Immigration and
Refugee Board of Canada

Immigration Appeal
Division

Commission de l'immigration
et du statut de réfugié du Canada

Section d'appel de
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Western Region
Library Square
Suite 1600 300 W Georgia St
Vancouver, BC V6B 6C9
Telephone: (604) 666-5946
Facsimile: (604) 666-3043

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To the **appellant** at the following address:

Devinder Singh
6947 – 126 A Street
Surrey BC V3W 1K6

Personal Service: ☐
Prepaid Regular Mail: ☒
Courier: ☐
Fax: ☐

To the **appellant's counsel** at the following address:

Khushpal Taunk
Barrister & Solicitor
209 - 8556 120th Street
Surrey BC V3W 3N5

Personal Service: ☐
Prepaid Regular Mail: ☒
Courier: ☐
Fax: ☐

To the **Minister's counsel** at the following address:

CANADA BORDER SERVICES AGENCY
Immigration Appeals
BC/Yukon Region
Library Square
Attention: M.McPhalen
Suite 700 - 300 West Georgia
Vancouver, BC V6B 6C8

Personal Service: ☐
Prepaid Regular Mail: ☒
Courier: ☐
Fax: ☐

(Signature) 

(Print Name) B.CHONG

IMMIGRATION AND REFUGEE BOARD OF CANADA

IMMIGRATION APPEAL DIVISION

COMMISSION DE L'IMMIGRATION ET DU STATUT DE RÉFUGIÉ DU CANADA

SECTION D'APPEL DE L'IMMIGRATION

IAD File No. / N° de dossier de la SAI : VA4-02505
Client ID no. / N° ID client : 5132-6599

# Reasons and Decision – Motifs et décision

*Sponsorship*

| | |
|---|---|
| **Appellant(s)** | **Appelant(s)** |
| DEVINDER SINGH | |
| **Respondent** | **Intimé** |
| The Minister of Citizenship and Immigration<br>Le Ministre de la Citoyenneté et de l'Immigration | |
| **Date(s) and Place of Hearing** | **Date(s) et Lieu de l'audience** |
| December 14, 2005<br>Vancouver, BC | |
| **Date of Decision** | **Date de la Décision** |
| January 13, 2006 | |
| **Panel** | **Tribunal** |
| Margaret Ostrowski | |
| **Appellant's Counsel** | **Conseil de l'appelant(s)** |
| Khushpal Taunk | |
| **Minister's Counsel** | **Conseil de l'intimé** |
| Michael McPhalen | |

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# Reasons for Decision

## Introduction

[1] The appellant, DEVINDER SINGH, appeals from a refusal to issue a permanent resident visa to PARVINDER SINGH AULAKH (the "applicant") as his dependent child pursuant to section 12 of the *Immigration and Refugee Protection Act* (the "*Act*").[1]

[2] The visa officer determined that because the non-accompanying family member (the applicant) was not examined, paragraph 117(1)(d) of the *Immigration and Refugee Protection Regulations* (the "*Regulations*")[2] applied and the applicant was not considered a member of the family class.

[3] The visa officer relied on the evidence that: "[the applicant's father] had a interview with an immigration officer on May 30, 2000. In the interview, [he] confirmed the children on his application for permanent residence are not going to accompanying [sic] him to Canada, and he understood that he cannot sponsor them in the future".[3]

[4] At issue in this case is whether the applicant is excluded by the operation of paragraph 117(9)(d) for consideration as a member of the family class because he was not examined in conjunction with his sponsor's application.

[5] A hearing before the Appeal Division is a hearing *de novo* and additional evidence that was not before the visa officer may be taken into account. The burden of proof on a balance of probabilities rests with the appellant.

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1 *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.
**12.** (1) A foreign national may be selected as a member of the family class on the basis of their relationship as the spouse, common-law partner, child, parent or other prescribed family member of a Canadian citizen or permanent resident.

2 *Immigration and Refugee Protection Regulations*, SOR/2002 – 227.
**117.** (9) A foreign national shall not be considered a member of the family class by virtue of their relationship to a sponsor if
(*d*) subject to subsection (10), the sponsor previously made an application for permanent residence and became a permanent resident and, at the time of that application, the foreign national was a non-accompanying family member of the sponsor and was not examined.

3 Record, p. 47.

## Background and Relevant Evidence

[6] The appellant is a fifty-two year old taxi driver born in India and the father of two children, one of whom is the applicant. He left India in June 1994 (or June 1993) and according to the CAIPS[4] notes, he was (in the U.S.) 'arrested or received' by INS border patrol 07Oct1994. The notes state: "Dep proc which may mean deportation proceedings but not sure". He made an application for permanent residence in Canada on September 4, 1998 and included his two children in the application as his dependents though he did not have custody of them at that time. The CAIPS notes state on Dec. 8, 1999, "the applicant has remained silent to date regarding the fact that he is under deportation proceedings and that he has appealed an application for political asylum in the USA." He became a permanent resident of Canada on March 20, 2002 from Los Angeles. He was divorced from his first wife, the mother of his children, on November 20, 1996 and it was stated in the order that "the respondent was guilty of cruelty and desertion and the petitioner could not live with the respondent". The order further states that notice of the petition for the divorce order was given to the respondent, the appellant - that he was served – but he did not appear in Court and was proceeded against *ex-parte*. His ex-wife was given custody of the children at that time. The appellant remarried on May 3, 1997 and is presently separated from that wife.

[7] The appellant was interviewed on May 30, 2000 and the CAIPS notes state that "In the interview the father confirmed the children on his application for permanent residence are not going to accompanying (sic) him to Canada. He did not meet the statutory requirements at the time of the spr's immigrant application."

[8] The applicant is the nineteen year old son of the appellant who at the date of his application for permanent residence in 2004, was attending College (12th grade) in Amritsar, India. In evidence were letters from the applicant to the appellant expressing the wish that he wanted to come to Canada and be with his father and some friends that have come to Canada.

[9] On page 32 of the record is a copy of a statement dated 2.12.2002 from the mother of the applicant stating that "I handover the custody of both the children to applicant Devinder Singh."

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4 CAIPS - Computer Assisted Immigration Processing System.

[10] Counsel for the appellant submitted that subsection 117(10) of the *Act* applies because the appellant's application form for permanent residence included the appellant's children (the children had been disclosed to the visa officer) and it was the decision of the visa officer not to examine the appellant's children at that time.

[11] Counsel for the Minister agreed that the visa officer made a determination that the children were not to be examined as the appellant did not have custody of them and such a determination was in conformance with the law at that time. He submitted that the appellant knew that he could not sponsor them at a later time as was documented in the CAIPS notes and that subsection 117(10) could not be used.

## Analysis

[12] The evidence is clear and unrebutted that the appellant disclosed his children at the time in his application for permanent residence. The evidence is also clear that the visa officer made a determination not to examine the children at that time which conformed with the law in existence at the time.

[13] The panel has reviewed the cases of *Dawid*[5] and Marcado.[6] In the *Dawid* case, the panel found that:

> I find the evidence in this case proves on a balance of probabilities that the Applicant was disclosed as a non-accompanying dependent. I am satisfied the Applicant falls under s.117(1) and that the Applicant was not examined because an officer determined it was not required.

[14] In the *Marcado* case, the panel came to the following conclusion:

> Based on the evidence presented by the appellant, which the panel finds to be credible and trustworthy, the panel concludes that the applicant was disclosed but not examined at the time of his sponsor's application for permanent residence because an officer determined that the applicant was not required by the former Immigration Act to be examined.

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5 *Dawid v. Canda (Minister of Citizenship and Immigration)* [2005] I.A.D.D. No. 55, Nos. VA3-03812, 3545-9656, Weibe, February 15, 2005.

6 *Marcado v. Canada (Minister of Citizenship and Immigration)* [2005] I.A.D.D. No. 299, No. TA4-13311, Waters, August 10, 2005.

[15] In both cases, the exception in 117(10) to paragraph 117(9)(d) was applied because of the finding of fact that the applicant had been disclosed at the time of application by the appellant for permanent residence.

[16] Because, in fact, subsection 117(10) also refers to "the former Act", the panel is persuaded that notwithstanding that the determination not to examine was made under the former Act and was in conformance at that time, subsection 117(10) applies to determinations made under the former Act and is applicable.

[17] Accordingly, the concerns of the visa officer regarding the applicability of paragraph 117(9)(d) are not supported by this panel. The appellant has met the onus of demonstrating that the applicant comes within the exception to paragraph 117(9)(d) found in subsection 117(10) of the *Regulations* and is not excluded from membership in the family class.

[18] At page 30 of the Record, there is a reference to the appellant having been guilty of cruelty against his wife. This evidence may give rise to a consideration of whether Regulation 133(1)(f) applies to this case. However, since the matter was not raised at the hearing, the panel will not consider it further.

[19] As no issue was raised regarding the nature of the U.S. deportation proceedings against the appellant, the panel declines to address this matter further.

## Decision

[20] The applicant, Parvinder Singh Aulakh, is not excluded by the provisions of paragraph 117(1)(d) of the *Regulations* and is to be considered as a member of the family class of the appellant. The appeal of Devinder Singh is allowed.

# NOTICE OF DECISION

The appeal is allowed. The officer's decision to refuse a permanent resident visa is set aside, and the officer must continue to process the application in accordance with the reasons of the Immigration Appeal Division.

**"Margaret Ostrowski"**
**Margaret Ostrowski**

**13 January 2006**
**Date** (day/month/year)

**Judicial review** – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.