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From: Immigration Representatives / Représentants immigration (IRCC)

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Sent: Mon, 22 Feb 2021 12:44:29

To:

Cc: Immigration Representatives / Représentants immigration (IRCC)

Subject: FW: 12 month bar H&C applications, applicability to dependent children -- REP-2020-2766

Sensitivity: Normal

Good day

In your query, you wish to know whether a person – specifically, your client’s two daughters – may be included as a dependent in both a refugee claim and an H&C application at the same time. You note that, while it is clear from the Program Delivery Instructions (PDIs) that a principal applicant cannot submit an H&C application while a refugee claim is in process and for 12 months following, this is not as clear in the case of the dependent children.

Response

The bar on applying for H&C while a refugee claim is in process and for 12 months following applies equally to dependents as it does to the principal applicant. The daughters cannot be included in both the H&C application and the refugee claim at the same time and will have to choose between their mother’s H&C application and their father’s refugee claim.

Note that, if the daughters choose to not file a refugee claim at this time and their father receives a positive decision on his claim and goes on to file an application for permanent residence as a protected person, he may include the daughters in his application for permanent residence at that time provided that they still meet the definition of “family member” in R1(3).

Similarly, if the daughters choose not to be included in their mother’s H&C application at this time, their mother may ask to have them added to the H&C application at any point before it is finalized provided the bar on H&C does not continue to apply to the daughters and that they continue to meet the definition of “family member” in R1(3).

Background

A review of the exceptions to applying for H&C contained in the *Immigration and Refugee Protection Act* (IRPA) under A25(1.2) (known as the H&C bar) reveals that this section does not distinguish between the principal claimant and/or applicant and their dependents. Instead, this section lays out the exceptions to applying H&C in reference to the *foreign national*, a status that applies to both the principal applicant and their dependents. For example, the section states,

A25(1.2) The Minister may not examine the request if

(b) the foreign national has made a claim for refugee protection that is pending before the Refugee Protection Division or the Refugee Appeal Division

Thus, it becomes clear that this section of the Act applies to both the principal applicant and any dependents who wish to request H&C consideration.

Furthermore, when filing a refugee claim as a family, it is important to note that, while the claims may be joined, each person is

distinguished as an individual in the IRB decision as all have technically made a claim for protection. In other words, a dependent is considered a claimant in their own right rather than just an extra element of the principal claimant's claim. Thus, if the children's father includes his two daughters in his refugee claim, besides the father, the two daughters will also be considered to have a pending refugee claim.

Bringing these two elements together, it becomes clear that, if the daughters were to be included in their father's refugee claim, they would fall under the description of foreign nationals who have made a claim for refugee protection that is pending before the Refugee Protection Division or the Refugee Appeal Division. Thus A25(1.2) would apply and the daughters would be barred from applying for H&C.

The Immigration Representatives Mailbox

From:

Sent: January 20, 2021 1:52 PM

To: Immigration Representatives / Représentants immigration (IRCC) <IRCC.ImmigrationRepresentatives-Representantsimmigration.IRCC@cic.gc.ca>

Subject: 12 month bar H&C applications, applicability to dependent children

Good day,

I have a client (principal applicant - PA), for whom I am in the process of putting together an H&C application. PA has two daughters, _____ years old, who can be included in her application as dependent children who are presently in Canada.

PA just informed me that her ex-husband recently entered Canada and intends to file a refugee claim, with the assistance of another lawyer. PA's husband wants to include the two daughters in his refugee claim, given that they too were affected by the persecution he suffered (but not the PA, she was already separated from the ex-husband at the time of the events).

Can the daughters still be included in PA's H&C application, or must they choose between their mother's H&C and their father's refugee claim? I am obviously aware of the prohibition on submitting an H&C application while a refugee claim is in process and the 12 month bar following a negative refugee decision; but in this case, **it is the dependent children, and not the PA, who would have a pending refugee claim. There is no guidance in the H&C operational bulletin.**

(<https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/permanent-residence/humanitarian-compassionate-consideration/intake-who-may-apply.html#refugee-claim>)

Please advise. Thanks!