still argue that there would be a disproportionate impact on the applicant due to their personal circumstances should they be required to apply form outside of Canada.

Step 1a& b – Exemption for Visa Requirement and Exemption from Requirements for becoming a Permanent Resident

A cornerstone of *IRPA* is that prior to arrival on Canada persons who wish to live permanently in Canada must submit their application outside Canada and obtain a permanent resident visa. The *IRPA* and the Regulations set out the circumstances in which foreign nationals can submit an application form within Canada for permanent residence. To be eligible, a foreign national must be a member of a class set out in R72(2). As discussed earlier, sponsored spouses and common-law partners who have temporary status in Canada are permitted by regulation to make an application from within Canada and are therefore not H&C cases. Possible H&C cases would then include:

- Sponsored family applicants outside of the family class;
- Spouses and common-law partners without legal status in Canada; and
- Other categories (i.e.: *de facto* family members, non-sponsored parents and grandparents, and former Canadian citizens)

Under *IRPA*, any foreign national who is inadmissible or does not meet the requirements of the Act or *Regulations* may make a written request for consideration under S25(1) of

the Act for an exemption from the permanent resident visa requirement based on H&C or Public policy grounds.

Where applicable, a sponsorship in support of the application should accompany the application as it may be considered in conjunction with all other factors presented to the decision-maker. However, sponsorships accepted in these circumstances are not legal requirements as they are neither in accordance with the Act or regulations and the applicant is not technically part of the family class.

Sponsored Family Applicants Outside the Family Class

While all H&C applications are assessed using the criteria of undue, undeserved or disproportionate hardship the following is also considered in these types of cases:

- Whether the applicant would have been a potential member of the family class had they applied form outside of Canada;
- Whether a sponsorship has been submitted and approved;
- Canada's interest in maintaining and protecting the health, safety and good order of Canadian society; and
- The degree of establishment in Canada.

Other considerations will include the applicant links to the country of origin, and the family member's links to the country of origin.

Spouses and Common-law Partners Without Legal Status

These cases, like all other H&C cases are assessed using the criteria of undue, undeserved hardship. The reviewing officer will also look to the following:

- the bona fides of the marriage or common-law relationship;
- the legality of the marriage;
- the circumstances and the timing of the marriage or common-law relationship (For example, did the marriage take place before or after the applicant was refused a visitor extension or when removal was imminent);
- The length of the relationship;
- Whether there are children born of the relationship;
- The religious, social and cultural norms of the commun
- Prior interface with CIC (For example, prior marriage of convenience, refused applications or misrepresentation).

Marriage or the existence of a common-law relationship is not automatically sufficient grounds for a successful H&C decision. In fact, the Immigration Manual IP5 clearly states that, in these circumstances, couples should anticipate a separation during immigrant processing.

Parents and Grandparents (whether sponsored or Not)

Family members may submit an H&C application either with or without a sponsorship Undertaking. The following factors will also be taken into consideration:

- Proof of relationship;
- The hardship that would occur if the application for visa exemption was refused;

- Prior information provided to CIC/CPC (i.e.: pertaining t a Visitor Visa request);
- The level of interdependency;
- Support available in the home country;
- Whether the applicant is able to work; and
- The degree of establishment in Canada.

De Facto family Members

De facto Family members are persons who do not meet the definition of a family class member. They are, however, in a situation of dependence that makes them a *de facto* member of a nuclear family in Canada. Examples would include a son or daughter, or brother or sister left alone in the country of origin without family of their own, or an elderly aunt or uncle or unrelated person who has resided with the family for a long time. Immigration Manual IP 5 indicates that a key fact for the Immigration Officer to ascertain is the difficulty that the applicant would have in meeting financial or emotional needs without the support or assistance of the family unit in Canada. Separation in these circumstances of genuine dependence may be grounds for a positive H&C decision.

The following factors will also be taken into consideration:

- Whether the dependency is bona fide;
- The level of dependency;
- The stability of the relationship;
- The length of the relationship;
- The ability and willingness of the family to provide support;
- The applicant's alternatives outside of Canada;
- Documentary evidence about the relationship (i.e.; joint bank accounts or real estate holdings, insurance policies, letters from family and friends); and
- The degree of establishment in Canada.

Sponsorship

An H&C application based on a family relationship is normally supported by a sponsorship application. Sponsorship applications should be submitted at the same time as the H&C Application and sponsorship decisions are made before consideration of the H&C request. Lack of sponsorship does not mean that the H&C application is automatically refused. But it is a factor to be taken into consideration and may ultimately affect the applicant's ability to become a permanent resident if they are ultimately determined inadmissible for financial reasons.

Former Canadian Citizens

In these instances where former Canadian citizens request landing on H&C grounds, the following non-exhaustive factors may be considered in addition to the standard criteria:

- How and why the applicant lost Canadian citizenship;
- The strength of cultural and emotional ties to Canada;
- Whether there are close family members in Canada;
- Whether there are close family, friends and support in another country;
- The degree of establishment in Canada; and
- The hardship that the applicant would experience if the application was refused.

Officers will, of course be expected to ensure, at the onset that the applicant was, in fact, a Canadian citizen and that he or she subsequently lost his or her citizenship. As such, the practitioner should provide written confirmation of same, provided from the Citizenship Registry Office in Sydney Nova Scotia, in the submission package.

Best Interest of the Child

IRPA provides for consideration of the best interest of the child. In the H&C context, Officers are required to reasonably consider the best interest of children affected by the H&C request and determination. Here the practitioner should consider preparing materials from the affected child's point of view. In turn, such materials are to be considered bearing in mind the child's age and maturity. Note however that although Immigration Manual IP 5 references principles of international law it clearly cautions Officers that the best interest of the child is only one of many important factors in making an H&C decision. Specifically, officers are to weigh and balance the interests of the individual facing removal and the impact of this removal on their family members.

Prolonged Stay in Canada Leading to Establishment

The key to success in these cases is to demonstrate hardship in that that the applicant has been in Canada for a significant period of time because circumstances beyond his or her control. That is, circumstances in the home country (i.e. war or civil unrest) have prevented his or her return. The degree of establishment may play a determinative role in the following types of cases:

- Parents/grandparents not sponsored;
- Separation of parents and children (outside the family class);
- *De facto* family members;
- Prolonged inability to leave Canada has led to establishment;
- Family violence; and
- Former Canadian citizens.

Factors to be considered would include:

- the applicant's employment history;
- whether a pattern of sound financial management exists;
- the applicant's integration into the community;
- any professional, linguistic or other study that the applicant has undertaken that illustrates integration;
- the applicant's civil record in Canada (prior encounters with the criminal justice system)

Where the period of inability to return home is significant and there is evidence of a significant degree of establishment in Canada, these factors may yield a favourable H&C decision.

Step 2 - Admissibility

After a positive H&C decision, the actual assessment of the Permanent Residence application takes place. At this stage is the determination of whether the applicant

meets the requirements of the *Act* and *Regulations* and is admissible. Issues of inadmissibility may arise in a number of circumstances including the following:

- S.39 Financial inadmissibility;
- Inadmissibility of Overseas Family Members;
- Medical inadmissibility; or
- Background and criminal inadmissibility.

Although an inadmissible foreign national may submit an H&C application, a positive decision to waive the visa requirement and certain selection criteria does not overcome admissibility requirements. If after a positive H&C decision is made, it is determined that the foreign national is in fact inadmissible, the application will be refused.

Financial Inadmissibility

The final determination is delayed until the end of the application process in order to allow the applicant an opportunity to take advantage of employment opportunities that come with the positive H&C decision and a work permit.

Admissibility of Overseas Family Members

Overseas family members are required to undergo background or criminal checks as a prerequisite to approving the principal applicant for Permanent Residence. An inadmissible family member, whether accompanying or not, inside of outside of Canada, renders the principal applicant inadmissible. The inadmissibility of family members, whether accompanying or not is considered in conjunction with all other factors of the case. Officers are, however, delegated the authority to waive the requirement that non-accompanying family members be examined in order for a foreign national to become a permanent resident in S. 25(1) cases.

Medical Inadmissibility

After a positive H&C decision is made and no inadmissibility is apparent, applicants and their family members listed on the application for Permanent Residence undergo a medical examination. The exemption in S38(2) for excessive demand is specific to members of the family class ands convention refugees. Applicants and their family members who apply for permanent residence under H&C cannot, therefore benefit from this exemption. However, where an applicant is the subject of a medical inadmissibility opinion, the Officer must inform the applicant of the opinion and provide him or her with an opportunity to respond.

Background and Criminal Inadmissibility

Criminally inadmissible applicants can apply for rehabilitation if the conviction was outside of Canada. If the conviction was within Canada the practitioner should consider an application for a pardon.

Where criminal charges have been laid but are still outstanding Immigration Manual IP5 instructs Officers to consider the seriousness of the charge, all other favourable factors of the case, and whether there is a family connection i.e. an outstanding murder charge of a family member. In situations where the charge is of a serious nature and it will be some time before the matter is resolved, or family members are involved the application is

likely to be refused. On the other hand, where the charge is relatively minor i.e.: shop-lifting and other factors of the case are favourable; the Officer may conclude that the latter outweighs the detrimental impact of the former.

B. The Application Process

All H&C applications are sent to CPC - Vegreville. The basic requirements of the application are:

- Completed and signed application forms – Request for exemption from Permanent Resident Visa Requirement [IMM 5001], Supplementary Information –H&C cases[IMM5283] Document Checklist – H&C Cases[IMM 5280];
- A presentation of the facts in support of the hardship; and
- Proof of payment of the requisite fees.

Incomplete applications will be returned unprocessed to the applicant.

If a positive H&C decision is made; the entire application is processed at the CPC. However, where Vegreville Delivery Agents or Service Delivery Specialists determine that they can not make a decision – the case is complex or requires an in depth assessment of bone fides or degree of hardship, a personal interview is required, or a refusal is a possible outcome - the application is then referred to a CIC Office where Officers will make the decision.

Once receipted-in at CPC-Vegreville, an application to remain in Canada on H&C grounds is comprised of two steps:

- The H&C assessment (for exemption for the Permanent residence visa requirement);
- Assessment of the Application for Permanent Residence in Canada.

In the first step, the decision-maker decides whether the foreign national should be permitted to apply from within Canada and whether the foreign national should be exempted from the selection criteria related to becoming a permanent resident from within Canada. Where a positive determination is made, the applicant is then exempted from both the normal requirement to obtain a permanent resident visa set out at S11(1) and, where required, from certain selection criteria set out at R72(1)(a)(c)(d) to facilitate processing of the application from with in Canada. In essence, a successful H&C application at this stage allows the foreign national to overcome the normal visa requirement and the legislated immigration class restrictions.

In the second step, the decision-maker moves toward a decision to confirm permanent residence. In order to become a permanent resident the applicant must still meet the requirements for permanent residence set out in R68, including that the applicant (and family members – where applicable – whether accompanying or not) are not otherwise inadmissible. The Officer is to assess all information relating to the requirements and admissibility of the applicant during the period up to and including the permanent residence interview. Note that a negative decision can be made at any time if the applicant or the applicant's family members are found to be inadmissible.

Quebec Process

Provincial approval is required for H&C applications when the applicants:

- Are not members of the family class;
- Will be living in a province that has entered into an agreement giving it sole responsibility fort the selection of some classes of immigrants.

Interviews

According to Immigration Manual IP5 the right to be heard does not extend to a personal interview or hearing. Moreover, CIC takes the position that where a personal interview is required; there is no right for counsel to attend. However, in practice, counsel is permitted to attend when available on the date set for interview.

Reasons and Appeal

CIC takes the position that unless specifically directed by statutory authority, written reasons are not required. By this logic, in the absence of a statutory right to reasons for H&C cases, a written decision need only state that there were insufficient H&C grounds for exercising discretion. Pursuant to S.65there is no appeal based on H&C considerations unless it is decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

Removal Order

Foreign nationals under a removal order who submit a properly completed H&C application are entitled to a decision, however, there is no requirement that CIC delay implementation for the removal order unless a positive determination has been made during step 1, the H&C assessment. [R239] However, after a positive H&C decision has been rendered, a removal order can be stayed as per R233 until the step 2 decision - whether to grant Permanent Residence- is made. The stayed removal order is not a barrier to the permanent residence unless it is related to inadmissibility.

Removal Prior to Determination of H&C

Where the H&C assessment is not completed prior to the applicant's removal from Canada the H&C application should still be considered. The applicant will be informed of the decision in writing and if it is approved, and the applicant is otherwise admissible to return to Canada, he or she will be permitted to re-enter for processing.

Applicant's Departure after a Positive H&C Decision

There is no requirement to re-admit applicants who have received a positive H&C decision and now seek to re-enter Canada to finalize the application. Where such applicants are admissible, re-entry may be granted by the issuance of a Visitor Record valid until the anticipated date of permanent residence.

Positive H&C Decision After Removal

Applicants who receive a positive H&C decision after removal and not otherwise inadmissible, will be allowed to return to Canada. In these cases, CIC/CPC- Vegreville

sends an e-mail to the appropriate visa office informing it of the decision. Once the visa office has verifies that identity, security, criminal and medical checks are complete and valid it:

- Issues a Temporary Resident Permit (TRP);
- Notifies CIC/CPC Vegreville that the permit has been issued; and
- Advises the applicant to contact CIC-CPC – Vegreville upon return to Canada in order to resume processing.

However, where the applicant is found inadmissible or the Visa Office is reluctant to issue the TRP, the Visa Office informs CIC- CPC -Vegreville and together they determine the outcome.

IV. CONCLUDING REMARKS

IRPA's Family Class provisions reflect a greater understanding of families and the types of barriers that they have encountered when making an Application for Permanent Residence in the past. For instance, the provisions that allow for the inclusion of older children represent a legislative shift that is consistent with the *IRPA*'s purported objective of family reunification. However, the new Humanitarian and Compassionate provisions, although provided for in broad language in the *Act* are highly discretionary – leaving much to the decision-maker. Moreover, the Immigration Manual, provided by the department as guidance for decision-makers, promotes a restrictive approach to discretionary decision making. As such, there is good reason to believe that the new H&C program represents something of a counter-shift - away form facilitating the reunion of families and others.