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DNA, Discrimination and the Definition of "Family Class": *M.A.O. v. Canada (Minister of Citizenship and Immigration)*

Cindy L. Baldassi*

Résumé

Ce commentaire examine le traitement réservé par la loi canadienne sur l'immigration aux enfants qui ne sont ni des enfants adoptifs ni des enfants biologiques de leurs parents. Cet examen est fait à travers l'étude d'un cas porté devant la Cour fédérale concernant le rejet de l'immigration parrainée d'un garçon qui s'est avéré ne pas être le fils génétique de son père légal. Ce cas met en exergue le fait que Citoyenneté et Immigration Canada est plus enclin à demander des tests d'empreintes génétiques de la part d'immigrants et de réfugiés issus de pays pauvres qui ont des difficultés à obtenir les documents généralement requis. De plus, seuls les enfants adoptifs qui n'ont plus aucun lien juridique avec leurs familles biologiques peuvent être parrainés alors même que ce type d'adoption est interdit dans certains pays et certaines religions et, de ce fait, certains membres de la famille deviennent inadmissibles. L'examen et l'acceptation de titres justificatifs de façon aléatoire et inégale a pour effet de créer une situation où certains enfants non biologiques peuvent être acceptés dans le pays sur les mêmes bases que d'autres sont rejetés. Pour conclure, la loi et la politique existantes en matière de parrainage relatif à la catégorie de « regroupement familial » portent atteinte de manière fondamentale aux droits de la personne à l'égalité, sur la base de caractéristiques religieuses, raciales, ethniques et économiques des demandeurs. Des contestations judiciaires à venir pourraient remédier à l'effet discriminatoire de la manière dont la catégorie de « regroupement familial » est présentement définie et interprétée.

Introduction

Both the previous and current statutes governing Canadian immigration law list family reunification as a key goal of the system.[1] Despite this goal, some permanent residents and Canadian citizens have more difficulty than others do in proving that

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their relatives are indeed their relatives. In particular, immigration officials sometimes request DNA samples in order to establish genetic ties between the applicant and the sponsor. The decisions in *M.A.O. v. Canada (Minister of Citizenship and Immigration)*, from both the Immigration Appeal Division (IAD)[2] and the Federal Court of Canada,[3] examine the circumstances in which such a request may be considered appropriate.

When this story of Somali immigrants to Canada is juxtaposed with other laws, practices, and policies regarding immigrant "members of the family class", disturbing themes emerge, involving assumptions about what type of family is real and worthy of recognition by the Canadian government. Although current legislation and older jurisprudence limits sponsorship to biological or adoptive offspring, deeper examination of internal Citizenship and Immigration Canada (CIC) policies and other parts of the legislation expose exceptions to this rule, but those exceptions are available to only a privileged few. Despite some legal acknowledgement of our society's changing definition of "family", certain types of people—usually Westernized, relatively wealthy, and emulating the ideology of the traditional nuclear family—are more able to rely on this recognition in the immigration process than are others.

The history of Canadian immigration policy is chequered with both overt and subtle discrimination against particular groups. In the early years of the country, many laws expressly forbade or restricted entry to members of distinct racial, ethnic, and religious groups, or to people from specified countries.[4] More recently, commentators have demonstrated that many policies and programs still employ discriminatory practices that adversely affect particular classes of people, either intentionally or indirectly.[5] Differential treatment of refugees and immigrants who

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and support, and the Federal Courts' Selection Committee and Sim, Lowman, Ashton & McKay LLP for recognition of this paper and the accompanying financial support.

1. *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 [IRPA], s. 3 (1)(d) states, "The objectives of this Act with respect to immigration are ... to see that families are reunited in Canada."
2. *M.A.O. v. Canada (Minister of Citizenship and Immigration)* (2002), 21 Imm. L.R. (3d) 28, [2002] I.A.D.D. No. 89 (QL) [IAD decision]; *M.A.O. v. Canada (Minister of Citizenship and Immigration)*, [2005] I.A.D.D. No. 18 (QL) [second IAD decision, or IAD decision (2)].
3. *M.A.O. v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1406, 242 F.T.R. 248, 37 Imm. L.R. (3d) 129 [FC decision].
4. Donald Galloway, *Immigration Law* (Concord, Ont.: Irwin Law, 1997) 3; Reg Whitaker, *Double Standard: The Secret History of Canadian Immigration Law* (Toronto: Lester & Orphen Dennys, 1987); Tania das Gupta, "Families of Native People, Immigrants, and People of Colour" in N. Mandell & A. Duffy, eds., *Canadian Families: Diversity, Conflict, and Change* (Toronto: Nelson Thomson Learning, 2000) 146; Agnes Calliste, "Race, Gender and Canadian immigration policy: Blacks from the Caribbean, 1900–1932" (Winter 1993–94) 28:4 Journal of Canadian Studies 131; Beverley Baines, "When is past discrimination un/constitutional?: the Chinese Canadian redress case" (2002) 65 Sask. L. Rev. 573–585.
5. Audrey Macklin, "Foreign Domestic Worker: Surrogate Housewife or Mail Order Servant?" (1992) 37 McGill L.J. 681; Inna Kogan, "Hidden discrimination in education of skilled workers" (October 2002)

lack favoured types of identity documents is one such example,[6] as is demonstrated by A.O.'s story.

THE SPONSORSHIP OF A.O.

Background Facts[7]

M.A.O. and S.S.A. were married in Somalia in 1983, and had three children: a daughter, L.O., and two sons, S.O. and A.O. Unfortunately, S.S.A., the mother, died within two months of A.O.'s birth in 1987. M.A.O. later remarried, and his second wife sponsored him to come to Canada under the family class provisions of the 1978 *Immigration Act* and *Regulations*.[8] He was landed in June 1998 and submitted sponsorship applications for his three children at the end of that year.

Like many Somalis,[9] the family was unable to provide Citizenship and Immigration Canada with documentary proof of the birth registrations because the civil war in Somalia had decimated the bureaucratic infrastructure responsible for such records. M.A.O. submitted his passport, which included the names and photos of all three children, and affidavits attesting to the familial relationship, including three from people who were at the hospital for A.O.'s birth.

The Visa Officer assigned to the file decided that the materials provided were insufficient proof of the parent-child relationship, and wrote to M.A.O. on 1 June 1999, explaining his decision and stating:

> [The children] and yourself are therefore *invited* to undergo a DNA blood test to prove that you are the natural biological father of [the children]. The cost of undergoing such a test is entirely the applicant's or the sponsor's responsibility ...
>
> *Failure to undergo a DNA blood test will likely lead to the refusal of an application.* Please notify us as soon as possible if anyone refuses to do the test. *If we do not hear from you within 3 months of the date of this letter* we will assume that there is no interest in doing the test and *we will proceed accordingly with the refusal of the application.* [emphasis added][10]

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22 Imm. L.R. (3d) 13; Anne Dobson-Mack, "Independent immigrant selection criteria and equality rights: discretion, discrimination and due process" (1993) 34 C. de D. 549.

6. Sherene H. Razack, "'Simple Logic': Race, the Identity Documents Rule and the Story of a Nation Besieged and Betrayed" (2000) 15 J.L. & Soc. Pol'y 181; Julia Dryer, "The Undocumented Convention Refugees in Canada Class: Creating a Refugee Underclass" (1998) 13 J.L. & Soc. Pol'y 166.
7. Unless otherwise stated, the facts are extracted from the IAD decisions and the FC decision.
8. R.S.C. 1985, c. I-2 [the "former *Act*"] and *Immigration Regulations*, 1978, SOR/78-172 [the former *Regulations*].
9. See Maureen Murray, "Somalis protest refugee rules: They say policies are holding them back" *Toronto Star* (31 May 1995) A7; "Somali refugees say Ottawa discriminates" *CBC News* (30 June 1999), online: CBC <http://www.cbc.ca>; Rebecca Bragg, "Testing our compassion: Demand for costly DNA tests for Third World immigrants sparks accusations of racism" *Toronto Star* (20 May 1995) C1.
10. As quoted in the FC decision at para. 81.

The family complied with the "invitation" in August 1999, and the results showed that M.A.O. could not be the biological father of A.O. CIC issued entrance visas for S.O. and L.O., but rejected A.O.'s application since he was not a "member of the family class" as defined in s. 2 (1) of the former *Regulations*. The definitions operable at the time included:

> "member of the family class", with respect to any sponsor, means ...
>
> (b) the sponsor's dependent son or dependent daughter, ...
>
> "dependent son" means a son who
>
> (a) is less than 19 years of age and unmarried, ...
>
> "son" means, with respect to a person, a male
>
> (a) *who is the issue of that person* and who has not been adopted by that person, or
>
> (b) who has been adopted by that person before having attained 19 years of age; (fils) [emphasis added][11]

M.A.O. appealed the refusal to the Immigration Appeal Division of the Immigration and Refugee Board.[12]

First Decision of the Immigration Appeal Division

The appeal was heard by a panel of one, Board Member Rhea M.J. Hoare, who permitted M.A.O.'s request for a confidentiality order to protect the family's identities.[13] M.A.O. did not dispute the testing methodology or accuracy, instead choosing to argue that such tests have no impact on the fact that A.O. is his son. Ms. Hoare stated that DNA tests are the "best evidence currently available" to determine biological relationships, and that once DNA results are known, "other traditional types of evidence regarding identity ... are rendered immaterial ... The panel is not in a position to give greater weight to other evidence of relationship over and above the DNA result."[14]

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11. Former *Regulations*, s. 2 (1). The definition of "son" has since changed: see *infra* note 32 and accompanying text.
12. Since his siblings left for Canada, A.O. has continued to live with family friends in Kenya. The family speaks on the phone regularly, and financial support is sent to Kenya from Canada.
13. Counsel for M.A.O. argued that "the possibility that there was adulterous conduct within his marriage" could result in penalties under sharia law, and could lead to the stigmatization of the family in the Muslim community. While the written reasons appear to dismiss the possibility of actual harm to M.A.O. (as opposed to his late wife), the likelihood that the information from the hearing and reasons would be publicly available in Kenya is deemed enough to threaten the safety of A.O.: IAD decision, paras. 2–9. Some IAD decisions are available on the Internet, which might be what Ms. Hoare meant by publication in Kenya.
14. IAD decision, para. 21.

Ms. Hoare characterizes the central question of the appeal as a simple one of jurisdiction: if A.O. is not a member of the family class, then the IAD lacks the jurisdiction to consider the appeal of the decision. However, family class status here hinges on the interpretation of the word "issue" in the definition of "son." Counsel for the Minister of Citizenship and Immigration contended that "issue" means biological descendant, and the only way a sponsor can bring a child to Canada under the former *Act* when there is no biological relationship is through adoption. Other Canadian statutes support this biological interpretation of "issue".

M.A.O. countered that "issue" should include both legal and biological children. As explained by expert witness Professor El Obaid Ahmed El Obaid, both the family law of Somalia and Islamic law in general determine that a child born to a woman in a legal marriage is the husband's child, regardless of DNA results. Since the marriage took place under sharia law and all parties are still practising Muslims, A.O. is the legal son of M.A.O. and should be considered his legal issue.

Ms. Hoare rejected the application of "foreign law" to a question of Canadian statutory interpretation, since "there is ample Canadian law to assist in a consideration of what ["issue"] means in this legislative context."[15] She stated that the plain and ordinary meaning of "issue", in common language and in legal usage, covers children in relation to their biological parents, a position taken in previous IAD decisions and *Canada (Minister of Citizenship and Immigration) v. Soma Devi Joshi*,[16] a case that is binding on the IAD. The Member concluded that A.O. cannot be the issue of M.A.O. and is therefore excluded from the family class.[17]

In the alternative, M.A.O. claimed that the narrow interpretation of the word "issue" constituted a breach of his rights under the *Canadian Charter of Rights and Freedoms*,[18] specifically "section 7 (security of the person) by interference with a right to family life and section 15 (equality) on the grounds of discrimination against him on his national origin, his religion and his family status."[19] Without considering the detailed tests that apply to both *Charter* sections, Ms. Hoare dismissed these arguments on the basis that it is not Canadian law that restricts M.A.O.'s ability to reunite his fam-

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15. *Ibid.*, para. 24. In relation to the applicability of foreign law for determining the validity of a foreign marriage or adoption, as is allowed in the former *Act* and *Regulations*, the Member states, "Even then, foreign law must be adequately proven", signalling she doubted that the evidence before her did so.

16. (1997) 128 F.T.R. 185 (FCTD) [*Joshi*].

17. IAD decision, at paras. 32–35. Ms. Hoare notes early in the reasons that neither side argued that A.O. fit under a family class category other than "dependent son" so she did not consider the possibility: at para. 13.

18. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

19. IAD decision, para. 37.

ily in Canada but "foreign law, religious practices and custom" that discriminates against them. She provided examples:

> Professor El Obaid testified that [M.A.O.] could not adopt [A.O.] under Sharia (Islamic) law or Muslim religious practices as the child would already be recognized as the product of a legally valid marriage. There is no operative law under Islamic law allowing adoption ...
>
> Canadian law would allow the appellant to explore the possibility of adoption ... It is the custom of his country of origin, as reflected in its religious beliefs and resulting laws, which prevent [*sic*] the appellant from taking these steps ... It is not a limitation placed on him by Canadian law. All the possible solutions under Canadian law are open to the appellant. *It is his personal choice, based on his religious beliefs, and the custom of his country of origin which forecloses some of these to him. He has made the choice not to avail himself of them.* It is not a violation of the Charter if foreign law does not make provisions for a certain legal procedure recognized in Canada. Problems with foreign law are a very poor reason to set aside or to read a meaning into a section of Canadian legislation which is clear on its face and in its interpretation to date. [emphasis added][20]

Therefore, the appeal was dismissed.

Decision of the Federal Court

Madam Justice Elizabeth Heneghan heard oral arguments in the case on 1 May 2003. M.A.O. again contended that "issue" is a legal term going beyond biology, and that the common law continues to allow for the presumption of paternity[21] when the putative father is married to the mother, just as in sharia law. Counsel noted that family law courts are generally moving away from strict biological definitions of family, and first consider the potential harm to the child before demanding DNA testing. If the Visa Officer had requested more affidavit and documentary evidence as an alternative to testing, M.A.O. would have declined to give a DNA sample, he argued. Since DNA is "qualitatively different" from other proof, CIC discriminates against some sponsors unless it requests this type of evidence from everyone. The written reasons set out the *Charter* arguments in greater detail than the IAD decision, but the grounds of discrimination remained unchanged.[22]

Counsel for the Minister ("the Respondent") defended the IAD decision, since A.O. is clearly not M.A.O.'s biological or adopted child and the IAD therefore lacked juris-

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20. *Ibid.*, paras. 39–40.

21. Briefly put, at common law, when a man is married to a woman who gives birth, he is generally presumed to be the father, although statutory modifications of this rule vary in regards to whether this presumption is rebuttable and who has standing to do the rebutting. For the historical roots of the presumption, see Sir William Blackstone, *Commentaries on the Laws of England*, ed. by Edward Christian (London: A. Strahan, 1803) at 446–59. For more details on how the presumption of paternity works in Canadian law, see Mary Jane Mossman, *Families and the Law in Canada* (Toronto: Emond Montgomery, 2004) at 735–53.

22. FC decision, paras. 26–41. The details have been omitted here, as the case was not decided on constitutional grounds.

diction to consider any other arguments. The Respondent argued that even in the absence of such binding authority as *Joshi*, all presumptions of paternity cited are rebuttable, and the DNA evidence rebutted the presumption in these circumstances. It was noted that other Somali Muslims have legally adopted children despite the prohibition in sharia law.[23] The Respondent further submitted that M.A.O. could not demonstrate actual discrimination based on an enumerated or analogous group, so all the *Charter* arguments failed at the threshold, as well as at the later stages.[24]

More than five months after the hearing, the Court issued a Direction requesting further submissions "on the collection and use of DNA evidence in this case and the IAD's evaluation of that evidence."[25] M.A.O.'s reply elaborated on the previous arguments that he would have preferred to tender other evidence in lieu of DNA, but believed he had no choice. He said that allowing the genetic results to trump all other considerations is inconsistent with the family-reunification goals of CIC, with other parts of the former *Act* that define family in broader terms than close genetic relationships, and with the best interests of the child.

CIC objected to further submissions because M.A.O. neglected to raise them at the IAD stage, and since the actual DNA tests were not impugned. The government noted there was no direct proof before the Visa Officer that A.O. was in fact the son of S.S.A., since none of the affidavit evidence came from a person who witnessed the actual birth. Justice Heneghan dismissed this argument because it was "offensive" and because "[t]he reasons of the IAD do not question the maternity of A.O.'s mother, and it certainly was not a ground for the decision to dismiss the appeal."[26] The point is not entirely correct, since Ms. Hoare called S.S.A. the "alleged mother" of A.O. in her only direct reference to the point, although she elsewhere did mention A.O. and his siblings, implying she thought the three children had one parent in common.[27] The IAD decision largely avoided language that accepts any of M.A.O's claims as fact; the FC decision, on the other hand, repeatedly referred to M.A.O. "and his children" to include all three teenagers, and never uses the phrase "putative father" to describe M.A.O. Justice Heneghan clearly accepted that M.A.O. is the *legal* father of A.O., even if this relationship is not biological or adoptive, and despite the Visa Officer's inability to do so on the original evidence before him.

Justice Heneghan held that the IAD finding on "issue" is correct,[28] and instead focused on the invitation to provide a DNA sample. Such evidence is neither mandated nor prohibited under the former *Act* and *Regulations*, she stated, nor is any particular type

23. Citing *Osman v. MCI*, [1999] I.A.D.D. No. 2902 (QL).
24. FC decision, paras. 42–54.
25. *Ibid.*, para. 55.
26. *Ibid.*, paras. 66–67.
27. IAD decision, at paras. 16, 18.
28. FC decision, at paras. 68–75.

of evidence preferred above another. The IAD decision, however, stated that the legislation requires that "that those applying for a benefit, such as entry to Canada, *provide the best evidence possible* of the identity and connection at issue"[29] [emphasis added]. The statute and *Regulations* do not support the "best evidence" language; therefore, Heneghan J. declared the statement an error in law that led to the IAD failing to question the legitimacy of the original "invitation" to provide a genetic sample.

Not surprisingly, the wording of the invitation was considered another error. Justice Heneghan characterized as "reasonable" M.A.O.'s understanding that if he refused to provide DNA, the Visa Officer would close the files. She continued:

> [T]he visa officer's letter requesting the DNA evidence, stating that if it was not provided the application would "likely" be refused, was improper and unfair. *While in some circumstances DNA evidence may be considered necessary by the deciding officer*, in the present case, the visa officer did not consider whether the Applicant could provide other evidence.
>
> I agree with the Applicant that DNA evidence is "qualitatively different" from other forms of evidence. *The intrusion into an individual's privacy that occurs with DNA testing means that it is a tool that must be carefully and selectively utilized.* The visa officer acted as if this evidence was the only way under the former Act that the Applicant could prove his relationship to his children, instead of regarding it as one of several ways that the Applicant could establish his familial relationship to his children. In this manner, the officer fettered his discretion.[30] [emphasis added]

Therefore, the application for judicial review was allowed and the IAD was ordered to reconsider the case. Unfortunately, the reasons did not address the *Charter* arguments raised in the proceeding.

Although M.A.O. only asked that other types of evidence be considered along with the DNA results, Justice Heneghan issued the rather unusual order that the new IAD panel ignore the DNA tests in its decision and focus only on documentary evidence of the relationship, including any new material that M.A.O. chose to rely on. She noted that this was the best way "to remedy the unfairness to the Applicant that has resulted from this improperly obtained evidence." [31]

Immigration decisions from the Federal Court can be appealed only when the judge certifies a question on a serious issue of general importance that would be dispositive of the appeal. In original arguments, M.A.O.'s counsel submitted a question regarding the definition of "issue", but the current *Regulations* have eliminated the use of this term, and now expressly define a dependent son as a "biological child" or adopted child;[32] therefore the question regarding "issue" is moot. Justice Heneghan decided

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29. IAD decision, at para. 20.
30. FC decision, at paras. 83–85.
31. *Ibid.* at para. 91, and attached Order.
32. *Immigration and Refugee Protection Regulations*, SOR/2002-227 [the current *Regulations*], s. 2.

there would be no question for certification, given the "unique factual situation" in the case.[33]

These very specific directions to the new IAD panel, coupled with the lack of an appeal right, seem designed to ensure that the obstructions to A.O.'s immigration to Canada would end as quickly as possible. A certified question would almost certainly have led to a trip to the Federal Court of Appeal, further delaying family reunification. As written, the directions leave very little room for another refusal, especially since a Federal Court judge seems to have accepted the evidence demonstrating that M.A.O. treats A.O. as his son. One commentator reads the case as expanding the definition of "family" in the immigration context, to one more closely resembling Canadian family law.[34] The narrowness of the decision, however, seems unlikely to provide much precedential value for future litigants, and unfortunately for the O.s, it wasn't even enough at the IAD.

Second Decision of the Immigration Appeal Division

Board Member Egya Sangmuah reheard the case on 7 July 2004. All of the immediate family members, including A.O. and his guardian in Kenya, gave oral evidence to complement new affidavits and documentary materials. Reasons released 12 January 2005 again dismissed the appeal for lack of jurisdiction. Much of the new material in this appeal centred around establishing M.A.O.'s presence in Somalia at the time of conception, and demonstrating that A.O. has always been treated as M.A.O.'s son. For many years, M.A.O. worked in Saudi Arabia and travelled back to Somalia only infrequently. Not surprisingly, given the circumstances and the time elapsed, M.A.O. had trouble remembering exactly when and for how long he had visited Somalia in the mid 1980s, but testified that he was in Somalia for at least two months before and after the probable date of A.O.'s conception in early 1987.[35]

Pointing to discrepancies between testimony and affidavits from the two IAD hearings, the Member claimed there was no "credible or trustworthy evidence that [M.A.O.] was in Somalia at the time A.O. was conceived" and that testimony on the issue was "vague, confusing and inconsistent".[36] M.A.O. gave conflicting information on how often he could leave Saudi Arabia, and also contradicted himself on the stage of his first wife's pregnancy with A.O. at the time he returned to Saudi Arabia, saying it was eight to nine months along but then correcting that to "a small pregnancy" to match his affidavits. Since M.A.O. turned in the older passport he used for these visits when he obtained the new one needed to immigrate to Canada,

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33. FC decision, paras. 92–93.
34. Lene Madsen, "Biology not Destiny? *O.(M.A.) v. Canada (Minister of Citizenship & Immigration)* and the Recognition of Relationship" (2004) 22 C.F.L.Q. 177.
35. IAD decision (2), paras. 9–13.
36. *Ibid.* at para. 12.

and he "did not provide documents, such as airline tickets or a letter from his former employer in Saudi Arabia to show that he visited Somalia at the time A.O. was allegedly conceived",[37] there was no other evidence regarding his whereabouts in 1987.

Mr. Sangmuah also questioned whether M.A.O. had ever treated A.O. as his son.

> [M.A.O.'s] sister and her husband raised A.O. from his mother's death until he left Somalia around the age of 10. Since he left Somalia in 1997, A.O. has been in the care of the appellant's friend, M.A.Y., in Nairobi, Kenya. The appellant seems to believe that he cared for A.O. because he sent his sister and M.A.Y. money for his upkeep. Beyond sending money, the appellant's parental role was minimal. He could not remember the name of the school A.O. attended in Somalia, never asked for his school report, kept no photograph of A.O. from his early years, and had no recollection of any milestones or significant events in his life in Somalia. What is more troubling is that even after visiting A.O. in Nairobi, the appellant could not provide details of his circumstances in Nairobi, including his schooling and the kinds of materials he likes to read. This evidence does not assist the panel in concluding that A.O. is the appellant's issue.[38]

M.A.O.'s current passport proved nothing since "Somali authorities issued the passport after he told them A.O. was his son".[39] The testimony from family members and other evidence, such as the fact that A.O.'s name is a combination of M.A.O.'s name and that of his father and grandfather, even when coupled with records of money transfers, phone calls, and a trip to Kenya, appears to have been given little to no weight.

Sadly, this marks the end of M.A.O.'s attempts to bring his son to Canada; no further appeals or applications for review were filed.[40] The conclusion of this litigation also leaves several areas of immigration law unexamined by the Federal Court. While the definition of "issue" is now moot (as a result of the term's replacement with the words "biological child" in the current *Regulations*[41]), the questions regarding the use of DNA testing and IRPA's narrow definitions of "adoption" and "family" may still provide constitutional challenges for the future. Those areas are worth a closer examination.

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37. *Ibid.* at para. 16.

38. *Ibid.* The Member neglects to mention whether M.A.O. knew any more facts about the lives of his two biological children, who were raised in the same circumstances as A.O., before they joined him in Canada in 2000.

39. *Ibid.* at para. 15.

40. Canadian Council for Refugees, *Non-Citizens in Canada: Equally Human, Equally Entitled to Rights: Background Information* (Montreal: Canadian Council for Refugees, 2006), online: Canadian Council for Refugees <http://www.web.ca/ccr/CESCRbackgrounder.pdf>.

41. *Supra* note 32 and accompanying text.

Analysis

The DNA in Lieu of Documentation Requirement

CIC began using DNA analysis to prove family relationships in 1991, scrapping the far less reliable blood tests that had previously been used to evaluate biological and genetic parenthood.[42] At the time, at least one immigration lawyer applauded the decision, noting that some sponsorship applications failed due to lack of evidence of a relationship, but those families could now submit DNA tests in lieu of documents.[43] Canada joined several countries including the United States, Finland, Sweden, New Zealand, Italy, Israel, and the Netherlands in requiring DNA samples in at least some cases.[44]

Although it might seem odd to people born and raised in North America, there are a variety of reasons that immigrants might lack the type of credentials and certificates Canadians regularly rely on to prove their identity. As mentioned above, military crises like the Somali civil war and the United States' intervention in Iraq can result in lost or unobtainable records.[45] In some countries, people do not automatically order these types of documents until they are needed for specific purpose, such as international travel or emigration.[46] As Sherene Razack notes, "The possession of proper identity documents may reflect nothing more than the power and resources of an individual able to procure them."[47] When such identification is required, Somali women and children usually resort to the passport of their husband or father, since it must list his family members,[48] as M.A.O's passport did for his three children.

While M.A.O. was invited to submit blood samples so he could sponsor his children, adults often sponsor their parents as well, and DNA tests can also prove the biological relationship between siblings. Immigration officials cite various reasons for requiring genetic testing, depending on the circumstances. During media attention to a reported high number of test invitations for the Somali community, government officials said they had to "take precautions to keep Somali war criminals out of Canada

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42. "Immigrant DNA testing cited: DNA test used to settle cases" *Vancouver Sun* (14 March 1991) A11.
43. *Ibid.*, quoting David Matas.
44. J. Taitz, J.E.M. Weekers & D.T. Mosca "DNA and Immigration: the Ethical Ramifications" (2002) 359 Lancet 793 at 794; "Israel orders DNA tests" *Calgary Herald* (3 July 1998) A2; "Holland: DNA testing voluntary for family-member immigrants" *Vancouver Sun* (26 March 1999) A18.
45. CIC requires DNA testing for children born in Iraqi refugee camps: see Marina Jimenez, "Tough refugee rules create agony for parents: DNA tests to prove paternity is hurdle for those wanting to reunite families" *The Globe and Mail* (16 October 2004) A3.
46. Bragg, *supra* note 9; Dryer, *supra* note 6 at 176; and *Uyanze v. MCI*, [2000] I.A.D.D. No. 135, (QL), where the sponsor explained that there were no birth certificates issued when his children were born in what was then Zaire, and that he himself, like 90% of people born in Zaire, did not have a birth certificate: at para. 10.
47. Razack, *supra* note 6 at 185.
48. Bragg, *supra* note 9.

and DNA testing is one way to do that."[49] More recently, another spokesperson cited concerns about international trafficking in children when defending the policy.[50] Former Immigration Minister Sergio Marchi was more direct when questioned back in 1995: "[I]n order to protect the integrity of the system, I think Canadians would expect us (to ensure people are related)."[51]

It is difficult to determine how often applicants are invited to provide DNA to CIC. Officials repeatedly claim that the practice is rare, so they do not track the requests,[52] and the internal manuals of the Department state that "a DNA test to prove relationship is a last resort [to be requested only] when documentary submissions are not satisfactory evidence of a *bona fide* relationship."[53] A representative from one of the companies authorized to do tests for Canadian immigration applications estimated that more than 3,500 sponsors provided samples between 1991 and 1997,[54] and CIC reports that almost 8,000 family class cases between 1991 and 2000 involved DNA.[55] The O. family is not the only one to receive an invitation for DNA testing before other options were offered.[56]

Since some people decline the invitation to provide genetic samples, the number of such requests made by visa officers is obviously higher. A few parties refuse to submit to tests,[57] or simply cannot pay for them;[58] these instances are not counted by the

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49. "Somali refugees say Ottawa discriminates" *supra* note 9. Presumably, the argument is that known war criminals could claim to be a relative of Canadian permanent residents by falsifying their identities and submitting an application; while negative DNA results would not reveal their true identity, they would at least be kept out of Canada. Most Somalis who lack documents are women and children, however (and ironically), Somali war criminals likely have better access to identity documents than members of the general population: Dryer, *supra* note 6 at 174–75.

50. Jimenez, *supra* note 45.

51. Dianne Rinehart, "DNA tests help, not hinder, relatives to sponsor immigrants: Marchi" *The [Montreal] Gazette* (10 May 1995) A16.

52. *Ibid.*

53. *OP 1 Procedures (Overseas Processing Procedures)*, p. 8, online: Citizenship and Immigration Canada, <http://www.cic.gc.ca/manuals-guides/english/op/op01e.pdf>.

54. Jennifer Clay, "DNA testing plays modern-day detective role in civil suits" *The Lawyers Weekly* (6 June 1997).

55. Jimenez, *supra* note 45.

56. Canadian Council for Refugees, *Impacts on Children of the Immigration and Refugee Protection Act* (Montreal: Canadian Council for Refugees, 2004), online: Canadian Council for Refugees <http://www.web.net/~ccr/children.pdf>.

57. In *Gosal v. MCI*, 2000 Carswell 433, a woman applying to enter Canada who was not sponsoring any family members at the time refused to provide DNA to prove that the sisters she listed on her immigration form were not actually her daughters; see also *Uyanze*, *supra* note 46.

58. *Sheikhahmed v. MCI*, [1999] I.A.D.D. No. 818, (QL). The applicant was willing to submit to the tests but could not afford the $3000 required, and the company did not allow instalment payments. The IAD permitted the family's children to be sponsored on humanitarian and compassionate grounds, since it found their story credible. Note this differs from *M.A.O.*, since there was no definitive proof that the children were not genetically related to the parents in *Sheikhahmed*.

Department and might very well be higher than the number of people who comply, given the prohibitive costs of the procedure. One recent refugee claimant needed $900 to prove the family status of one son,[59] but this figure does not include the additional costs of tests done overseas, including the shipping and travel expenditures, all of which must be paid by the sponsor or the family class applicant. This cost hurdle proves insurmountable for many people.

We also lack hard figures on how many people who provide DNA then fail the test. One newspaper article from 1995 claims that one in five applicants who undergo testing is not genetically related, but the reporter fails to cite her source or the dates covered.[60] Another Canadian genetic testing company reported a lower percentage of false claims, at about 7.8 per cent, from the samples it tested.[61] No doubt at least a few people knowingly making false family class claims decline to take the test, meaning that the actual percentage of individuals consciously attempting to sponsor non-biologically related people as relatives could be higher or lower than the test failure rate.

As argued in *M.A.O.*, advocates for refugees and immigrants have bitterly protested the DNA requirement, which is almost always applied to people coming from a mere handful of countries in Africa and Asia.[62] This has sparked cries of racial discrimination. While some applicants may be wealthy, many are not, and the additional expenses and delays for a large family can be substantial. CIC continues to claim that the policy is applied equally to all immigrants, regardless of race or country of origin, when the documentation provided is insufficient to prove the family relationship. Unfortunately, in addition to countries where identity papers are not the norm or have been destroyed, CIC says that false certificates and registrations are easy to acquire in certain other areas.[63] Citizens of these countries are rarely white. At a minimum, this is systemic discrimination affecting an already disadvantaged class of people.

If we accept for the sake of argument that the federal government always has valid reasons for limiting both the numbers and types of people who enter Canada with the intent of establishing permanent residence,[64] it seems unlikely that *Charter* chal-

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59. Jimenez, *supra* note 45. See also *Sheikhahmed, ibid.*, where testing two children and one adult cost $3000.

60. Kim Lunman, "DNA test weeds out illegal immigrants" *Calgary Herald* (26 January 1995) A1.

61. Allan Thompson, "Immigration's DNA tests vindicate most" *Toronto Star* (10 May 1995) A11.

62. Rebecca Bragg, "DNA tests ordered in immigration dispute" *Toronto Star* (9 May 1995) A1; Dryer, *supra* note 6 at 179; Thompson, *ibid.*; J. Taitz *et al.*, *supra* note 44.

63. Spokesperson Pam Cullum in 1995: "In some countries you can walk down the street and walk into a store and pay for a form, then get two people to sign it. Ghana has particular problems with documentation." Thompson, *supra* note 61.

64. A point not fully conceded here, but elaboration of these issues is well beyond the scope of this case comment.

lenges claiming discrimination on the basis of national origin would result in courts banning all invitations to supply DNA on the above concerns alone. An applicant making these *Charter* arguments would likely need to produce hard data on the frequency and circumstances of CIC's demands for DNA testing if they were to prove discriminatory intent or effect, and such data do not appear to exist at the moment. The Supreme Court of Canada has held that there is no absolute right for a non-citizen to stay in Canada,[65] and would almost certainly be unwilling to fetter completely the federal government's ability to place restrictions on who is deemed a member of the family class. If particular countries are more likely to have problems with identity documentation, and those countries are home to a largely non-white population, that does not automatically mean that the demand for "better evidence" is evidence of a racist immigration system (or so would go the argument).[66] Since a failed DNA test merely excludes an applicant from the family class and does not completely preclude the non-genetic relative from entering Canada,[67] requests for DNA samples cannot be evaluated in isolation but instead must considered in the context of the entire immigration scheme, in accordance with other immigration jurisprudence.[68]

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65. *Canada (MCI) v. Chiarelli*, [1992] 1 S.C.R. 711: "The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country" at p. 733.

66. Clearly this could be evidence of systemic racism and/or a breach of substantive equality, but the Supreme Court seems to be slowly resiling itself from its previous stronger stance on equality: see *Auton (Guardian ad litem of) v. British Columbia (A.G)*, 2004 SCC 78 (where the Court seems to be retreating from the definitions used in *Law*, claiming there are many formulations: paras. 21–25), and *Trociuk v. British Columbia (A.G.)*, [2003] 1 SCR 835, where a strict formal equality analysis is applied: Hester Lessard, "Mothers, Fathers and Naming: Reflections of the *Law* Equality Framework and *Trociuk v. British Columbia (A.G.)*" (2004) 16 C.J.W.L.168.

67. Section 25 (1) of IRPA reads:

    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. [emphasis added]

    This humanitarian and compassionate exemption, and its predecessor in the former *Act*, is intended to ameliorate the uneven impact of CIC requirements, and to form a catch-all category for people like A.O. who do not fit neatly into existing categories. The additional expense and time involved, however, as well as the discretionary nature of this power, mean its value as a remedy is questionable at best.

68. See, for example, *Powell v. MCI* (2005), 255 D.L.R. (4th) 59 (FCA), finding that since the appellant had access to both the humanitarian and compassionate exemption and the ability to apply for review of an officer's discretion in executing a removal order, the deportation order itself did not present a breach of section 7 of the *Charter*; *Poshteh v. MCI*, [2005] 3 F.C.R. 487 (FCA) holding that inadmissibility on the basis of membership in a terrorist group did not engage section 7 rights because there were still numerous legal steps that the appellant could use to try to stay in Canada. However, a discrimination claim would not usually hinge on the other ways in which a claimant could obtain her goals, but instead on whether some people received preferential treatment in comparison to the claimant; the same logic might not apply in section 15 challenges.

More importantly, a well-circumscribed DNA policy would almost certainly be upheld under section 1 of the *Charter* in today's political climate, given the government defence of security and human trafficking concerns. For example, it might not be discriminatory to insist on DNA tests where a third party offers strong evidence that a child is his or her own while a sponsor instead claims the child as his or her own. It would not be impossible for a serious criminal to obtain fraudulent identity documents; DNA might well prove those documents false. These are, however, fairly rare circumstances. Future courts might still limit the circumstances in which CIC can demand DNA, however, as Justice Heneghan effectively did in the instant case, and perhaps require visa officers to inform sponsors about several types of evidence that might be accepted instead of DNA.[69] If genetic connections are relevant to the definition of "family class", then requiring DNA tests is probably constitutional in at least some circumstances.[70] Whether genes should define family (with the exception of adoption) is discussed in the remainder of this comment.

The current policy of testing most people from certain countries *regardless of other evidence* does not seem to meet the *Charter* tests, however. Since IRPA does not demand DNA, alternate types of evidence must be requested first, something we know is not always occurring presently.[71] As demonstrated below,[72] certain other applicants are not asked for DNA samples, despite questionable documentary evidence or even explicit proof that the child is not genetically related to the sponsor, and other potential immigrants merely have to provide non-legal proof of a relationship to be eligible to come to Canada. Arguably, it might be necessary to ask for a DNA test if absolutely no other evidence is provided, but CIC is discriminating against some applicants by failing to give everyone an equal opportunity to offer up proof that is neither genetic nor in the form of a legal document.

The "Traditional Canadian Adoption" Requirement

While adoption is recognized in the definition of "family class", the word has varying meanings in different cultures, legal systems, and religions, and the type accepted by CIC is quite limited. Canada does not permit the sponsorship of adoptees who still have legal ties to anyone in their biological families, even if full legal rights and responsibilities have been assumed by the adoptive parent(s). An adoptee cannot

69. Recent additions to the CIC policy manuals include a "Sample letter requesting a DNA test (to be adapted to your needs)." The letter includes "sample reasons" for requesting DNA, including birth certificates issued after the date of application for permanent residence, or that authorities in the originating country claim they did not issue. While the letter says DNA tests are not mandatory, it does not suggest the sponsor provide further documentary evidence: *OP 1 Procedures*, *supra* note 53 at p. 49.

70. Also, DNA results should always be permitted as evidence on a voluntary basis, since it is true that, for economically secure sponsors, genetic tests may sometimes be the quickest and even cheapest way to prove filiation.

71. *Supra* note 56 and accompanying text.

72. Under the heading "The Genetic Family Requirement".

have two sets of legal parents for the purposes of Canadian immigration legislation, i.e., an adoptee cannot be sponsored by one set of parents and then later apply to sponsor the other set. This is explicit in policy documents,[73] is supported by the jurisprudence,[74] and has now been entrenched in IRPA and current *Regulations*.[75]

Not all families encompassing non-genetically related children are formed through this type of adoption. Many civil law countries allow simple adoption, which does not change the adoptee's civil status in relation to such rights as inheritance and succession.[76] Only some of these countries, like France, also allow full adoption, which extinguishes all legal ties with the first family and therefore complies with CIC's adoption requirements.[77] The *Regulatory Impact Analysis Statement* (RIAS)[78] that accompanied the publication of the current Canadian *Regulations* explains that simple adoption was excluded from the family class because "potential Immigration program integrity issues would have arisen as sponsorship of the original parent would be possible."[79]

This is a rare official admission that the boundaries of the family class are drawn to limit the number of people who can potentially be sponsored by Canadian citizens and permanent residents; CIC's usual position is that family reunification is prioritized. In effect, they are saying please feel free to reunite your family in Canada; offer limited to two parents per person. The legislation and policy refuse to acknowledge that a few people may feel close family connections with both sets of families, genetic and adoptive, and should not have to choose between the two. CIC also ignores the fact that adoption as practised in Canada is becoming much more open. Traditional closed adoption that severs all ties with and hides all information about the birth family has been described as replicating and reinforcing patriarchy,[80] and some re-

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73. *International Adoption and the Immigration Process* (Ottawa: Minister of Public Works and Government Services, 1997) under the heading "Questions and Answers" p. 11.

74. E.g. *Borno v. Canada (MCI)* (1996), 118 F.T.R. 104 (FCTD): an adoptee from Haiti was brought to Canada in 1986 by her adoptive mother, and was later prohibited from sponsoring her birth mother's application for permanent residence in Canada.

75. SOR/2002-227 [the current *Regulations*]. Section 3(2) reads, "For the purposes of these Regulations, 'adoption,' for greater certainty, means an adoption that creates a legal parent-child relationship and severs the pre-existing legal parent-child relationship."

76. Kathryn McDade, *International Adoption in Canada: Public Policy Issues* (Ottawa: Studies in Social Policy, 1991) at 10.

77. Katherine O'Donovan, "'Real' Mothers for Abandoned Children" (2002) 36 Law & Soc'y Rev. 347 at 362.

78. *Canada Gazette* Part II, Volume 163 Extra (14 June 2002), online: <http://canadagazette.gc.ca/partII/2002/20020614-x/pdf/g2-136x9.pdf> at 177 [RIAS]. Adoption and Guardianship begins at page 261.

79. *Ibid.* at 265.

80. Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 Alta. L. Rev. 1035 at 1036.

searchers believe it is inherently damaging to all parties,[81] although others disagree with this assessment.[82] As a result, most domestic adoptions in Canada now contain some degree of openness, although legal ties to the birth family are generally absent.[83] Furthermore, along with the advent of open adoption, other changes in North American society have led to increasing numbers of people with some parental ties to more than two people, even though the law might not yet have fully caught up to this reality.[84]

Family class adoption policy gives us insight into the other restrictions set by the government: they simply want to limit the number of people eligible to immigrate here. In this instance, devaluing certain types of family relationships and privileging the two-parent nuclear family is the chosen method of restriction. It seems rather harsh, since so few people are adopted,[85] and not every single adoptee with birth families overseas will want to sponsor him or her—many will not ever know their biological families. It must be noted that there are no limits on the number of relatives one can sponsor, as long as each one comes within the definition of "family class". Excluding a small number of adoptees' birth relatives but never limiting the number of children who can be sponsored by others, appears random, unless it is understood as reinforcing a certain traditional image of family. It certainly has nothing to do with what the adoptee might want or need or whom she treats as a family member.

Even more troubling is the refusal to allow children like A.O., whose religion forbids adoption, to immigrate as family members. While Islamic law does prohibit adoption, "at least insofar as it would entail a notion of fictive kinship", it has a strong tradition of guardianship relationships for children who are orphaned or unable to be cared for by their biological parents.[86] As a result, some Muslim children do live in families with which they have no genetic connection but who consider them to be full members of the family. One's biological origins are considered immutable, and

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81. Annette Baran, Reuben Pannor & Arthur Sorosky, *The Adoption Triangle: The Effects of the Sealed Record of Adoptees, Birth Parents, and Adoptive Parents* (New York: Anchor/Doubleday, 1978).

82. See discussion in Cindy L. Baldassi, "The Quest to Access Closed Adoption Files in Canada: Understanding Social Context and Legal Resistance to Change" (2005) 21 Can. J. Fam. L. 211.

83. Kerry Daly & Michael Sobol, *Adoption in Canada: Final Report* (Guelph, Ont.: National Adoption Study, University of Guelph, 1993) at 57–58.

84. Alison Harvison Young, "Reconceiving the Family: Challenging the Paradigm of the Exclusive Family" (1998) 6 Amer. U. J. Gender & L. 505.

85. Although statistics are difficult to come by, it seems that about 4% of Canadians are adoptees, many of whom experienced a step-parent adoption rather than a full stranger adoption: H. Philip Hepworth, *Foster Care and Adoption in Canada* (Ottawa: Canadian Council on Social Development, 1980) at 138.

86. Daniel Pollack *et al.*, "Classical Religious Perspectives of Adoption Law" (2004) 79 Notre Dame L. Rev. 693 at 732; Syed Mumtaz Ali, "Establishing Guardianship: The Islamic Alternative to Family Adoption in the Canadian Context", online: The Canadian Society of Muslims <http://www.muslim-canada.org/adopt.htm>.

Islamic law does not permit them to be hidden by "legal fictions" such as adoptive parenthood; however, the strong prohibition on adultery means that a person in the circumstances of A.O.'s biological father, whoever he may be, cannot claim A.O. as his legal son. M.A.O. is A.O.'s legal father in Islamic law, because of his marriage to A.O.'s mother.[87]

These relationships, however, are not recognized by Canadian immigration law and can lead to children being unable to move to Canada with the only family they have ever known, while having no known genetic parent with whom they can live elsewhere. M.A.O.'s *Charter* argument based on religion was likely the strongest in his case. There is no other way he can sponsor A.O. unless he applies for a humanitarian and compassionate exemption[88] another lengthy process requiring documentary and affidavit evidence, and one that M.A.O.'s counsel began but then received no response from CIC.[89] Regardless of Ms. Hoare's opinion in the first IAD decision, religion is not merely a choice, and Canadian law is required to consider religious difference when offering benefits such as immigration. In light of this fact, CIC's definition of "dependent child" is unfairly limited to children in the custody of their biological or adoptive parents.[90]

The drafters of IRPA and the current *Regulations* attempted to remedy these shortcomings in the family class definition by creating the new category of legal guardianship. For a child to qualify, the child's biological parents must be dead or have abandoned the child, adoption as defined in the *Regulations* must not be possible, and the arrangement must be authorized by officials in both countries.[91] Unfortunately, because the provinces protested that they lacked sufficient protections for children brought to Canada under guardianship, the provisions have now been repealed and are unlikely to reappear any time soon.[92]

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87. Pollack *et al.*, *ibid.* at p. 734.

88. IRPA, s. 25, also known as H & C applications. The section explicitly mentions that the Minister must "tak[e] into account the best interests of a child directly affected" as part of the considerations.

89. After the first IAD decision, the family initiated an H & C application for A.O., and offered to withdraw the application for judicial review in the Federal Court, but the visa office in Kenya never responded to the file: Geri Sadoway, personal communication (email), 30 May 2006 (on file with the author). Ms. Sadoway was counsel for M.A.O. In another similar case from Tibet, where the non-biological but legal father offered to adopt his two children but could not afford the $12,000 price tag per child, an H & C was filed almost two years ago but the family has had no response from the visa office in India: *ibid.*

90. Ali, *supra* note 86.

91. *Regulations*, s. 117 (1)(e), now repealed: see *infra*.

92. *Canada Gazette*, Volume 139, Part I (8 January 2005), online: < http://canadagazette.gc.ca/partI/2005/20050108/pdf/g1-13902.pdf > at 436–40. The RIAS states that "CIC will continue to deal with immigration cases where children in need of care are brought into families through guardianships ... where humanitarian and compassionate reasons exist, [officers can] use their discretion to allow these children into Canada" (at 440). See also Tom Blackwell, "Rule change closes the door on children" *National Post* (14 January 2005) A3. At least one sponsor who applied for a humanitarian and

The repealed regulations would have been of little use to M.A.O., since A.O. is not currently under the guardianship of M.A.O. in Somali law but is instead his legal son. It is worth noting that even if M.A.O. adopted A.O. under Canadian or Kenyan law, or wished to file another humanitarian and compassionate exemption, he would almost certainly need to begin the sponsorship process all over again, filing a new application in the given category, along with the new supporting evidence,[93] all of which will cost more time and money. Success would still be uncertain, since even when all foreign and Canadian legal requirements for adoption have been met, family class sponsorship may still be refused if CIC determines that the new family bonds were created solely for the purpose of immigrating to Canada—"adoptions of convenience"—and some applicants need to tender additional evidence of the genuine nature of the relationship. The failure to prove a genuine parent-child relationship between the adoptee and adoptive family, as well as the corresponding existence of continuing ties with the biological family, have been the most common grounds for rejecting the validity of an overseas adoption.[94] Of course, such proof consists of the affidavits, testimony, and documentary evidence that the Visa Officer and Board Members rejected in A.O.'s case.

The Genetic Family Requirement

Despite the creative arguments of M.A.O.'s counsel, as a strict question of statutory interpretation, it is difficult to dispute the findings on the word "issue". Not only does the Federal Court's interpretation comply with the common usage in other Canadian legislation, it also complies with the general stance of CIC policies. In light of the tight restrictions on adoptive relationships, a broader interpretation could lead to children like A.O. sponsoring biological parents, even though the children were the "legal issue" of other people. Looking forward, the language of IRPA and the current *Regulations* seem to indicate that biology is considered an essential element of non-adoptive families, a change that seems intended to clarify rather than modify the former *Act*'s definition of "son".[95]

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compassionate exemption for de facto family members has been rejected and told to file a family class sponsorship instead: Canadian Council for Refugees, *supra* note 56 at 15.

93. In a similar case before the IAD, a man tried to sponsor his daughter born in Cambodia as the result of a non-marital relationship. When DNA testing concluded the sponsor was not the genetic father of the girl, he appealed and executed a legal adoption of the child in the interim months. The IAD panel followed Federal Court of Appeal cases stating that the date for determining whether a person is a member of the family class is the date of application for permanent residence, not the date of the appeal. Therefore, the appellant must file a new sponsorship application for his newly adopted daughter: *Kong v. MCI*, VA0-02776 (IAD) 12 June 2001.

94. P. Tomlinson, "Adoption and Sponsorship: Characteristics of Bona Fide Foreign Adoptions" (2001) 12:10 Immigration and Citizenship 1 at 1. The requirement of a "genuine relationship of parent and child" is from the definition of 'adopted' in s. 2 (1) of the former *Regulations*.

95. See also *Canada (Minister of Citizenship and Immigration) v. Vong*, 2005 FC 855, where Justice Heneghan rejects a board member's decision that the definition of "mother" is not limited to biology

Illustrating her arguments through immigration cases including the first IAD decision in *M.A.O.*, Lene Madsen has criticized Canadian immigration law for its lack of consistency with Canadian family law, and the resulting lesser protection for actual family relationships, the best interests of the child, and *Charter* rights when the parties are immigrants or potential immigrants.[96] She argues that "the immigration regime should account for and reflect recent developments within family law",[97] including the decline of biological ties as being determinative of parentage and especially paternity, and she believes that these types of changes should have been incorporated into IRPA.

Her analysis is persuasive and raises important questions about the legitimacy of certain restrictions on foreign nationals and their families when compared to people who are already Canadian citizens or permanent residents. However, a closer examination of existing immigration regulation and practice demonstrates that CIC frequently *does* resort to applying established family law principles such as the presumption of paternity, but only in circumstances that tend to protect the rights and relationships of families that mirror the preferred nuclear model of the patriarchal family, or where the applicants' and sponsors' socio-economic profiles are more privileged than that of M.A.O. and his children. CIC fails to look for immigration fraud in numerous types of cases where it could occur quite easily but is masked by documentation that can be obtained utilizing presumptions, legal fictions, or exceptions, or where the country of origin has not been tagged as having a high incidence of fraudulent documentation.

Consider the requirement of a valid birth certificate or registration, from countries that CIC believes are relatively free of document fraud. Many jurisdictions that practise the type of closed adoption preferred by immigration legislation also reissue the child's birth certificate, making it appear that the adoptive parents are the biological parents and that the child was actually born to the adoptive mother.[98] This practice is designed to make the adoptive family mirror the biological (and perhaps patriarchal) model.[99] Unless the family discloses the adoption order, no publicly available paper trail exists.

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and adoption but should encompass step-parents.

96. Lene Madsen, "Second Class: Law Meets Family in the Immigration Context" (2003) 21 C.F.L.Q. 103.

97. *Ibid.* at p. 151.

98. See for example, Ontario's *Vital Statistics Act*, RSO 1990 c. V. 4, at s. 28 (2). For a discussion of the development of American laws mandating reissued birth certificates in the mid-1900s, see Elizabeth J. Samuels, "The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records" (2001) 53 Rutgers L. Rev. 367 at 377; for Australia, see Audrey Marshall & Margaret McDonald, *The Many-Sided Triangle: Adoption in Australia* (Carleton South, Australia: Melbourne University Press, 2001) at 29, 38.

99. Bracco, *supra* note 80; Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (Boston: Houghton Mifflin, 1993) at 55.

Looking at any given birth certificate from many countries, it may be impossible to know that the child is adopted. This is an area ripe for immigration fraud, since sponsors of adoptees are required to provide evidence that the adoption was "in the best interests of the child within the meaning of *The Hague Convention on Adoption*."[100] This provision is largely about child trafficking and illegal overseas adoptions that exploit the birth parents. A valid objective, but one that adds expense and time to the sponsorship process, a process already lacking in thrift and speed in the simplest of cases. It must be tempting for adoptive parent sponsors to simply ignore this requirement and pretend the birth certificate reflects biology, since the issuing jurisdiction intended it could be used in this way.

As admitted earlier, adoptees constitute a relatively minor percentage of all children, but fathers and children in M.A.O. and A.O.'s situation may be more common.[101] For obvious reasons, the exact statistics are unknown, but genetics researchers estimate that up to 10 per cent of us are not the biological children of the fathers listed on our birth certificates—and the fathers are also in the dark about the truth.[102] When these births are registered, the families benefit from the presumption of paternity and no one orders DNA tests before issuing the birth certificate. Women who use sperm, egg, or embryo donation are also frequently filing birth registrations that list the parents as people other than the gamete providers, and most Western jurisdictions fail to question heterosexual couples on this point when they register a birth.[103]

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100. Current *Regulations*, s. 117 (2).

101. Many immigration cases deal with this issue. For example, see *Deo v. Canada (MCI)*, [2004] I.A.D.D. No. 224 (QL), where a refugee from India tried to sponsor his parents and discovered his father was not biologically related to him. In disbelief the family requested another round of DNA tests, which produced the same result. His mother's application was accepted. On appeal to the IAD, Board Member Shirley Collins accepted a de facto familial relationship existed between the refugee and his mother's husband, and allowed the appeal. The Member noted that the mother could sponsor her husband as an accompanying family member; therefore, he did not need to be sponsored by the son. Not all families are so lucky.

102. Commentators present various statistics on the incidence of mistaken paternity. Serge Brédart and Robert M. French summarize several studies from around the world, which reported numbers from 1.4% to 30%: Brédart & French, "Do Babies Resemble Their Fathers More Than Their Mothers? A Failure to Replicate Christenfeld and Hill" (1999) 20 *Evolution & Human Behavior* 129 at 130–31. Carolyn Abraham, "Mommy's little secret" *The Globe and Mail* (14 December 2002) F1, puts the average at 10%. However, recent re-evaluation of various international paternity studies asserts that the true rate is unknown but is very likely lower than the oft-reported 10% figure, perhaps even under 5%: Kermyt G. Anderson, "How Well Does Paternity Confidence Match Actual Paternity? Evidence From Worldwide Non-Paternity Rates" (2006) 48 Current Anthropology 511.

103. *Gill v. Murray*, 2001 B.C.H.R.T. 34; *A.A. v. New Brunswick (Department of Family and Community Services)*, [2004] N.B.H.R.B.I.D. No. 4; *M.D.R. v. Ontario (Deputy Registrar General)*, [2006] O.J. No. 2268 (Ont. SCJ) (QL). The representative of the British Columbia birth registry testified in *Gill* that a birth certificate was about biological truth, but then admitted the agency failed to check the biology when heterosexual couples filed, and conceded that some couples using donor gametes must be filing as if the child was their genetic offspring. These decisions and legislative changes in some provinces now allow non-biological parents to be listed on birth certificates without filing for adoption.

Therefore, it is likely that a good percentage of the birth certificates that CIC accepts as proof of parentage list someone other than the genetic father or even mother.

Given the disruption to M.A.O.'s family and other obvious repercussions that could follow the revelation of the biological truth, many would likely applaud CIC's restraint in not investigating every otherwise valid birth certificate that is submitted as evidence of family class membership. Remember, however, that the boundaries of the family class are defined not only to prevent fraud but also to limit individuals to two parents only. Adoptees, "children of infidelity", and donor children have at least one other parent, and it can be possible for the child to develop a family relationship with this person if he or she knows the truth. Many adoptees are told of their status, and even if the adoption was confidential, they may later search for and locate their biological relatives. A few reunions result in the development of family ties, most of which do not supplant the relationship with the adoptive parents but coexist with it. The Federal Court allowed a judicial review for one such biological father who was denied a humanitarian and compassionate exemption; the reasons accept the notion of having more than two parents.[104]

Given the increasing medicalization of our society, particularly in regards to genetic inheritance,[105] it is very likely that more mistaken paternity cases will be discovered than in the past, and that a few people will then establish familial bonds with their genitors. Their birth certificates do not represent biology, but the offspring might originally be unaware of the fact. If they demonstrate the relationship through DNA, how will CIC exclude them from the family class, as is done with the birth families of adoptees? These people meet the definition of "biological child" or "issue", and were never legally adopted by their social fathers. The fact they have other *legal* fathers is irrelevant to Canadian immigration law—remember that M.A.O. is A.O.'s legal father under Somali law. The current legislative scheme does not explicitly exclude genetic but non-legal parents from the family class although we can presume that Parliament and CIC intended to do so, given the stated reason for the narrow definition of "adoption" in the family class provisions.[106]

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104. *Chen v. MCI*, 2003 FCT 447. Mr. Justice Blais commented:

    I understand that the legislation provides a definition of the term "father" to impeach potential scams. However, in the case at bar, I believe that the presence of a *bona fide* desire to reunite with a biological relative and that the evolution of the relationship since that reunification are sources of compassion for which the immigration officer should have considered more seriously. In my opinion, our society is now more open to various family situations and the fact that a person may have two fathers, one adoptive and one biological, is highly possible in present days.

    Recently, the Ontario Court of Appeal permitted a child to have three legal parents: *A.A. v. B.B.*, [2007] O.J. No. 2 (QL). This is the most recent example of Madsen's argument that Canadian family law is not reflected in its immigration policy: Madsen, *supra* note 96.

105. Timothy Caulfield, "Canadian Family Law and the Genetic Revolution: A Survey of Cases Involving Paternity Testing" (2000) 26 Queen's L.J. 67; Janet L. Dolgin, "Choice, Tradition and the New Genetics: The Fragmentation of the Ideology of the Family" (2000) Conn. L. Rev. 523 at 542–65.

106. *Supra* notes 73 to 79 and accompanying text.

These incidents in which some immigrants benefit from the presumption of paternity and legitimacy of birth registrations might still be relatively rare, but they are glaring examples of family law principles operating for the benefit of certain types of families in the immigration context. If these families do nothing to raise a visa officer's suspicion, i.e., if the parents are married, come from countries with full adoption and without civil unrest, natural disasters, or suspicions of widespread document fraud, no one will order a DNA test. Through the practice of accepting most valid birth certificates as proof of a biological relationship, the presumption of paternity is implicit in immigration law.

In yet another exception, children born as the result of reproductive technologies, if physically born to the mother and not to a surrogate, are also officially accepted as the "biological children" of the mother's male partner, even if the child shares no genetic link with either parent, provided the family can prove donor gametes were used. A man married to a woman who uses a sperm donor to get pregnant can still sponsor the resulting child as his "biological child" as defined in the current *Regulations*. Why? The CIC policy manual, *OP 2: Processing Members of the Family Class*, explains:

> In Canadian Family Law, *the spouse or common-law partner of the parent who gives birth to a child is presumed to be the other legal parent even if there is no genetic relationship to the child.* If the child was born through a surrogacy arrangement, however, the child will legally be the child of the surrogate mother who gave birth until a subsequent adoption occurs that would create a legal parent/child relationship [*sic*].[107] [emphasis added]

That is correct: the very same presumption denied to M.A.O. is permitted when the parents have the money to access reproductive technologies. Not only are these children allowed to be members of the family class, a child with no biological link to the father is still his "biological child" because Canadian family law allows for the presumption of paternity in marriage, *even when the presumption is effectively rebutted by the admission that the family used reproductive technologies.* Apparently, the new term "biological child" is considerably more flexible than "issue" was, in that it can encompass a non-biological child.

To benefit from this presumption, parents must supply evidence that they used reproductive technologies and that the child was in fact born to the mother.[108] If they used a more low-tech method of sperm donation and conception that lacks a medical paper trail, however, the father cannot sponsor their child, although the mother could.

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107. Citizenship and Immigration Canada, *OP 2: Processing Members of the Family Class*, online: <http://www.cic.gc.ca/manuals-guides/english/op/op02e.pdf>. The last sentence is not correct in all provinces or in all other jurisdictions, although it is true in Britain. See *Rypkema v. British Columbia* (2003), 233 DLR (4th) 760, which lists the cases in Manitoba, Ontario, Alberta, and the United States that found that the genetic and intended parents of a baby born through gestational surrogacy arrangements (where another woman carries the embryo to term) were the legal parents and could be listed as such on the birth certificate "without the trouble and expense of the adoption process."

108. *Ibid.*

If she dies, however, the father could never sponsor the child to come to Canada as a member of the family class, all because the mother chose a less-expensive method of sperm donation than reproductive technologies.

Artificial insemination has been around for decades, and *in vitro* fertilization and embryo donation have occurred for more than 20 years.[109] Most of these children are not told the truth about their genetic makeup,[110] but, as mentioned above, disclosure becomes more likely as human beings continue to emphasize the importance of genes, and that fact is increasing the incidence of genetic testing. Since these children are deemed biological offspring under IRPA, it is unclear whether legislation and policy as written could preclude them from later sponsoring their genetic parents.

Finally, Parliament and the Ministry of Citizenship and Immigration have increased the likelihood of family class admissibility for such people as unmarried conjugal partners,[111] another example of CIC accepting modern family law principles. This recognizes that gays and lesbians, as well as opposite sex couples, may have valid family relationships without the legal sanction of marriage. Applicants demonstrate the conjugal relationship through affidavits, interviews, and documentary evidence such as phone bills, photos, and letters,[112] not scientific tests or verifiable legal documents. We have seen that children whose relationships can only be proven through the same non-legal and non-biological types of evidence are not so easily admissible, especially if any contradictory evidence, such as a DNA sample, exists.

Obviously, CIC does understand *and accept* that family can go beyond the biological and beyond legal documentation. All of these people who benefit from the expansive definition of "family" differ from M.A.O. in a way that could be grounds for a *Charter* argument: country of origin, religion, economic wealth, and family status. Perhaps even more disturbing is the fact that children who were conceived through sexual acts with non-marital partners have fewer rights than those conceived through reproductive technologies. Not all cases of sperm donation and surrogacy involve medical specialists.[113] This, however, is not permitted by CIC. Nor is outright "infidelity".

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109. P.C. Steptoe & R.G. Edwards, "Birth After Reimplantation of a Human Embryo" (1978) 336 Lancet 2; H. Widdows & F. MacCallum, "Disparities in parenting criteria: an exploration of the issues, focusing on adoption and embryo donation" (2002) 28 Journal of Medical Ethics 139 at 141.

110. S. Golombok *et al.*, "The European study of assisted reproduction families" (2002) 17 Human Reproduction 830; Katheryn D. Katz, "Snowflake Adoptions and Orphan Embryos: The Legal Implications of Embryo Donation" (2003) 18 Wis. Women's L.J. 179 at 219–20.

111. Current *Regulations*, s. 117 (1)(a).

112. *Processing Members of the Family Class*, *supra* note 107 at page 15. Note, however, that monogamy is a requirement, according to the manual. Monogamy is not officially required for you to sponsor your married spouse, unless, of course, a visa officer doubts the genuineness of the relationship and suspects a marriage of convenience.

113. See, for example, G.W. Stewart, "Adoption and Surrogacy in New Zealand" (1991) 22 V.U.W.L.R. 131, discussing a surrogacy case where "conception was achieved by natural means" (at 131); in *Re T (Paternity: Ordering Blood Tests)* [2001] 1 F.L.R. 247, a married couple attempted semi-anonymous donor

Those who have transgressed the boundaries of the monogamous two-parent family will be stigmatized and punished through exclusion from the family class, regardless of how they conduct their relationships within the immediate family. The family class definition as a whole, then, is discriminatory, even if individual restrictions viewed in isolation from other categories are not as clearly so.

Conclusion

Although CIC's intense scrutiny of family class sponsorships in order to ferret out fraudulent claims may have a *prima facie* legitimacy in light of concerns about trafficking of children and women, granting haven to war criminals, and "floods" of too many new immigrants arriving in a short period of time, the actual construction and application of Canadian immigration law discriminates by failing to search for fraud in all of the possible and probable circumstances. While the former and current legislation define a parent-child relationship as either genetic or adoptive, applicant families who most closely mirror the mainstream middle-class Canadian model of family but whose ties of filiation are neither genetic nor adoptive are more likely to succeed in sponsorship than families emigrating from other backgrounds, since their actual circumstances will not be investigated and DNA will not be required.

Restrictions and additional tests for some immigrants can be justified only if they are applied in a non-discriminatory fashion, but the CIC consistently fails to verify the validity of genetic relationships in circumstances where Western-style documentation is available but research shows a portion of the children will not be biologically related to one of their social and legally-recognized parents. Families who can produce proof of their use of reproductive technologies are exempted from the genetic filiation and stringent adoption requirements, while parents whose children are the biological result of a less high-tech and possibly non-monogamous method of conception (that humanity has known since prehistoric times) must hope their birth documentation is accepted, or their children will suddenly not exist in the eyes of Canadian law. In this way, CIC grants primacy to paperwork and genetics, and not to the best interests of the child or the realities of actual families. This discrimination is on the basis of nationality, ethnicity, and religion—all of which are groups protected by the *Charter*. Both the former *Act* and IRPA purport to place a high priority on family reunification, but certain types of families are given easier passage than others.

Unequal acceptance of family law standards by CIC operates as an additional "adaptability" test for family class applicants, through failing to look behind the identity credentials and outward appearances of families that best match, in configuration

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insemination through sex with four different men; in *H(W) v. P(WL)* (1997) 28 RFL (4th) 344 (NBQB), the parties attempted a surrogacy arrangement where the father had sexual intercourse with the surrogate, but the plan fell through and the Court named the birth mother the legal mother.

and in socio-economic background, the Canadian idealized family. The message is that the better you already fit into this mould, the less attention we will pay to the origin of your family relationships and your fidelity to your spouse/partner. If your country of origin places less emphasis on bureaucratic paperwork, or has higher reported incidents of documentary fraud, be prepared to demonstrate that your family is nothing less than a permanently monogamous, two-parent structure, and be prepared to pay far more to sponsor your family members, because of DNA testing and additional evidence requirements, than your more-Westernized counterparts.

Even if we wish to accord high importance to fraud detection in immigration, the fairest solution is not to automatically demand genetic testing of parties who lack reliable paperwork, but instead to first investigate the genuineness of the relationships more thoroughly, as is done when CIC suspects marriages and adoptions of convenience, and as is required of conjugal partners.[114] As Justice Heneghan ordered in *M.A.O.*, additional affidavits from people who know the parties, combined with such records as phone bills and money transfer receipts, could be used to demonstrate that *M.A.O.* and his two genetically-related children consider A.O. to be an equal member of the family, despite his DNA.

Given the intrusive nature of DNA testing, the same options should be available to parents and their children. Ignoring the alternative family formation methods of those with non-mainstream backgrounds, such as economic disadvantage, racialization, and religious difference, is a clear violation of the *Charter*. The Canadian immigration system cannot pick and choose which parts of section 15 it wishes to respect—the anti-discrimination rules must apply across the board. No system will protect against all incidents of fraud, but any fair system of Canadian immigration law must protect against the systemic discrimination of vulnerable parties such as children and religious minorities, as is currently occurring in family class processing.

114. That the CIC claims to accept valid birth certificates from countries free of fraud suspicion but does not automatically accept valid marriage licences and adoption paperwork as complete proof of genuine relationships is yet another example of how Canadian immigration law and practice unevenly applies definitions and presumptions about family.