



SUBMISSION ON 117(9)(d)

1. Introduction

In June 2002, as part of the changes introduced with the *Immigration and Refugee Protection Act*, the definition of a member of the family class was amended to exclude certain family members. Under 117(9)(d) of the Regulations, a person is not a member of the family class, and hence cannot be sponsored, if they were not examined by a visa officer when the sponsor immigrated to Canada.

Specifically, R. 117(9)(d) excludes a person if:

the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.¹

The following are some examples of family members who have been excluded as a result of this regulation:

- A man immigrates to Canada without knowing that a woman has given birth to his child. According to the immigration laws, that child is not his family member and therefore cannot be sponsored.
- A woman who immigrates to Canada is pressured by family or others not to mention a child she has had out of wedlock. According to the immigration laws, that child is not her family member and therefore cannot be sponsored.
- A refugee is resettled to Canada. Shortly before leaving, she gets married. Since she lives in a refugee camp, she has no way of contacting the Canadian visa officer. The people to whom she can speak advise her to get to Canada and then apply to sponsor her husband. She arrives in Canada pregnant. According to the immigration laws, her husband is not a family member and therefore cannot be sponsored.
- A man is selected as an economic immigrant to Canada. A week before he leaves, he marries his fiancée, assuming that he can apply to sponsor her once he arrives in Canada. After he arrives in Canada he learns that according to the immigration laws, his wife is not a family member and therefore cannot be sponsored.
- A man comes to Canada and applies for refugee status, which is granted. Although he has reported that he is married in his refugee claim forms, when he applies for permanent residence he does not include his wife on the form as he does not have enough money to cover her processing fee. He speaks little English or French, and is assisted in filling out the form only by a friend with no legal experience. Under 117(9)(d), his wife is not a family member and therefore cannot be sponsored.

¹ In July 2004 an exception was added at R. 117(10) if the visa officer had decided that the family member did not need to be examined. This exception was intended to apply in particular to refugees who reported a family member but they couldn't be examined, for example, because their whereabouts were unknown. Canada Gazette, Vol. 138, No. 16 — August 11, 2004. <http://canadagazette.gc.ca/partII/2004/20040811/html/sor167-e.html>

Because the sponsored person is excluded from the family class, an appeal to the Immigration Appeal Division from refusal of the sponsorship application can only address the question of whether the provision was correctly applied. Humanitarian factors, which are frequently critical in sponsorship appeals, cannot be considered.

The excluded family member provision is having devastating consequences on families who are kept divided, potentially for ever, because of circumstances beyond their control or an honest mistake. Worst of all, children are being made to suffer separation from a parent.

2. International obligations

As a party to the Convention on the Rights of the Child, Canada has an obligation to facilitate family reunification and to give a primary consideration to the best interests of the child:

“[...] applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner” Convention on the Rights of the Child, Art. 10

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” Convention on the Rights of the Child, Art 3(1)

117(9)(d), which keeps children separated from their parents and fails to give primary consideration to their best interests, puts Canada in violation of its international obligations.

3. Government rationale for 117(9)(d)

The government has justified the introduction of the excluded family member provision on the following grounds:

a) The need to ensure honesty

According to CIC’s manual chapter OP2 (Processing members of the Family Class), the intent of the excluded family member provisions is “to ensure that persons whom the sponsor made a conscious decision to exclude (either by not declaring and/or not having the persons examined) from their own application for permanent residence cannot later benefit by being sponsored by this same person as a member of the family class.”²

b) The need to prevent immigration of family members who, if originally declared, would have prevented the sponsor’s immigration

OP2 also tells us that 117(9)(d) “exists to prevent applicants from later being able to sponsor otherwise inadmissible family members under the generous family class sponsorship rules when these family members would have prevented the applicant’s initial immigration to Canada for admissibility reasons.”³

² OP2, 14 Nov. 2006, s. 5.12, p. 12.

³ Ibid., p. 14.

4. Responding to the government's arguments

The excluded family member provision is not necessary or effective for these stated purposes, for a number of reasons:

a) The exclusion is not limited to fraudulent non-disclosure

If the purpose is to ensure honesty, the penalty should be limited to cases where there was a deliberate intention to mislead. However, 117(9)(d) excludes equally both family members deliberately excluded and family members where there was no conscious decision not to disclose them. Justice Mosley of the Federal Court has made this point plainly: "I do not read the paragraph in which those terms are found as limiting the scope and effect of paragraph 117(9)(d) to fraudulent non-disclosure. The regulation is clear. Whatever the motive, a failure to disclose which prevents the immigration officer from examining the dependent precludes future sponsorship of that person as a member of the family class."⁴

b) The exclusion covers family members whose existence was unknown

A specific category of family members who were not consciously excluded is the category of family members whose existence was not known at the time of the sponsor's immigration to Canada. Clearly a father who does not know his child has been born cannot make a conscious decision to exclude the child and equally cannot have the unknown child examined. Yet, the regulation nevertheless excludes the child as a family member.

c) The exclusion has retroactive effect

The government claims that the measure is intended to promote honesty and certainly knowledge of the measure could be said to deter non-disclosure from future applicants, in some cases.⁵ However, the existence of the measure cannot work as a deterrent for events in the past. Yet, the measure excludes family members who were not examined when the sponsor immigrated before the regulation came into existence.

d) The provision is not limited to family members who are inadmissible

Part of the government's rationale is that people should not be able to get around inadmissibility provisions by not declaring family members. So, for example, the government argues that an economic class immigrant should not be able to later bring an undeclared child who is inadmissible on health grounds if coming under the economic class, but exempted from inadmissibility if sponsored under the family class. However, the excluded family member provision applies also to family members who are not inadmissible, where there is no question of anyone trying get around the inadmissibility provisions. The provision also applies to people who arrived under the refugee category, which benefits from the same exemptions as the family class and therefore there would be no reason for a refugee not to declare a family member in order to get around inadmissibility.⁶

⁴ Federal Court, *Chen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 678, 12 May 2005.

⁵ In some cases, knowledge would not deter non-disclosure, e.g, in cases where a woman fears that disclosing an "illegitimate" child could mean risk to her life.

⁶ *Immigration and Refugee Protection Act*, 38(2) exempts from inadmissibility on excessive medical demands both members of the family class and protected persons.

e) The exclusion applies to the family members, often children

It seems that the goal is to ensure a penalty for failure to disclose a family member. The penalty of exclusion, however, is predominantly borne by the family member who is denied family reunification. The excluded family members are in many cases innocent children, who are thus made to pay the penalty for the alleged offence of the parent.

f) The *Immigration and Refugee Protection Act* already has a provision for misrepresentation

If there is a “conscious decision” to fraudulently not disclose the existence of a family member, the *Immigration and Refugee Protection Act* already has a provision for finding a person inadmissible for misrepresentation.⁷ This provision applies correctly to the person guilty of the misrepresentation. Inadmissibility on the basis of misrepresentation is valid for two years.⁸ It is difficult to understand why, when the Act limits the bar based on misrepresentation to two years, the exclusion for family members, who are in many cases wholly innocent of any wrongdoing, is for life.

It is very rare in the immigration context for policies and practices to have a permanent consequence. For example, persons deported from Canada may still return, upon obtaining the Minister’s written authorization (s.52(1), R226(1)). Persons who are inadmissible to Canada because of criminality may eventually become permanent residents, either by obtaining a pardon or, after the passage of time, through the rehabilitation provisions of the Regulations (R18). By contrast, a child whose parent fails to include them in the parent’s application for permanent residence, whatever the reason or circumstances, is forever barred from being sponsored by that parent.

5. Eliminating Regulation 117(9)(d)

The CCR calls for the elimination of Regulation 117(9)(d). Officers should be required to consider all the facts of the case, including intention and any mitigating circumstances, in deciding whether to impose an exclusion, which should in no case exceed the two years provided for generally under IRPA.

6. Interim changes: amendments to current guidelines and procedures

Pending an amendment to the Regulations to eliminate 117(9)(d), the CCR recommends changes to current guidelines and procedures.

a. H&C decision-making - criteria and process in 117(9)(d) cases

OP 2 should be amended in order to:

- provide information about and examples of the unintended consequences of 117(9)(d) on people who had not made a conscious decision to conceal a family member. Currently, the text only provides two examples of scenarios of undeclared family members: refugees who believed family members were dead and fear of revealing a child born out of wedlock. However, there are many other scenarios that need to be considered, including:

⁷ *Immigration and Refugee Protection Act*, 40(1)(a).

⁸ *Immigration and Refugee Protection Act*, 40(2)(a).

- children born without the father being aware of their birth or that he was the father;
 - refugees who marry or have a child in between the interview and departure and have limited or no access to the visa post to report it.
 - women who are under pressure from their husband or other family members not to report children.
 - refugees who did not include family members on their application for landing because they could not afford the fees.
 - persons who receive bad advice (from a legal representative, officials of an organization such as UNHCR or IOM, or others).
 - persons who do not read English or French, and therefore have not had access to information about CIC rules on declaring family members.
 - persons who mistakenly believe that they can declare and sponsor a newly-acquired spouse once they arrive in Canada.
- provide a gender analysis of the impacts of 117(9)(d), including the fact that women and girls may be subject to pressures from family members and may in fact be unaware of what is being put in their immigration application as paperwork may be handled by family members.
 - provide more details about the obligations flowing from the Convention on the Rights of the Child, particularly as they apply to 117(9)(d) cases, including specific reference to Canada's obligation to facilitate family reunification. It should be made clear that if it is in the best interests of the child to be reunited with a parent in Canada, a positive H&C decision should be made. No child may be made to pay for the sins, if any, of the parent.
 - provide more examples deserving of positive H&C.
 - require that when CIC is about to prepare a refusal based on 117(9)(d), the applicant and sponsor be notified and invited to present any H&C reasons for processing of the application for permanent residence. [OP2 notes that visa officers can, on their own initiative, recommend a case for H&C acceptance. However, applicants are not likely to provide relevant information on H&C factors if they were not aware that they are affected by 117(9)(d). Instead, applications are refused and a new application must be made for H&C. It would be much more efficient to deal with the H&C question within the first application.]

CIC should also provide information in family class sponsorship kits and on their website about the need to invoke H&C considerations where a family member has not been declared.

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