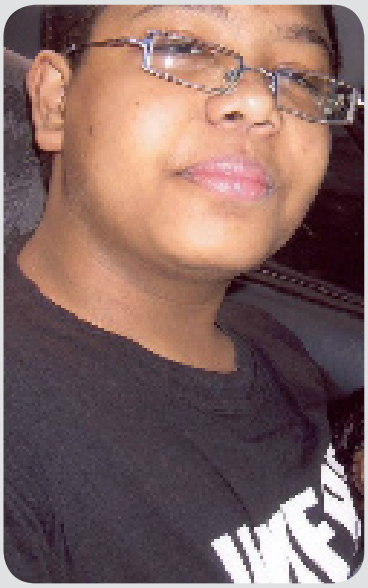
Canadian Council for Refugees
Conseil canadien pour les réfugiés

Families Never to be United: Excluded family members



REGULATION 117(9)(d): EXCLUDED FAMILY MEMBERS

Among the changes to immigration legislation introduced in 2002 was Regulation 117(9)(d), creating a category of "excluded family members". According to this rule, a person is not a family member for immigration purposes, and therefore cannot be sponsored, if the family member was not examined by an immigration officer when the sponsor immigrated to Canada.

This provision was intended to deter or penalize deliberate misrepresentation. Its impact, however, is much broader:

- It excludes family members even when there was no intention to misrepresent.
- The penalty – a lifetime bar on family reunification – is completely disproportionate.
- It has a devastating impact on children, who are made to suffer because of the actions or omissions of their parents.
- It particularly affects those who are most vulnerable, such as refugees and those who suffer discrimination, on the basis of gender, sexual orientation, race, etc.

According to Citizenship and Immigration Canada, families wishing to be exempted from the application of 117(9)(d) should apply for humanitarian and compassionate consideration (H&C), under section 25 of the Immigration and Refugee Protection Act. Some families have been reunited through humanitarian and compassionate consideration, but this recourse fails others, as the following cases show.

RIGHTS OF THE CHILD

The excluded family member rule violates our international human rights obligations:

- to deal "in a positive, humane and expeditious manner" with applications by children or their parents to enter Canada for the purpose of family reunification.[1]
- to protect the family as "the natural and fundamental group unit of society."[2]

SOLUTION: The Canadian Council for Refugees calls for the repeal of the excluded family member rule (Immigration and Refugee Protection Regulations 117(9)(d)).

[1] Convention on the Rights of the Child, article 10(1).
[2] International Covenant on Civil and Political Rights, article 23(1) and International Covenant on Economic, Social and Cultural Rights, article 10(1).

A toddler separated from her mother

In 2003, Ziba* fled to Pakistan with her young son, Ali, in order to escape gender-based persecution in Iran. The UN High Commissioner for Refugees recognized them as refugees and referred them for resettlement to Canada. In 2005, they were accepted by Canada and a group in Saskatoon undertook to sponsor them.

While waiting for the processing to be completed, Ziba became pregnant. She was terrified. How would the neighbours react if they learned she was pregnant when she was not married to the child's father? Would the UNHCR cut off the financial support she depended on, as she believed could happen? Would Canada close her file and deny her son and herself the possibility of getting to safety? Despite these fears, she did try to contact a Canadian visa officer to explain her situation. She was only able to speak to a male interpreter at the Embassy, who refused her request to speak to a visa officer. Because of the stigma of her situation, she did not dare tell the interpreter that she was pregnant.

In March 2006, Ziba gave birth to a baby girl, Niloufar. A few months later, in July 2006, Ziba travelled to Canada with her son, Ali. She left Niloufar in the care of Rostam, the baby's father, himself an Iranian without permanent status or family in Pakistan, believing she would be able to apply for them to join her in Canada later.

Shortly after she arrived, Ziba told her sponsors in Saskatoon about Niloufar. Ziba applied for Niloufar to be admitted to Canada on humanitarian and compassionate grounds since she was excluded under R. 117(9)(d).

The visa officer's notes give no indication that Niloufar's best interests were considered at all.

In anguish because of the separation from her daughter, Ziba found it difficult to settle in Canada. The sponsoring group tried to support her in learning English and finding a job, but she was too preoccupied and upset to give these things her full attention. Ali, who is now 14, also suffers from his mother's distraction and depression: a teacher at school has commented that he seems withdrawn.

In July 2007, a year after Ziba arrived in Canada, Citizenship and Immigration Canada rejected the humanitarian and compassionate application for Niloufar. The visa officer's notes give no indication that Niloufar's best interests were considered at all. The extremely brief review of the case concludes: "given [Niloufar] lives with her biological father in Pakistan, father is not being sponsored at this time, I am not satisfied that grounds exist to warrant special relief under section 25(1) of IRPA" [section providing for humanitarian and compassionate consideration, taking into consideration the best interests of the child].

The Current Situation

Niloufar is now two years old. Rostam struggles to care for her as a single parent: he works as a taxi driver, leaving Niloufar with an older couple while he works, or taking her in the taxi with him when they are not available. When Niloufar is sick, he communicates with Ziba by internet for advice on what to do. Every month, Ziba sends $400, more than a third of what she earns.

In January 2008, the visa office in Islamabad agreed to review its decision refusing humanitarian and compassionate consideration. The results of the review are awaited.

*All names have been changed to protect the family.

A baby separated from both parents

In 2002, Joseph Largao, a Sierra Leonian who had been targetted and lost a leg in the civil conflict in his country, was interviewed by a Canadian visa officer. Joseph and his family were accepted for resettlement to Canada, but the processing of their case was extremely slow. As the years went by, the family became increasingly worried that they would never be able to leave for Canada. Finally, in 2005 their papers were ready, but by then a new son, Quenty, had been born to Joseph and his wife Gbassay, in May 2005. Knowing that re-opening the file to include the new baby would lead to yet further delays for the whole family, prolonging their insecurity, they decided to go to Canada and report the birth of the baby as soon as they arrived. This was what friends advised. Hard as this was, they left the baby behind in the care of Gbassay's sister, expecting that they would soon be reunited with him in Canada.

Thirty-two months after his father first showed a Canadian immigration official his picture, it appears that no immigration official has considered whether it is in Quenty's best interests to be allowed to join his family in Canada.

As soon as the family arrived in Newfoundland – at the airport even – Joseph showed a picture of Quenty to an immigration official and to a representative of the private sponsorship group that welcomed his family.

With the help of the private sponsors, a church in Grand Falls-Windsor, Joseph filled out the papers to sponsor Quenty. The sponsorship application was filed in October 2005. In March 2007 the application was refused because Quenty is an excluded family member under R. 117(9)(d). Joseph, with the parish priest acting as counsel, appealed the decision to the Immigration and Refugee Board, which refused the appeal in August 2007, because the visa officer's refusal was not "wrong in law".

The sponsors, meanwhile, did their best to support Joseph and Gbassay's efforts to reunite with their son, although they have no expertise in negotiating the immigration system. Citizenship and Immigration Canada officials offered little guidance about what they should do. The sponsors wrote detailed and impassioned letters to the immigration authorities and the Immigration and Refugee Board (see right).

The Current Situation

Quenty is now almost three years old. He is being looked after in Sierra Leone by his aunt and uncle, who have several children of their own. According to UN statistics, Sierra Leone has the world's highest mortality rate for children under 5 years. Thirty-two months after his father first showed a Canadian immigration official his picture, it appears that no immigration official has considered whether it is in Quenty's best interests to be allowed to join his family in Canada.

"I am writing you today to ask you to please help us in getting Baby Quincy [Quenty is also known as Quincy] Largao to come to Canada. His dear mother is missing him so very much. She has diabetes, you know and she is very good with her diet and exercise, and I know that she is a very good mother. She would so much benefit from having her son, living with her in Canada, as it would take the stress of grieving for him away. Because she does grieve for him, especially when she sees a newborn or tiny child. We had a baptism in our church and she cried for her son. The whole family has benefited so much from moving here. And we want that for baby Quincy. To be united with his family."

- Patricia Rideout, chair of the sponsoring group, April 2007.

"For the past two years I have been surprised, disappointed and grown more and more angry that an infant, born approximately four months before they departed for Canada, has been barred admission to this Country. […] It has been very painful to watch this family's grief over the past two years and to see their growing frustration with the Government that they thought welcomed them. It is even more painful to think of one little life in Africa, that should be here in the arms of his family, and who is being punished, whose very life is in jeopardy, because his father humanly failed to follow technicalities in our Immigration System."

- Doug Tucker, Warden, Parish of Windsor/Bishop's Falls, June 2007

Victims of discrimination, oppression and R. 117(9)(d)

In 2003, Shankari fled to Canada, escaping her violently abusive husband. She had had to leave behind her two sons, in the care of her mother. In Canada Shankari was recognized as a refugee and her younger son was able to join her in 2006. Five years after she fled, however, her older son, Akino remains in Sri Lanka, separated from his mother and brother, because of R. 117(9)(d).

Akino is the son of Shankari's first husband, a Chinese man who left Sri Lanka, abandoning his wife, before Akino's birth. Shankari and Akino were left in a vulnerable situation, she a single mother, he a child of mixed ethnicity, subject to discrimination.

When she arrived in Canada as a refugee claimant, Shankari did not mention the existence of her first son, Akino, because of fears relating to the abusive situation she was fleeing. She was later misguidedly advised by someone not to correct the omission while she went through the refugee claim process.

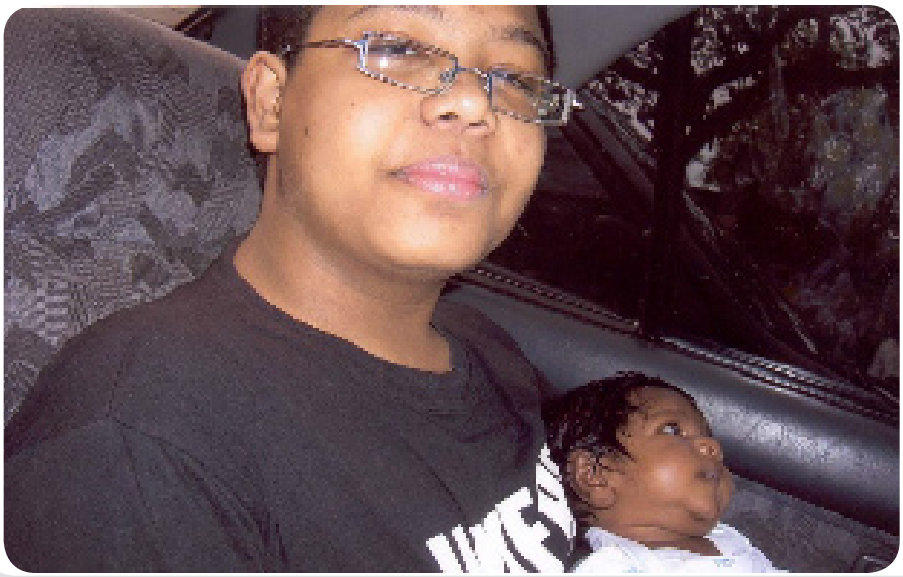
Once she found out that Akino was barred from reunification with her, Shankari turned in deepening distress to numerous individuals and agencies seeking help. It was not until 2007 that she was referred to an organization that helped her make a humanitarian and compassionate application on behalf of Akino. The application was submitted in September 2007 and is still pending.

"My little brother Andrew who is currently not with me who is residing in Canada he was the apple of my eye he was my best friend he was the only one I could play with now without him I am very lonely at least when my mother wasn't there I had my brother as a consolation…I cannot put into words the way I miss my brother it is virtually incomprehensible to put into words the way I miss him... Normally in Sri Lanka most grandmothers do not take care of their grandchildren since they have taken care of their own children thus I am very grateful to her but now her health is rapidly degrading and the doctors have said her main cause of illness is stress. Thus now I think I am becoming a burden on my grandmothers health."

- Extract from letter written by Akino

The Current Situation

Akino is now 16 years old. He has never known his father, has suffered discrimination and rejection all his life because of his mixed ethnicity, has seen his mother brutally abused by her second husband, and been forced to live separated from her for the past five years, as well as from his brother for the last two years. His grandmother, with whom he has been living, now has serious health problems and can no longer look after him.



Teenagers don't need their mother?

Samia (17 years), and her 16-year-old brother, Meraj, are living in Bangladesh with their aunt, because R. 117(9)(d) denied them reunification with their mother in Canada.

Samia and Meraj's father abandoned their mother, Sayada Mohsina, while she was pregnant with Meraj. However, a few years later, in 1998, their paternal grandmother abducted the children, keeping them until 2004. During this period, they were prevented from having any contact with their mother.

In deep distress because of the loss of her children, Sayada was encouraged by her parents to move to the USA. She opened a travel agency there and met and married her current husband. In 2001, they decided to immigrate to Canada. US immigration lawyers advised them that it was not necessary to include Sayada's children in the application as she could sponsor them later, if she were able to get custody. Based on this advice, and because they could not produce the necessary documentation for the children, from whom they were barred access, the children were not included on the application.

In 2004, Samia and Meraj's father's family decided that they no longer wanted to care for the children. Samia and Meraj went to live with Sayada's mother. Sayada went to visit them and, back in Toronto, she consulted lawyers about sponsoring them. They told her that she could not, because she had not listed them on her permanent residence application.

In October 2005, Sayada's mother died, and Samia and Meraj went to live with their aunt, Sayada's sister. The situation is crowded and uncomfortable: nine people live in a 3-bedroom apartment. Samia and Meraj must sleep on the floor; they feel that they are not welcome, although Sayada sends her sister money for support.

In October 2006, Sayada found a lawyer who explained that she could apply for her children on humanitarian and compassionate (H&C) grounds.

The application was refused in April 2007.

The Current Situation

Sayada took the matter to the Federal Court. In March 2008, the Court overturned the decision and sent the matter back for a new assessment by a different visa officer. Sayada, in extreme psychological distress because of the separation, is hoping each day for a phone call to tell her that her children are accepted.

In the rejection letter written to each of the two children (when they were aged 15 and 16), the visa officer wrote:

"I considered the best interest of the child and came to the conclusion that this is not justifying H&C considerations. I note that you are soon to be an adult, you have completed your primary education in an International School and you are soon to complete your Secondary Education also in an International School. You have lived all your life in Bangladesh and you speak Bengali, the local language. You[r] mother in Canada can continue to provide you with financial support until the end of your studies or even after if she wishes. She provides support to you since 9 years while being in foreign countries, she can continue to do so at a distance. You have several close and extended family member[s] in Bangladesh. Your father is still alive and living in Bangladesh. Your mother still has siblings in that countr[y]. You are a student, you have therefore a social network in Bangladesh, your classmates and school friends; you are not left alone. You presented no evidence that you are currently under undue hardship in Bangladesh. The photos on file show a nice house interior in terms of Bangladesh standard suggesting that your life in Bangladesh is at least in the upper middle class. I see that rejoining with your mother and having the opportunity to continue your life in Canada would be of great interest to you, but it is not sufficient to overcome the exclusion from the family class."

An improbable happy ending

In 2005, Ben Gardent, a US citizen, applied to immigrate to Canada in order to be able to reunite with his partner, Andrei Sukhov. US immigration laws do not recognize same-sex relationships, whereas Canada does. Ben and Andrei met in Kazakhstan: because of discrimination against same-sex couples, they were not able to live together in either of their countries.

Ben could not include Andrei as a family member on his original immigration application since they had been unable to meet the legal requirement of one year cohabitation. As he understood it, he would need to become a permanent resident and then sponsor Andrei.

While processing was underway, Ben found work in Moscow and he and Andrei were able to live together.

In correspondence, Citizenship and Immigration Canada advised Ben to report any change of legal status: "If there is a change in your legal status or that of any family member (marriage, birth, death, adoption, divorce, etc.) you must notify us before your departure so that we can give you instructions." Since he was not married and there was no reference to common law partners, it never occurred to Ben that his legal status might change simply by virtue of the number of months he and Andrei had been able to live together.

In January 2007, Ben arrived at the Canadian border in Rock Island, Quebec, with his permanent resident visa. It was just weeks after he and Andrei had passed their one year anniversary of cohabitation. Ben explained to a friendly border official why he was moving to Canada, and informed him of his common-law partner, even asking him whether Andrei needed to be declared as a dependant on the Confirmation of Permanent Residence form. The officials said it wasn't necessary and he signed the form stating that he was single with no dependants.

In June 2007 Citizenship and Immigration Canada (CIC) rejected Ben's application to sponsor Andrei, based on Regulation 117(9)(d). Andrei had been Ben's common law partner on the day Ben became a permanent resident, and had not been declared.

Appalled by the unfairness of this and almost hopeless about the chances of reuniting with Andrei, Ben decided to see whether the border official would confirm their conversation. He returned to the border post in Quebec, tracked down the official and explained to him that if he did not help, Regulation 117(9)(d) would most likely condemn him to permanent separation from Andrei. He agreed to write a letter stating that Ben had informed him of the existence of a common-law partner and that he landed him anyway.

One happy ending: With the letter from the border official who landed him in hand, Ben and Andrei were able to have the 117(9)(d) denial overturned! Andrei's application for permanent residence is currently being processed.

"We had fought for over four years to be together when neither of our countries would take us. Canada was our last beacon of hope, but now CIC was telling us that we could never be together there. I kept replaying my immigration process over and over in my head, wondering what I could have done to prevent this scenario from playing out. I went through all the what-ifs - What if I had inquired with the embassy as to what "etc" referred to? What if the embassy had worded its correspondence in a better way reflecting the need to declare common-law relationships? What if the border guard had done his job and not let me enter? What if Andrei and I had reached one year of cohabitation January 19 instead of November 19? I could not believe that Canada could have a law condemning families to permanent separation."

"I realize now that I am one of the lucky ones. There are several other instances of immigrants challenging 117(9)(d) denials on the basis that they had informed Canadian border officials about the existence of dependants prior to landing, but were landed anyway.

"Unlike me, none of these immigrants had an official statement from immigration officials to support their claims and all of their appeals were summarily denied due to credibility issues.

"But what if these people weren't lying? What if they were really victims of CIC errors? Without the immigration official's statement, I am sure my 117(9)(d) denial would still stand today, even though I did declare my partner to an immigration official, as required by law."

Over five years, and still separated...

Razia Mussaferzada arrived in Canada in February 2003, as a refugee from Afghanistan. She was 19 years old, and was resettled along with her mother and younger brother (her father had died during the years the family were refugees in Pakistan). At the interview with the visa officer in Pakistan, Razia had mentioned that she was engaged to be married. Shortly before her departure for Canada, Razia and her fiancé, Farhad, were married, because they heard that Razia would not be able to sponsor a fiancé (the possibility of sponsoring a fiancé was closed off as part of the legislative changes introduced in 2002).

When the family arrived at the airport in Canada, the immigration officer spoke to Razia's mother on behalf of the family. No one asked anything directly of Razia. Of course, communication was limited, as no one in the family could speak English or French. The fact that Razia was now married was not mentioned.

Shortly after her arrival, Razia applied to sponsor her husband. The application was refused on the basis of Regulation 117(9)(d). Mistakenly believing that this might make her husband eligible, Razia returned to Pakistan and remarried Farhad. The second application for sponsorship was rejected in June 2006.

Razia then made a third application, this time requesting humanitarian and compassionate consideration. At the end of 2006, Razia went to visit her husband in Pakistan. She became pregnant and a baby boy, Ali, was born on 3 August 2007.

Ali was born on 3 August 2007.

The humanitarian and compassionate decision

A Canadian visa officer refused the application in September 2007. The notes on the review of humanitarian and compassionate consideration read as follows:

"Not satisfied explanation provided sufficiently explains as to why sponsor did not declare PA [principal applicant] by either informing visa office or at POE [port of entry], as it was their responsibility to do so. Explanation that PA [presumably should say sponsor] did not have level of English ability required in order to understand or declare this fact not credible, particularly given ability to write and communicate in English as per evidence on file.

Not satisfied explanation sufficiently explains why PA did not provide this updated info when POE officer would have asked if there was any changes in family configuration or information and confirmed this information with the sponsor, and would have been certain that they understood, as is routine during landing.
Other factors in submission reviewed yet insufficient humanitarian and compassionate grounds provided to warrant positive H&C decision."

The visa officer does not appear to have considered that:

- Razia was a 19 year old woman when she arrived in Canada, having spent half her life as a refugee.
- Both Razia and Farhad are refugees: if they cannot be reunited in Canada, there is no safe home they can return to in order to be together.
- Razia and Farhad's baby, Ali, has a right to have both his parents with him. The visa office file includes reference to Razia being pregnant, and to Ali's birth certificate being received, but Ali's best interests are never considered.

An error that can never be pardoned

Rajive* applied in 1999 to immigrate to Canada from his native India. In 2001, while his application was still in process, he married Smita. He left for Canada later that year, not having declared his wife to Canadian immigration officials, a clear error on his part, but an error of ignorance and inattention, rather than any deliberate attempt to deceive.

Several months after Rajive arrived in Canada, the immigration rules changed, and the introduction of Regulation 117(9)(d) meant that Smita was no longer considered Rajive's family member and could not be sponsored.

His application to sponsor his wife was therefore refused. He appealed it to the Immigration and Refugee Board, where it was refused. He appealed that decision to the Federal Court, which confirmed that the law did not permit him to sponsor his wife.

Meanwhile, Rajive had been putting energy into settling into his new country, keeping up the hope that there would be a way around the legal bar on his reunification with his wife. He found work, eventually taking up employment with a municipality in Ontario. He became a Canadian citizen.

A humanitarian and compassionate application was put in for Smita. It was refused on the basis that Smita has a good job in India and is well settled there.

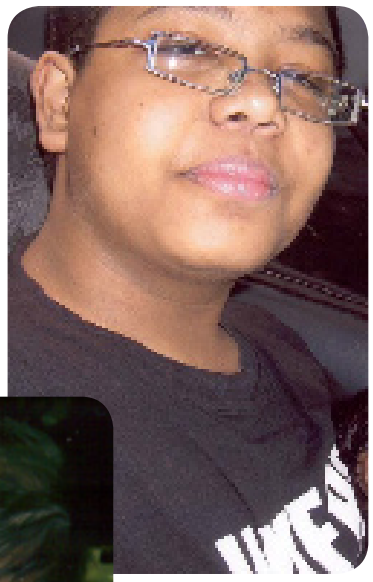
The Current Situation

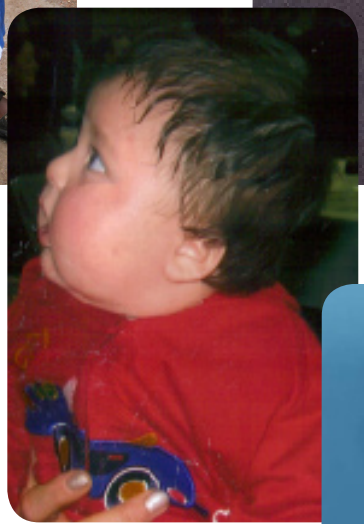
Rajive accepted the verdict and moved back to India, where he is now reunited with his wife.

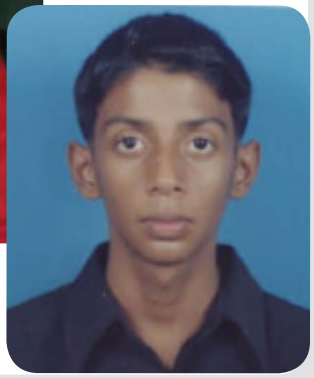
Life Sentence

Under Canadian immigration legislation, if Rajive had been found guilty of misrepresentation, he would have been inadmissible for two years. If Smita had committed a crime, she could have been considered rehabilitated after five years. But the punishment for an undeclared family member is a life sentence. Rajive will never be able to sponsor his wife because of an error made seven years ago.









* Names have been changed to protect privacy.

INADEQUACY OF HUMANITARIAN AND COMPASSIONATE (H &C) RECOURSE

Humanitarian and compassionate considerations:

"The Minister shall, upon request of a foreign national who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative, 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." IRPA 25.(1)

As the cases on the preceding pages show, H&C is not an adequate recourse because:

- **Affected families are not routinely informed** that they can apply for humanitarian and compassionate consideration. As a result, many families waste years looking for a solution.
- **Preparing a submission for a request for humanitarian and compassionate consideration requires expertise.** There are few organizations able to do this on behalf of affected families. If they cannot afford to hire a lawyer, families struggle to put together a strong submission, especially if they don't have a high level of education and fluency in English or French.
- **Many compelling cases are refused.** Some applications involving children are refused without any consideration of the bests interests of the affected child, even though the law requires this. In several negative decisions, there is no indication that the visa officer has even thought about compelling circumstances that deserve humanitarian consideration.

According to proposed amendments to the Immigration and Refugee Protection Act tabled 14 March 2008, as part of Bill C-50, even the right to have a humanitarian and compassionate application examined will be eliminated.

SOLUTION: The Canadian Council for Refugees calls for the repeal of the excluded family member rule (Immigration and Refugee Protection Regulations 117(9)(d)).

For more information, consult the following CCR documents:

Submission on Excluded Family Members, R. 117(9)(d), June 2007,
http://www.ccrweb.ca/documents/excludedfam.pdf
Families Never to be United: Excluded Family Members, January 2007,
http://www.ccrweb.ca/excludedfammembers.pdf
Impacts on children of the Immigration and Refugee Protection Act, November 2004,
http://www.ccrweb.ca/children.pdf
Strategies for intervening in family reunification cases: Practical guide, February 2008,
http://www.ccrweb.ca/documents/frguide.pdf

On the CCR campaign for family reunification: **www.reunification.ca**

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