

## Chapter Three

### Health Grounds - Medical Inadmissibility Section 38 of the *Immigration and Refugee Protection Act*

#### Introduction

The *Immigration and Refugee Protection Act* (IRPA) has changed the wording of the medical inadmissibility provision from that in the *Immigration Act* and has provided additional definitions of key terms such as "excessive demands" in the Regulations (IRPR) to the new Act. It has retained a requirement for medical examinations for all sponsored immigrants and their dependents. IRPA has however provided an exemption for prescribed close family members from the excessive demands part of the medical inadmissibility definition. Lastly IRPA preserves a discretionary power for members of the IAD to offer special relief from this ground of inadmissibility.

#### A. LEGISLATIVE PROVISIONS

##### Medical Inadmissibility - Definition

Section 38 of IRPA sets out the basis on which a foreign national may be determined to be inadmissible on medical grounds:

- s. 38 A foreign national is inadmissible on health grounds if their health condition
- (a) is likely to be a danger to public health;
  - (b) is likely to be a danger to public safety; or
  - (c) might reasonably be expected to cause excessive demand on health or social services.

As the cases prior to IRPA are based on the *Immigration Act*, (now repealed), the medical inadmissibility provision is included below for comparative purposes:

- s. 19.(1) No person shall be granted admission who is a member of any of the following classes:
- (a) persons who are suffering from any disease, disorder, disability or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer concurred in by at least one other medical officer,
    - (i) they are or are likely to be a danger to public health or to public safety, or

(ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services.

## Definitions – foreign national

A “foreign national” means a person who is not a Canadian Citizen or a permanent resident and includes a stateless person.<sup>1</sup>

## Definition of “excessive demand”

The term "excessive demand" means

- (a) a demand on health services or social services for which the anticipated costs would likely exceed average Canadian per capita health services and social services costs over a period of five consecutive years immediately following the most recent medical examination required by these regulations, unless there is evidence that significant costs are likely to be incurred beyond that period in which case the period is no more than 10 consecutive years; or
- (b) a demand on health services or social services that would add to existing waiting lists and would increase the rate of mortality and morbidity in Canada as a result of the denial or delay in the provision of those services to Canadian citizens or permanent residents.<sup>2</sup>

## Definition of Health Services

The term "health services" means any health services for which the majority of the funds are contributed by governments, including the services of a family physicians, medical specialists, nurses, chiropractors, and physiotherapists, laboratory services and the supply of pharmaceutical or hospital care.<sup>3</sup>

## Definition of Social Services

The term "social services" means any social service, such as home care, specialized residence and residential services, special education services, social and vocational rehabilitation services, personal support services and the provision of devices related to those services,

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<sup>1</sup> S. 2(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

<sup>2</sup> S. 1(1) of the *Immigration and Refugee Protection Regulations* (IRPR), SOR/2002-227.

<sup>3</sup> S. 1(1) IRPR.

- (a) that are intended to assist a person in functioning physically, emotionally, socially, psychologically, or vocationally; and
- (b) for which the majority of the funding, including funding that provides direct or indirect financial support to an assisted person, is contributed by governments, either directly or through publicly-funded agencies.<sup>4</sup>

## IRPA - Health Condition

Note that IRPA no longer makes reference to "disease, disorder, disability or other health impairment" contained in the former *Immigration Act* and uses "health condition" instead.

## Means of proof

The former means of proof was "in the opinion of a medical officer concurred in by at least one other medical officer". In s. 20 of the IRPR, it sets out that one officer designated to do that task must now make that assessment:

s. 20 An officer shall determine that a foreign national is inadmissible on health grounds if an assessment of their health condition has been made by an officer who is responsible for the application of s. 29 to 34 and who concluded that the foreign national's health condition is likely to be a danger to public health or public safety or might reasonably be expected to cause excessive demand.

It should be noted that under IRPA there continues to be two decisions on medical inadmissibility that take place for an application for permanent residence: the "medical" opinion and the visa officer's assessment of that opinion.

## Factors to be considered

The terms "excessive demands", "health services" and "social services" are used in Regulations 31, 33 and 34 respectively which states that "before concluding whether a foreign national's health condition (a) is likely to be a danger to public health or (b) is likely to be a danger to public safety or (c) might reasonably be expected to cause excessive demand" the officer **shall consider**

- (a) any reports made by a health practitioner or medical laboratory with respect to the foreign national; and
- (b) in the case of excessive demand, "any condition identified by the medical examination"
- (c) in the case of public health, "the communicability of any disease that the foreign national is affected by or carries",

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<sup>4</sup> S. 1(1) IRPR.

- (d) in the case of public safety, "the risk of a sudden incapacity or of unpredictable or violent behavior of the foreign national that would create a danger to the health or safety of persons living in Canada."

## **All Immigrants must undergo a medical examination**

All applicants for permanent resident status (and non-accompanying dependants) are required to undergo a medical examination.<sup>5</sup> When a holder of a permanent Resident visa seeks to enter Canada as an immigrant he or she must also hold a valid medical certificate indicating they are not medically inadmissible based on a medical examination within the prior 12 months.<sup>6</sup> It should be noted that a failure to undergo a medical examination can form the basis for a refusal based on a separate ground of inadmissibility, i.e. non-compliance with the Act or Regulations, as per s. 41(a) of IRPA. Although an appeal can be granted to overcome this ground the applicant must still undergo a medical for further visa processing to continue.

## **Classes of persons exempt from "excessive demands"**

Section 38(2) of the IRPA specifically states

s. 38(2) (excessive demands) does not apply in the case of a foreign national who

- (a) has been 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;
- (b) has applied for a permanent resident visa as a Convention refugee or a person in similar circumstances;
- (c) is a protected person; or
- (d) is, where prescribed by the regulations, the spouse, common-law partner, child or other family member of a foreign national referred to in any of paragraphs (a) to (c).

It should be noted that the exemption set out above only applies to the ground of "excessive demand" and not to the inadmissibility based on "danger to public health" or "danger to public safety". The IRPA objective in s. 3(1)(h) of protecting the public from infectious diseases is not compromised by the family-based exemptions.

See also s. 24 of the IRPR which provides an exemption for a "conjugal partner" and dependent child from the excessive demand inadmissibility.

This exemption applies only to a "nuclear" family member and does not extend to parents of a sponsor or their dependent children or other sponsorable members of the family class. In

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<sup>5</sup> s. 30(1)(a) of IRPR.

<sup>6</sup> S. 30(4) of IRPR.

those cases, the discretionary relief provision is available. See the reference below for more comment on that special relief.

## **B. APPLICATION OF PROVISIONS IN A SPONSORSHIP APPEAL HEARING**

The vast majority of appeals at the IAD respecting medical inadmissibility are restricted solely to a request for discretionary relief. Should a member of the IAD be called on to assess whether a foreign national is inadmissible on health grounds, i.e. whether the refusal is valid in law, there will continue to be a requirement to determine if the officer has reached the conclusion properly.

### **Legal validity of the refusal**

Historically the IAD and the Federal Court have framed many challenges to the refusal to issue permanent resident visas to family class applicants as a failure to follow proper prescribed procedure or a failure to employ proper technical language. Often there is an underlying but unstated breach of natural justice which has led to the decision being found to be unreasonable. Often these early cases involved a breach of the duty to act fairly or in a manner which would allow the applicant an opportunity to know the case to be met on appeal. Lastly, there can be an overlap of purely "technical defects" and natural justice issues.

### **Technical defects**

Early decisions of the IAD which allowed appeals in law in medical refusal cases, and especially those which followed the Federal Court's decision in *Hiramen*,<sup>7</sup> tended to do so on purely technical grounds based on deficiencies in the refusal letter or the Medical Notification form. However, later decisions of the Court generally emphasized a less technical and more purposive approach which looked at whether the sponsor was informed of the case to be met and whether there was an expression of the opinion required under the *Immigration Act*.

The disadvantage to the sponsor of winning an appeal based on a technical defect is that the visa officer may again refuse the application on the medical ground, as the substantive ground did not form the basis for the IAD's decision.<sup>8</sup> For example, where the appeal was allowed

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<sup>7</sup> *Hiramen, Sandra Cecilia v. M.E.I.* (F.C.A., no. A-956-84), MacGuigan, Thurlow, Stone, February 4, 1986. In *Hiramen*, the Court held that the entries in the Medical Notification form were inconsistent to the point of incoherence. Refer to page 6, "Medical Notification Form," for further details.

<sup>8</sup> Section 77(5) of the *Immigration Act* provides that where an appeal has been allowed by the IAD, processing of the application is to be resumed, and the visa officer is to approve the application, if "the requirements of [the] Act and regulations, other than those requirements on which the decision of the Appeal Division has been given," have been met.

because the medical reports had expired before the visa officer rejected the application, the visa officer could again consider the medical condition, as the Board's decision did not relate to the medical condition.<sup>9</sup> Likewise, where the appeal was allowed because the reasons for refusal did not adequately inform the sponsor of the case to be met, the application could again be refused on the same ground, but this time with the reasons for the refusal adequately expressed.<sup>10</sup> The effect of section 77(5) of the *Immigration Act* was examined by the Federal Court in *King*.<sup>11</sup> The Court held that the applicant still had to establish her medical admissibility. The only issue that was *res judicata* was the medical issue found to be erroneous by the IAD.<sup>12</sup>

## Defective Refusal Letter

Pursuant to section 77(1) of the *Immigration Act*, the visa officer was required to inform the sponsor of the reasons for the refusal of the sponsored application for permanent residence. The purpose of this provision was to ensure that the sponsor was aware of the case that has to be met on appeal.

It has been held that the nature of the medical condition must be disclosed where the refusal is based on medical inadmissibility.<sup>13</sup> However, the refusal letter should not be looked at in isolation from the record.<sup>14</sup> Section 77(1) of the *Immigration Act* can be complied with by setting out intelligible reasons in the record.<sup>15</sup>

## Medical Notification Form

After assessing an applicant's medical condition, the medical officers prepare a Medical Notification form to notify the visa officer of their diagnosis, opinions, and the applicant's medical profile. The visa officer relies on this information to determine the applicant's admissibility. The Medical Notification form must contain an expression of the opinion required by section 19(1)(a) of the *Immigration Act* in order to support a refusal. Once there is a clear

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<sup>9</sup> *Mangat, Parminder Singh v. M.E.I.* (F.C.T.D., no. T-153-85), Strayer, February 25, 1985. Nor had the Board taken a "[...] decision that the medical problem in question was to be ignored, e.g. on compassionate grounds." (at 2).

<sup>10</sup> *Dhami, Gurnam Singh v. M.E.I.* (I.A.B. 84-6036), Chambers, Tremblay, Howard, January 8, 1987.

<sup>11</sup> *King, Garvin v. M.C.I.* (F.C.T.D., no. IMM-2623-95), Dubé, May 23, 1996.

<sup>12</sup> The IAD had found the Medical Notification form unreasonable because it was unclear as to whether the mass in question was in the lung or mediastinum. The appeal was allowed in law as a result. The appeal on compassionate or humanitarian grounds was dismissed.

<sup>13</sup> *Shepherd, Tam Yue Philomena v. M.E.I.* (I.A.B. 82-6093), Davey, Benedetti, Suppa, November 18, 1982.

<sup>14</sup> *M.E.I. v. Singh, Pal* (F.C.A., no. A-197-85), Lacombe, Urie, Stone, February 4, 1987. Reported: *Canada (Minister of Employment and Immigration) v. Singh* (1987), 35 D.L.R. (4th) 680 (F.C.A.).

<sup>15</sup> *Tung, Nirmal Singh v. M.E.I.* (I.A.B. 86-6021), Mawani, Singh, Anderson (dissenting), June 30, 1987.

expression of the medical opinion required by section 19(1)(a), the evidentiary burden of proof shifts to the sponsor to show that the medical officers failed to take into consideration relevant factors, or took into consideration irrelevant factors in forming their opinion.<sup>16</sup>

Where the information in the Medical Notification form is inconsistent to the point of incoherence and is couched in terms of “possibility,” rather than “probability” as is required by section 19(1)(a)(ii) of the *Immigration Act*, the refusal based on that form is not valid.<sup>17</sup> However, in assessing the Medical Notification form, the IAD should consider the form as a whole, to see if it contains on its face a clear expression of the medical opinion required.<sup>18</sup> Further, the IAD should not find the refusal invalid because the word “possibility” rather than “probability” was used in the form without considering the rest of the document.<sup>19</sup> Nevertheless, where a probability regarding treatment was deduced from a mere possibility of health deterioration, the Federal Court has found the Medical Notification form to be defective.<sup>20</sup> In addition, the Federal Court has upheld the Immigration Appeal Board’s decision that the Medical Notification form only expressed a possibility of excessive demands, rather than a probability, where the medical officers indicated that the progression and prognosis were unknown.<sup>21</sup>

Some examples of situations in which the Medical Notification form has been found to be defective include notifications in which the concurring medical officer’s signature is missing;<sup>22</sup> the date and name of the medical officers are not filled in and in which neither box is ticked off to indicate which subparagraph of section 19(1)(a) is being relied on.<sup>23</sup>

A refusal based on an expired Medical Notification form is invalid,<sup>24</sup> but Medical Notification forms with the “valid until” space left blank (as is usually the case in appeals before the IAD) have been held not to be subject to challenge.<sup>25</sup>

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<sup>16</sup> *M.E.I. v. Chong Alvarez, Maria Del Refugio* (IAD V90-01411), Wlodyka, April 10, 1991. This case was a section 71 appeal by the Minister from the decision of an adjudicator not to issue a removal order. The onus of proof in a section 71 appeal and at an inquiry under section 27 of the *Immigration Act* lies with the Minister.

<sup>17</sup> *Hiramen*, *supra*, footnote 7.

<sup>18</sup> *Parmar, Jaipal Singh v. M.E.I.* (F.C.A., no. A-836-87), Heald, Urie, Stone, May 16, 1988; *M.E.I. v. Pattar, Sita Kaur* (F.C.A., no. A-710-87), Marceau, Desjardins, Pratte (dissenting), October 28, 1988. Reported: *Pattar v. Canada (Minister of Employment and Immigration)* (1988), 8 Imm. L.R. (2d) 79 (F.C.A.); *M.E.I. v. Sihota, Sukhminder Kaur* (F.C.A., no. A-76-87), Mahoney, Stone, MacGuigan, January 25, 1989; *Bola, Lakhvir Singh v. M.E.I.* (F.C.A., no. A-417-88), Marceau, Stone, Desjardins (dissenting), May 18, 1990. Reported: *Bola v. Canada (Minister of Employment and Immigration)* (1990), 11 Imm. L.R. (2d) 14 (F.C.A.).

<sup>19</sup> *Bola*, *ibid.*

<sup>20</sup> *Badwal, Tripta v. M.E.I.* (F.C.A., no. A-1193-88), MacGuigan, Urie, Mahoney, November 14, 1989. Reported: *Badwal v. Canada (Minister of Employment and Immigration)* (1989), 9 Imm. L.R. (2d) 85; 64 D.L.R. (4th) 561 (F.C.A.).

<sup>21</sup> *M.E.I. v. Sidhu, Satinder Singh* (F.C.A., no. A-1250-88), Desjardins, Heald, Mahoney, January 12, 1990.

<sup>22</sup> *Tang, Lai Keng v. M.E.I.* (I.A.B. 79-6093), Campbell, Glogowski, Loiselle, September 20, 1979.

<sup>23</sup> *Khan, Mary Angela v. M.E.I.* (I.A.B. 85-9043), Tisshaw, Blumer, Ahara, October 6, 1986. See also *Mohamed, Liaquat Ali v. M.E.I.* (I.A.B. 85-9648), Sherman, Chu, Eglington (dissenting), July 27, 1987, where the panel reached the opposite conclusion, relying on the narrative statement on the form.

<sup>24</sup> *Jean Jacques, Soutien v. M.E.I.* (I.A.B. 80-1187), Scott, Houle, Tremblay, May 20, 1981.

Where the Medical Notification form indicates that the condition is one of “unknown pathology,” the inability to determine the exact cause of the disorder or illness does not result in the Medical Notification form being deficient.<sup>26</sup>

Where the Medical Notification form outlines several health conditions, but does not indicate which medical profile category applies to which condition, the notification is not deficient where it contains enough information for the sponsor to know the case to be met.<sup>27</sup> Further, as criteria in the Immigration Manual are mere guidelines, the failure to comply with these guidelines is not fatal where there is other evidence to support the opinion.<sup>28</sup> Similarly, where multiple health conditions are listed in the Medical Notification form, it is not always essential to identify which conditions form the basis of the medical opinion.<sup>29</sup>

Where the narrative on a Medical Notification form contained an erroneous and highly probative fact, and a reasonable possibility existed that conclusions reached in the narrative were based on this fact, the refusal was invalid as a result.<sup>30</sup>

## Duty of fairness owed by Visa and Medical Officers

There is a duty upon immigration officials to act fairly and to ensure that the medical officers’ opinion is reasonable.<sup>31</sup> What is necessary to comply with the duty of fairness will depend on the circumstances of each case.

The Federal Court has recognized an immigration officer’s duty to act fairly. This duty of fairness was breached when an applicant was not given a fair opportunity to make submissions before the decision was made to refuse his son on medical grounds.<sup>32</sup> An immigration officer

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<sup>25</sup> *Fung, Alfred Wai To v. M.E.I.* (I.A.B. 83-6205), Hlady, Glogowski, Petryshyn, December 14, 1984; *Shanker, Gurdev Singh v. M.E.I.* (F.C.A., no. A-535-86), Mahoney, Pratte, Heald, June 25, 1987.

<sup>26</sup> *Pattar, supra*, footnote 18.

<sup>27</sup> *Parmar, supra*, footnote 18.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Sihota, supra*, footnote 18.

<sup>30</sup> *Mahey, Gulshan v. M.C.I.* (IAD V96-02119), Clark, July 20, 1998; upheld in *M.C.I. v. Mahey, Gulshan* (F.C.T.D., no. IMM-3989-98), Campbell, May 11, 1999. The narrative in question stated that the applicant, who suffered from coronary heart disease, was 42 years old when in fact he was 52.

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

<sup>32</sup> *Gao, Yude v. M.E.I.* (F.C.T.D., no. T-980-92), Dubé, February 8, 1993. Reported: *Gao v. Canada (Minister of Employment and Immigration)* (1993), 18 Imm. L.R. (2d) 306 (F.C.T.D.). Citizenship and Immigration Canada Manual OP 15 – Medical Procedures, dated 2007 – 04 – 23, requires visa officers to advise applicants

may also be under a duty to undertake further investigation or call for an updated medical examination.<sup>33</sup>

Visa officers routinely send a “fairness letter” inviting further medical evidence from applicants before a final decision on medical admissibility is made.<sup>34</sup> The Federal Court has been critical of the wording of some of the letters<sup>35</sup> and has found in their use a breach of procedural fairness. For example, in one case, the letter did not disclose the criteria used by the medical officers in forming their opinion or the nature of the excessive demands.<sup>36</sup> Where the fairness letter was mistakenly sent to the applicant’s husband in the Philippines instead of to the applicant in Canada, she was denied an opportunity to respond to the medical inadmissibility finding respecting her son.<sup>37</sup>

Non-disclosure of information requested by an applicant’s counsel concerning the basis on which a medical opinion has been rendered is a breach of fairness.<sup>38</sup>

Where the medical officers requested a medical report and received it within two weeks, the Federal Court held that the medical officers had a duty to consider the report in forming their opinions.<sup>39</sup> The duty to consider the new medical evidence has been characterized by the Immigration Appeal Division as a legitimate expectation of the sponsor.<sup>40</sup>

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of the medical officers’ opinion and give them an opportunity to present further medical evidence before refusing the application. Where such evidence is presented, medical officers are instructed to clearly state, in their statutory declarations, that they have considered such evidence.

<sup>33</sup> *Ibid.* See also *Boateng, Dora Amoah v. M.C.I.* (F.C.T.D., no. IMM-2700-97), Lutfy, September 28, 1998 to the same effect.

<sup>34</sup> See the discussion in chapter 11, “Fairness and Natural Justice under the IRPA”, “Knowing Case to be Met and Opportunity to Respond.” Earlier case-law established that the duty of fairness did not oblige an immigration officer to communicate relevant medical information to an applicant before making a decision: *Stefanska, Alicja Tunikowska v. M.E.I.* (F.C.T.D., no. T-1738-87), Pinard, February 17, 1988. Reported: *Stefanska v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm. L.R. (2d) 66 (F.C.T.D.). However, this case may be of doubtful authority in view of the current practices of immigration and medical officers.

<sup>35</sup> *Fei, Wan Chen v. M.C.I.* (F.C.T.D., no. IMM-741-96), Heald, June 30, 1997. See however *Ma, Chiu Ming v. M.C.I.* (F.C.T.D., no. IMM-812-97), Wetston, January 15, 1998.

<sup>36</sup> *Li, Leung Lun v. M.C.I.* (F.C.T.D., no. IMM-466-96), Tremblay-Lamer, September 30, 1998.

<sup>37</sup> *Acosta, Mercedes v. M.C.I.* (F.C.T.D., no. IMM-4790-97), Reed, January 7, 1999.

<sup>38</sup> *Wong, Ching Shin Henry v. M.C.I.* (F.C.T.D., no. IMM-3366-96), Reed, January 14, 1998. The Court subsequently ordered the medical officers to respond by a specified date to counsel’s questions: *Wong, Ching Shin Henry v. M.C.I.* (F.C.T.D., no. IMM-3366-96), Reed, November 27, 1998.

<sup>39</sup> *Lee, Sing v. M.E.I.* (F.C.T.D., no. T-2459-85), Martin, May 1, 1986.

<sup>40</sup> *Shah, Nikita v. M.C.I.* (IAD T96-02633), D’Ignazio, June 23, 1998, followed in *Singh, Narinder Pal v. M.C.I.* (IAD T97-04679), D’Ignazio, September 27, 1999.

The failure to avail oneself of the opportunity to make submissions (when given two months to do so) is not a breach of procedural fairness.<sup>41</sup>

The Federal Court in *Parmar*<sup>42</sup> held that its intervention was not warranted where the medical officers had failed to comply strictly with all the guidelines set out in the Immigration Manual and the non-compliance was minimal and non-prejudicial. It further held: “It is essential for those officials both in Canada and abroad to be meticulous in ensuring that applicants for admission to this country be made aware of the basis for refusing their application for admission to Canada.”

## Use of expert medical reports by IAD

A member may receive expert reports as to the health condition of the foreign national but they must be assessed in conformity with the guidelines below and **may not be used to disprove the diagnosis of the officer**. They may however be useful in assessing the present condition as it impacts the issue of discretionary relief.

What follows is a synopsis of the case law that developed under the *Immigration Act* respecting the medical officer’s decision (medical notification) as well as the visa officer’s consideration of that decision and the process by which such decisions are reached.

## The Diagnosis and Prognosis

The Federal Court’s statement in *Mohamed*<sup>43</sup> that the applicant must have been suffering from the medical condition diagnosed by the medical officers may seem to indicate that the IAD is to consider the correctness of the medical diagnosis made by the medical officers. Likewise, the Federal Court’s statement in *Uppal*<sup>44</sup> that whether a diagnosis is correct is a question of fact on which the parties may lead evidence may have led to the same conclusion. However, in neither of these cases was the issue directly before the Court. In *Mohamed*, the issue was the reasonableness of the medical officers’ opinions and in *Uppal*, the issue was whether the diagnosis was vague. However, in *Jiwanpuri*,<sup>45</sup> the issue was squarely raised before the Federal Court. The IAD had found that the diagnosis was erroneous, based on the evidence before it. The Federal Court held that the IAD cannot question the **correctness** of a medical diagnosis as it does not have the necessary expertise to do so and should not do so even with the help of expert medical evidence.

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<sup>41</sup> *Hussain, Amin v. M.C.I.* (F.C.T.D., no. IMM-3419-95) Noël, September 26, 1996. Reported: *Hussain v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 86 (F.C.T.D.)

<sup>42</sup> *Parmar*, *supra*, footnote 18, at 7.

<sup>43</sup> *Mohamed*, *infra*, footnote 51.

<sup>44</sup> *Uppal v. Canada (Minister of Employment and Immigration)*, [1987] 3 F.C. 565.

<sup>45</sup> *Jiwanpuri*, *infra*, footnote 73.

The IAD has interpreted the Federal Court cases as still allowing the IAD to determine whether or not the diagnosis is vague, ambiguous, uncertain or insufficient. If there has not been a definite diagnosis, it cannot support the opinion reached by the medical officers;<sup>46</sup> if there has been a definite diagnosis, its correctness cannot be challenged.

Whether a diagnosis is vague, insufficient, uncertain or ambiguous is a question of fact rather than law that must be determined after examining the evidence presented.<sup>47</sup>

Certainty in prognosis is not required. The use of “long term” and “short term” in the prognosis is not vague.<sup>48</sup>

The medical officers must base their diagnosis and opinion on medical evidence. A diagnosis cannot be based only on an admission of a charge of conspiring to supply controlled drugs and of past drug addiction.<sup>49</sup>

## Reasonableness of Medical Officers' Opinion

The IAD must decide whether the opinion expressed by the medical officers pursuant to section 19(1)(a) of the *Immigration Act* regarding danger to public health or safety or excessive demands is reasonable based on the circumstances of the particular case.<sup>50</sup>

In *Mohamed*,<sup>51</sup> the Federal Court set out the general rule as follows:

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<sup>46</sup> *Nijjar, Ranjit Singh v. M.E.I.* (IAD V89-00964), Wlodyka, Chambers, Verma, January 9, 1991.

<sup>47</sup> *Uppal, supra*, footnote 44; *Shanker, supra*, footnote 25.

<sup>48</sup> *M.C.I. v. Ram, Venkat* (F.C.T.D., no. IMM-3381-95), McKeown, May 31, 1996. See also *Pattar, supra*, footnote 18, where a condition of “unknown pathology” did not render the Medical Notification form deficient. In *Litt, Mohinder Kaur v. M.C.I.* (IAD V95-01928), Jackson, June 11, 1998, the medical officer used “mild chronic renal failure” and “chronic renal failure” interchangeably and the medical report was not found to be inconsistent or vague. But in *Phan, Hat v. M.C.I.* (IAD W93-00090), Wiebe, September 4, 1996, the IAD found a diagnosis of “respiratory insufficiency” so vague as to be meaningless where the report cited no time-frames as to deterioration and there was no reference to functional disabilities that might impair the applicant. In *Singh, Balbir Kaur v. M.C.I.* (IAD V97-01550), Carver, May 8, 1998, the prognosis of deterioration was found to be not speculative merely because coronary angiogram procedures were not available (in Fiji) or used in forming the diagnosis of coronary artery disease.

<sup>49</sup> *M.E.I. v. Burgon, David Ross* (F.C.A., no. A-17-90), MacGuigan, Linden, Mahoney (concurring in the result), February 22, 1991. Reported: *Canada (Minister of Employment and Immigration) v. Burgon* (1991), 13 Imm. L.R. (2d) 102 (F.C.A.). See also *D’Costa Correia, Savio John v. M.C.I.* (IAD T96-03318), Maziarz, February 27, 1998, in which the IAD held that the applicant’s admission, which he later denied, that he drank half a bottle of alcohol per day did not constitute a proper basis for a diagnosis of “chronic alcohol abuse” where the Medical Notification form did not mention the type of alcohol consumed or the medical consequences, if any, of such consumption.

<sup>50</sup> *Ahir v. Canada (Minister of Employment and Immigration)*, [1984] 1 F.C. 1098 (C.A.).

It is therefore open to an appellant to show that the medical officers' opinion was unreasonable and this may be done by the production of evidence from medical witnesses other than "medical officers". However, evidence that simply tends to show that the person concerned is no longer suffering from the medical condition which formed the basis of the medical officers' opinion is clearly not enough; the medical officers may well have been wrong in their prognosis but so long as the person concerned was suffering from the medical condition and their opinion as to its consequences was reasonable at the time it was given and relied on by the visa officer, the latter's refusal of the sponsored application was well founded.<sup>52</sup>

Reasonableness is a question of fact; thus it is incumbent on a sponsor to establish an evidentiary foundation to any such challenge.<sup>53</sup>

The IAD should not assume that the medical officers' opinion is reasonable based only on an agreement that the medical condition exists.<sup>54</sup>

In assessing reasonableness, the IAD should consider whether the medical officers applied the correct criteria in assessing an applicant.<sup>55</sup> Medical officers may rely on the guidelines in the Medical Officer's Handbook in making their assessment, but they must be flexible and look at individual circumstances. The guidelines are based on generally accepted medical experience.<sup>56</sup> The Handbook may be given a great deal of weight as it is similar to medical journals and textbooks. The issue is whether the medical officers fettered their discretion.<sup>57</sup>

"Tests of admissibility must be relevant to the purpose and duration for which admission is sought."<sup>58</sup> It is unreasonable for the medical officers to assess a visitor based on the same criteria used to assess an immigrant.<sup>59</sup> Likewise, an applicant who is included in the principal applicant's application as a dependant should not be assessed as an independent applicant and required to establish self-sufficiency.<sup>60</sup> The IAD has applied this reasoning in a number of

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<sup>51</sup> *Mohamed v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 90 (C.A.).

<sup>52</sup> *Ibid.*, at 98.

<sup>53</sup> *Takhar, Manjit Singh v. M.E.I.* (IAD V90-00588), Wlodyka, Chambers, Verma, March 4, 1991.

<sup>54</sup> *Deol, Daljeet Singh v. M.E.I.* (F.C.A., no. A-280-90), MacGuigan, Linden, Robertson, November 27, 1992. Reported: *Deol v. Canada (Minister of Employment and Immigration)* (1992), 18 Imm. L.R. (2d) 1 (F.C.A.).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ajanev, Gulbanoo Sadruddin v. M.C.I.* (F.C.T.D., no. T-1750-92), MacKay, March 29, 1996. Reported: *Ajanev v. Canada (Minister of Citizenship and Immigration)*(1996), 33 Imm. L.R. (2d) 165 (F.C.T.D.).

<sup>57</sup> *Ludwig, James Bruce v. M.C.I.* (F.C.T.D., no. IMM-1135-95), Nadon, April 9, 1996. Reported: *Ludwig v. Canada (Minister of Citizenship and Immigration)* (1996) 33 Imm. L.R. (2d) 213 (F.C.T.D.).

<sup>58</sup> Adjudicator Leckie, quoted with approval by the Federal Court in *Ahir, supra*, footnote 50, at 1101. See also *Deol, supra*, footnote 54; *Ng, Kam Fai Andrew v. M.C.I.* (F.C.T.D., no. IMM-2903-94), Jerome, January 16, 1996; and *Chu, Raymond Tak Wah v. M.C.I.* (F.C.T.D., no. IMM-272-94), Jerome, January 16, 1996.

<sup>59</sup> *Ahir, ibid.*

cases.<sup>61</sup> In *Wong*,<sup>62</sup> the Federal Court clarified the factors to be considered in the case of an applicant who was a dependant:

The assessment of probable demands is to involve an analysis of whether, on the balance of probabilities having regard to all the circumstances, including, but not limited to, the severity of her condition, the degree and effectiveness of the support promised by her family, and her prospects for economic and personal physical self sufficiency, [she] will be cared for in her family home into the future.<sup>63</sup>

The grounds of unreasonableness include incoherence or inconsistency, absence of supporting evidence, failure to consider cogent evidence<sup>64</sup> and failure to consider the factors stipulated in section 22 of the *Immigration Regulations*.<sup>65</sup> Note, however, that the failure to consider the section 22 factors only applies to section 19(1)(a)(i) of the *Immigration Act*, not to section 19(1)(a)(ii).<sup>66</sup>

The duty to look at the reasonableness of the opinion arises where the notice is manifestly in error, e.g. where it relates to the wrong party or an irrelevant disease or if not all relevant medical reports had been considered.<sup>67</sup> The visa officer has no authority to review the diagnostic assessment made by the medical officers. Where the issue of reasonableness arises on the evidence before the visa officer, the officer may elect to seek further medical evidence. Where no such issue arises, the visa officer must rely on the opinion. The visa officer has no discretion but to refuse if the opinion is that the person is inadmissible.<sup>68</sup>

The IAD has held that where there are two different and contradictory medical notifications on file concerning an applicant the visa officer has a duty to forward them to the

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<sup>60</sup> *Ng, supra*, footnote 58; *Chu, supra*, footnote 58. See also *Deol, supra*, footnote 54, where the IAD failed to consider that the medical officers appeared to have assessed the applicant as a “new worker” instead of a sponsored dependant. See also *Chun, Lam v. M.C.I.* (F.C.T.D., no. IMM-5208-97), Teitelbaum, October 29, 1998, where the medical officers’ assessment should not have been limited to economic factors given that the applicant’s daughter was a dependant who was not expected to become independent in the immediate future.

<sup>61</sup> *Tejobunarto, Lianggono v. M.C.I.* (IAD T97-00565), Boire, July 28, 1998; *Grewal, Parminder Singh v. M.C.I.* (IAD V95-01266), Boscariol, November 21, 1997; *Kaila, Harmandeep Kaur v. M.C.I.* (IAD V95-02830), McIsaac, October 2, 1997; *Nagra, Ajaib Singh v. M.C.I.* (IAD V94-00245), Bartley, July 14, 1997.

<sup>62</sup> *Wong, Chan Shuk King v. M.C.I.* (F.C.T.D., no. IMM-2359-95), Simpson, May 24, 1996. Reported: *Wong v. Canada (Minister of Citizenship and Immigration)* (1996), 34 Imm. L.R. (2d) 18 (F.C.T.D.).

<sup>63</sup> *Ibid.*, at 2-3.

<sup>64</sup> *Ismaili, supra*, footnote 31.

<sup>65</sup> *Gao, supra*, footnote 32.

<sup>66</sup> See discussion of *Ismaili, supra*, footnote 31.

<sup>67</sup> *Hussain, Amin v. M.C.I.* (F.C.T.D., no. IMM-3419-95), Noël, September 26, 1996. Reported: *Hussain v. Canada (Minister of Citizenship and Immigration)* (1996), 35 Imm. L.R. (2d) 86 (F.C.T.D.).

<sup>68</sup> *Ajane, Gulbanoo Sadruddin v. M.C.I.* (F.C.T.D., no. T-1750-92), MacKay, March 29, 1996. Reported: *Ajane v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 165 (F.C.T.D.). See also *Ludwig, James Bruce v. M.C.I.* (F.C.T.D., no. IMM-1135-95), Nadon, April 9, 1996. Reported: *Ludwig v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 213 (F.C.T.D.); and *Tong, Kwan Wah v. M.C.I.* (F.C.T.D., no. IMM-2565-96), Heald, October 31, 1997.

medical officer to re-consider. This situation should have raised a doubt in the mind of the visa officer as to the reasonableness of the medical notification.<sup>69</sup>

In a recent case decided under IRPA, *Kim*, a psychologist's report had been filed detailing the extent of the applicant's son's disability and considering some aspects of long-term prognosis and care. The Respondent admitted that it had never been reviewed by the officer deciding this matter. It was sent to Ottawa's Medical Services who sent a report that was in the record. Justice Phelan held that it is not sufficient for the officer to ignore the psychologist's report on the basis that someone else (e.g. Medical Services) would deal or had dealt with it.<sup>70</sup>

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

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

Following cases like *Jiwanpuri*,<sup>73</sup> it appears that the IAD can consider evidence other than strictly medical evidence to question the reasonableness of the medical opinion.

## Excessive demands

"Excessive Demands" is now defined in section 1 of the IRPR.

Where there is a lack of evidence before the medical officers as to the likelihood of the particular applicant's recourse to social services, the particular social services likely required should such recourse be required, the expense of such services (adjusting for any set-offs), and the quality of family support available, their conclusion as to excessive demands lacks an sufficient evidentiary basis. The medical officers have a duty to assess the circumstances of each individual that comes before them in his or her uniqueness.<sup>74</sup> This direction arose in the context

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<sup>69</sup> *Syal-Bharadwa, Bela v. M.C.I.* (IAD V97-02011), Borst, November 30, 1999.

<sup>70</sup> *Kim, Shin Ki v. M.C.I.* (F.C., no. IMM-345-07), Phelan, January 29, 2008; 2008 FC 116.

<sup>71</sup> *Hussain, supra*, footnote 67.

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

<sup>73</sup> *Jiwanpuri, Jasvir Kaur v. M.E.I.* (F.C.A., no. A-333-89), Marceau, Stone, MacGuigan, May 17, 1990. Reported: *Jiwanpuri v. Canada (Minister of Employment and Immigration)* (1990), 10 Imm. L.R. (2d) 241 (F.C.A.).

<sup>74</sup> *Poste, John Russell v. M.C.I.* (F.C.T.D., no. IMM-4601-96), Cullen, December 22, 1997. Applied in *Ho, Nam Van v. M.C.I.* (IAD C97-00009), Wiebe, January 13, 2000.

of a mental disability, but it may be applicable to other areas of medical refusals as well and has recently been found to be applicable to cases of physical disability.<sup>75</sup>

“Excessive demands” was held in *Jim*<sup>76</sup> to mean “more than what is normal or necessary.” The Federal Court accepted “excessive demands” as meaning “unreasonable” or “beyond what the system reasonably provides to everyone.”<sup>77</sup> The Federal Court applied this definition in *Ludwig*,<sup>78</sup> holding that

[...] the necessity of monitoring the applicant’s health situation over a five-year period, the probability that the applicant’s cancer would recur, and the applicant’s reduced chances of a cure, would cause or might reasonably be expected to cause, demands on Canada’s health or social services that would be more than “normal or necessary”.<sup>79</sup>

There should be some evidentiary basis for determining that an applicant’s admission would cause or might reasonably be expected to cause excessive demands.<sup>80</sup> The fact that an applicant was found unfit, by reason of insanity, to stand trial for murder and had since, at all material times, been detained under a Lieutenant Governor’s warrant did not automatically support the conclusion that the applicant’s admission might reasonably be expected to cause excessive demands on health or social services.<sup>81</sup> Neither does the fact that someone had been

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<sup>75</sup> *Cabaldon Jr., Antonio Quindipan v. M.C.I.* (F.C.T.D., no. IMM-3675-96), Wetston, January 15, 1998..

<sup>76</sup> *Jim, Yun Jing v. S.G.C.* (F.C.T.D., no. T-1977-92), Gibson, October 25, 1993. Reported: *Jim v. Canada (Solicitor General)* (1993), 22 Imm. L.R. (2d) 261 (F.C.T.D.). Cited with approval in *Choi, Hon Man v. M.C.I.* (F.C.T.D., no. IMM-4399-94), Teitelbaum, July 18, 1995. Reported: *Choi v. Canada (Minister of Citizenship and Immigration)* (1995), 29 Imm. L.R. (2d) 85 (F.C.T.D.).

<sup>77</sup> *Jim, ibid.* In *Gill, Gurpal Kaur v. M.C.I.* (F.C.T.D., no. IMM-3082-98), Evans, July 16, 1999, the Court noted in *obiter dicta* that the fact that many Canadians of the applicant’s age require a particular operation (knee replacement) cannot justify in law a finding that the admission of a person who also needs this operation will impose excessive demands on the health system. In this situation, any “excessive demand” is caused by the devotion of resources that are inadequate to meet the demand from the present population, not by the admission of an otherwise qualified applicant for a visa. The IAD on the re-hearing of this appeal declined to follow this *obiter dicta*: *Gill, Gurpal Kaur v. M.C.I.* (IAD T97-02345), Whist, January 21, 2000.

<sup>78</sup> *Ludwig, supra*, footnote 57, at 14.

<sup>79</sup> See also *Ajane, supra*, footnote 56, where the finding of excessive demands was also upheld. There was evidence that the applicant had undergone a mastectomy; there was no evidence of recurrence of the cancer after two years; and her examining physician indicated that her prognosis was excellent. However, relying on the medical guidelines, the medical officers were of the opinion that the applicant’s admission might cause excessive demands because a five-year period had not yet elapsed; it was probable she would suffer a significant recurrence; and there was only a 70 per cent chance of survival over a five-year period.

<sup>80</sup> Citizenship and Immigration Canada instructions OP 96-10, IP 96-13, EC 96-02, dated May 9, 1996, instruct medical officers to prepare statutory declarations routinely to support their opinions of excessive demands. The declarations are to refer to all medical evidence considered; any experts consulted and their qualifications; the reasons for forming their opinion; and the costs of required health or social services. It should be noted that the Appeal Division has rarely seen these statutory declarations in appeals. Please note: 2007 OP 15 has no reference to such a Stat Dec. See also *Kumar, Varinder v. M.C.I.* (IAD V97-03366), Boscariol, December 30, 1998 where the panel comments on the sufficiency of the respondent's evidence.

<sup>81</sup> *Seyoum, Zerom v. M.E.I.* (F.C.A., no. A-412-90), Mahoney, Stone, Décary, November 15, 1990.

addicted to drugs automatically bring the person within section 19(1)(a)(ii) of the *Immigration Act*.<sup>82</sup>

The IAD has dealt with an applicant's physical disability and its impact on the validity of a refusal. In *Rai*,<sup>83</sup> the applicant suffered from post-polio paraparesis of her lower limbs. The applicant produced medical evidence that she had adapted remarkably to her infirmity and intended to forego recommended medical treatment to prevent deterioration of the condition. The panel found that the applicant's willingness to forego recommended medical treatment did not go towards showing the unreasonableness of the opinion regarding excessive demands. The panel also held that eligibility for provincial income assistance programs for persons with disabilities did not constitute excessive demands. In *Wahid*,<sup>84</sup> the applicant who suffered from quadriplegia was entitled to attendant care services, but never used them as he preferred to be independent. The IAD considered the evidence that the sponsor had made his house physically accessible and that the applicant had the determination and the resources to ensure that he would not place excessive demands on services to conclude that the refusal was not valid in law.

A Federal Court decision, has indirectly dealt with the notions of scarcity of services and cost. In *Rabang*<sup>85</sup>, a case involving an applicant with developmental delay with cerebral palsy, the Court found that a determination as to the reasonableness of the opinion of the medical officers with regard to excessive demands could not be made without evidence that the services in question are publicly funded and evidence as to availability, scarcity or cost of those services. The Court was not ready to accept that this was a matter within the special knowledge or expertise of the medical officer, nor was the Court ready to accept the argument that requiring such evidence would pose an undue administrative burden. The services in question were special education, physical therapy, occupational therapy, and speech therapy as well as ongoing specialist care. The Court was also not willing to accept that the onus is on the appellant to satisfy the medical officer that the applicant's demands on publicly funded health and social services would not be excessive. The Court stated that this was not the fundamental problem in the case, the problem being that the record disclosed no evidence at all on the critical question of excessive demand.

## **Post-Hilewitz Law**

Since the Supreme Court of Canada decision in *Hilewitz*<sup>86</sup> the legal landscape has dramatically shifted for medical inadmissibility visa refusals based on excessive demands. It is important therefore to consider what changed and any potential impact those changes may have for appeals at the IAD.

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<sup>82</sup> *Burton*, *supra*, footnote 49; *D'Costa Correia*, *supra*, footnote 49.

<sup>83</sup> *Rai*, *Paraminder Singh v. M.C.I.* (IAD V97-00279), Carver, April 20, 1998.

<sup>84</sup> *Wahid*, *Gurbax Singh v. M.C.I.* (IAD T96-04717), Kitchener, January 21, 1998.

<sup>85</sup> *Rabang*, *Ricardo Pablo v M.C.I.* (F.C.T.D., no. IMM-4576-98), Sharlow, November 29, 1999.

<sup>86</sup> *Hilewitz v. Canada (M.C.I.)* and *De Jong v. Canada (M.C.I.)* were joined in *Hilewitz and De Jong v. Canada* [2005] SCC 57, [2005] 2 S.C.R. 706, decided October 21, 2005.

*Hilewitz* and *De Jong* applied separately for permanent resident visas in the investor and self-employed categories respectively. Visa officers refused the applications, despite the applicant's substantial financial resources, because the applicants' children suffered from an intellectual disability, and were found to be medically inadmissible under the former *Immigration Act*, s. 19(1)(a)(ii). The officers concluded that they would require a variety of social services, e.g., special schooling, vocational training, etc., far in excess of the social services required by an average Canadian resident of his age. Their admission would cause excessive demands on social services. The issues in both of these cases are: of what relevance were the financial circumstances of the prospective immigrants? How should one view their willingness and ability to pay for social services once they reach Canada?

The Supreme Court joined the two appeals and held that the term "excessive demands" is inherently evaluative and comparative so medical officers must assess likely demands on social services, not mere eligibility for them. They must necessarily take into account both medical and non-medical factors. This requires individualized assessments. The Court explained that the medical officer cannot ignore the very assets that qualify the applicant for admission to Canada when determining the admissibility of his disabled son. Given their financial resources, the applicants would likely be required to contribute substantially, if not entirely, to any costs for social services provided by the province of Ontario, where they wish to settle.

How has this landmark decision been interpreted by the Federal Court and the IAD? Kelen J. held in both *Airapetyan*<sup>87</sup> and *Ching-Chu*<sup>88</sup> that one's ability or intention to pay for social services should not be restricted to applicants in business immigration categories. The IAD has reached the same conclusion as well<sup>89</sup>. In *Colaco*<sup>90</sup>, the Court of Appeal held, in an application for permanent residence by a "skilled worker" class, that the Minister erred in not considering the applicant's financial willingness and commitment to pay for social services for their mildly mentally retarded child.

Of course "excessive demands" can apply to both social services as well as "medical services". Campbell J. made this distinction in *Lee* where an applicant in the "entrepreneur category" was refused for excessive demands as a result of his polycystic kidney disease. The Court held:

- (1) Although the Applicant is an entrepreneur with considerable net worth, the Officer did not err by failing to consider the Applicant's ability to pay for his own health care for the following reasons: (i) *Hilewitz* (SCC) dealt specifically with "social services" and not "health services"; (ii) a permanent resident automatically has health insurance in Canada; (iii) paying for health care is contrary to Canadian public policy; (iv) charging patients for

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<sup>87</sup> *Airapetyan, Lidiya v. M.C.I.* (F.C., no. IMM-2570-06), Kelen, January 17, 2007; 2007 FC 42.

<sup>88</sup> *Ching-Chu, Lai v. M.C.I.* (F.C., no. IMM-694-07), Kelen, August 28, 2007; 2007 FC 855.

<sup>89</sup> *Zhang, Jiang v. M.C.I.* (IAD TA4-10174), Tumir, February 7, 2006.

<sup>90</sup> *Colaco, Peter Anthony v. M.C.I.* (F.C.A., no. A-366-06), Linden, Létourneau, Sexton, September 12, 2007; 2007 FCA 282.

insured health services is expressly prohibited under the *Canada Health Act*. Based upon how Canada disseminates health services to permanent residents, a person's financial ability to pay for health services would be irrelevant (*Deol*); and (v) excessive demands on health care are more than just financial demands, e.g., using up finite places in waiting lists (*Gilani*).

(2) The Officer breached procedural fairness by not also considering the Applicant's request for a temporary resident permit.

In *Kirec*<sup>91</sup> the applicant's daughter suffers from Althetoid Cerebral Palsy. The visa officer found she was medically inadmissible for excessive demand based on her need for social services. The applicant argued that he did not know the contents of the medical file and did not know the criteria applied to assess his daughter's condition and therefore the fairness letter process was flawed. The Court disagreed as the fairness letter included the medical findings in the medical notification. The letter indicated the applicant's daughter was non-verbal, completely dependent for all activities of self care, utilizes the services of occupational and speech therapy, physiotherapy and assistive technology for communication. Although there was not a dollar figure on the services utilized by the applicant's daughter through the publicly funded Vancouver School Board, there was evidence that she required a full time special education assistant - this alone constitutes an excessive demand on social service as it clearly exceeds the threshold of \$4,057. In addition, she required the services of physiotherapists, occupational therapists, speech language therapists and had utilized public funds for a wheelchair. It was reasonable for the visa officer to trust the findings of the medical officer that she would continue to use those services on return to Canada. The applicant failed to make any submissions regarding how family support would offset the excessive demands other than an expressed intention to utilize private services. The visa officer properly took into account the applicant's daughter's personal circumstances including her long history of using social services while in Canada.

There have been some specific situations that have arisen worth noting. The Court commented<sup>92</sup> that the medical officer should compare the applicant's situation to the average cost for Canadian citizens of **the same age group**. It should be noted that this interpretation is at odds with the actual definition of "excessive demands" in IRPA. The visa officer cannot be faulted for failing to conduct an individualized assessment when no plan for the daughter's care in Canada and no submissions are put forward for consideration<sup>93</sup>.

## Intellectual Disability Cases

Special mention must be made of cases involving intellectual disability or "mental retardation". The concept of mental retardation cannot be used as a stereotype. The degree and

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<sup>91</sup> *Kirec, Babur v. M.C.I.* (F.C., no. IMM-6272-05), Blais, June 23, 2006; 2006 FC 800

<sup>92</sup> *Hossain, Ishtiaq v. M.C.I.* (F.C., no. IMM-4132-05), Gauthier, April 11, 2006; 2006 FC 475.

<sup>93</sup> *Gau, Hui-Chun v. M.C.I.* (F.C., no. IMM-7127-05), Mactavish, October 23, 2006; 2006 FC 1258.

probable consequences of the degree of mental retardation for excessive demands must be assessed by the IAD. It is an error for a medical officer to fail to specify the degree of mental retardation, thus making it difficult to assess the reasonableness of the finding.<sup>94</sup> The degree of mental retardation must be indicated by the medical officers, as there may be a higher level of proof required to establish excessive demands in the case of mild mental retardation.<sup>95</sup>

If a finding of excessive demands is based not on the medical condition as such, but on the potential failure of family support, there must be evidence as to the probability of such failure.<sup>96</sup>

The Federal Court set aside a visa officer's refusal where the record did not contain an estimation of the actual amount of specialized education required by the applicant's daughter or any documentation concerning the availability of, or current access to, that specialized education.<sup>97</sup>

An opinion based on the need for special schooling, training and indefinite home care and supervision was found to be reasonable in *Choi*.<sup>98</sup> In *Jaferi*,<sup>99</sup> the daughter of an applicant was found to be developmentally handicapped and special schooling would cost 260 per cent more than schooling for a healthy child. The Federal Court found that the medical officers' finding was not unreasonable. However, in *Ismaili*,<sup>100</sup> the Federal Court found that the visa officer did not properly consider the issue of excessive demands as the evidence was that the applicant's son required a vitamin supplement at a cost of \$12 per month and there was no waiting list at the special school he required. The cost of the special schooling was not canvassed as in *Jaferi*.<sup>101</sup>

In *Ma*,<sup>102</sup> it was held to be well established that specialized education is a "social service" within the meaning of the Act. In *Sabater*,<sup>103</sup> the Federal Court held that services provided by schools to the handicapped may be considered as social services. The Federal Court of Appeal in

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<sup>94</sup> *Deol, supra*, footnote 54; *Sabater, Llamado D. Jr. v. M.C.I.* (F.C.T.D., no. IMM-2519-93), McKeown, October 13, 1995. Reported: *Sabater v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 59 (F.C.T.D.); *Nagra, supra*, footnote 61.

<sup>95</sup> *Sabater, supra*, footnote 94. See also *Poste, John Russell v. M.C.I.* (F.C.T.D., no. IMM-4601-96), Cullen, December 22, 1997; *Fei, supra*, footnote 35; and *Lau, Hing To v. M.C.I.* (F.C.T.D., no. IMM-4361-96), Pinard, April 17, 1998.

<sup>96</sup> *Litt, Jasmail Singh v. M.C.I.* (F.C.T.D., no. IMM-2296-94), Rothstein, February 17, 1995. Reported: *Litt v. Canada (Minister of Citizenship and Immigration)* (1995), 26 Imm. L.R. (2d) 153 (F.C.T.D.). See also *Truong, Lien Phuong v. M.C.I.* (IAD T96-00900), Kitchener, Bartley, Boire, April 7, 1997.

<sup>97</sup> *Cabaldon Jr., supra*, footnote 75.

<sup>98</sup> *Choi, supra*, footnote 76.

<sup>99</sup> *Jaferi, supra*, footnote 31.

<sup>100</sup> *Ismaili, supra*, footnote 31.

<sup>101</sup> *Jaferi, supra*, footnote 31.

<sup>102</sup> *Ma, supra*, footnote 35.

<sup>103</sup> *Sabater, supra*, footnote 94.

*Thangarajan*<sup>104</sup> and in *Yogeswaran*<sup>105</sup> indicated that the education of mentally challenged students within the publicly funded provincial school system does constitute a “social service” within the meaning of section 19(1)(a)(ii) of the Act. The Court explained that since institutionalization of the mentally retarded is a social service, a substitute more modern program, special education, is also a social service.

In deciding whether to exercise its discretionary jurisdiction the Appeal Division would fetter its discretion by not considering all factors relevant to its determination. For example, in *Deol*,<sup>106</sup> the Appeal Division focused on the refusal of the family to acknowledge the mental retardation of one of its members and the successful functioning of the two households. At the same time, the Appeal Division failed to consider, particularly, the nature of the medical condition of mental retardation, “the psychological dependencies it engenders and the close bonds of affection that may arise in such a family, all in light of the objective [...] of the *Immigration Act* of facilitating the reunion of close relatives in Canada.”<sup>107</sup> The Federal Court has observed that the Appeal Division should not use stereotyping or irrelevant considerations in deciding whether to grant special relief.<sup>108</sup>

## Timing

Generally, the reasonableness of a medical opinion is to be assessed at the time it was given and relied on by a visa officer.<sup>109</sup> Nevertheless, in making that assessment, the IAD may rely on any relevant evidence adduced before it.<sup>110</sup> Further, where the IAD is presented with a new opinion of a medical officer, concurred in by another medical officer, it is the reasonableness of that opinion that must be assessed.<sup>111</sup>

Evidence as to an applicant’s condition subsequent to the refusal has limited relevance to the legal validity of the refusal. In *Shanker*,<sup>112</sup> the Federal Court held that evidence of an applicant’s medical condition subsequent to the refusal is not relevant to the legality of the refusal. However, it may still be relevant to the extent that it can demonstrate that the medical

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<sup>104</sup> *M.C.I. v. Thangarajan, Rajadurai Samuel* (F.C.A., no. A-486-98), Létourneau, Rothstein, McDonald, June 24, 1999; reversing *Thangarajan, Rajadurai Samuel v. M.C.I.* (F.C.T.D., no. IMM-3789-97), Reed, August 5, 1998.

<sup>105</sup> *Yogeswaran, Thiyagaraja v. M.C.I.* (F.C.T.D., no. IMM-1505-96), McKeown, April 17, 1997.

<sup>106</sup> *Deol, supra*, footnote 54.

<sup>107</sup> *Ibid.*, at 7.

<sup>108</sup> *Budhu, Pooran Deonaraine v. M.C.I.* (F.C.T.D., no. IMM-272-97), Reed, March 20, 1998.

<sup>109</sup> See, for example, *Jiwanpuri, supra*, footnote 73; *Gao, supra*, footnote 32; and *Mohamed, supra*, footnote 51.

<sup>110</sup> *Jiwanpuri, supra*, footnote 73.

<sup>111</sup> *Kahlon, Darshan Singh v. M.E.I.* (F.C.A., no. A-115-86), Mahoney, Stone, MacGuigan, February 6, 1989. Reported: *Kahlon v. Canada (Minister of Employment and Immigration)* (1989), 7 Imm.L.R. (2d) 91 (F.C.A.)

<sup>112</sup> *Shanker, supra*, footnote 25.

officer's opinion was unreasonable at the time it was given and relied on by the visa officer.<sup>113</sup> It is not enough to simply show that the applicant is no longer suffering from the medical condition.<sup>114</sup>

## Discretionary Jurisdiction to grant special relief

The IAD continues to have the power to grant relief to those sponsored members of the family class who are medically inadmissible. The member may grant their appeal if they are satisfied that at the time the appeal is disposed of "taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case"<sup>115</sup>.

Of particular relevance when considering compassionate or humanitarian factors within the context of medical inadmissibility is evidence of an applicant's current state of health.<sup>116</sup> Improvement will be considered in favour of the sponsor (although a decision to grant special relief probably should not turn solely on this criterion),<sup>117</sup> while evidence that the condition is stable or has deteriorated may be considered against the sponsor.<sup>118</sup>

In *Szulikowski*,<sup>119</sup> the IAD allowed the appeal on discretionary grounds although the cost of open-heart surgery would exceed \$25,000, given there was no waiting list in Alberta and appropriate post-operative care was not available in the Ukraine for the applicant, who was the sponsor's adopted son.

In *Rai*,<sup>120</sup> the efforts of a family to provide specialized transport and to adapt their house for wheelchair accessibility were positive humanitarian and compassionate factors to be considered.

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<sup>113</sup> *Jiwanpuri, supra*, footnote 73.

<sup>114</sup> *Mohamed, supra*, footnote 51.

<sup>115</sup> S. 67(1)(c) IRPA.

<sup>116</sup> *Kirpal* is a now a historic footnote: *Kirpal* no longer applicable in the IRPA context. According to one decision of the Federal Court, the IAD errs if it "weighs" the legal impediment to admissibility against the strength of the humanitarian or compassionate factors present in an appeal: *Kirpal v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 352 (T.D.). Further, the Court in *Kirpal* held that the IAD should consider separately whether the granting of special relief is warranted with respect to each applicant. However, as canvassed in *Chauhan, Gurpreet K. v. M.C.I.* (IAD T95-06533), Townshend, June 11, 1997, in decisions that pre-date *Kirpal*, the Federal Court of Appeal has sanctioned consideration of the legal impediment in the exercise of the IAD's discretionary jurisdiction. In *Chauhan*, the panel also articulated its disagreement with the holding in *Kirpal* regarding the separate consideration of special relief for each applicant.

<sup>117</sup> *Choi, Tommy Yuen Hung v. M.E.I.* (I.A.B. 84-9134), Weisdorf, Suppa, Teitelbaum, September 2, 1986.

<sup>118</sup> *Zheng, Bi Quing v. M.E.I.* (IAD T91-01428), Sherman, Weisdorf, Tisshaw, January 3, 1992; *Tonnie v. M.E.I.* (IAD T91-00202), Bell, Fatsis, Singh, March 30, 1992; *Moledina, Narjis v. M.E.I.* (IAD T91-02516), Ahara, Chu, Fatsis, May 8, 1992.

<sup>119</sup> *Szulikowski, Myron Joseph (Mike) v. M.C.I.* (IAD V97-03154), Nee, August 13, 1998.

<sup>120</sup> *Rai, supra*, footnote 83.

IRPA now sets out the impact of an allowed appeal on the sponsorship process: "An officer, in examining a permanent resident or foreign national, is bound by the decision of the Immigration Appeal Division to allow an appeal in respect of a foreign national."<sup>121</sup>

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<sup>121</sup> S. 70(1) IRPA.

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