Immigration and Refugee Board of Canada
Commission de l'immigration et du statut de réfugié du Canada

Immigration Appeal Division

REMOVAL ORDER APPEALS
IMMIGRATION AND REFUGEE PROTECTION ACT

Legal Services
Immigration and Refugee Board of Canada

January 1, 2009

Canada

Immigration and Refugee Board of Canada | Commission de l'immigration et du statut de réfugié du Canada

MEMORANDUM NOTE DE SERVICE

To/Destinataires

Chairperson; IAD Deputy Chairperson; IAD ADCs; LPDD; All IAD Members and Tribunal Officers/Président; vice- président de la SAI; vice-présidents adjoints de la SAI; DAPP; tous les commissaires et agents du tribunal de la SAI

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Removal Order Appeals / Appels d'une mesure de renvoi

Please find attached the updated version of the *Removal Order Appeals Paper*, dated January 1, 2009, which was prepared by Legal Services. This work is intended to assist decision-makers and staff of the IAD in carrying out their duties. The electronic version will be available on *Info*net and on the IRB's website.

The following Legal Advisors contributed to the update of the paper: David Schwartz (Introduction and coordinator of the paper); Gary Dukeshire (Chapters 2 and 11); Ritva Ahti (Chapters 3 and 4); Gordon Hayhurst (Chapter 5); Lori Disenhouse (Chapter 6); Richard Tyndorf (Chapters 7 and 8); Sharon Silberstein (Chapter 9); Joel Rubinoff (Chapter 10); and Linda Koch (Chapter 12).

Vous trouverez ci-jointe la mise à jour du document *Appels d'une mesure de renvoi* daté du 1er janvier 2009, qui a été préparé par les Services juridiques. Ce document vise à aider les décideurs et les employés de la SAI dans l'exécution de leurs fonctions. La copie électronique sera versée dans le site Internet de la CISR et *info*net.

Les conseillers juridiques suivants ont collaboré à la mise à jour du document : David Schwartz (introduction et coordination du document), Gary Dukeshire (chapitres 2 et 11), Ritva Ahti (chapitres 3 et 4), Gordon Hayhurst (chapitre 5), Lori Disenhouse (chapitre 6), Richard Tyndorf (chapitres 7 et 8), Sharon Silberstein (chapitre 9), Joel Rubinoff (chapitre 10) et Linda Koch (chapitre 12).

Canada

I trust that you will find this update useful. The paper is reviewed annually to determine whether it requires updating. We want to be sure that it continues to meet your needs. If you have any comments about the format or the content of this work, please forward them to David Schwartz, Legal Services, Western Region.

J'espère que cette mise à jour vous sera utile. Tous les ans, ce document fait l'objet d'un examen qui permet de déterminer s'il doit être mis à jour pour continuer de répondre à vos besoins. Si vous avez des commentaires à faire sur la présentation matérielle ou sur le contenu, faites-les parvenir à David Schwartz des Services juridiques du bureau régional de l'Ouest.

This update replaces the previous version of the paper in its entirety. It incorporates case law up to January 1, 2009. Please discard the previous version of the paper.

Cette mise à jour remplace l'ensemble de la version précédente du document. Elle tient compte de la jurisprudence jusqu'au 1er janvier 2009. Veuillez supprimer la version précédente du document.

Original signed by/ original signé par

<<Sylvia Cox-Duquette>>

Senior General Counsel
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TABLE OF CONTENTS

Introduction

This paper deals with the provisions of the *Immigration and Refugee Protection Act* (IRPA) and the *Immigration and Refugee Protection Regulations* (IRPR) as they pertain to removal order appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada (IRB). In addition, this paper covers residency obligation appeals. This paper represents the most current treatment of the law as expressed in the jurisprudence respecting removal order appeals before the IAD. Both Federal Court and IAD jurisprudence has been used for this paper. The cut-off date for cases is December 31, 2008 (except for the *Khosa* decision of the Supreme Court).

This paper does not constitute legal opinion and should not be taken to represent the views of the IRB and its members.

Generally

Under IRPA there are three specific classes of persons defined in IRPA who may have, in some circumstances, a right of appeal to the IAD from a removal order. These classes include a permanent resident, a protected person and a foreign national. A permanent resident is someone who has obtained permanent resident status and has not lost it. A protected person is a person on whom refugee protection has been conferred and who has not lost that status. A foreign national is someone who is not a Canadian citizen or a permanent resident and may include a stateless person.

The IAD hears appeals from removal orders (exclusion orders, departure orders and deportation orders) issued to permanent residents and protected persons by the Immigration Division (ID) at an admissibility hearing or by an officer at an examination. It also hears appeals by the Minister from ID decisions to not issue removal orders at an admissibility hearing. A foreign national who holds a permanent resident visa has an appeal against a removal order.

Residency obligation appeals under section 63(4) of the Act are also covered in this paper, although these are an appeal type in itself, and not a type of removal order appeal. The IAD can hear an appeal from a decision made by a visa officer overseas denying recognition of a person's permanent residence status due to non-residence in and absence from Canada. The same issues that arise in these section 63(4) appeals can also arise in a removal order appeal under section 63(3) – typically, this occurs at a port of entry when a permanent resident is trying to return to Canada, and an immigration officer in Canada issues a removal order on the grounds of a violation of the permanent residency obligation.

The grounds for an appeal continue to include the following:

1. the decision appealed is wrong in law or fact or mixed law and fact,
2. a principle of natural justice has not been observed, and
3. discretionary relief for humanitarian and compassionate considerations in all the circumstances of the case including the best interests of a child.

The right of appeal has been in some cases curtailed or restricted by the provisions in IRPA to give effect to one or more of the objectives of IRPA. In s. 3(1)(h), for example, one objective of IRPA is "to protect the health and safety of Canadians and to maintain the security of Canadian society". Persons who are found to be inadmissible on grounds of security (s. 34), violating human or international rights (s. 35) serious criminality punished in Canada by a term of imprisonment of at least two years (s. 36 and s. 64(2)) or organized criminality (s. 37) have no access to an appeal, pursuant to s. 64 of IRPA. In section 63(1) appeals by a foreign national who holds a permanent resident visa based on a family class sponsorship, section 65 permits discretionary relief only if the foreign national is a member of the family class and their sponsor is a sponsor within the meaning of the regulations.

Every effort has been made to provide relevant cases in each chapter. If anyone believes that a relevant case is missed, it would assist the authors and the editor if the omitted case is brought to their attention, along with an explanation as to its relevance. This will ensure that the IRB can continue to provide helpful material to both members and counsel in this form.

Chapter Two

Right of Appeal

Introduction

The *Immigration and Refugee Protection Act*[1] (IRPA) sets out the circumstances under which a permanent resident or foreign national may appeal a removal order that is issued against them. IRPA also sets out the appeal rights of the Minister in the event the Immigration Division (ID) refuses to issue a removal order at the end of an admissibility hearing. This chapter provides an overview of the various ways in which an appeal of a removal order (or the non-issuance of a removal order) can come before the Immigration Appeal Division (IAD) as well as the statutory limitations on the right to appeal that are set out in IRPA.

Right to Appeal

In practice, the bulk of the caseload of removal order appeals at the IAD involves permanent residents as the right to appeal differs depending on whether the person against whom the removal order is made is a permanent resident or foreign national. While all permanent residents have a right to appeal to the IAD from the issuance of a removal order, subject to certain limitations found in sections 64 and 65, the right of foreign nationals to appeal the issuance of a removal order is considerably limited. The Minister also has a right to appeal when the ID does not issue a removal order at the end of an admissibility hearing. The right of appeal for foreign nationals, permanent residents, and the Minister is each described in detail in this section while limitations on the right to appeal are treated later in the chapter.

Foreign Nationals

There are two sections[2] of IRPA under which a foreign national may have a right to appeal from the issuance of removal order. These sections extend appeal rights to foreign nationals who hold a permanent resident visa and foreign nationals who are protected persons. However, the scope of the appeal rights is limited by sections 64 and 65 of IRPA.

An appeal to the IAD by a foreign national may be from a decision of the ID to issue a removal order after an admissibility hearing or from a decision of an immigration officer to issue a removal order. It will depend on whether it is the Minister or the ID

1 S.C. 2001, c. 27.

2 IRPA, subsections 63(2) and (3).

who has jurisdiction to issue the removal order in the given case. In most cases, it will be the ID issuing the removal order which forms the basis of the appeal as the Minister's jurisdiction is limited to issuing a removal order in the circumstances enumerated in subsection 228(1) of the *Immigration and Refugee Protection Regulations*[3] (IRPR). This subsection stipulates the following circumstances in which the Minister may issue a removal order against a foreign national without referring the section 44 report to the ID:

- if the foreign national is inadmissible under paragraph 36(1)(*a*) or (2)(*a*) of the Act on grounds of serious criminality or criminality;
- if the foreign national is inadmissible under paragraph 40(1)(*c*) of the Act on grounds of misrepresentation;
- if the foreign national is inadmissible under section 41 of the Act on grounds of
- failing to appear for further examination or an admissibility hearing under Part 1 of the Act,
- failing to obtain the authorization of an officer required by subsection 52(1) of the Act,
- failing to establish that they hold the visa or other document as required under section 20 of the Act,
- failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, or
- failing to comply with subsection 29(2) of the Act to comply with any condition set out in section 184; and
- if the foreign national is inadmissible under section 42 of the Act on grounds of an inadmissible family member, the same removal order as was made in respect of the inadmissible family member.

Further, if the section 44 report contains any grounds of inadmissibility other than those enumerated in subsection 228(1) of IRPR, the report must be referred to the ID.

Foreign nationals who hold a permanent resident visa

Pursuant to subsection 63(2) of IRPA, foreign nationals who hold a permanent resident visa may appeal to the IAD from the issuance of a removal order. Subsection 63(2) is as follows:

> 63(2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

[3] SOR/2002-227, June 11, 2002.

Appeals made pursuant to subsection 63(2) do not represent a significant percentage of the caseload before the IAD. This type of appeal would involve a person who was issued a permanent resident visa, usually at a visa post outside of Canada, and presents himself at a port of entry with that visa seeking admission as a permanent resident. If the examining officer believes the person is inadmissible, the officer will issue a removal order or the section 44 report may be referred to the ID for an admissibility hearing. Pursuant to section 23 of IRPA, the officer would authorize the person to enter Canada for the purpose of their admissibility hearing or appeal, subject to the mandatory conditions stipulated in section 43 of IRPR. An appeal would then lie to the IAD from the decision of the officer to issue a removal order or from the decision of the ID following an admissibility hearing.

The wording of subsection 63(2) indicates that an appeal under this subsection is available only to those foreign nationals who hold a permanent resident visa. Under the former *Immigration Act*,[4] paragraph 70(2)(b), an appeal was available for those "in possession of a valid immigrant visa." The word "valid" was not brought forward into IRPA. The Federal Court in *Zhang*[5] considered what it means to hold a permanent resident visa in light of the fact that this nuance was not carried forward. In that case, the visa officer had issued a permanent resident visa to Ms. Zhang. The Minister then became aware that her husband, who had claimed refugee status in Canada, had indicated during the course of his claim that another woman was actually his wife. The visa office then telephoned Miss Zhang, informing her that her visa had been cancelled. When she used the visa to try to enter Canada anyway, the examining officer referred her to an admissibility hearing where the ID found her inadmissible for non-compliance with the Act. When she tried to appeal to the IAD, the Board dismissed the appeal for lack of jurisdiction, holding that because the visa had been revoked prior to her arrival, she did not "hold" a permanent resident visa. The Federal Court agreed with this interpretation and stated:

> Parliament can hardly be said to have intended that foreign nationals would be able to use visas revoked by Canadian officials in an attempt to fraudulently enter the country, and then rely on those revoked visas as a basis for their appeal rights.
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>
> If subsection 63(2) applied to "invalid" visas, like those that have been revoked, would it also apply to ones that have expired? This logic defies common sense […] The fact that Ms. Zhang still held the physical copy of her visa did not change the legal consequence of its revocation. Rather than pursuing an appeal of the immigration officer's removal order before the Board, she should have sought judicial review of the officer's decision in this Court.[6]

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4 R.S.C. 1985, c. I-2. [repealed]

5 *Zhang, Xiao Ling* v. *M.C.I.* (F.C. no. IMM-4249-06), de Montigny, 5 June 2007; 2007 FC 593.

6 *Ibid*, at paragraphs 13 and 16.

In light of the Court's ruling in *Zhang*, it appears that the long line of jurisprudence under the former Act dealing with valid immigrant visas is still relevant to determining if a foreign national "holds" a permanent resident visa under IRPA for the purposes of subsection 63(2). This jurisprudence is canvassed below.[7]

The Court dealt with this issue in *Hundal*.[8] In this case, Mr. Hundal had been issued an immigrant visa after being sponsored by his wife. Prior to Mr. Hundal's arrival in Canada, his wife signed a statutory declaration withdrawing her sponsorship. An adjudicator issued an exclusion order against Mr. Hundal and he appealed to the Appeal Division. The Appeal Division concluded that Mr. Hundal was in possession of a valid immigrant visa and allowed the appeal on humanitarian and compassionate grounds.

The argument made by the Minister in *Hundal* was that once the sponsorship was withdrawn, the condition for issuing Mr. Hundal's visa could not be met and the visa ceased to be valid. The Court disagreed with this approach and went on to set out some broad principles regarding validity of visas:

- As a general principle, once a visa has been issued, it remains valid.
- There are four exceptions to this general principle:
  - Exception #1: Where there is a frustration or impossibility of performance of a condition on which the visa was issued. This applies only when it is obvious that a supervening act makes the satisfaction of the condition of the visa impossible.
  - Exception #2: Where there is a failure to meet a condition of the granting of the visa itself before the visa is issued. The essential components of the issued visa were not present before the visa was issued and, therefore, the visa is void *ab initio*.
  - Exception #3: where the visa has expired.
  - Exception #4: where the visa has been revoked by a visa officer.

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7 Also see chapter on visas under IRPA.

8 *Canada (Minister of Citizenship and Immigration)* v. *Hundal*, [1995] 3 F.C. 32 (T.D.) reasons endorsed on appeal in *Canada (Minister of Citizenship and Immigration)* v. *Hundal* (F.C.A. no. A-406-95), Strayer, Linden, Robertson, November 20, 1996.

It should be noted that the first exception stipulated in *Hundal* was based on Federal Court of Appeal case law at the time which has since been overturned in *McLeod*.[9] Therefore, the first exception no longer applies.

In analyzing the facts in *Hundal*, the Court was of the view that none of the four exceptions applied. As a result, the Appeal Division did have jurisdiction to hear the appeal and the judicial review application was dismissed.

In *Oloroso*,[10] Mr. Justice Gibson reviewed the case law and questioned whether the second exception in *Hundal* was suspect. He relied on the reasoning in *Seneca*[11] which involved similar facts, to conclude that it was not logical to take away the right of appeal to the Appeal Division on the basis that visas were improperly issued, when that was the very issue to be decided. The applicants had obtained immigration visas as husband and wife and two children. It was learned at the port of entry that the principal applicant was legally married to another woman when the purported marriage of the adult applicants took place. An adjudicator made exclusion orders against the applicants. The Appeal Division determined that it had no jurisdiction in the appeals against the exclusion orders, since the applicants were not in possession of valid visas. Moreover, the wife was not a member of the family class.

Since the hearing of these cases by the Federal Court of Appeal and the Federal Court Trial Division, the IAD has addressed the issue of whether an appellant had a valid immigrant visa under the former *Immigration Act.* There are also a few cases under IRPA which deal with the question of whether an appellant holds a permanent resident visa and therefore, has a right of appeal to the IAD.

In *Nyame*,[12] the appellant had been issued an immigrant visa in the wrong name and the wrong birth date. The appellant's passport contained the same misinformation. The Appeal Division panel concluded that the appellant was perhaps in violation of sections of the former *Immigration Act*, but that this case did not fall within one of the four exceptions set out in the Federal Court decision in *Hundal*; therefore, the appellant was in possession of a valid immigrant visa and the Appeal Division had jurisdiction to hear the appeal.

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9 *McLeod, Beresford and Glenford* v. *M.C.I.* (F.C.A. no. A-887-96), Isaac, Strayer, Linden, November 6, 1998. In this case, the principal applicant died after the issuance of the visa but before her children travelled to Canada. The Court found that the children who travelled to Canada did hold valid visas and, as such, could appeal to the IAD. This decision overturned a previous Federal Court of Appeal decision which had come to an opposite conclusion (see *De Decaro: M.C.I.* v. *De Decaro, Ireland Pizzaro* (F.C.A. no. A-916-90), Pratte, Letourneau, Marceau (concurring in part), March 1, 1993.).

10 *Oloroso* v. *Canada (Minister of Citizenship and Immigration)* [2001] 2 F.C. 45.

11 *Canada (Minister of Citizenship and Immigration)* v. *Seneca* [1998] 3 F.C. 494 (T.D.), affirmed by *Canada (Minister of Citizenship and Immigration)* v. *Seneca* [1999] F.C.J. No. 1503 (C.A.).

12 *Nyame, Daniel* v. *M.C.I.* [IAD T95-07505], Townshend, January 28, 1997.

In two cases, *Li*[13] and *Chung*,[14] the Appeal Division considered the situation where immigrant visas had been issued to the appellants as members of the family class, as unmarried dependent sons, but the appellants married between the date of the applications for permanent residence and the date of issuance of the immigrant visas. In both cases, the Appeal Division concluded that the second exception, as noted in *Hundal*, applied in that a condition of the visa was that the appellants be unmarried (since they were married, they were not members of the family class and could not be sponsored), and therefore, there was a failure to meet a condition of the granting of the visas before the visas were issued. On this basis, the Appeal Division determined that the appellants did not have valid immigrant visas and the Appeal Division did not have jurisdiction to hear the appeal.

In *Mohammed*,[15] the appellant, his wife and one child were issued immigrant visas. The appellant did not disclose to the visa officer that he had two other children. The appellant declared his two other children at the port of entry and a removal order was issued against him. The issue for the Appeal Division was to determine whether the appellant, his wife and child had valid immigrant visas within the meaning of subsection 70(2) of the former *Immigration Act*. The panel found that, even though there was a failure to disclose the two children, the appellants were still members of the family class. Therefore, the appellants were in possession of valid immigrant visas and the Appeal Division had jurisdiction to hear the appeal.

In *Opina*,[16] the Appeal Division took a similar approach. In this case, the appellant had failed to disclose the existence of his children prior to the issuance of his immigrant visa. The Minister argued that the immigrant visa had been issued to the appellant as an unmarried son with no dependants and therefore, since he did in fact have children, the immigrant visa was not valid. The panel considered the applicable definitions of "dependent son" in the *Immigration Regulations 1978*, and concluded that the existence of children did not automatically place the appellant outside of the family class.

In *Geda*,[17] the IAD found that the appellants did hold permanent resident visas and thus did have a right to appeal where the allegation was that they were inadmissible

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13 *Li, Bing Qian* v. *M.C.I.* [IAD V94-02390], Singh, October 15, 1996.

14 *Chung, Van* v. *M.C.I.* [IAD V94-00495], Verma, March 29, 1996.

15 *Mohammed, Khan* v. *M.C.I.* [IAD V94-00788], Singh, December 20, 1994.

16 *Opina, Felicismo* v. *M.C.I.* [IAD T98-01553], D'Ignazio, April 9, 1999.

17 *Geda, Meseret Kidane* v. *M.C.I.* [IAD no. TA5-13919], MacLean, December 3, 2007 (interlocutory decision). [appeal allowed on humanitarian and compassionate grounds *Geda, Meseret Kidane* v. *M.C.I.* [IAD no. TA5-13919], MacLean, September 9, 2008. See also *Kajagian, Marina Sarkis* v. *M.C.I.* [IAD no. TA5-01865], Ross, November 22, 2005 (interlocutory decision) where the IAD found that the appellants held permanent resident visas and thus had a right to appeal pursuant to subsection 63(2) where they had been granted visas as accompanying dependents of a skilled worker and they came to Canada despite the fact that the principal applicant (the skilled worker) had died prior to coming. The appeal was eventually allowed: *Kajagian, Marina Sarkis* v. *M.C.I.* [IAD no. TA5-01865], Hoare, May 30, 2006

for non-compliance with the act pursuant to subsection 41(a) of IRPA. In that case the appellants had been included in their mother's application for permanent residence as protected persons. Prior to their arrival in Canada they both got married but did not inform the visa office in Kenya of their change in marital status. The Board noted that in this case the appellants' right to a visa did not stem from their being members of the family class, but rather from the fact that their mother obtained status as a protected person. The Board, citing *Zhang,*[18] held at paragraph 34 that:

> Section 63(2) of the IRPA does not place any limitations on the manner in which the foreign national obtained the visa, rather it allows that once having obtained a permanent residents visa (except in the case of an invalid visa) the foreign national has a right to appeal. Thus, any foreign national, who possesses a valid permanent resident visa, has the right to appeal a decision to remove them from Canada. The inadmissibility attaches to the foreign national and it is the question of that inadmissibility that they have a right to appeal. Unlike the foreign national who has applied for a permanent resident visa as a member of the family class and been refused one, the holder of a permanent resident visa has certain rights, an appeal the Immigration Appeal Division being one of them. [Footnote omitted][19]

As noted in *Hundal*, if a visa is revoked, then it is not a valid visa and the person does not have a right of appeal to the IAD. In two decisions, the Appeal Division has dealt with the requirements of notice of revocation of a visa to an immigrant visa holder. In both cases, the sponsor had withdrawn the sponsorship prior to the applicant spouse's arrival at the port of entry. In *Lionel,*[20] an immigration officer in Canada decided to cancel the appellant's visa, and asked officials at the visa post to "attempt to retrieve" the visa. The appellant was advised by telegram to attend at the High Commission with his passport and visa; however, he was never advised that the visa was no longer valid. He proceeded to the port of entry. The Appeal Division held that it was not sufficient to invite the appellant to the visa post for a meeting; the revocation of his visa had to be explicitly conveyed to him. As this was not done, the visa remained valid and the appellant was in possession of a valid visa when he arrived at the port of entry.

In *Hundal,*[21] a visa officer sent a telegram to the appellant at the address she provided to the visa post to notify her of the withdrawal of the sponsorship and the subsequent invalidity of the visa. The appellant claimed not to have received the telegram. The Appeal Division held that the Federal Court—Trial Division decision in *Hundal*[22] was distinguishable from the facts in the case before it as a visa officer had

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18 *Zhang, supra*, footnote 5.

19 *Geda, supra*, foonote 17.

20 *M.C.I.* v. *Lionel, Balram Eddie* [IAD T98-01553], D'Ignazio, April 9, 1999.

21 *Hundal, Kulwant Kaur* v. *M.C.I.* [IAD V97-01735], Clark, August 17, 1998.

22 *Hundal*, *supra*, footnote 8.

made a decision to cancel the visa and that decision had been communicated to the appellant. Procedural fairness did not require actual notice to the appellant of the revocation of her visa. The visa office had done all that could be expected of it in sending the notice to the address the appellant provided. The appellant was not the holder of a valid visa when she arrived at a port of entry and consequently, she did not have a right of appeal to the Appeal Division.

In *Chhoker,*[23] a case decided under IRPA, a sponsor withdrew her sponsorship after a permanent resident visa had been issued to her husband. He left for Canada soon afterwards and did not receive the telegram sent by the visa office notifying him that the visa was not valid for travel to Canada and requesting that he return the visa. When he arrived at the port of entry, an exclusion order was made against him. He appealed under subsection 63(2) of the IRPA. The issue identified at the outset of the hearing was "whether or not the appellant was in possession of a permanent resident visa." Minister's counsel contended that the appellant did not hold a permanent resident visa and that consequently, the IAD lacked jurisdiction to hear the appeal. The member concluded that the visa became invalid when it was cancelled prior to the arrival of the appellant at the port of entry. Although the decision does not specifically conclude to a lack of jurisdiction, the appeal was dismissed without any reference to humanitarian and compassionate considerations, suggesting an implicit recognition that the appellant did not, in fact, have a right of appeal.

Protected Persons

The second way in which a foreign national may appeal the issuance of a removal order is pursuant to subsection 63(3) of IRPA. It stipulates that:

> 63(3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

Therefore, if the foreign national against whom a removal order is issued is a protected person as defined in section 95 of IRPA, they have an appeal to the IAD. Pursuant to section 95, a protected person is a person whom has been determined to be a Convention refugee under a visa application, a person whom the Board has determined to be a Convention refugee or a person in need of protection, or a person whose application for protection has been allowed by the Minister. Further, the person must not have had that status subsequently vacated. In order to have jurisdiction to hear an appeal of a foreign national under this section, the IAD will need to be satisfied that the person is, in fact, a protected person.

[23] *Chhoker, Gurtej Singh* v. *M.C.I.* [IAD VA3-00958], Workun, January 4, 2004.

Permanent Residents

Pursuant to subsection 63(3) of IRPA, all permanent residents have a right to appeal the issuance of a removal order made against them. This will always be an appeal from the decision of the ID, except in cases where the sole allegation is that the permanent resident failed to comply with the residency obligation. In those cases, the Minister may make the appropriate removal order directly without referring the case for an admissibility hearing before the ID and the appeal, therefore, would be directly from the Minister's decision to issue the removal order.

The question of whether the IAD has jurisdiction to extend the time to file an appeal under subsection 63(3) was raised in *Rumpler*.[24] The appellant was a permanent resident who missed the 30-day filing deadline to file an appeal. The argument raised by the Minister in that case was that once the 30-day delay to file an appeal passed, the removal order came into force and the appellant lost his permanent residence status pursuant to paragraph 46(1)(c) of IRPA. The Minister argued that since the appellant was no longer a permanent resident, the IAD had lost jurisdiction. The IAD accepted this argument, but the Federal Court reversed this decision, holding that such a narrow interpretation would not give effect to Parliament's intention to afford a right of appeal in the circumstances. Therefore, the Court held that the IAD does have jurisdiction to hear requests to extend the time to file an appeal. The consequence of accepting such an application is that the appellant would retain his permanent resident status and the IAD would proceed to hear the appeal.

Minister's Appeal

If the Minister refers a section 44 report to the ID for an admissibility hearing and the ID does not issue a removal order against the subject of the proceedings, the Minister may appeal that decision to the IAD pursuant to subsection 63(5) of IRPA. Subsection 63(5) reads as follows:

> 63(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.

Unlike appeals by a foreign national or permanent resident where the Minister or the ID would have already issued a removal order, in appeals by the Minister the IAD will need to issue a removal order pursuant to subsection 67(2) of IRPA if it allows the appeal or orders a stay and it does not refer the decision back to the original decision-maker for reconsideration.

[24] *Rumpler, Eluzur* v. *M.C.I.* (F.C. no. IMM-1552-06), Blanchard, December 13, 2006; 2006 FC 1485. A question was certified in this case but no appeal was filed.

Limitations on the Right to Appeal

The right to appeal the issuance of a removal order to the IAD is expressly limited by sections 64 and 65 of IRPA. These limitations are explained below.

IRPA - Section 64

The right to appeal for both foreign nationals and permanent residents is expressly limited by section 64 of IRPA. This section reads as follows:

> 64(1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.
>
> (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

This section operates to remove the right of appeal for those permanent residents or foreign nationals who are inadmissible on grounds of security, violating human or international rights, serious criminality, or organized criminality. In such cases, the remedy available to the permanent resident or foreign national would be by way of an application for leave for judicial review of the decision of the Minister or the ID.

With respect to the lack of jurisdiction to hear appeals when the inadmissibility relates to serious criminality, the operation of this section is muted somewhat by subsection 64(2) which defines serious criminality for purposes of subsection 64(1) as being that which was punished by a term of imprisonment of at least two years.

The approach the IAD should take regarding the application of section 64 has been commented on by the Court. The jurisprudence indicates that the IAD's jurisdiction is limited to deciding whether the factual requirements for the application of section 64 exist to remove the right to appeal.[25] In cases besides serious criminality, this will generally be a simple determination regarding whether or not a removal order has been issued for one of the grounds enumerated in section 64. In cases of serious criminality, because of the operation of subsection 64(2), the IAD must also determine if the removal order which was issued against the appellant was with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

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[25] See, for example, *Kroon, Andries* v. *M.C.I.* (F.C. no. IMM-4119-03), Rouleau, May 14, 2004; 2004 FC 697; *Magtouf, Mustapha* v. *M.C.I.* (F.C. no. IMM-5470-06), Blais, May 3, 2007; 2007 FC 483; *Thevasagayampillai, Diana* v. *M.C.I.* (F.C. no. IMM-8494-03), Martineau, May 2, 2005; 2005 FC 596; *Livora, Juan Miguel Benavides* v. *M.C.I.* (F.C. no. IMM-3785-05), Noël, January 31, 2006; 2006 FC 104. Also see the approach to the operation of subsection 68(4) in *Ferri, Loreto Lorenzo* v. *M.C.I.* (F.C. no. IMM-9738-04), Mactavish, November 22, 2005; 2005 FC 1580; and *Ramnanan, Naresh Bhoonahesh* v. *M.C.I. and M.P.S.E.P.* (F.C. no. IMM-1991-07), April 1, 2008; 2008 FC 404.

An argument was raised in *Tiky*[26] that section 64 did not apply to protected persons. In that case, the appellant was a protected person as defined in subsection 95(2) of IRPA. A removal order had been issued against him pursuant to paragraph 35(1)(a) for violating human or international rights. The IAD refused to hear the appeal due to the application of section 64. The appellant argued that including protected persons within the application of section 64 was not an interpretation consistent with the Charter and international instruments. The Court rejected this argument, citing the fact that an interpretation that included protected persons was consistent with the objectives of IRPA and the definition of foreign national found in section 2 of IRPA.

In *Holway,*[27] an appeal of a refusal of a sponsorship application, the argument was raised that section 64 should be interpreted such that it does not apply to decisions of visa officers. The Court held that section 64 of IRPA does not differentiate between decisions made by immigration officers and those made by the IRB and that section 64 operates to remove the right to appeal in both circumstances.

The jurisprudence from the IAD indicates that it will refuse to hear an appeal of a removal order when the appellant has had another removal order issued against him or her which comes under the appeal limitation found in section 64 of IRPA. In *Peter*,[28] the IAD dismissed two appeals for lack of jurisdiction when only one was caught by section 64. In that case, the appellant had filed an appeal following the issuance of a removal order for serious criminality and for which he had received a sentence of just over seven months. Another removal order was subsequently issued against him for serious criminality for an offence for which he received a sentence of 48 months. He then filed an appeal of that removal order. The IAD dismissed both appeals for lack of jurisdiction and stated:

> However, I am of the view that he lost this right by being convicted of a subsequent offence; sexual assault with a weapon, for which he received a sentence of over 2 years of imprisonment and being found inadmissible based on that conviction. Therefore, since he lost his right of appeal pursuant to section 64 of the IRPA against his second deportation order, it will defeat the intent of Parliament in enacting section 64 of the IRPA if he preserves his right of appeal to the IAD against his first deportation order. Section 64 states no appeal may be made to the IAD when that section is applicable. Therefore, I must conclude that the appellant no longer has a right of appeal pursuant to section 64 of the IRPA against either deportation orders.[29]

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[26] *Tiky, Anbessie Debele* v. *M.C.I.* (F.C. no. IMM-3111-04), Pinard, May 6, 2005; 2005 FC 615 reasons endorsed on appeal: *Tiky, Anbessie Debele* v. *M.C.I*, (F.C.A. no. A-254-05), Décary, Sexton, Evans, December 13, 2005; 2005 FCA 426.

[27] *Holway, Mohammad Mohsen* v. *M.C.I.* (F.C. no. IMM-7518-04), Russell, September 14, 2005; 2005 FC 1261.

[28] *Peter, Leonard Michael* v. *M.C.I.* [IAD no. TA3-24046], Néron, February 28, 2005.

[29] *Ibid* at paragraph 12. Also see *Jamil, Mohamad Towfic* v. *M.C.I.* [IAD no. MA1-07596/MA4-02891], Manglaviti, April 23, 2004.

Similar reasoning has been used to dismiss an appeal for lack of jurisdiction when no actual appeal was filed from the second removal order, but it would be caught by section 64 if there were such an appeal filed.[30]

The constitutionality of section 64 has been contested.[31] Most commonly, the removal of the right to appeal has been attacked as being contrary to the principles of fundamental justice found in section 7 of the Charter. In *Kroon*[32] and *Livora*,[33] the Federal Court upheld the constitutionality of this section. Further, the Court held in the same two cases that the IAD does not have jurisdiction to hear arguments regarding the constitutionality of section 64 as Parliament has expressly removed the right to appeal to the IAD in these cases. Therefore, once the factual determination is made that the criteria in section 64 is satisfied, the IAD loses jurisdiction, including with respect to constitutional arguments.

The Federal Court in *Nabiloo*[34] dealt with the question of whether or not section 64 barred an appeal when the ground invoked was serious criminality and there was an appeal from conviction filed. In that case, the appellant had been sentenced to three years incarceration for two drug offences. The Court held that the filing of a criminal appeal did not change the appellant's status and she remained an individual who was barred by subsection 64(2) from bringing an appeal to the IAD.

Another question that has arisen with respect to subsection 64(2) is whether the word "punished" in subsection 64(2) refers to the sentence imposed or the actual time spent in detention. The jurisprudence is clear that it refers to the sentence imposed.[35]

An issue which often arises with respect to subsection 64(2) is whether or not an appellant who is alleged to be inadmissible on the ground of serious criminality received a sentence of at least two years. In cases where the appellant spent time in pre-sentence custody that was counted toward his or her sentence, the question arises whether that portion of the sentence spent in pre-sentence custody should be counted as part of the term of imprisonment pursuant to subsection 64(2).

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30 *Tiet, Hiep Van* v. *M.C.I.* [IAD no. WA6-00043], Workun, March 3, 2008 which followed the reasoning in *Peter, supra*, footnote 28 and found that the second removal order was enforceable in law and, thus, rendered the appeal from the first removal order moot. Also see *Van Der Haak, Bartele* v. *M.P.S.E.P.* [IAD no. VA5-01115], Workun, January 8, 2008 and *Fattah, Arafat Abdul* v. *M.P.S.E.P.* [IAD no. VA5-01092], Workun, March 11, 2008.

31 For a complete review of this subject, see the chapter on constitutional issues.

32 *Kroon, supra* footnote 25.

33 *Livora, supra* footnote 25.

34 *Nabiloo, Ashraf* v. *M.C.I.* (F.C. no. IMM-3220-07), Snider, February 1, 2008; 2008 FC 125. A question was certified in this case but the appeal to the Federal Court of Appeal was discontinued.

35 *Martin, Claudette* v. *M.C.I.* (F.C.A., no. A-126-05), Nadon, Sexton, Sharlow, October 25, 2005; 2005 FCA 347. Also see *Nabiloo, ibid*.; *Cartwright, Russ Allan* v. *M.C.I.* (F.C. no. IMM-3400-02), Heneghan, June 26, 2003; 2003 FCT 792; and *Sherzad, Karamuddin* v. *M.C.I.* (F.C., no. IMM-5154-04), Mactavish, May 27, 2005; 2005 FC 757.

In a long line of cases,[36] the jurisprudence was consistent in its interpretation that pre-sentence custody that had been expressly credited toward the sentence of the appellant should be considered part of the term of imprisonment for the purposes of subsection 64(2). Therefore, pursuant to this interpretation, in the case of an appellant who had spent nine months in pre-sentence custody and then received an additional 16 months at the time of sentencing, the punishment for the purposes of subsection 64(2) would be a 25 month term of imprisonment and the IAD would not have jurisdiction to hear the appeal, provided the sentencing judge had expressly factored in the time spent in pre-sentence custody. Likewise, had the sentencing judge expressly counted the time spent in pre-sentence custody as "double-time", as is often the case in criminal matters, the sentence for the purposes of subsection 64(2) would then be 34 months.

The reasoning behind this interpretation is illustrated in *Sherzad* as follows:

> [45] The reasoning in these cases (*Allen, Atwal, Smith, Gomes, and Cheddesingh*) is exemplified by the statement of Justice Pinard in *Atwal* where he observed that, in enacting subsection 64(2) of IRPA "Parliament sought to set an objective standard of criminality beyond which a permanent resident loses his or her appeal right, and Parliament can be presumed to have known the reality that time spent in pre-sentence custody is used to compute sentences under s. 719 of the Criminal Code".
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> [57] Thus, the credit given to an offender for the time served prior to conviction is deemed part of the offender's "punishment". It would, in my view, be inappropriate for an offender to be able to argue in the criminal context that his or her sentence should be reduced in light of the time that the individual spent in pre-trial detention, and then to be able to turn around in the immigration context and say that no consideration should be given to the period spent in pre-trial detention, and only the period of the sentence should be considered for the purposes of subsection 64(2) of the IRPA.
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> [61] Such an interpretation would provide a positive incentive for all offenders to use pre-trial delay to circumvent subsection 64(2), which cannot have been Parliament's intent. [Footnotes omitted][37]

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[36] *Martin, ibid*; *Sherzad, ibid*; *M.C.I.* v. *Atwal, Iqbal Singh* (F.C., no. IMM-3260-03), Pinard, January 8, 2004; 2004 FC 7; *Cheddesingh (Jones), Nadine Karen* v. *M.C.I.* (F.C., no. IMM-2453-05), Beaudry, February 3, 2006; 2006 FC 124; *M.C.I.* v. *Smith, Dwight Anthony* (F.C., no. IMM-2139-03), Campbell, January 16, 2004; 2004 FC 63; *Shepard, Ian Tyrone* v. *M.C.I.* (F.C., no. IMM-6694-04), Heneghan, July 26, 2005; 2005 FC 1033; *Magtouf, Mustapha* v. *M.C.I.* (F.C., No. IMM-5470-06), Blais, May 3, 2007; 2007 FC 483.

[37] *Sherzad, supra,* footnote 35 at paragraphs 45, 57, and 61.

This interpretation, however, was put into question with the Supreme Court of Canada decision in *Mathieu*.[38] In that case, the Court dealt with the question of whether, in the criminal context, a sentence of imprisonment of less than two years is actually less than two years within the meaning of the *Criminal Code*[39] even where the judge would have imposed a longer term of imprisonment but for the offender's pre-sentence custody. The question was important in this case as the threshold of two years affected the sentencing judges' ability to make a probation order and also affected eligibility for parole. The Court decided that in that context, pre-sentence custody should not be counted as part of the sentence. While the Court acknowledged that there could be exceptions to this principle, it stated:

> [6] In short, I find that the term of imprisonment in each case is the term imposed by the judge at the time of sentence. The offender's prior detention is merely one factor taken into account by the judge in determining that sentence.[40]

The IAD has not applied the reasoning in *Mathieu* to the interpretation of section 64 of IRPA and has continued to apply pre-sentence custody that is expressly incorporated into the appellant's sentence as part of the term of imprisonment imposed.[41] The Federal Court has recently agreed that the reasoning in *Mathieu* does not apply in the context of subsection 64(2) of IRPA. In *Brown*,[42] the IAD had decided that it did not have jurisdiction to hear the appeal as the appellant had been sentenced to 34 months, taking into account 17 months of pre-trial detention counted as double. Although the Court ultimately reversed the decision of the IAD as it did not agree that it was clear from the sentencing transcript that the pre-trial detention was, in fact, counted as double time, it agreed with the principle that the reasoning in *Mathieu* did not apply. The Court cited the fact that subsection 64(2) takes into consideration how the person was actually punished as well as the fact that the purpose of section 36 of IRPA is to exclude from Canada non-citizens who have committed certain crimes. As such, the Court stated that:

> [22] For the purposes of IRPA, the focus is on the term of imprisonment which the sentencing judge imposed or considered as part of the punishment. That is the measure of seriousness to which IRPA is directed.
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> [23] Therefore, the IAD was correct that pre-sentencing custody could be part of the calculation in determining whether the

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38 *R.* v. *Mathieu* (S.C.C., no. 31662), McLachlin, Bastarache, Binnie, Deschamps, Fish, Abella and Charron, May 1, 2008; 2008 SCC 21.

39 R.S.C. 1985, c. C-46.

40 *Mathieu, supra*, footnote 38 at paragraph 6.

41 See, for example, *Pierre, Nahomie* v. *M.P.S.E.P*. [IAD no. MA8-10166], Paquette, January 16, 2009; *Mihalkov, Miroslav Vassil* v. *M.P.S.E.P*. [IAD no. TA7-05378], Dolin, October 21, 2008; and *Nana-Effah, Benbella* v. *M.P.S.E.P*. [IAD no. MA8-02628], Paquette, October 29, 2008.

42 *Brown, Alvin John* v. *M.P.S.E.P*. (F.C. no. IMM-2455-08), Phelan, June 23, 2009; 2009 FC 660.

> Applicant had been punished by a term of imprisonment of at least two years.[43]

Based on this case, it can be said that the pre-*Mathieu* line of authorities regarding pre-sentence custody remains good law in that pre-trial detention that is expressly considered by the sentencing judge as being part of the sentence, is considered part of the punishment for the purposes of section 64(2) of IRPA.

IRPA - Section 65

In rare cases, a foreign national who holds a permanent resident visa may have an appeal to the IAD pursuant to subsection 63(2) of IRPA but section 65 could operate to remove the IAD's jurisdiction to allow the appeal or stay the removal order on humanitarian and compassionate grounds. Section 65 limits this ground of appeal as follows:

> 65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

This section most often applies to limit appeals on humanitarian and compassionate grounds when an appeal is filed pursuant to subsection 63(1) following a failed sponsorship application, but it may also operate in cases where a foreign national arrives at a point of entry with a permanent resident visa as a result of a successful sponsorship application. If a removal order is issued against that foreign national, the immigration officer will allow that person to enter Canada for the purpose of their admissibility hearing or appeal. The foreign national could then file an appeal to the IAD pursuant to subsection 63(2) of IRPA. Section 65 would operate in that circumstance to remove the IAD's jurisdiction to consider allowing the appeal or staying the removal order on humanitarian and compassionate grounds if it is not first established that the person is a member of the family class.

The IAD has interpreted section 65 as applying only to those foreign nationals holding a permanent resident visa as a result of a successful sponsorship application. In *Kajagian,*[44] the IAD decided that section 65 did not apply and thus did not remove its discretionary jurisdiction. In that case, the appellants had been granted visas as accompanying dependents of a skilled worker. They came to Canada despite the fact that the principal applicant (the skilled worker) had died prior to coming. The Board found that section 65 was not engaged in that it was not an appeal in respect of an application based on membership in the family class. It stated that:

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[43] *Brown, ibid* at paragraphs 22-23.

[44] *Kajagian, supra*, footnote 17.

> In the panel's view, IRPA Section 65 clearly reflects parliament's recognition of the special nature of the "Family Class" and is a protective mechanism by which the legislators sought to protect its integrity. As the instant appeal is based not on membership in the family class but on the Skilled Worker Class, the provisions of Section 65 cannot operate. Therefore, the panel concludes that the appellants can invoke humanitarian and compassionate grounds in their appeal to the IAD.[45]

[45] *Kajagian, supra*, footnote 17 at paragraph 11.

CASES

Chapter Three

Permanent Residence

Introduction

The Immigration and Refugee Protection Act (IRPA)[1] provides that permanent residents, protected persons and foreign nationals who are in possession of a permanent resident visa all have the right to appeal removal orders against them.[2] In addition, the IRPA provides for a ground of appeal which applies only to permanent residents. The appeal is not against a removal order although it may result in the Immigration Appeal Division (IAD) making a removal order. The appeal is against a decision made by an officer outside Canada that a permanent resident does not meet the residency obligation found in section 28 of the IRPA. 3.

This chapter deals exclusively with permanent residents – their appeal rights, their status and their appeals concerning the residency obligation.

Removal orders against permanent residents

Notwithstanding the general principle that permanent residents have the right to enter and remain in Canada[4], those rights are not absolute. Removal orders[5] may be made against permanent residents if they are found inadmissible on any of a number of grounds: security,[6] violating human or international rights,[7] serious criminality,[8] organized criminality,[9] misrepresentation,[10] failure to comply with any conditions imposed by the regulations or failure to comply with the residency obligation in *IRPA*.[11]

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1 *Immigration and Refugee Protection Act*, S.C. 2001, as amended.

2 *IRPA*, subsection 63(3).

3 *IRPA*, subsection 63(4).

4 *IRPA*, subsection 27(1).

5 The *Immigration and Refugee Protection Regulations* (*IRP Regulations*), SOR/2002-227, June 11, 2002 (as amended) specify the types of removal orders to be made, depending on the ground of inadmissibility. Subsection 228(2) mandates a departure order against a permanent resident reported for failure to comply with the residency obligation. Other grounds of inadmissibility and the applicable removal orders can be found in section 229.

6 *IRPA*, section 34.

7 *IRPA*, section 35.

8 *IRPA*, subsection 36(1).

9 *IRPA*, section 37.

10 *IRPA*, section 40.

11 *IRPA*, paragraph 41(b).

In accordance with subsection 44(2) of *IRPA*, a permanent resident may be ordered removed only by the Immigration Division and not by the Minister, except in the case of a breach of the residency obligation.

Jurisdictional issues

A permanent resident enjoys a right of appeal to the Immigration Appeal Division (IAD)[12] unless the removal order is based on one of the first four grounds listed above.[13]

Thus there are two jurisdictional issues. The first one is whether the appellant is a permanent resident as defined in the *IRPA.*

> The question ... of determining whether a person is or is not a permanent resident is ... fundamental to the exercise of the board's jurisdiction.[14]

The second issue is whether an appeal to the IAD is barred because the Immigration Division found the permanent resident inadmissible on one of the grounds[15] enumerated in subsection 64(1) of the *IRPA*: security, violating human or international rights, serious criminality, or organized criminality.

Acquisition and loss of permanent resident status

A permanent resident is defined as "a person who has acquired permanent resident status and has not subsequently lost that status under section 46 [of *IRPA*]."[16] Section 46 and the loss of permanent resident status will be discussed in more detail below.

Acquiring permanent resident status

Permanent residence is still acquired in essentially the same way as it was under the former *Immigration Act* (former Act)[17] although the term "landing" and "landed immigrant" used in the former Act has disappeared from the *IRPA.* The prescribed procedure is for a person to apply outside Canada for a permanent resident visa to be presented at a Canadian port of entry. The visa officer abroad issues the visa to an applicant if the officer is satisfied that the applicant is admissible. At the port of entry, an

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12 *IRPA*, subsection 63(3).

13 *IRPA*, section 64.

14 *Canada (Minister of Employment and Immigration) v. Selby*, [1981] 1 F.C. 273, 110 D.L.R. (3d) 126 (C.A). Although this decision predates the *IRPA*, the principle remains unchanged.

15 In cases where the permanent resident is facing more than one removal order, the IAD has held that there is no right of appeal against a removal order where a second removal order (prior or subsequent) is caught by s. 64. See, for example, *Tiet v. M.C.I.* (IAD WA6-00043), Workun, March 3, 2008.

16 *IRPA*, subsection 2(1).

17 *Immigration Act*, R.S.C., 1985, c. I-2, as amended.

immigration officer re-examines the visa holder to determine if he or she still meets the requirements of the Act. Once admitted by the immigration officer, the visa holder becomes a permanent resident.[18]

Not everyone who acquires permanent residence starts the process from outside Canada.[19] Among the exceptions created by the *Regulations* are protected persons[20] and the "spouse or common-law partner in-Canada" class[21], that specifically allow for applications for permanent residence from within Canada, without the need to apply to be exempted from the requirement for a visa.

Finally, there is one other way to become a permanent resident. It is described in subsection 46(2) of the *IRPA* and covers the more rarely seen situation of reverting to permanent resident status after ceasing to be a Canadian citizen under paragraph 10(1)(a) of the *Citizenship Act*.[22]

Permanent resident cards

Under *IRPA*, everyone is issued a permanent resident card when they become a permanent resident.[23] Permanent residents who were landed before the card existed have to apply for the permanent resident card,[24] so that they may be examined to determine whether they are permanent residents. The cards (sometimes referred to as Canada cards) are provided or issued only in Canada.[25]

While permanent resident cards are evidence of permanent resident status, their issuance does not confer status. The significance of permanent resident cards was explained by the Federal Court in *Ikhuiwu*:

> […] the legislative scheme under the *IRPA* makes it clear that the mere possession of a permanent resident card is not conclusive

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18 *IRPA*, sections 20 and 21, and the *IRP Regulations*.

19 It is possible to apply under *IRPA* section 25 to be exempted on humanitarian and compassionate grounds from the usual requirements of the *IRPA*. In addition, the *IRP Regulations* allow certain categories of persons apply for permanent residence from within Canada.

20 *IRP Regulations*, section 175. Protected persons are permitted to make applications to remain in Canada as permanent residents.

21 *IRP Regulations*, sections 123 – 129.

22 *Citizenship Act*, R.S.C., 1985, c. C-29. Under subsection 10(1) of the *Citizenship Act*, a person ceases to be a Canadian citizen where his status was obtained or retained by false representation or fraud or by knowingly concealing material circumstances. Where citizenship is revoked under this provision, the person reverts to the status of permanent resident unless the subsection 10(2) exception applies. The exception deals with cases where the false representation, fraud or concealment related to the person's admission to Canada as a permanent resident.

23 *IRPA*, section 31 provides that permanent residents will be provided status documents. Section 53 of the *IRP Regulations* identifies that status document as a permanent resident card. *IRP Regulations*, paragraph 53(1)(a) indicates it will be provided to persons who become permanent residents under *IRPA*.

24 *IRP Regulations*, paragraph 53(1)(b).

25 *IRP Regulations*, section 55.

> proof of a person's status in Canada. Pursuant to section 31(2) of the *IRPA*, the presumption that the holder of a permanent resident card is a permanent resident is clearly a rebuttable one. In this case, it is clear that the permanent resident card, which was issued in error after it was determined by the visa officer in Nigeria that the applicant had lost his permanent residence status, could not possibly confer legal status on him as a permanent resident, nor could it have the effect of restoring his permanent resident status which he had previously lost because he didn't meet the residency requirements.[26]

A person outside Canada who does not have the card is presumed not to have permanent resident status.[27] Although a permanent resident card is not required within Canada and it also is not required to enter Canada, it is required by transportation companies to carry permanent residents who want to travel back to Canada.[28]

A permanent resident card is issued for different periods of validity depending on the circumstances of the permanent resident. As a general rule, a permanent resident card is valid for five years.[29]. However, the period of validity is limited to only one year if the status of the permanent resident is in the process of being re-examined. A card valid for one year will be issued to permanent resident waiting for a final determination of a decision made outside Canada on the residency obligation.[30] It is also issued for one year where a subsection 44(1) report against a permanent resident has set into motion a process whose outcome has still to be finally determined.[31]

Loss of Permanent Resident Status

Once acquired, permanent resident status can be lost in certain circumstances. Subsection 46(1) of the *IRPA* sets out the four ways in which permanent residents can lose their status.

- if they become Canadian citizens[32]

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26 *Ikhuiwu v. Canada* (*Minister of Citizenship and Immigration*), 2008 FC 35, paragraph 19.

27 *IRPA*, paragraph 31(2)(b).

28 *IRP Regulations*, subsection 259(f) provides that a permanent resident card is a prescribed document for the purposes of *IRPA* subsection 148(1). Paragraph 148(1)(b) prohibits transportation companies from carrying to Canada any person who does not hold a prescribed document.

29 *IRP Regulations*, subsection 54(1).

30 *IRP Regulations*, paragraph 54(2)(a).

31 *IRP Regulations*, paragraph 54(2)(b),(c) and (d).

32 *IRPA*, paragraph 46(1)(a). Under the *Immigration Act*, the effects of acquiring or losing Canadian citizenship were included in the definition of permanent resident. Now, under the *IPRA*, they are included in section 46 on the loss of status.

- on a final determination of a decision made outside of Canada that they have failed to comply with the residency obligation under section 28 of *IRPA*
- when a removal order made against them comes into force[33]
- on a final determination under section 109 to vacate a decision to allow their claim for refugee protection or a final determination under subsection 114(3) to vacate a decision to allow their application for protection.

The first situation would raise no issues concerning the IAD's jurisdiction, as Canadian citizens are not subject to removal orders or residency obligations.

In the other circumstances enumerated in subsection 46(1), the *IRPA* ensures that permanent resident status will not be lost until the permanent resident has had an opportunity to contest the loss of status. Taking the example of removal orders for instance, where, as in the case of permanent residents, there is a right of appeal, the removal order does not come into force (and consequently the permanent resident retains status) until the appeal period expires, or if an appeal is filed, the day the appeal is finally determined.[34] Retaining permanent resident status is critical to having a right of appeal to the IAD under subsections 63(3) or (4).

Another way to lose permanent residence status is to voluntarily relinquish it. There are no statutory provisions dealing with voluntary relinquishment, but the CIC has developed procedures and forms[35] to deal with the practice which has also given rise to some IAD case law. An issue of particular importance is whether a person who has voluntarily relinquished permanent residence status can subsequently retract the relinquishment and assert his or her appeal rights as a permanent resident.

One decision[36] of the IAD took the view that a relinquishment of status was to be taken as written. The appeal was made by a permanent resident who was held in detention after being ordered removed. He signed a waiver of his right to appeal and a form IMM 5539B, *Declaration: Relinquishment of Permanent Resident Status / Where the Residency Obligation is Met* in order to gain his release and to be allowed to travel abroad. Once outside Canada, he filed an appeal arguing that his relinquishment should be considered null and void because he had signed under duress. The member dismissed the argument and the appeal, holding that the appellant had lost his status as a permanent resident, which meant that the tribunal did not have jurisdiction.

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33 Section 49 of the *IRPA* sets out when a removal order comes into force.

34 *IRPA*, paragraph 49(1)(b).

35 OP 10 Permanent Residency Status Determination, Section 13 and Appendix C**.**

36 *Hozayen, Aly Reda Mohamed v. M.C.I.*, IAD MA3-02470, Hudon, May 18, 2004.held that the appellant had lost his status as a permanent resident.

Another IAD decision[37] illustrates a situation where it was not necessary to consider the effect of a relinquishment or if it could be withdrawn. Regardless of whether or not the appellant had been successful in restoring his permanent resident status, there was no decision on his residency obligation or removal order against which he could appeal.

> **13** No decision has been made outside Canada on the residency obligation with respect to the appellant as the appellant signed a voluntary relinquishment of his permanent resident status in order to obtain the visitor's visa.
>
> **14** Section 63(3) of the IRPA indicates a permanent resident may only appeal to the IAD against a decision at an examination or admissibility hearing to make a removal order against a permanent resident. This includes a removal order made for breaching the residency obligation.
>
> **15** At this point in time, the appellant has no right of appeal to the IAD under section 63 (3) of the IRPA, as no removal order has been made against him.

A similar decision[38] involved an appellant who had signed a *Declaration, Voluntary Relinquishment of Permanent Resident Status and Consent to a Decision on Residency Obligation and* a *Waiver of Appeal Rights Resulting in Loss of Status under A46(1)(b)* which he submitted along with his Notice of Appeal. The member specifically wrote that he was leaving aside the issue of whether the appellant was still a permanent resident, and dismissed the appeal because the appellant had not submitted a copy of a decision made outside of Canada with respect to his residency obligation.

The case law to date provides no definitive answer to the question of whether a person can withdraw a voluntary relinquishment of permanent resident status, particularly if the person who made the decision to relinquish was fully aware of the consequences.

It is perhaps instructive to note that in the section on issuance of travel documents, the CIC's Operational Manual on Overseas Processing (OP 10) does allow for the possibility that permanent residents will change their minds about waiving their appeal rights.

> Should applicants voluntarily declare that they have failed to comply with the A28 residency obligations, that they concur with the manager's negative determination and voluntarily waive their right to appeal under A63(4), they still have 60 days to reconsider, change their mind and file an appeal.[39]

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[37] *Tosic, Milos v. M.C.I.*, (IAD TA5-07793), Waters, November 18, 2005.

[38] *El Hemaily, Mohamed Tarek v. M.C.I.*, (IAD TA7-08921), Waters, April 28, 2008.

[39] OP 10, *supra*, footnote 35, subsection 16.3.

The IAD member in *Sobrado*[40] decision seems to indicate that a right of appeal would have existed if the appellant had withdrawn her relinquishment of permanent resident status within the time period allowed by CIC (30 days if there was an appeal against a removal order; 60 days if a determination outside Canada was appealed). However, Ms. Sobrado apparently never informed the Minister that she wished to withdraw a relinquishment she had signed two days prior to filing a notice of appeal. The member held that because the relinquishment was not withdrawn, the appellant was no longer a permanent resident of Canada and consequently, had no right of appeal to the IAD. The appeal was dismissed for lack of jurisdiction,

The residency obligation

The *IRPA* imposes a clearly defined residency obligation on permanent residents, set out in section 28. A failure to comply with this requirement is a distinct ground of inadmissibility under subsection 41(b).

Although the former *Immigration Act* also had a physical residency requirement, absence from Canada, even for an extended period of time, did not lead to a loss permanent resident status unless it was determined that the permanent resident had the intention to abandon Canada[41]. Permanent residents who remained outside Canada for more than half of any 12-month period were deemed to have abandoned Canada as their place of permanent residence and the onus was on them to prove the contrary. Returning resident permits were, by statute, proof of a lack of intention to abandon Canada as a permanent residence. An adjudicator or an immigration officer determined whether or not the permanent resident had lost status as a result of an intention to abandon but the *Immigration Act* provided no corresponding ground of inadmissibility. The old case law under the *Immigration Act* regarding the intention to abandon is no longer relevant to appeals in law, as the *IRPA* has made the determination of compliance with the residency obligation, for most cases, a matter of simple arithmetic. However, the concept of abandonment is still relevant to the IAD's exercise of humanitarian and compassionate discretion in residency obligation appeals.

Under the *IRPA*, when the residency obligation is not met, a permanent resident in Canada may be reported as inadmissible and issued a departure order.[42] If the permanent resident has requested travel documents or has otherwise come to the attention of Canadian authorities outside Canada and a decision is made outside Canada that a permanent resident has not complied with the residency obligation nor demonstrated humanitarian and compassionate considerations that would overcome the breach[43], no removal order is made; the applicant receives a letter setting out the

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40 *Sobrado, Adelia Maria Alves v. M.C.I.* (IAD TA6-03391), Ross, March 30, 2007.

41 *Immigration Act*, section 24.

42 See footnote 5.

43 *IRPA*, paragraph 28(2)(c) The officer is required to consider of humanitarian and compassionate factors before making a determination.

negative determination. In both cases, the permanent resident has the right to appeal to the IAD.[44]

An appellant can challenge the legal validity[45] of a residency obligation decision. In addition, the *IRPA* expanded the jurisdiction of the IAD so that it is able to exercise humanitarian and compassionate discretion in residency obligation appeals.

Section 28 of the IRPA

The residency obligation is an ongoing obligation that must be met by permanent residents in order to maintain their status. Basically, for at least 730 days (2 years) in every 5 year period,[46] a permanent resident must be either physically present in Canada,[47] or outside Canada in certain defined situations. Permanent residents outside Canada must be either:

- employed on a full-time basis by a Canadian business or in the public service of Canada or a province;[48]
- accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent;[49] or
- accompanying a permanent resident who is their spouse or common-law partner or, in the case of a child, their parent who is employed on a full-time basis by a Canadian business or in the public service of Canada or of a province; (emphasis added).[50]

In order to be "accompanying," the permanent resident must be ordinarily residing with their specified family member.[51] If the permanent resident is accompanying a permanent resident specified family member, that family member must also comply with the residency obligation.[52]

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44 *IRPA*, subsection 63(3) where there was a removal order, or 63(4) if the decision was made outside Canada.

45 *IRPA*, paragraphs 67(1)(a) and (b).

46 *IRPA*, paragraph 28 (2)(a). The starting point to count back five years.

47 *IRPA*, subparagraph 28 (2)(a)(i).

48 *IRPA*, subparagraph 28 (2)(a)(iii).

49 *IRPA*, subparagraph 28 (2)(a)(ii).

50 *IRPA*, subparagraph 28 (2)(a)(iv).

51 *IRP Regulations*, subsection 61(4): For the purposes of subparagraphs 28(2)(a)(ii) and (iv) of the Act and of this section, a permanent resident is accompanying outside Canada a Canadian citizen or another permanent resident – who is their spouse or common-law partner or, in the case of a child, their parent – on each day that the permanent resident is ordinarily residing with the Canadian citizen or the other permanent resident.

52 *IRP Regulations*, subsection 61(5): For the purposes of subparagraph 28(2)(a)(iv) of the Act, the permanent resident complies with the residency obligation as long as the permanent resident they are accompanying complies with their residency obligation.

The *IRP Regulations* define "child,"[53] "Canadian business"[54] and "employed on a full-time basis by a Canadian business or in the public service of Canada or a province."[55] Among other things, a Canadian business cannot be a "business of convenience" that is used primarily for the purpose of meeting the residency obligation.[56]

If at the time of an examination by an officer, the person has been a permanent resident for less than five years, they will only have to show that they *will be able to* meet the residency obligation for the five-year period right after they became a permanent resident.[57] In every other case, the officer looks at the five-year period immediately before the examination.[58]

If the permanent resident is reported for failing to meet the residency obligation, or a decision is made outside Canada that they have not met the residency obligation, the calculation of days stops running.[59] Those days will only be included in the calculation of the residency obligation if it is later determined that the obligation had been met.[60]

Although the method for calculating 730 days within a five-year period sounds straightforward, it can become complicated if the permanent resident is found to have breached the residency obligation more than once within a limited time. In one such case,[61] the appellant, a minor, had not complied with his residency obligation. The officer

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[53] *IRP Regulations*, subsection 61(6): For the purposes of subparagraphs 28(2)(a)(ii) and (iv) of the Act, a child means a child of a parent referred to in those subparagraphs, including a child adopted in fact, who has not and has never been a spouse or common-law partner and is less than 22 years of age.

[54] *IRP Regulations*, subsection 61(1): Subject to subsection (2), for the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act and of this section, a Canadian business is

(a) a corporation that is incorporated under the laws of Canada or of a province and that has an ongoing operation in Canada;

(b) an enterprise, other than a corporation described in paragraph (a), that has an ongoing operation in Canada and

(i) that is capable of generating revenue and is carried out in anticipation of profit, and

(ii) in which a majority of voting or ownership interests is held by Canadian citizens,

permanent residents, or Canadian businesses as defined in this subsection, or

(c) an organization or enterprise created by the laws of Canada or a province.

[55] *IRP Regulations*, subsection 61 (3): For the purposes of subparagraphs 28(2)(a)(iii) and (iv) of the Act, the expression "employed on a full-time basis by a Canadian business or in the public service of Canada or of a province" means, in relation to a permanent resident, that the permanent resident is an employee of, or under contract to provide services to, a Canadian business or the public service of Canada or of a province, and is assigned on a full-time basis as a term of the employment or contract to

(a) a position outside Canada;

(b) an affiliated enterprise outside Canada; or

(c) a client of the Canadian business or the public service outside Canada.

[56] *IRP Regulations*, subsection 61 (2).

[57] *IRPA*, subparagraph 28(2)(b)(i).

[58] *IRPA*, subparagraph 28(2)(b)(ii).

[59] *IRP Regulations*, subsection 62(1).

[60] *IRP Regulations*, subsection 62(2).

[61] *Wan, Lap Him Kris v. M.C.I.* (IAD TA6-00276), Nahas, May 16, 2008.

however determined that humanitarian and compassionate considerations justified the breach and the appellant was allowed to return to Canada as a permanent resident. A few months later, he left Canada for a brief holiday. When he tried to return to Canada, another officer determined once again that the appellant was not in compliance with the residency obligation. His appeal to the IAD was allowed, but it was on humanitarian and compassionate grounds. The residency determination was found to be valid in law as the appellant had not met the 730-day requirement in the five-year period prior to the new determination. The appellant received no special treatment in calculating the period as result of the first officer's decision.

In another case,[62] the appellant who had been refused a travel document due to his non-compliance with the residency obligation appealed to the IAD. It was a member of the IAD who found that there were sufficient humanitarian and compassionate considerations to warrant the grant of special relief. The appellant left Canada after that first appeal was allowed. He received a travel document on February 16, 2004 and spent a short time in Canada. When he applied for another travel document more than three years later, his application was refused and he appealed again to the IAD. The member proceeded on the basis of the parties' consensus was that it was appropriate to consider the five-year period immediately after February 16, 2004, when the appellant regained status as a permanent resident. Calculating the time that remained, the appellant could not accumulate the 730 days required. The appeal was dismissed.

Where an officer has determined that a permanent resident has not met the residency obligation, the officer may decide that the breach has been overcome if in the officer's opinion, taking into account the best interests of a child directly affected by the determination, humanitarian and compassionate considerations justify the retention of permanent resident status.[63] In addition, the IAD may allow an appeal on the basis of humanitarian and compassionate considerations.[64]

Challenges to Retrospective Legislation

The IAD has had to rule on numerous legal challenges[65] to the residency obligation provisions being applied to persons who were permanent residents prior to the June 28, 2002 implementation date of the *IRPA.* Where their physical presence in Canada fell short of the 730-day requirement, they argued that they should be entitled to preserve their permanent resident status on the basis of the *Immigration Act* definition of

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62 *Ibrahim, Asim v. M.C.I.* (IAD TA7-12585), Ross, August 5, 2008.

63 *IRPA*, paragraph 28(2)(c). The first decision by an officer in the *Wan* case, *supra*, footnote 61 is an example.

64 *IRPA*, paragraph 67(1)(c). The first decision by the IAD in the *Ibrahim* case, *supra*, footnote 62 is an example.

65 Most *Charter* challenges at the IAD have related to section 7 of the *Charter*, however in *Chen, Wen v. M.P.S.E.P.* (IAD VA5-00806), Mattu, February 26, 2007 and *Lei, Manuel Joao v. M.C.I.* (IAD VA4-01999), Mattu, July 20, 2006 the challenges also related to sections 12 and 15 of the *Charter* as well as section 1 of the *Canadian Bill of Rights.*

permanent resident which turned on whether there was an intention to abandon Canada as a permanent residence.

In the *Kuan* case,[66] the appellant argued that the *IRPA* did not clearly indicate that it was intended to have retroactive effect. Consequently, the new legislation should not apply to deprive the appellant of his vested right to retain permanent resident status in the absence of an intention to abandon. The member rejected this argument. Parliament had the authority to take away accrued or vested rights if it did so in clear and unambiguous terms. In the member's opinion, a clear intention could be found in section 328 of the *IRP Regulations* which dealt specifically with permanent residents under the former Act and the calculation of their residency obligation if they were outside Canada during specified periods prior to or immediately following June 28, 2002.

This issue was settled by the Federal Court in *Chu*[67] where the Court held that the legislative scheme in the *IRPA* was retrospective. The Court found that the presumption against retrospective or retroactive application of legislation was rebutted by the terms of the *IRPA* which repealed the former Act and unambiguously manifested Parliament's intention that the *IRPA* applied to immigration matters as of June 28, 2002. The Court also found that the appellant had not suffered a loss of life, liberty or security under section 7 of the *Charter*. The Federal Court of Appeal dismissed the appeal. Responding to the two certified questions, the Court confirmed that the five-year period in section 28 of the *IRPA* applied to periods prior to June 28, 2002 and that the retroactive application of section 28 did not breach section 7 of the *Charter*.[68]

Discretionary Relief in Residency Obligation Appeals

The IAD is able to exercise humanitarian and compassionate discretion in residency obligation appeals which it dismisses in fact or in law. Subsection 63(4) appeals were a new type of appeal and even the subsection 63(3) removal order appeals were based on a new ground of inadmissibility, so it was not immediately obvious how the IAD would exercise this discretion. It did not take long for the IAD to develop a body of case law that draws from the general principles relied upon and applied for many years. The *Ribic* factors[69] used in the context of appeals from removal orders to examine "all the circumstances of the case" and the *Chirwa*[70] standard are still considered useful guides.[71] It is interesting to note that the intentions of permanent residents who have

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66 See *Kuan, Chih Kao James v. M.C.I.* (IAD VA2-02440), Workun, September 24, 2003.

67 *Chu, Kit Mei Ann v. M.C.I.* (F.C., no. IMM-121-05), Heneghan, July 18, 2006; 2006 FC 893; reported 2007 FCR 578.

68 *Chu, Kit Mei Ann v. M.C.I.* (F.C.A., no. A-363-06), Décary, Linden, Sexton, May 29, 2007; 2007 FCA 205.

69 *Ribic, Marida v. M.E.I.* (IAB T84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985.

70 *Chirwa v. Canada (Minister of Manpower and Immigration)* (1970), 4 I.A.C. 338 (I.A.B.) at 350.

71 See, for example, *Harding, Marcia v. M.C.I.* (IAD TA4-18447), Collison, October 4, 2005 and *Chan, Kwok Keung Franco v. M.C.I.* (IAD TA6-16190), Mills, July 10, 2008.

been found not to have met their residency obligation, though not relevant in law, are often taken into account in the exercise of discretionary relief.[72]

The significance of factors considered in deciding whether equitable relief should be granted in residency obligation appeals naturally varies from case to case and some factors may overlap or need to be considered in conjunction with others. For example, an appellant who was absent from Canada for four years for a very good reason might present a more compelling case for equitable relief than another appellant who missed the residency obligation by only two months without any valid excuse. A non-exhaustive list of factors commonly considered includes the following:

- the extent of the non-compliance with the residency obligation
- the reasons for the departure from Canada
- the reasons for continued or lengthy stay abroad[73]
- whether attempts to return to Canada were made at the first opportunity[74]
- the degree of establishment in Canada; both initial and continuing[75]
- family ties to Canada and whether they are sponsorable
- hardship and dislocation that would be caused to the appellant and his/her family in Canada if the appellant were to be removed to his/her country of nationality
- the best interests of any children directly involved[76]
- whether there are other unique or special circumstances that merit special relief.

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[72] See, for example, *Wong, Yik Kwan Rudy v. M.C.I.* (IAD VA2-03180), Workun, June 16, 2003 in which a return to Hong Kong to put family affairs in order was unexpectedly extended due to a parent's terminal illness. In *Kok, Yun Kuen v. M.C.I.* (IAD VA2-02277), Boscariol, July 16, 2003, the appellant's "failure to demonstrate a past, present or a concrete intent and probability in the near future to establish residency in Canada…" was an important factor in deciding that no special relief was warranted.

[73] There may be reasons beyond the appellant's control that delayed the return.

[74] This is often a factor in the case of minors who leave Canada with their parents. See, for example, *Wan, supra*, footnote 61. In that case, the member considered that the appellant, nine years old at the time his parents took him back to China, had demonstrated his will to return to Canada at the first occasion available to him when he applied for a travel document at the age of seventeen.

[75] See, for example, *Thompson, Gillian Alicia v. M.C.I.* (IAD TA3-00640), MacPherson, November 12, 2003. The fact that an appellant was well-established in Canada before her residency obligation was breached, can be a positive factor in allowing discretionary relief.

[76] See, for example, *Konig, Andrew Daniel v. M.C.I.* (IAD VA2-03202), Kang, November 17, 2003. The member found that the best interests of developmentally handicapped children would be served by allowing the appellant who assisted a community care facility where the children were living, to remain in Canada.

Return to Canada for appeal

After a removal order is made against a permanent resident, they may leave Canada while their appeal is pending. In the case of a decision made outside Canada on the residency obligation, they may already be outside Canada.

Permanent residents do not lose their status until there has been a final determination of their appeal of their removal order.[77] Also, permanent residents do not lose their status when a decision is made outside Canada that they do not meet the residency obligation. It is only when there has been a final determination of that decision that they lose their status.[78] Therefore an appellant may be able to return to Canada as a permanent resident during the appeal process.[79]

In cases where an appellant has returned to Canada and the appeal under s. 63(4) is dismissed the IAD must issue a removal order,[80] i.e. a departure order.[81]

Travel documents

However, under *IRPA*, a permanent resident is required to have a permanent resident card or a travel document if they wish to use a transportation company to travel to Canada.[82] Returning resident permits no longer exist under *IRPA*.[83] Instead, permanent residents who are outside Canada and do not have a permanent resident card, may apply for a travel document to allow them to return to Canada. In deciding whether to issue a travel document, the officer will consider whether the permanent resident has met the residency obligation. The officer will issue a travel document to the permanent resident

- if the permanent resident complies with the residency obligation;
- the officer has determined that humanitarian and compassionate considerations exist which overcome the breach of the residency obligation and justify retaining permanent resident status; or

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77 *IRPA*, paragraphs 46(1)(c) and 49(1)(c).

78 *IRPA*, paragraphs 46(1)(b).

79 *IRPA*, subsection 19(2) of provides: "an officer shall allow a permanent resident to enter Canada if satisfied following an examination on their entry that they have that status." Subsection 27(1) of IRPA provides: "a permanent resident of Canada has the right to enter and remain in Canada, subject to the provisions of this Act."

80 *IRPA*, subsection 69(3).

81 *IRP Regulations*, subsection 228(2): For the purposes of subsection 44(2) of the Act, if a removal order is made against a permanent resident, who fails to comply with the residency obligation under s. 28 of the Act, the order shall be a departure order.

82 *IRP Regulations*, section 259 sets out the prescribed documents for the purposes of *IRPA* subsection 148(1). Travel documents issued to permanent residents outside Canada and permanent resident cards are prescribed documents under subsections 259(a) and 259(f) respectively.

83 Only transitional provisions in the *IRPA Regulations*, subsections 328(2) and (3) deal with returning resident permits and their effect on the calculation of the residency obligation.

- if the permanent resident was physically in Canada at least once in the 365 days before the examination, and they have appealed a determination on their residency obligation that was made outside Canada, or the time period for making their appeal has not expired.[84]

Given that these conditions, there is no guarantee that a travel document will be issued. There is no appeal against the refusal to issue the travel document.

In the event that an appellant cannot otherwise return to Canada, a permanent resident who appeals a decision made outside Canada on the residency obligation may make an application[85] under *IAD Rules* sections 43 and 46[86] for an order that they physically appear at the hearing. The IAD may, after considering submissions, and if satisfied that the presence of the permanent resident at the hearing is necessary, order the permanent resident to physically appear at the hearing, in which case an officer shall issue a travel document for that purpose. If approved, the travel document will generally be issued by CIC after the IAD has set a date for the hearing of the appeal.

The fact that an appellant wishes to appear in person is not in itself a sufficient ground for granting the order sought.[87] The IAD has dealt with applications to return in a number of appeals and has made the following rulings:

The appellant had established that there was an impediment to attending his hearing by way of teleconferencing where the appellant was hearing impaired and required the assistance of a sign language interpreter at his hearing. His counsel would also require either a captionist and or an ASL interpreter. The application was granted.[88]

The application was denied where the only ground the appellant gave for the order sought, was a desire to "be assured of being able to properly discuss the case and present his arguments...without any limitations or dependencies on technologies that might or might not be available".[89]

The application was denied where the request was made after one year had elapsed from the filing of the notice of appeal and no reason was given why the appellant had to be present in person.[90]

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84 *IRPA*, subsection 31(3).

85 *IRPA*, subsection 175(2): In the case of an appeal by a permanent resident under subsection 63(4), the Immigration Appeal Division may, after considering submissions from the Minister and the permanent resident and if satisfied that the presence of the permanent resident at the hearing is necessary, order the permanent resident to physically appear at the hearing, in which case an officer shall issue a travel document for that purpose.

86 *IAD Rules*, section 46 provides for a written application to return to Canada to be made no later than 60 days after the notice of appeal of the residency obligation decision is received by the IAD.

87 *Alipanah, Abolfazl v. M.C.I.* (IAD TA4-04349), Néron, September 15, 2004.

88 *Al-Gumer, Nazer Jassim v. M.C.I.* (IAD TA4-11257, Néron, November 16, 2004.

89 *Pour, Nabi Mohammad Hassani v. M.C.I.* (IAD TA4-04756), Boire, November 5, 2004.

90 *Wu, Jui-Hsiunge et al. v. M.C.I.* (IAD TA4-06696 et al.), Boire, July 11, 2005 (reasons signed August 4, 2005).

An application based on counsel's submission that it was essential that he and the appellant be physically together to review documents and otherwise prepare for the hearing was denied.[91]

[91] *Boulier, Junko v. M.C.I.* (IAD VA6-02910), Workun, February 16, 2007.

CASES

Chapter Four

Visas under IRPA

Introduction

Permanent residents, protected persons and foreign nationals who are in possession of a permanent resident visa may appeal removal orders made against them. This chapter deals with the last category – i.e. a removal order appeal by a foreign national, which is referred to in subsection 63(2) of the *Immigration and Refugee Protection Act (IRPA)*[1]:

> A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or admissibility hearing to make a removal order against them.

What IRPA changed

Under the *Immigration Act*[2], the right of appeal to the IAD extended not only to persons holding "valid immigration visas", but also to those with "valid visitor's visas". The *IRPA* eliminated appeals by holders of visitor's visas.

A Jurisdictional Issue

Foreign nationals other than protected persons only have a right of appeal against a removal order if they hold a permanent resident visa. If the Appeal Division decides that the appellant is in possession of such a visa, it can proceed to determine the legal validity of the removal order and to consider the exercise of its discretionary jurisdiction. If the Appeal Division determines that the appellant is not in possession of such a visa, then it has no jurisdiction to hear the appeal and the appeal is dismissed for lack of jurisdiction.

For the purposes of determining if the appellant holds a permanent resident visa (the *IRPA* term for an immigrant visa), pre-*IRPA* case law dealing with the validity of visas, particularly on the issue of when a visa can be considered invalid, continues to be instructive, despite some differences in the wording of the former *Act* and the *IRPA* provisions, and there is almost no new case law on the issue.

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1 *Immigration and Refugee Protection Act*, S.C. 2001, as amended.

2 *Immigration Act*, R.S.C., 1985, c. I-2, as amended.

Visa must be Valid

One obvious difference between the wording of the relevant provisions – paragraph 70(2)(b) of the *Immigration Act* and subsection 63(2) of the *IRPA* - is that the current provision does not use the word "valid" to qualify permanent resident visas. In *Zhang* [3], the applicant argued that the omission indicated that Parliament intended to remove validity of the visa as a prerequisite for the IAD to have jurisdiction. The Federal Court rejected the argument that the notion of validity, which was a legislative requirement under the *Immigration Act*, no longer existed under the *IRPA.* The Court supported the IAD's view that the statutory intent behind the old and new provisions was largely the same.

Visas and the Immigration Process

The two-stage immigration process and the significance of visas under the *IRPA* remain the same as they were under the *Immigration Act*.

> […] a visa only allows an individual to present himself for landing at a port of entry at which time there is a second examination to determine if he or she still meets the requirements of the Act and regulations for the purposes of landing, […].[4].

General Principle and Exceptions

Among the many cases under the *Immigration Act* concerning the validity of visas, the *Hundal*[5] decision stands out because it set out a general principle that created a presumption of valid visas, subject to four exceptions:

> The general principle is that once a visa is issued it remains valid. But there are four exceptions: (1) The *De Decaro* exception: a visa becomes ipso facto invalid where there is a frustration or impossibility of performance of a condition on which the visa was issued. (2) The *Wong* exception: a visa is invalid where there is a failure to meet a condition of the granting of the visa itself before the visa is issued. The visa is then void ab initio. (3) A visa ceases to be valid when it reaches its expiry date. (4) A visa is no longer valid if revoked or cancelled by a visa officer.[6]

The first two of the exceptions seem to have been included in order to account for decisions of the Federal Court of Appeal where visas had been found to be invalid.[7] However, decisions following *Hundal* have since explicitly reversed the *De Decaro* ruling and cast enough doubt on the authority of the *Wong* ruling, such that it can now be said that only the third and fourth exceptions above apply today.

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3 *Zhang, Xiao Ling v. M.C.I.* (F.C., no. IMM-4249-06), de Montigny, June 5, 2007, 2007 FC 593.

4 *Canada (Minister of Citizenship and Immigration)* v. *Hundal* [1995] 3.F.C. 32 , para. 13.

5 *Hundal, supra,* footnote 4.

6 *Hundal, supra,* footnote 4.

7 *Hundal, supra,* footnote 4, para.14. Justice Rothstein acknowledged that he had to deal with FCA dicta which were binding on him. He would have been referring to *De Decaro* and *Wong*.

The general principle and the exceptions are discussed below.

General Principle: Once issued, a visa remains valid

The Federal Court of Appeal in *De Decaro*[8] held that the death of a principal applicant between the issuance of the immigrant visas and arrival of at a port of entry invalidated the visas of the accompanying dependants. Justice Marceau voiced a strong dissent. His reasoning was echoed by Justice Rothstein in *Hundal*[9]. Both considered that there was no need to read into the legislation notions of conditional visas or invalidity of visas resulting from a failure to meet a condition. The scheme of the Act provided for a comprehensive immigration process in two stages. First, a visa officer issued a visa to an applicant if the officer concluded that the applicant was admissible. At the second stage, an immigration officer at the port of entry would determine if the holder still met the requirements of the Act. The second stage of the process provided the necessary control if a change occurred after the visa was issued.

Justice Rothstein used the same rationale for narrowing the application of *De Decaro*. He also took into consideration that if every change of condition after issue of a visa rendered the visa invalid, the right of appeal would be so limited as to be virtually meaningless. By narrowly defining the circumstances that resulted in visas becoming invalid, the Court was able to give meaning to the *Immigration Act* as a whole, including paragraph 70(2)(b), which gave valid visa holders the right of appeal to the Appeal Division. The Court stated the general principle that once a visa was issued, it remained valid, subject to four possible exceptions. The Federal Court of Appeal wholly endorsed Justice Rothstein's analysis and conclusion.[10]

First Exception: A condition becomes impossible to meet [11]

Justice Rothstein distinguished the facts in *Hundal*[12] from those in the *De Decaro*[13] case, which was the basis of the first exception. The "*De Decaro* exception" referred to a situation in which the visa was issued on a condition which subsequently became impossible to satisfy. Justice Rothstein construed this exception as narrowly as possible, as can be seen from his finding that although Mr. Hundal's spouse had withdrawn her sponsorship, the situation could be distinguished from the one covered by the exception because it would not have been impossible to reinstate the sponsorship.

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8 *De Decaro: Canada (Minister of Employment and Immigration)* v. *De Decaro*, [1993] 2 F.C. 408 (C.A).

9 *Hundal, supra,* footnote 4.

10 *Canada (Minister of Citizenship and Immigration)* v. *Hundal* (FCA no, A-406-95), Strayer, Linden, Robertson, November 20, 1996.

11 *Hundal, supra*, footnote 4, para. 15-16.

12 *Hundal, supra,* footnote 4.

13 *De Decaro, supra,* footnote 8.

When *McLeod*[14] came before the Federal Court of Appeal, more than five years had passed since *De Decaro* was decided, and the *Hundal* decision, based on the same reasoning expressed by the dissenting judge in *De Decaro*, had been affirmed by the Federal Court of Appeal. The Court thought it opportune to reconsider its earlier decision in *De Decaro*. Justice Strayer remarked that the parties in *McLeod* were all in agreement that there was nothing in the *Act* to support the view that visas were rendered invalid by a change of circumstances after the issue of a visa. As a result, *De Decaro* was reversed and the first exception no longer exists.

Second Exception: Failure to meet a condition of the granting of the visa itself before the visa is issued[15]

This is known as the "*Wong*" exception. The facts in *Wong*[16] were similar to those in *De Decaro* in that Ms. Wong was also an accompanying dependant. However, her father died before, rather than after, the issuance of the immigrant visas. The Federal Court of Appeal saw a clear distinction. Justice MacGuigan stated:

> Whatever should be the result where an element upon which the issuance of a visa is based subsequently ceases to exist, we are at least satisfied that, where, as here, the principal reason for the issuance of a visa ceased to exist before its issuance, such a visa cannot be said to be "a valid immigrant visa".

However, in the subsequent *Oloroso*[17] case, Justice Gibson reviewed the case law and questioned whether the *Wong* exception too was suspect. He was not convinced that the reasoning which applied to *De Decaro* exception could be extended to circumstances falling within the *Wong* exception. However, he noted that the Federal Court of Appeal had endorsed the reasoning of Justice Noêl in *Seneca*[18], a case whose facts he applied by analogy. Justice Noêl had concluded that it was not logical to take away the right of appeal to the Appeal Division on the basis that visas were improperly issued, when that was the very issue to be decided. Justice Gibson set aside the decision of the Appeal Division that it lacked jurisdiction. It would therefore seem that the second exception – i.e. the *Wong* exception, no longer exists either.

Third Exception: Visa has expired[19]

A visa that has an expiry date is not valid after the expiry date.

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[14] *McLeod v. Canada (Minister of Citizenship and Immigration),* (FCA no. A-887-96), November 6, 1998; [1999] 1 F.C. 257.

[15] *Hundal, supra,* footnote 4. para. 17.

[16] *M.E.I. v. Wong* (F.C.A. no. A-907-91), Hugessen, MacGuigan, Decary, May 17, 1993.

[17] *Oloroso v. Canada (Minister of Citizenship and Immigration)* [2001] 2 F.C. 45.

[18] *Canada (Minister of Citizenship and Immigration) v. Seneca* [1998] 3 F.C. 494 (T.D.), affirmed by *Canada (Minister of Citizenship and Immigration) v. Seneca* [1999] F.C.J. No. 1503.

[19] *Hundal, supra,* footnote 4. para. 18.

Fourth Exception: Visa is cancelled or revoked[20]

The fourth exception to a visa remaining valid is when it is revoked by a visa officer. In *Hundal [?],* Justice Rothstein considered that although there were no express provisions in the *Immigration Act* for revocation of a visa, the case law indicated that authority to revoke existed by necessary implication. He went on to say that in some circumstances the requirement to return a visa might be interpreted to constitute a cancellation of the visa.

Revocation has raised issues as to when it takes effect: is a visa cancelled when the Minister decides that it is or must the visa holder have been notified of the revocation? The three decisions below illustrate differing views.

In a case decided by the Appeal Division under the *Immigration Act* - *Hundal,*[21] a visa officer sent a telegram to the appellant at the address she provided to the visa post to notify her of the withdrawal of the sponsorship and the subsequent invalidity of the visa. The appellant claimed not to have received the telegram. The Appeal Division held that the Federal Court - Trial Division decision in *Hundal*[22] was distinguishable from the facts in the case before it as a visa officer had made a decision to cancel the visa and that decision had been communicated to the appellant. Procedural fairness did not require actual notice to the appellant of the revocation of her visa. The visa office had done all that could be expected of it in sending the notice to the address the appellant provided. The appellant was not the holder of a valid visa when she arrived at a port of entry and consequently, she did not have a right of appeal to the Appeal Division.

In another case heard by the Appeal Division, *Lionel*[23], an immigration officer in Canada decided to cancel the appellant's visa, and asked officials at the visa post to "attempt to retrieve" the visa. The appellant was advised by telegram to attend at the High Commission with his passport and visa; however, he was never advised that the visa was no longer valid. He proceeded to the port of entry. The Appeal Division held that it was not sufficient to invite the appellant to the visa post for a meeting; the revocation of his visa had to be explicitly conveyed to him. As this was not done, the visa remained valid and the appellant was in possession of a valid visa when he arrived at the port of entry.

In the *Chhoker*[24] case decided under the *IRPA*, a sponsor withdrew her sponsorship after a permanent resident visa had been issued to her husband. He left for

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[20] *Hundal, supra,* footnote 4. para. 19.

[21] *Hundal, Kulwant Kaur v. M.C.I.* (IAD V97-01735), Clark, August 17, 1998.

[22] *Hundal, supra,* footnote 4.

[23] *M.C.I. v. Lionel, Balram Eddie* (IAD T98-01553), D'Ignazio, April 9, 1999. The facts in this case are very similar to the facts in *Medel v. Canada (Minister of Employment and Immigration),* [1990] 2 F.C. 345 (C.A.) which is discussed in more detail in Chapter 5 at 5.4.2.

[24] *Chhoker, Gurtej Singh v. M.C.I.,* (IAD VA3-00958), Workun, January 4, 2004. Although the decision does not specifically conclude to a lack of jurisdiction, the appeal was dismissed without any reference to humanitarian and compassionate considerations, suggesting an implicit recognition that appellant did not, in fact, have a right of appeal.

Canada soon afterwards and did not receive the telegram sent by the visa office notifying him that the visa was not valid for travel to Canada and requesting that he return the visa. When he arrived at the port-of-entry, an exclusion order was made against him. He appealed under subsection 63(2) of the *IRPA*. The issue identified at the outset of the hearing was "whether or not the appellant was in possession of a permanent resident visa." Minister's counsel contended that the appellant did not hold a permanent resident visa and that consequently, the IAD lacked jurisdiction to hear the appeal. The member concluded that the visa became invalid when it was cancelled prior to the arrival of the appellant at the port-of-entry.

CASES

Chapter Five

Misrepresentation

Introduction

The misrepresentation provisions under the old *Immigration Act* provide that a permanent resident, where granted landing by reason of a false or improperly obtained passport, visa or other document pertaining to the person's admission, or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by that person or any other person, may be subject to the initiation of removal proceedings under s.27(1)(e) of the *Immigration Act*.

The materiality of misrepresentations under the *Immigration Act* has been the subject of numerous court decisions including the decision of the Supreme Court of Canada in *Canada (Minister of Manpower and Immigration) v. Brooks*, [1974] S.C.R. 850. *Brooks* held, among other things, that *mens rea*, or intention, was not an essential element for the misrepresentation. *Brooks* is discussed below.

The purpose of the misrepresentation provisions is to ensure that applicants provide complete, honest and truthful information in every manner when applying for entry into Canada.[1]

The misrepresentation provisions under s.40 of the *Immigration and Refugee Protection Act* (*IRPA)* can lead to a finding of **inadmissibility** whether the person is inside Canada or abroad. An inadmissibility report prepared with respect to a permanent resident, may lead to an inadmissibility hearing before the Immigration Division where a removal order may be made. (s. 44(1) & s.44(2)).

Inadmissibility for Misrepresentation

The misrepresentation provisions under *IRPA* can lead to a finding of inadmissibility of a permanent resident (leading to a removal order) or a foreign national being refused sponsorship. Section 40 reads, in part, as follows:

> 40. (1) A permanent resident or a foreign national is inadmissible for misrepresentation
>
> (a) for directly or indirectly misrepresenting or withholding material facts relating to a relevant matter that induces or could induce an error in the administration of this Act;

[1] Immigration Manuals, ENF 2, Evaluating Inadmissibility, section 9.

> (b) for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation;

If a person is found to be inadmissible pursuant to section 40, that permanent resident or foreign national continues to be inadmissible for misrepresentation for a period of two years following a final determination of inadmissibility in a refused sponsorship, or the date the removal order is enforced for a determination in Canada.[2] A person who pursues their appeal rights following a determination in Canada will, in effect, extend the two-year period because the removal order would not be enforced until a later date.

A foreign national subject to the two-year period of continued inadmissibility must obtain the written authorization of an officer under Regulation 225(3)[3] in order to return to Canada within the two-year period.

A further qualification to section 40(1)(b) is found in section 40(2)(b). It provides that "paragraph (1)(b) does not apply unless the Minister is satisfied that the facts of the case **justify** the inadmissibility" (emphasis added). It is not known at present how the Minister will exercise this "justification".

Possible Legal and Evidentiary Issues

"materiality"

Brooks[4] sets the stage for determining what is "material". Under the *Immigration Act* the untruth or the misleading information in an answer to a question does not have to be such as to have concealed an independent ground of deportation. The untruth or misleading information may fall short of this. What is relevant is whether the untruth or misleading answer or answers had the effect of foreclosing or averting further inquiries, even if those inquiries might not have turned up any independent ground of deportation.

Brooks has been followed in numerous cases. Information withheld from immigration officials which had the effect of foreclosing or averting further inquiries had included the fact of a religious marriage and two children born of that marriage[5], failure

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[2] Section 40(2)(a) reads as follows:

> the permanent resident or the foreign national continues to be inadmissible for misrepresentation for a period of two years following, in the case of a determination outside Canada, a final determination of inadmissibility under subsection (1) or, in the case of a determination in Canada, the date the removal order is enforced.

[3] Reg. 225(3) reads as follows:

> A foreign national who is issued an exclusion order as a result of the application of paragraph 40(2)(a) of the Act must obtain a written authorization in order to return to Canada within the two-year period after the exclusion order was enforced.

[4] *Canada (Minister of Manpower and Immigration*) v. *Brooks*, [1974] S.C.R. 850.

[5] *Hilario v. Canada (Minister of Employment and Immigration),* [1978] 1 F.C. 697 (C.A.).

to list children born out of wedlock[6], failure to provide details of previous applications for a visa to come to Canada[7], and loss of employment subsequent to the issuance of the visa[8].

While misrepresentations relating to marital status[9] and dependants[10] are common, the Appeal Division has considered a wide range of misrepresentations to be material, including:

- financial circumstances;[11]
- citizenship;[12]
- marriage of convenience;[13]
- false claim to be an orphan;[14]
- misrepresentation of identity;[15]
- criminal offences outside of Canada;[16]
- crimes against humanity;[17]
- as a deportee, failure to obtain the consent of the Minister to come into Canada;[18]
- failure to disclose that their sponsor had died before the visa was issued[19] or before they came to Canada;[20]

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6 *Okwe v. Canada (Minister of Employment and Immigration)* (1991), 16 Imm.L.R. (2d) 126 (F.C.A.).

7 *Khamsei v. Canada (Minister of Employment and Immigration)*, [1981} 1 F.C. 222 (C.A.).

8 *Gudino v. Canada (Minister of Employment and Immigration)*, [1982] 2 F.C. 40.

9 *Villareal v. M.C.I* (F.C.T.D., no. IMM-1338-98), Evans, April 30, 1999.

10 *Singh, Ahmar v. M.C.I.* (F.C.A., no. A-1014-96), Isaac, Strayer, Linden, November 6, 1998.

11 *Hussain, Kamram et al v. M.C.I.* (IAD T98-00701 *et al.*), Townshend, March 22, 1999.

12 *Johnson (Legros), Wendy Alexis et al v. M.C.I.* (IAD M97-01393), Ohrt, January 27, 1999; *Rivanshokooh, Gholam Abbas v. M.C.I.* (IAD T96-06109), Muzzi, October 1, 1997.

13 *Kaler, Sukhvinder Kaur v. M.C.I.* (IAD T97-06160), Boire, September 28, 1998; *Baki, Khaled Abdul v. M.C.I.* (IAD V97-02040), Major, December 9, 1998.

14 *Linganathan, Rajeshkandan v. M.C.I.* (IAD T97-06408), Kalvin, December 31, 1998.

15 *Pownall, Lascelles Noel v. M.C.I.* (IAD T97-03257), MacAdam, Kalvin, Buchanan, December 3, 1998.

16 *Huang, Jie Hua v. M.C.I.* (IAD T98-00650), Townshend, November 18, 1998.

17 *Mugesara, Leon at al v. M.C.I.* (IAD M96-10465 et al), Duquette, Bourbonnais, Champoux-Ohrt, November 6, 1998. This finding was ultimately upheld by the Supreme Court of Canada : *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100.

18 *Kaur, Manjit v. M.C.I.* (IAD T96-01365), Hoare, February 5, 1998.

19 *Grewal, Ramandeep Kaur v. M.C.I.* (IAD VA0-02149), Clark, November 2, 2000.

20 *Birdi, Gian Chand et al v. M.C.I.* (IAD T98-07278 et al.), Hoare, January 26, 2000.

- misrepresentation as to the date she last left Canada and the length of stay outside Canada;[21]
- the material fact that he had made an earlier fraudulent and unsuccessful refugee claim.[22]

Specific wording contained in s.40 of *IRPA* will likely give rise to legal and evidentiary issues. For example, what is the meaning in s. 40(1)(a) of *IRPA* of the phrase "*… directly or indirectly misrepresenting or withholding material facts…"*? Does it matter whether the person made the misrepresentation as opposed to someone else making the misrepresentation? (Under the former *Immigration Act*, the jurisprudence shows it did not matter.) Does this include giving untruthful or partial answers, or omitting reference to material facts (even if the person does not know what is material or was not asked)?

"directly or indirectly"

In *Wang*[23] the IAD adopted the Immigration Division member's analysis and conclusion on indirect misrepresentation. He noted that under *IRPA* there was no longer a reference to a misrepresentation "by any other person". The new language is "directly or indirectly". The member held that "it is not immediately apparent by this language that "indirectly" means a misrepresentation by another person. Nonetheless I can find no other logical interpretation." The Federal Court approved this approach. The word "indirectly" can be interpreted to cover the situation such as the present one where the applicant relied on being included in her husband's application, even though she did not know of his previous marriage.

In a case where the applicant had prior experience in completing immigration documents he was at least reckless or willfully blind by using a rogue agent who filed fraudulent documents on his behalf.[24]

"indirect misrepresentation"

An agent for the appellant obtained for him and submitted to CIC false or fraudulent documents relating to high school education. This constitutes an indirect misrepresentation.[25]

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21 *Sivagnanasundari, Sivasubramaniam v. M.C.I.* (IAD T98-043110, Sangmuah, December 20, 2000.

22 *Sidhu, Pal Singh (*a.k.a. *Sidhu, Harcharan Singh v. M.C.I.* (IAD VA0-03999), Workun, December 13, 2001; *Gakhal, Parupkar Singh v. M.C.I.* (IAD MA1-01362), Fortin, January 15, 2002.

23 *Wang, Xiao Qiang v. M.C.I.* (F.C., no. IMM-5815-04), O'Keefe, August 3, 2005; 2005 FC 1059 . A question was certified but not answered on appeal: (F.C.A., no. A-420-05), Noel, Evans, Malone, October 24, 2006; 2006 FCA 345.

24 *M.P.S.E.P. v. Yang, Guang* (IAD VA7-00495), Ostrowski, August 28, 2007.

25 *M.P.S.E.P. v. Zhai, Ning* (IAD VA02206), Ostrowski, March 6, 2007; application for leave and judicial review dismissed: (F.C., no. IMM-2035-07), Harrington, August 13, 2007.

Similarly, what is the meaning in s. 40(1)(a) of *IRPA* of the phrase "… *material facts relating to a relevant matter that induces or could induce an error in the administration of this Act"*? How might we interpret "*an error in the administration of this Act*"? [Note: There is a difference in the wording in the French version which could influence interpretation – rather than saying *that induces* it says, *as this induces*.] Is there a timing element in this provision – does it catch persons who misrepresent any immigration related circumstances at any time? What might be included in this provision? For example, does this include an applicant or sponsor making misrepresentations, partial answers, omissions, etc.; applicants on humanitarian and compassionate considerations who became permanent residents; or applicants withholding information from the examining designated physician?

Under s. 40(1)(a) of *IRPA* a person is inadmissible to Canada if he or she "withholds material facts relating to a relevant matter that induces or could induce an error in the administration" of the Act. In general terms, an applicant for permanent residence has a "duty of candour" which requires disclosure of material facts such as variations in personal circumstances such as marital status, and names of all children. An exception arises when applicants can show that they honestly and reasonably believed that they were not withholding material information.[26]

"Of course, applicants cannot be expected to anticipate the kinds of information that immigration officials might be interested in receiving. As the IAD noted in *Baro,*[27] "there is no onus on the person to disclose all information that might possibly be relevant. One must look at the surrounding circumstances to decide whether the applicant has failed to comply with s. 40(1)(a)."[28] In *Baro,* a spousal sponsorship, the applicant was asked for a "marriage check" which would have alerted him to the fact that they wanted to know if he had been married before. He provided one, but it did not disclose and he failed to mention a previous marriage and the steps he took to have his first wife presumed dead, thus foreclosing further lines of inquiry.

"could induce an error"

The IAD found the words "could induce an error" as referring to the potential of causing an error at any time, not the actual causing of the error. It was meant to catch those who caused an error or misrepresented or withheld material (an attempt to deceive) that had a potential of causing an error. It does not speak from the time of the "catching" of the misdeed, but at the time of the misdeed itself.[29]

Two factors must be present for a finding of inadmissibility under s. 40(1). There must be misrepresentations by the applicant and those misrepresentations must be material in that they could have induced an error in the administration of the *IRPA.* There

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26 *Medel v. Canada (Minister of Employment and Immigration),* [1990] 2 F.C. 345.

27 *Baro, Robert Tabaniag v. M.C.I.* (IAD VA5-02315), Nest, December 21, 2006.

28 *Baro, Robert Tabaniag v. M.C.I.* (F.C., no. IMM-309-07), O'Reilly, December 11, 2007.

29 *Zhai, ibid.*

is no requirement in s. 40(1)(a) that the misrepresentation must be intentional, deliberate or negligent.[30]

In *Pierre-Louis*[31] the applicant married the appellant in 2001. He applied for a visitor's visa in Haiti and was refused. On that application he disclosed a child born in 1996. In 2002 he applied for permanent residence in Canada. At that time he said he had no dependent children. The visa officer rejected this application because of misrepresentations during the interview. The applicant was inadmissible because of the misrepresentation about the child he had previously declared.

Finally, what is the meaning in s. 40(1)(b) of *IRPA* of the phrase "*…for being or having been sponsored by a person who is determined to be inadmissible for misrepresentation."*? Does this put the sponsor at risk of an inquiry for making misrepresentations? If yes, how far back may it go? Will the Minister "justify" the inadmissibility under s. 40(2)(b)?

Asuncion[32] partly answers the first question. The appellant was sponsored to Canada by his mother as a dependent in 1998. Prior to leaving the Philippines he married his spouse in a civil ceremony, and knew that there would be some sort of reprimand if he failed to declare his new status. After he was landed in Canada he returned to the Philippines and he and his wife had a church wedding. In 2001 he applied to sponsor his wife and two children. The application was refused since the applicants had not been examined at the time the sponsor became a permanent resident. An admissibility hearing led to a removal order and a subsequent appeal of that was dismissed. The misrepresentation made it impossible for him to sponsor his loved ones and also prohibited him from seeking to come back to Canada for a period of two years following the enforcement of the removal order.

Legislative Framework

Section 44 of *IRPA*, reproduced in part below, sets out the procedure to be followed under section 40:

> 44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.
>
> (2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a

[30] *Bellido, Patricia Zevallous v. M.C.I.* (F.C., no. IMM-2380-04), Snider, April 6, 2005; 2005 FC 452.

[31] *Pierre-Louis, Cynthia v. M.C.I.* (F.C., no. IMM-7627-04), Beaudry, March 17, 2005; 2005 FC 377.

[32] *Asuncion, Aristar Mallare v. M.C.I.* (F.C., no. IMM-10231-04), Rouleau, July 20, 2005; 2005 FC 1002.

> foreign national. In those cases, the Minister may make a removal order.

An inadmissibility report prepared with respect to a permanent resident may lead to an inadmissibility hearing before the Immigration Division where a removal order may be made. The effect of s.44(2) of *IRPA* is that a removal order made against a permanent resident for misrepresentation must be made by the Immigration Division, not by the Minister. Therefore, the Immigration Appeal Division (IAD) will have a full record for an appeal against a removal order for misrepresentation.

Jurisdiction – Legislative appeal rights to the Immigration Appeal Division

Parts of sections 63 to 65 of *IRPA* are set out below:

> 63. (1) A person who has filed in the prescribed manner an application to sponsor a foreign national as a member of the family class may appeal to the Immigration Appeal Division against a decision not to issue the foreign national a permanent resident visa.
>
> 63. (2) A foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division against a decision at an examination or inadmissibility hearing to make a removal order against them.
>
> 63. (3) A permanent resident or a protected person may appeal to the Immigration Appeal Division against a decision at an examination or inadmissibility hearing to make a removal order against them.
>
> 63. (4) A permanent resident may appeal to the Immigration Appeal Division against a decision made outside of Canada on the residency obligation under section 28.
>
> 63. (5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.
>
> 64. (3) No appeal may be made under subsection 63(1) in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor's spouse, common-law partner or child.
>
> 65. In an appeal under subsection 63(1) or (2) respecting an application based on membership in the family class, the Immigration Appeal Division may not consider humanitarian and compassionate considerations unless it has decided that the foreign national is a member of the family class and that their sponsor is a sponsor within the meaning of the regulations.

Note that the effect of s.64(3) of *IRPA* is that a spouse, common-law partner or child **does** have an appeal to the IAD, but other members of the family class, such as parents, **do not** have an appeal to the IAD. Note also that pursuant to s.65 of *IRPA* the IAD has limited discretionary jurisdiction. Is it open to the IAD to consider on its own initiative, or if raised by the Minister, whether the person was a spouse, common-law

partner or child within the meaning of the legislation? In *Manzanares*[33] the panel noted that "it remains to be decided whether, where the ground of refusal is misrepresentation under section 40 of *IRPA*, there is any right of appeal at all – even a right of appeal to determine jurisdiction – under section 64(3) of *IRPA*."

Transitional Issues

Section 192 of *IRPA* provides as follows:

> 192. If a notice of appeal has been filed with the IAD immediately before the coming into force of this section, the appeal shall be continued under the former Act by the Immigration Appeal Division of the Board.

IRPA came into force on June 28, 2002.

Nature of the Misrepresentation

In *Singh*[34] the appellant married her nephew to facilitate her admission to Canada as his spouse. She then divorced, remarried and sponsored her present husband to Canada in 2000 and their child was born in 1999. She was ordered removed from Canada on the basis of misrepresentations made and failures to disclose material facts in immigration applications respecting her marriages. The appellant claimed the IAD erred in concluding there were deliberate misrepresentations made by her respecting her second husband's application in the absence of evidence. The Court found that although there was no direct evidence of the appellant's knowledge of her husband's misrepresentations, there was some evidence on which those inferences could be made. The IAD did not make a finding she colluded with her second husband in his misrepresentations. The IAD did not specifically consider the benefits that her son would enjoy if he were allowed to stay and grow up in Canada. It is unnecessary for a decision-maker to make a finding to that effect (*Hawthorne*).[35] The IAD considered the respective benefits and disadvantages to the child of the applicant's removal or non-removal and the decision cannot be characterized as dismissive of the child's best interests. The application for judicial review was dismissed. [Note: no specific reference was made to section 40 of *IRPA*.]

For misrepresentations in the context of s. 117(9)(d) of the IRPR refer to the Sponsorship Appeals paper for a complete treatment of this topic.

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33 *Manzanares, Ma. Christina v. M.C.I.* (IAD TA2-15088), Stein, June 9, 2003.

34 *Singh, Rajni v. M.C.I.* (F.C., no. IMM-2038-03), O'Reilly, December 19, 2003; 2003 FC 1052.

35 *Hawthorne v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 475, [2002] F.C.J. 1687 (QL), following *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

Humanitarian and Compassionate Considerations

Humanitarian and compassionate factors are discussed generally in Chapter 9 of this paper, but the following notes are illustrative of the approach taken in removal order appeals.

The jurisdiction to grant discretionary relief is found in s. 67(1)(c) of *IRPA.* That section reads as follows:

> 67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the
>
> time the appeal is disposed of,
>
> (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

In considering all the circumstances, the Immigration Appeal Division exercises its discretion within the statutory context. The leading case in this area is *Ribic.*[36] In that case, the Immigration Appeal Board set out factors to be considered in the exercise of its discretion. These factors are as follows:

- the seriousness of the offence or offences leading to the removal order;
- the possibility of rehabilitation or, alternatively, the circumstances surrounding the failure to meet the conditions of admission;
- the length of time spent, and the degree to which the appellant is established in Canada;
- the family in Canada and the dislocation to the family that removal would cause;
- the family and community support available to the appellant; and
- the degree of hardship that would be caused to the appellant by the appellant's return to his or her country of nationality.

These factors are not exhaustive and the way they are applied and the weight they are given may vary according to the particular circumstances of the case.[37]

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[36] *Ribic, Marida v. M.E.I.* (IAB T84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985; as affirmed by *Chieu v. Canada (Minister of Citizenship and Immigration),* 2002 S.C.C. 3, January 11, 2002 and *Al Sagban v. Canada (Minister of Citizenship and Immigration),* 2002 S.C.C. 4.

[37] *Mikula, Istvan v. M.P.S.E.P.* (IAD VA5-01150), Ostrowski, May 1, 2006.

Generally, inadvertent or careless misrepresentation is treated more favourably than is misrepresentation of an intentional nature. In *Mikula*[38] the IAD found that the appellant intentionally misrepresented on documents to immigration authorities that he had never been detained or incarcerated. However, even where misrepresentation is found intentional, the panel may take into account all the relevant circumstances of the case and grant discretionary relief.[39]

The Immigration Division member and the IAD member found that the appellant misrepresented her name, age and marital status when she acquired permanent resident status in Canada. Her actions did induce an error in the administration of the Act and she was, therefore, inadmissible on the grounds of misrepresentation and was excluded from Canada. After assessing the *Ribic* factors the IAD found there were not sufficient humanitarian and compassionate considerations to warrant special relief. The IAD placed emphasis on the fact of the serious and deliberate nature of the misrepresentations, the fact that her husband remains in Sri Lanka, and the fact that no one in Canada is dependent on her for care and support, and there was no remorse.[40]

Lack of remorse[41] and other aggravating circumstances such as being arrogant and contemptuous also demonstrate a lack of genuine rehabilitation.[42] It is also relevant to assess the intentional nature of the misrepresentation, that is, whether it was simply inadvertent or careless.[43]

The applicant misrepresented her marital status. The applicant put in almost no evidence with respect to her best interests and humanitarian and compassionate factors. The Court held that it was unreasonable to expect the IAD to engage in a hypothetical analysis of H & C factors not advanced by the applicant.[44]

In *Balgobind*[45] the appellant had lived with one woman for ten years in Guyana. She allegedly left the appellant and his two infant sons to live with another man. The appellant then met a stranger, fell in love and married within the space of a week. He was landed in Canada as her sponsored spouse. A month or so after his arrival in Canada she gave birth to another person's child. He then divorced his wife in Canada and sponsored his ex-partner and her sons to join him in Canada. A removal order was made against him pursuant to section 40(1)(a) of *IRPA* which the IAD found to be legally valid.

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38 ibid.

39 *Cen, Wei Huan v, Canada (Minister of Citizenship and Immigration)* (V95-01552), McIsaac, July 23, 1996.

40 *Dissahakage, Dinesha Chandi v. M.C.I.* (IAD VA5-02066), Lamont, December 13, 2007.

41 ibid.

42 *Angba, Bartholemy v. M.C.I.* (IAD MA4-02658), Guay, December 8, 2006.

43 *Villareal, Teodor v. M.C.I.* (F.C.T.D., no. IMM-1338-98), Evans, April 30, 1999.

44 *Kaira, Charanjit Kaur v. M.C.I.* (F.C., no. IMM-2750-06), Phelan, April 11, 2007; 2007 FC 378.

45 *Balgobind, Harry Persaud v. M.C.I.* (IAD TA2-25814), Hoare, December 10, 2003.

After assessing the factors set out in *Ribic*[46] the IAD found there were insufficient humanitarian or compassionate circumstances to warrant the granting of special relief and the appeal was, therefore, dismissed.

In *Gomes*,[47] the appellant was ordered removed on the basis that she was granted permanent residence by reason of misrepresentations. She was granted landing under the family class, sponsored by her brother as an accompanying dependant of her parents. She presented herself as single and with no dependants. In fact, she was married and had a child. She subsequently sought to sponsor her husband and daughter. On appeal, the appellant conceded that the removal order was valid in law. In considering whether to grant the appellant discretionary relief, the Immigration Division could not ignore the fact that she and her family had a concerted plan over a period of about seven years to induce error in Canadian immigration officials in order to obtain permanent residence. The appellant was well aware of what she was risking when she married her husband, but tried to have the best of both worlds, her husband and Canada. The appellant had family in Bangladesh and it would not be a hardship for her to return there. The circumstances did not warrant special relief.

Terms and Conditions

In *Mohammad*[48] the appellant was being sponsored by his "wife" and failed to indicate that he had been married before. He had taken no steps either to obtain an annulment of that marriage or to obtain a divorce. The legal validity of the removal order was not challenged. The IAD found that there were sufficient humanitarian and compassionate considerations to warrant granting special relief taking into account the best interests of the appellant's children. A stay was granted on conditions, including a condition that he have his first marriage annulled or obtain a divorce.

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46 *Ribic, Marida v. M.E.I.* (IAB T84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 S.C.C. 3, January 11, 2002; *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, 2002 S.C.C. 4.

47 *Gomes, Elizabeth Ranu v. M.C.I.* (IAD MA3-03555), Patry, January 16, 2004.

48 *Mohammad, Samu-Ud-Din v. M.C.I.* (IAD VA3-01399), Kang, December 2, 2003.

CASES

Chapter Six

Conditions of Landing

General

Permanent residents may be removed from Canada for failure to comply with the conditions imposed upon them when they became permanent residents.

Paragraph 27(2) of IRPA states:

> (2) A permanent resident must comply with any conditions imposed under the regulations.

Paragraph 41 of IRPA states:

> s. 41. A person is inadmissible for failing to comply with this Act
>
> (b) in the case of a permanent resident through failing to comply with subsection 27(2) or section 28.

Paragraph 44 (1) and (2) set out that an officer who is of the opinion that a permanent resident is inadmissible may prepare a report and if the Minister is of the opinion that the report is well-founded the Minister may make a removal order.

Entrepreneurs

The Regulations impose specific, time sensitive conditions upon entrepreneurs who become permanent residents. Section 98 of the Regulations sets out the conditions that an entrepreneur must fulfill.

s. 98. (1) An entrepreneur who becomes a permanent resident must meet the following conditions:

> (a) the entrepreneur must control a percentage of the equity of a qualifying Canadian business equal to or greater than 33⅓ per cent;
>
> (b) the entrepreneur must provide active and ongoing management of the qualifying Canadian business; and
>
> (c) the entrepreneur must create at least one incremental full-time job equivalent for Canadian citizens or permanent residents, other than the entrepreneur and their family members.

(2) The entrepreneur must meet the conditions for a period of at least one year within a period of three years after the day the entrepreneur becomes a permanent resident.

(3) An entrepreneur who becomes a permanent resident must provide to an officer evidence of compliance with the conditions within the period of three years after the day the entrepreneur becomes a permanent resident.

(4) An entrepreneur must provide to an officer

(a) not later than six months after the day the entrepreneur becomes a permanent resident, their residential address and telephone number; and

(b) during the period beginning 18 months after and ending 24 months after the day the entrepreneur becomes a permanent resident, evidence of their efforts to comply with the conditions.

(5) The family members of an entrepreneur are subject to the condition that the entrepreneur meets the conditions.

Entrepreneurs are expected to make a significant economic contribution to Canada. This is to be achieved through the control of at least 33⅓ percent of the equity in a Canadian business that will create employment opportunities for one or more persons other than the entrepreneur and the entrepreneur's family. The entrepreneur is also expected to participate actively in the management of the business. These conditions must be met for a period of at least one year within three years of the entrepreneur becoming a permanent resident.

The Regulations also specify that family members of an entrepreneur are themselves subject to the fulfillment of the conditions by the entrepreneur. Therefore, family members are always removable if the entrepreneur fails to meet the conditions of landing. **The IAD must appoint a designated representative for any family members who are minors at the time of the hearing.**[1]

Entrepreneurs are expected to furnish immigration officers with evidence of their efforts to comply with the conditions set out in the Regulations.[2]

In a constitutional challenge to the old Regulations (s.23.1 (1) (a) to (d)), it was argued that the Regulations were overly broad and compelled a person to perform personal service to the state.[3] The IAD followed the test set out by the Supreme Court of Canada in *R. v. Heywood*[4] that legislation is overly broad and thus unconstitutional when its means are broader than necessary to achieve its objectives so that individual rights have been limited without good reason. Given that the objective stated in s.3 (h) of the old Act is to foster the development of a strong and viable economy and the prosperity of all regions in Canada, the breadth of the Regulations governing entrepreneurs was not overly broad and therefore not unconstitutional.

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1 *Vashee, Gautam Bapushai v. M.C.I.* Kelen, August 15, 2005; 2005 FC 1104.

2 Citizenship and Immigration Canada, OP 8; Entrepreneur and Self-Employed http://www.cic.gc.ca/english/resources/manuals/op/op08-eng.pdf.

3 *Mak v. Canada* (Minister of Citizenship and Immigration) [2003] I.A.D.D. No.467, (IAD VA1-03363), Clark, May 8, 2003.

4 [1994] 3 S.C.R. 761.

Right of appeal

Under section 63(3), a permanent resident may appeal a removal order to the IAD. Under section 67(1), there are three grounds of appeal;

(a) the decision appealed is wrong in law or fact or mixed law and fact;

(b) a principle of natural justice has not been observed; or

(c) sufficient humanitarian and compassionate considerations warrant special relief.

On the issue of legal validity, the only question is whether the entrepreneur clearly understood the conditions imposed upon becoming a permanent resident and did not fulfill them. At the time of making an application for permanent residence, entrepreneurs must sign a declaration stating that they intend and will be able to meet the conditions in s.98 (1)-(4) of the Regulations[5]. Therefore, it is unlikely that any entrepreneur will be able to assert lack of knowledge of the conditions.

Under the old Act an entrepreneur could be removed if he or she "knowingly contravened a term or condition"[6] and under *IRPA* the entrepreneur becomes inadmissible for "failing to comply" with the conditions imposed under the Regulations. The case law established that "knowingly contravened," as used in paragraph 27(1)(b) of the old Act, referred to simple knowledge of the contravention and did not require *mens rea* or wilful non-compliance.[7] The change in wording to "failing to comply" has not produced any change in the case law with respect to the test for legal validity. The IAD has to be satisfied that the entrepreneur understood the conditions and did not comply with them. Once it is clear that the entrepreneur understood the conditions that had to be met, it is irrelevant that the entrepreneur fully intended to comply with the condition and that the condition became impossible to fulfill.[8]

The old Act provisions were subject to a Charter challenge on the basis that paragraph 27(1) (b) of that Act violated section 7 of the Charter because of its similarity to an absolute liability offence. It was argued that an appellant has no opportunity to explain lack of compliance with the terms and conditions of landing with respect to legal validity and this is a denial of fundamental justice. The Appeal Division followed the reasoning of the Federal Court in *Mohammed*[9] that it is not a principle of fundamental justice that someone who does not satisfy the requirements of a statutory regime is

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5 Citizenship and Immigration Canada, OP 8; Entrepreneur and Self-Employed, s.6.5.

6 Section 27(1)(b) of the *Immigration Act.*

7 See *Baker* v. *M.C.I.* (IAD T93-10044), Townshend, January 28, 1994, where in referring to paragraph 27(1)(b) the Appeal Division stated: "This is a very harsh section, in that the term "knowingly" has been interpreted by the Federal Court of Appeal as meaning merely having knowledge of the contravention of the condition entered into. There is no requirement for *mens rea*, [intent], control of the circumstances, or responsibility for the contravention. Mere knowledge is sufficient."

8 *Kim, Mann* v. *M.C.I.* (IAD T98-02335), D'Ignazio, October 7, 1998; *Gabriel* v. *Canada (Minister of Employment and Immigration)* (1984), 60 N.R. 108 (F.C.A.).

9 *Mohammed, Abu Tayub v. M.C.I.* (F.C.T.D., IMM-3601-95), MacKay, May 12, 1997.

entitled to special concessions. The Appeal Division found that paragraph 27(1) (b) does not engage section 7 of the Charter.[10]

Discretionary Jurisdiction

If the Appeal Division determines that the entrepreneur failed to comply with the conditions in the Regulations the removal order is valid in law as against the entrepreneur and any family members who immigrated with the entrepreneur[11]. However, the appeal may also be considered based on whether there are sufficient humanitarian and compassionate considerations to warrant special relief.[12] Each family member can advance his or her particular circumstances which may warrant special relief.[13]

In considering special relief for an entrepreneur, the panel may consider the extent to which the entrepreneur made serious efforts to comply with the conditions. For example, the panel may find that despite the entrepreneur's conscientiousness and diligence, circumstances outside of the entrepreneur's control hindered compliance with the conditions.[14] Evidence of continuing efforts of a substantial nature to meet the investment and business requirements may be considered.[15] A stay of removal may be granted in order to allow the entrepreneur more time to fulfill the conditions.[16]

The best interests of any child directly affected by the decision must also be a factor considered.[17]

.....The Appeal Division may also consider a breach of procedural fairness by the immigration officer as a factor in the exercise of its discretionary jurisdiction.[18]

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10 *Ateeq, Shaista v. M.E.I.* (IAD No. T97-01063), Marziarz, October 1, 1999.

11 *Zidour, Abdelkader v. M.C.I.*, Pinard, December 20, 2006;, 2006 FC 1518.

12 Please see Chapter 9 for general discussion of factors to be considered for special relief.

13 The Federal Court in *Chang, Chun Mu v. M.C.I.*, Shore, February 14, 2006; 2006 FC 157, upheld an IAD decision that departed from the usual methodology of considering each family member's H&C situation separately. In that appeal the IAD refused to consider the children's appeals separately from their parents even though the children had positive factors in their favour. The parents' had participated in a sham arrangement in trying to meet the entrepreneur conditions and the IAD felt that to grant the children special relief would ultimately benefit the parents.

14 *Liu, Kui Kwan v.M.E.I. v.* (IAD V90-01549), Wlodyka, August 20, 1991. The Appeal Division examined how conscientious the appellant had been in his attempt to comply with the terms and conditions and considered all the factors which hindered compliance.

15 In *De Kock* v. *M.C.I.* (IAD V96-00823), Clark, December 17, 1996, the appellant was granted a two-year stay in order to try and fulfill the conditions. He submitted evidence to show a guaranteed $100,000 investment, the acquisition of a business licence, and the proven track record of his proposed business in other locations. In *Luthria* v. *M.C.I.* (IAD T93-03725), Aterman, September 9, 1994, the appellant had made some effort to establish a business, but was unsuccessful. The panel acknowledged the uphill struggle because of the recession, but found the appellant's efforts were not strenuous enough to warrant equitable relief. In *Maotassem, Salim Khalid* v. *M.C.I.* (IAD T97-00307), Maziarz, December 17, 1997, the appellant had twice tried to comply with the conditions and the businesses failed for reasons beyond his control. The evidence failed to establish that the appellant was then on the road to becoming able to meet the terms and conditions and therefore no special relief was granted.

16 *Vashee, supra*, footnote 1.

17 *Elias, Touchan Said v. M.C.I.*, Pinard, September 30, 2005;2005 FC 1329.

CASES

[18] *Lin,Ying Kor et al v. M.C.I.* (F.C.T.D., no. IMM-4245-00), Kelen, December 12, 2001.

Chapter Seven

Criminal Grounds for Removal

Introduction

The most frequently heard appeals at the IAD are criminality-based removal orders involving permanent residents of Canada. A permanent resident may be ordered removed from Canada if found described in subsection 36(1) of *IRPA* for "serious criminality". The ground of "criminality" found in subsection 36(2) does not apply to permanent residents. A foreign national, however, may be ordered removed from Canada if found described in subsection 36(1) or 36(2) of *IRPA.*

The relevant removal order in relation to subsections 36(1) or (2) is a deportation order. In the case of a permanent resident, only the Immigration Division has the jurisdiction to issue the order. The Immigration Division has exclusive jurisdiction over foreign nationals who are inadmissible under paragraph 36(2)(*d*) (see *Immigration and Refugee Protection Regulations,* s. 228(1)(*a*), s. 229(1)(*c*) and (*d*)). In cases involving foreign nationals convicted in Canada, the removal order may be made by an immigration officer.

A permanent resident, a protected person, and a foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division (IAD) against a decision at an admissibility hearing or examination to make a removal order against them. The appeal can be based on both grounds of appeal, that is, that the removal order is not legally valid and that the discretionary jurisdiction of the IAD should be exercised in the appellant's favour (see *IRPA*, s. 63(2) and 63(3)).

With respect to the ground of "serious criminality", however, there is no right of appeal, either for permanent residents or for foreign nationals, if the crime was punished in Canada by a term of imprisonment of at least two years (*IRPA*, s. 64(1) and (2)).

The Federal Court has held that the IAD has no jurisdiction to entertain appeals (on the merits) in such cases. The appeal must be dismissed for lack of jurisdiction if the person has determined to be inadmissible on one of the enumerated grounds. The IAD is not empowered to determine whether the foreign national is in fact inadmissible.[1]

While it is possible for the Minister to appeal to the IAD against a decision of the Immigration Division on any ground of inadmissibility (*IRPA*, s. 63(5)), such appeals occur infrequently.

[1] *Kang, Sarabjeet Kaur* v. *M.C.I.* (F.C., no. IMM-2445-04), Mactavish, February 25, 2005; 2005 FC 297. The case in question also considered the effect of s.196 of the Transitional Provisions, which provides for the discontinuation of an appeal if the appeal could not have been made because of s.64 of *IRPA*.

This chapter deals only with Canadian convictions or crimes committed on entering Canada. Foreign convictions and crimes committed outside Canada are dealt with in chapter 8, Criminal Equivalency.

Relevant Legislation

The relevant provisions of *IRPA* dealing with "serious criminality" and "criminality", based on Canadian convictions or crimes committed on entering Canada, can be broken down as follows:[2]

- "serious criminality" – IRPA, s. 36(1)(a) – conviction in Canada for a federal offence
- punishable by a maximum term of imprisonment of 10 years or more or
- where a term or imprisonment of more than 6 months has been imposed
- "criminality" – conviction in Canada for a federal offence punishable by a maximum term of imprisonment of less than 10 years – IRPA, s. 36(2)(a)
- "criminality" – two summary convictions in Canada for federal offences, not arising out of a single occurrence – IRPA, s. 36(2)(a)
- "criminality" – committing, on entering Canada, a federal offence prescribed by regulations ("transborder crime") – IRPA, s. 36(2)(d)

To trigger the operation of these grounds of inadmissibility, the offence must be punishable "under an Act of Parliament". In other words, the underlying offence must be one that is found in a federal statute.

Subsection 36(3) of *IRPA* sets out a number of principles governing the application of the grounds of inadmissibility in subsections 36(1) and (2). They will be addressed in the course of this and the following chapters.

Burden and Standard of Proof

As a general proposition, the onus is on the Minister to establish the ground of inadmissibility alleged.

The burden of proof relating to admissibility hearings is found in subsection 45(*d*) of *IRPA*, which provides that:

- in the case of a permanent resident or a foreign national who has been authorized to enter Canada, the Immigration Division must make the

[2] For the full text of the inadmissibility provisions refer to the relevant sections of the *Immigration and Refugee Protection Act*.

applicable removal order "if it is satisfied that the foreign national or the permanent resident is inadmissible".

- in the case of a foreign national who has *not* been authorized to enter Canada, the Immigration Division must make the applicable removal order "if it is not satisfied that the foreign national is not inadmissible".

At the IAD, the appellant must establish that they are not inadmissible on the relevant ground of inadmissibility, as determined by the Immigration Division or by an immigration officer.

Section 33 of *IRPA* provides that inadmissibility under section 36 (as well as under sections 34, 35 and 37) includes facts arising from omissions. Unless otherwise provided, admissibility may be based on facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

The meaning of the term "reasonable grounds to believe", which was found as well in the former *Immigration Act,* was considered in *Mugesera*,[3] where the Supreme Court of Canada endorsed the following statement of the law:

> [114] The first issue raised by s. 19(1)(*j*) of the *Immigration Act* [i.e., the predecessor of *IRPA*, s. 35(1)(*a*)] is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.) [*Sabour, Mohammad Reza v. M.C.I.* (F.C.T.D., no. IMM-3268-99), Lutfy, October 4, 2000].

The Supreme Court also noted, at para. 116, that the "reasonable grounds to believe" standard applies only to questions of fact, i.e., the findings of fact made by the tribunal.

> When applying the "reasonable grounds to believe" standard, it is important to distinguish between proof of questions of fact and the determination of questions of law. The "reasonable grounds to believe" standard of proof applies only to questions of fact: *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.), at p. 311.

Thus the "reasonable grounds to believe" standard does not apply to conclusions of law. Conclusions of law are reviewed by the Federal Court on the correctness standard.[4]

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[3] *Mugasera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at para. 114; 2005 SCC 40.

[4] Ibid, para. 37.

Canadian Convictions

Only convictions under Canadian federal laws ("an offence under an Act of Parliament") render a person inadmissible on grounds of serious criminality or criminality. Thus a person convicted of criminal contempt of court would not be caught, as the punishment for criminal contempt is not codified, but is derived from the common law.[5]

Whether a Canadian conviction will render someone inadmissible on the ground of serious criminality or criminality depends on the nature of the offence, the possible punishment based on the maximum term of imprisonment the offence carries under the law, and the actual sentence that was imposed on conviction for the offence.

In some cases, a permanent resident or foreign national may be inadmissible for a conviction registered during a previous period of residence or stay in Canada. Inadmissibility cannot be based on offences alleged to have been committed in Canada for which there has been no conviction, except where a foreign national is inadmissible for a "transborder crime" under paragraph 36(2)(*d*) of *IRPA*.

Classification of Criminal Offences

Canadian criminal offences are either indictable or summary conviction, depending on their seriousness. Many criminal offences, known as "hybrid offences", can be prosecuted either by way of indictment or summary conviction, at the election of the Crown. By virtue of paragraph 34(1)(*a*) of the *Interpretation Act*, hybrid offences are indictable until the prosecution elects to proceed by summary conviction. However, paragraph 36(3)(*a*) of *IRPA* provides that for the purposes of *IRPA*, a "hybrid offence" is deemed to be indictable, even if it has been prosecuted summarily.[6] (This represents a change from the situation that prevailed under the *Immigration Act,* where a hybrid offence was considered to be a summary conviction if the offence was prosecuted summarily.[7])

Where an offence is prosecuted by way of summary conviction, section 787(1) of the *Criminal Code* provides that the maximum term of imprisonment is six months, unless otherwise indicated.[8] The maximum possible sentence for an indictable offence is five years, unless otherwise specified (see section 743 of the *Criminal Code*).

Offences designated as contraventions under the *Contraventions Act* cannot be the basis for inadmissibility for serious criminality or criminality (*IRPA*, s. 36(3)(*e*)).[9]

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5 *Massie, Pia Yona* v. *M.C.I.* (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000.

6 This provision was applied in *Derbas, Rachid* v. *M.C.I.* (F.C., no. IMM-1923-07), Shore, November 1, 2007; 2007 FC 1194. The person was found described in s.36(2)(a), despite the fact that he was found guilty of a "hybrid" offence that was punished on summary conviction.

7 See *Potter* v. *Canada (Minister of Citizenship and Immigration)*, [1980] 1 F.C. 609 (C.A.).

8 The *Criminal Code* contains several offences, colloquially called "super summary" offences, punishable on summary conviction by a maximum sentence of 18 months' imprisonment. See, for example, s.267 (assault with a weapon or causing bodily harm), s.269(b) (unlawfully causing bodily harm).

9 Under the *Contraventions Act*, the Governor in Council may make regulations designating federal offences as "contraventions" and enforcement authorities may issue tickets to persons charged with such offences, rather than

Meaning of Conviction

The validity of a Canadian conviction on the merits cannot be put in issue at a hearing before the IAD. A conviction under a wrong name is nonetheless a conviction.[10]

If a person pleads guilty to, or is found guilty of, an offence and is granted a conditional or absolute discharge, this will not constitute a conviction for the purposes of *IRPA.* Subsection 730(3) of the *Criminal Code*, which establishes the effect of conditional and absolute discharges, provides that, in such cases as are specified, "the offender shall be deemed not to have been convicted of the offence", subject to certain exceptions.

The word "conviction" means a conviction that has not been expunged.[11] Paragraph 36(3)(*b*) provides that inadmissibility on the grounds of serious criminality or criminality may not be based on a conviction in respect of which there has been a final determination of acquittal, for example, on appeal to a higher court. Thus, a person may no longer be inadmissible at the time of their hearing before the IAD where their conviction has been overturned on appeal or where granted a discharge.[12]

Where no issue of an appeal of a conviction is raised at the hearing, the member is entitled to rely on the evidence adduced by the parties There is no duty to conduct an inquiry beyond the evidence before the member.[13]

Term of Imprisonment

The words "term of imprisonment … imposed" found in paragraph 36(1)(*a*) refer to the sentence imposed by the court and not the actual time served in prison.[14] The Federal Court has

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using procedures under the *Criminal Code*. The offences designated as contraventions in the *Contraventions Regulations* are relatively minor offences under legislation such as the *Canada Shipping Act, Department of Transport Act*, *Government Property Act*, and *National Parks Act*. *IRPA* also sets out procedures in section 144 for "ticketable offences" prescribed by regulation.

10 *Lampros, Michael George* v. *M.C.I.* (F.C., no. IMM-434-05), Lemieux, February 18, 2005; 2005 FC 267.

11 *Canada (Minister of Employment and Immigration)* v. *Burgon*, [1991] 3 F.C. 44 (C.A.).

12 See *Lew* v. *Canada (Minister of Manpower and Immigration)*, [1974] 2 F.C. 700 (C.A.), where the appellant successfully appealed the conviction, and was granted an absolute discharge after he had been ordered deported, but before the matter was determined on appeal to the Immigration Appeal Board. The Court held that the Board ought to have considered the appeal in light of the circumstances existing at the time of the appeal (i.e., the absolute discharge). In *Kalicharan* v. *Canada (Minister of Manpower and Immigration)*, [1976] 2 F.C. 123 (T.D.), the Court held that a person convicted at trial is a convicted person notwithstanding that he may have an unexhausted right of appeal. However, when a court of appeal substitutes a conditional discharge for a sentence imposed by a trial court, then the conviction is deemed never to have been passed and the basis for making the removal order not only no longer exists in fact, but it is deemed, not to have existed at all. But see also *Wade, William Jerry* v. *M.C.I.* (F.C.T.D., no. IMM-1021-94), Gibson, August 11, 1994, where execution of a deportation order based on a conviction that was subsequently quashed on appeal. In overturning the conviction, the appeal court ordered a new trial only on the issue of whether the applicant was guilty of second degree murder or manslaughter; it left beyond doubt the applicant's culpability for a very serious offence.

13 *Soriano, Teodore* v. *M.C.I.* (F.C.T.D., no. IMM-2335-99), MacKay, August 29, 2000.

14 Compare *Martin, Claudette* v. *M.C.I.* (F.C.A., no. A-126-05), Nadon, Sexton, Sharlow, October 25, 2005; 2005 FCA 347, where the Court interpreted the word "punished" used in s.64(2) of *IRPA* with respect to a term of imprisonment.

held that time spent in pre-trial or pre-sentence custody which is computed by the criminal court in arriving at the person's sentence should be considered part of the "term of imprisonment" for the purposes of determining appeal rights under subsection 64(2) of *IRPA*.[15] The same rationale has been applied by the Immigration Division and IAD in relation to paragraph 36(1)(*a*).[16] The Immigration Division has held that the decision of the Supreme Court of Canada in *R. v. Mathieu*,[17] which was decided in the context of criminal law, does not apply in the immigration law context, when interpreting paragraph 36(1)(*a*)[18]. The IAD has held likewise in relation to the similarly worded subsection 64(2).[19]

The IAD has ruled that a conditional sentence constitutes a "term of imprisonment" under paragraph 32(1)(*a*). The rationale is that a conditional sentence is not an alternative to imprisonment; it is a term of imprisonment served in the community.[20] This appears to be consistent with the dicta of the Supreme Court of Canada.[21]

Two Offences Not Arising Out of a Single Occurrence

The words "not arising out of a single occurrence" found in paragraph 36(2)(*a*), in the context of inadmissibility for foreign nationals based on two summary conviction offences, were interpreted in two Federal Court cases decided in relation to a similar provision under the *Immigration Act.* It was held that an "occurrence" is synonymous with the terms "event" and

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15 *M.C.I.* v. *Atwal, Iqbal Singh* (F.C., no. IMM-3260-03), Pinard, January 8, 2004; 2004 FC 7; *Cheddesingh (Jones), Nadine Karen* v. *M.C.I.* (F.C., no. IMM-2453-05), Beaudry, February 3, 2006; 2006 FC 124.

16 See, for example, *M.P.S.E.P.* v. *Nazaire, Jacques Narcisse* (ID A8-00625), Ladouceur, October 23, 2008 (*RefLex* Issue 347); *M.P.S.E.P.* v. *Ramos Pacheco, Giovanni Joaquin* (ID A8-01078), Kohler, January 9, 2009 (*RefLex* (Issue 351).

17 In *R.* v. *Mathieu*, 2008 SCC 21, the Supreme Court held that "the term of imprisonment in each case is the term of imposed by the judge at the time of sentence. The offender's prior detention is merely one factor taken into account by the judge in determining that sentence." The Court also stated: "Although it is possible, on an exceptional basis, to treat the time spend in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence – in the context of a minimum sentence, for example, or of a conditional sentence – these are exceptions that prove the rule. As to minimum sentences, see *R.* v. *Wust*, [2000] 1 S.C.R. 455; 2000 SCC 18; regarding conditional sentences, see *R.* v. *Fice*, [2005] 1 S.C.R. 742; 2005 SCC 32."

18 See *M.P.S.E.P.* v. *Nazaire, Jacques Narcisse* (ID A8-00625), Ladouceur October 23, 2008 (*RefLex* Issue 347); *M.P.S.E.P.* v. *Ramos Pacheco, Giovanni Joaquin* (ID A8-01078), Kohler, January 9, 2009 (*RefLex* Issue 351).

19 See *Mihalkov, Miroslav Vassil* v. *M.P.S.E.P.* (IAD TA7-05378), Dolin, October 21, 2008 (*RefLex* Issue 346); *Nana-Effah, Benbella* v. *M.P.S.E.P.* (IAD MA8-02628), Paquette, October 29, 2008 (*RefLex* Issue 346); *Mjasiri, Amin Mohamed* v. *M.P.S.E.P.* (IAD TA4-07045), MacLean, December 18, 2008 (*RefLex* Issue 350); *Pierre, Nahomie* v. *M.C.I.* (IAD MA8-10166), Paquette, January 16, 2009 (*RefLex* Issue 350).

20 *Meerza, Rizwan Mohamed* v. *M.C.I.* (IAD TA2-21315), Hoare, September 15, 2003 (*RefLex* Issue 224). An adjudicator came to the same conclusion with respect to a person described in s.27(1)(d) of the *Immigration Act*. See *M.C.I.* v. *Santizo, Marco Antonio* (Adjudication A1-00471), Nupponen, September 27, 2001 (*RefLex* Issue 176). A member of the Immigration Division held to the contrary: *M.C.I.* v. *Sahota, Ranjit Singh* (ID A3-02512), Iozzo, March 11, 2004. A conditional sentence was the basis for the deportation order in *Canada (Citizenship and Immigration)* v. *Khosa*, 2009 SCC 12, which upheld the IAD's decision on s.67(1)(c) of *IRPA*; however, that point was not argued before the courts.

21 In *R.* v. *Fice*, 2005 SCC 32, Justice Bastarache, writing for the majority, stated at para. 17: "in enacting s.742.1 [of the *Criminal Code* – Imposing of Conditional Sentence], Parliament intended to cast a small net and only capture conduct serious enough to attract *a sentence of incarceration* but not so severe as to warrant a penitentiary sentence." (emphasis added)

"incident" and not with "a course of events". Therefore, summary conviction offences which were committed on different dates arose out of different occurrences rather than a single occurrence.[22] (Since "hybrid" offences are deemed to be indictable for the purpose of inadmissibility under section 36 of *IRPA*, this provision is now used less frequently than under the *Immigration Act*.)

Transborder Crime

Foreign nationals may be found inadmissible for committing, on entering Canada, a federal offence prescribed in section 19 of the *Immigration and Refugee Protection Regulations*. In this case, no conviction is required.[23] The prescribed offences are indictable offences (including "hybrid" offences) under the *Criminal Code*, *IRPA, Firearms Act, Customs Act,* and *Controlled Drugs and Substances Act.*

Relevant Time for Determining Inadmissibility

The facts at the time of the offence must be assessed based on the Canadian law as it reads at the time of the admissibility hearing or appeal to the IAD. Thus a person may no longer be inadmissible as a result of changes to the *Criminal Code* occurring after their criminal conviction.

In *Robertson*[24], the applicant was ordered deported pursuant to paragraph 19(1)(*c*) of the *Immigration Act* based on a 1971 conviction of possession of stolen property valued at more than $50, an offence which carried a maximum of 10 years' imprisonment. However, the *Criminal Code* was subsequently amended such that that penalty applied to stolen goods exceeding $200, which amendment was in force at the time of the inquiry in 1978. (According to the evidence, the retail value of the stolen property in question did not exceed $150, and the wholesale value was approximately $45 to $60; thus the maximum punishment at the time would have been imprisonment for two years.) In setting aside the deportation order, the Federal Court of Appeal stated:

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22 *Alouache, Samir* v. *M.C.I.* (F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995. Reported: *Alouache* v. *Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 68 (F.C.T.D.). Affirmed on other grounds by *Alouache, Samir* v. *M.C.I.* (F.C.A., no. A-681-95), Strayer, Linden, Robertson, April 26, 1996. In this case, the applicant was convicted of three offences that occurred on different dates. The applicant argued that these convictions arose out of a single occurrence, namely a marital dispute. The Court did not accept this argument as the breakdown of the applicant's marriage was "a course of events" and not a single occurrence. Compare with *Libby, Tena Dianna* v. *M.E.I.* (F.C.A., no. A-1013-87), Urie, Rouleau, McQuaid, March 18, 1988. Reported: *Libby* v. *Canada (Minister of Employment and Immigration)* (1988), 50 D.L.R. (4th) 573 (F.C.A.), where the Court held that the applicant's original charge of theft and his failure to report for fingerprinting in connection with that charge arose out of the same occurrence.

23 In *Wang, Wei* v. *Canada (Minister of Citizenship and Immigration)* (F.C., no. IMM-4212-05), von Finckenstein, May 19, 2006, 2006 FC 625, the applicant uttered a forged document to an immigration officer on examination at the port of entry in an attempt to gain readmissions to Canada as a student.

24 *Robertson* v. *Canada (Minister of Employment and Immigration)*, [1979] 1 F C. 197 (C.A.). See also *Weso, Mohamed Omar* v. *M.C.I.* (F.C.T.D., no. IMM-516-97), Cullen, April 21, 1998.

> In my opinion, 19(1)(*c*) can only be used to deport a person where that person has been convicted of an offence for which the maximum punishment at the date of the deportation order is ten years. The word "constitutes" in the present tense supports this view.

Conversely, a person may not have been inadmissible at the time of their conviction, but has become so as a result of a subsequent amendment to the *Criminal Code*.

In *Ward*,[25] at the time of the applicant's conviction in Ireland of the offence of false imprisonment, the Canadian equivalent offence, namely forcible confinement, carried a term of imprisonment of five years, whereas at the date of the deportation order, the offence provided for a term of imprisonment not exceeding 10 years. The Federal Court–Trial Division held that there was no reason to distinguish the principle enunciated in *Robertson*, and that the adjudicator had not erred in considering the (more severe) punishment for the offence as of the date of the deportation order.

The Federal Court–Trial Division has held that an amendment to the *Immigration Act* could render someone inadmissible based on an earlier conviction that would not have attracted inadmissibility before the amendment.[26] However, an amendment to *Immigration Act* between the time of the admissibility hearing (at which a removal order was issued) and the time the appeal was heard, was held not to accrue to the benefit of the person, who would no longer have been inadmissible as a result of the amendment. The Federal Court of Appeal stated that unless Parliament has clearly indicated otherwise, the correctness of the adjudicator's decision must be measured by the law in force at the time of the decision.[27]

Pardons and Rehabilitation

Paragraph 36(3)(*b*) provides that inadmissibility on the grounds of serious criminality or criminality may not be based on a conviction in respect of which a pardon has been granted, where that pardon has not ceased to have effect or been revoked under the *Criminal Records Act.* Section 3 of the *Criminal Records Act* provides that a person who has been convicted of a federal offence or a regulation made under an Act of Parliament can apply to the National Parole Board for a pardon of that offence.

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[25] *Ward, Patrick Francis* v. *M.C.I.* (F.C.T.D., no. IMM-504-96), Heald, December 19, 1996. Reported: *Ward* v. *Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 102 (F.C.T.D.). In the related Immigration Appeal Board decision of *Reyes* v. *Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 148 (I.A.B.), there was the added complication that the foreign offence was not equivalent to an indictable offence in Canada at the time the application for permanent residence was filed, but became one prior to the conclusion of the processing of the application. The Board held that such an offence could not bring the applicant within the ambit of section 19 and that the visa officer could not apply amendments to the *Criminal Code* enacted after the filing of the application to the detriment of the applicant.

[26] *Kanes, Chellapah* v. *M.E.I.* (F.C.T.D., no. IMM-1918-93), Cullen, December 14, 1993. Reported: *Kanes* v. *Canada (Minister of Employment and Immigration)* (1993), 22 Imm. L.R. (2d) 223 (F.C.T.D.); *Cortez, Rigoberto Corea* v. *S.S.C.* (F.C.T.D., no. IMM-2548-93), Rouleau, January 26, 1994. Reported: *Cortez* v. *Canada (Secretary of State)* (1994), 23 Imm. L.R. (2d) 270 (F.C.T.D.), at 276.

[27] *Bubla* v. *Canada (Solicitor General)*, [1995] 2 F.C. 680 (C.A.).

Section 18.1 of the *Immigration and Refugee Protection Regulations* provides for the possibility of deemed rehabilitation for persons inadmissible solely on the basis of having been convicted in Canada of two or more offences that may only be prosecuted summarily. For this prescribed class to override paragraph 36(2)(*a*) of *IRPA*, at least five years have elapsed since the completion of the imposed sentence.

Young Offenders

A young offender is someone who is 12 years of age or older but less than 18 years of age. Paragraph 36(3)(*e*) provides that inadmissibility for serious criminality or criminality may not be based on an offence for which the person is found guilty under the *Young Offenders Act*, which has been repealed, or under the *Youth Criminal Justice Act*. However, if the proceedings were transferred to adult court under the provisions of the *Young Offenders Act*, they may render the person inadmissible.[28]

The *Young Offenders Act* was repealed on April 1, 2003 and replaced with the *Youth Criminal Justice Act, 2002*. The transfer provision is eliminated under the latter legislation. Instead, the youth court first determines whether or not the young person is guilty of the offence and then, under certain circumstances, it may impose an adult sentence. Citizenship and Immigration Canada has taken the position that a young offender convicted under the *Youth Criminal Justice Act* is not inadmissible, unless he or she received an adult sentence.[29]

Right of Appeal

The IAD has no jurisdiction to entertain an appeal (on the merits) against a removal order on the ground of serious criminality where the offence was punished in Canada by a term of at least two years.

The words "punished … by a term of imprisonment" found in subsection 64(2) refers to the sentence imposed by the court and not the actual time served in prison.[30]

The Federal Court had held that time spent in pre-trial or pre-sentence custody which is computed by the criminal court in arriving at the person's sentence should be considered part of the "term of imprisonment" for the purposes of section 64(2).[31]

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[28] In *Tessma (Ayele), Letwled Kasahun* v.*M.C.I.* (F.C., no. IMM-5652-02), Kelen, October 2, 2003; 2003 FC 1126, the Court held that proceedings transferred from youth court to ordinary court under s.16 of the *Young Offenders Act* are not covered by the exemption in s.36(3)(e) of *IRPA*. Subsection 16(7) of the *Young Offenders Act*, provided that, after the youth court judge made an order transferring the proceedings to ordinary court, the proceedings under that Act were discontinued, and the proceedings with respect to the criminal charges were taken before the ordinary court.

[29] Citizenship and Immigration Canada website, Internet: http://www.cic.gc.ca/english/information/applications/guides/5312E2.asp.

[30] *Martin, supra*, footnote 14.

[31] *Atwal, supra*, footnote 15*; Cheddesingh, supra*, footnote 15.

The IAD has held that the decision of the Supreme Court of Canada in *R. v. Mathieu,*[32] which was decided in the context of criminal law, does not apply in the immigration law context, when interpreting subsection 64(2).[33]

Legal Validity

If the appeal from the removal order is based on the first ground of appeal, that is, on any ground of appeal that involves a question of law or fact, or mixed law and fact, the IAD will have to determine whether the removal order is valid in law.

An appellant may argue that they were wrongly convicted. The IAD has held that it cannot go behind the conviction in considering the legal validity of the removal order.[34] However, in assessing the legal validity of the removal order, the IAD may consider whether the conviction was accurately categorized by the Immigration Division member as falling within subsection 36(1).

If the conviction which is the basis for the removal order has been overturned on appeal, then the IAD can quash the removal order[35] because the hearing is a hearing *de novo.* However, the IAD does not have to wait for the appeal of the conviction to be heard before disposing of the appeal.[36]

Discretionary Jurisdiction

Where the refusal is valid in law, the IAD may consider whether or not sufficient compassionate or humanitarian considerations exist to warrant the granting of special relief in light of "all the circumstances of the case", pursuant to section 67(1)(*c*) of *IRPA.* For a detailed discussion of the IAD's discretionary jurisdiction see Chapter 9.

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[32] *R.* v. *Mathieu*, *supra*, footnote 17.

[33] See *Mihalkov, Miroslav Vassil* v. *M.P.S.E.P.* (IAD TA7-05378), Dolin, October 21, 2008 (*RefLex* Issue 346); *Nana-Effah, Benbella* v. *M.P.S.E.P.* (IAD MA8-02628), Paquette, October 29, 2008 (*RefLex* Issue 346); *Mjasiri, Amin Mohamed* v. *M.P.S.E.P.* (IAD TA4-07045), MacLean, December 18, 2008 (*RefLex* Issue 350); *Pierre, Nahomie* v. *M.C.I.* (IAD MA8-10166), Paquette, January 16, 2009 (*RefLex* Issue 350).

[34] *Encina, Patricio* v. *M.C.I.* (IAD V93-02474), Verma, Ho, Clark, January 30, 1996.

[35] See *Kalicharan*, *supra*, footnote 35 where the applicant appealed the sentence but not the conviction, and subsequently, the sentence appeal was allowed and the applicant was granted a conditional discharge.

[36] *Kalicharan*, *supra*, footnote 35.

CASES

Chapter Eight

Criminal Equivalency

Introduction

There are several provisions in *IRPA* relating to criminality *IRPA* where the issue of equivalency of foreign criminal convictions and offences to Canadian offences arises. If a person is found described in one of the equivalency provisions in subsection 36(1) for "serious criminality" or 36(2) for "criminality" that render them inadmissible to Canada, a removal order may be issued against that person. The relevant removal order in such cases is a deportation order, which must be issued by the Immigration Division (see *Immigration and Refugee Protection Regulations,* s. 229(1)(*c*) and (*d*)).

A permanent resident may be ordered removed from Canada if found described in subsection 36(1) of *IRPA* for "serious criminality". The ground of "criminality" found in subsection 36(2) does not apply to permanent residents. A foreign national, however, may be ordered removed from Canada if found described in subsection 36(1) or 36(2) of *IRPA.*

Certain persons – notably, permanent residents, but also protected persons and foreign nationals who hold a permanent resident visa – have a right of appeal to the Immigration Appeal Division (IAD) from the removal order on both grounds of appeal, that is, that the removal order is not legally valid and that the discretionary jurisdiction of the IAD should be exercised in the appellant's favour (see *IRPA,* s. 63(2) and 63(3)). It is also possible for the Minister to appeal against a decision of the Immigration Division in an inadmissibility hearing (*IRPA,* s. 63(5)), but such appeals occur infrequently.

Relevant Legislation

A person may be inadmissible on the grounds of serious criminality or criminality either because of a conviction for an offence committed outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament *or* for having committed an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament. These grounds of inadmissibility raise issues known as equivalency of foreign offences to Canadian ones.

The relevant provisions of *IRPA* where the issue of equivalency arises with respect to the grounds of serious criminality and criminality can be broken down as follows:[1]

[1] For the full text of the inadmissibility provisions refer to the relevant sections of the *Immigration and Refugee Protection Act*.

- "serious criminality" – foreign conviction for an offence that, if committed in Canada, would constitute a federal offence punishable by a maximum term of imprisonment of 10 years or more – *IRPA*, s. 36(1)(*b*)
- "serious criminality" – committed an act outside Canada that is an offence where it was committed and that, if committed in Canada, would constitute a federal offence punishable by a maximum term of imprisonment of 10 years or more – *IRPA*, s. 36(1)(*c*)
- "criminality" – foreign conviction for an offence that, if committed in Canada, would constitute a federal indictable offence (punishable by a maximum term of imprisonment of less than 10 years) – *IRPA*, s. 36(2)(*b*)
- "criminality" – committed an act outside Canada that is an offence where it was committed and that, if committed in Canada, would constitute a federal indictable offence (punishable in Canada by maximum term of imprisonment of less than 10 years) – *IRPA*, s. 36(2)(*c*)
- "criminality" – foreign conviction for two offences not arising out of a single occurrence that, if committed in Canada, would constitute federal (summary conviction) offences – *IRPA*, s. 36(2)(*b*)

To trigger the operation of these grounds of inadmissibility, the equivalent Canadian offence must be punishable "under an Act of Parliament", i.e., one that is found in a federal statute.

Burden and Standard of Proof

As a general proposition, the onus is on the Minister to adduce sufficient evidence to establish the ground of inadmissibility alleged.

The burden of proof relating to admissibility hearings is found in subsection 45(*d*) of *IRPA*, which provides that:

- in the case of a permanent resident or a foreign national who has been authorized to enter Canada, the Immigration Division must make the applicable removal order "if it is satisfied that the foreign national or the permanent resident is inadmissible".
- in the case of a foreign national who has *not* been authorized to enter Canada, the Immigration Division must make the applicable removal order "if it is not satisfied that the foreign national is not inadmissible".

At the IAD, the appellant must establish that they are not inadmissible on the relevant ground of inadmissibility, as determined by the Immigration Division.

Section 33 of *IRPA* provides that inadmissibility under section 36 (as well under sections 34, 35 and 37) includes facts arising from omissions. Unless otherwise provided, inadmissibility may be based on facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur. Paragraph 36(3)(d) provides that a determination of whether a permanent resident has committed an act described in paragraph 36(1)(*c*) must be based on a balance of probabilities.

The meaning of the term "reasonable grounds to believe", which was also found in the former *Immigration Act*, was considered in *Mugesera,*[2] where the Supreme Court of Canada endorsed the following statement of the law:

> [114] The first issue raised by s. 19(1)(*j*) of the *Immigration Act* [i.e., the predecessor of *IRPA*, s. 35(1)(*a*)] is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.) [*Sabour, Mohammad Reza v. M.C.I.* (F.C.T.D., no. IMM-3268-99), Lutfy, October 4, 2000].

The Supreme Court also noted, at para. 116, that the "reasonable grounds to believe" standard applies only to questions of fact, i.e., the findings of fact made by the tribunal.

> When applying the "reasonable grounds to believe" standard, it is important to distinguish between proof of questions of fact and the determination of questions of law. The "reasonable grounds to believe" standard of proof applies only to questions of fact: *Moreno v. Canada (Minister of Employment and Immigration)*,
>
> [1994] 1 F.C. 298 (C.A.), at p. 311.

Thus the "reasonable grounds to believe" standard does not apply to conclusions of law. Conclusions of law are reviewed by the Federal Court on the correctness standard.[3]

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[2] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at para. 114; 2005 SCC 40.

[3] Ibid., para. 37.

GENERAL PRINCIPLES

Equating the Foreign Offence to a Canadian Federal Statute

A person may be inadmissible on the ground of serious criminality or criminality because of a conviction for an offence outside Canada or for having committed an act or omission outside Canada that is an offence in the place where it was committed. In the latter case, a conviction need not have been registered nor criminal charges laid in the foreign jurisdiction.

One must then determine whether the offence of which the person was convicted or the act or omission the person committed would, if committed in Canada, constitute an offence that is punishable under Canadian law.[4] The Canadian offence must be found in an Act of Parliament, that is, a federal statute. For the purposes of *IRPA*, indictable offences include "hybrid offences", i.e., offences that may be prosecuted in Canada either summarily or by way of indictment (*IRPA*, s. 36(3)(*a*)).

Determining Equivalency

Equivalencing is the exercise of finding a Canadian offence that is the equivalent of the foreign offence underlying a conviction outside Canada. The principles to be followed when determining equivalency were developed in the context of foreign convictions and are set out in several leading decisions of the Federal Court of Appeal. It is not clear whether these principles apply in relation to foreign offences where there has been no conviction. That matter will be discussed later.

Leading Federal Court Dicta

Brannson v. Canada (Minister of Employment and Immigration), [1981] 2 F.C. 141 (C.A.), at 152-154, 145, per Ryan J.A.:

> Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential elements correspond. One must, of course, expect differences in the wording of statutory offences in different countries.
>
> ... where, as here, the definition of the foreign offence is broader than, but could contain, the definition of an offence under a Canadian statute, it may well be

[4] In *Canada (Minister of Employment and Immigration) v. Burgon*, [1991] 3 F.C. 44 (C.A.), Mahoney J.A. stated, at 50:

> On the other side of the coin, as we well know, some countries severely, even savagely, punish offences which we regard as relatively minor. Yet Parliament has made clear that it is the Canadian, not the foreign, standard of the seriousness of crimes, as measured in terms of potential length of sentence, that governs admissibility to Canada. The policy basis for exclusion under paragraph 19(1)(*c*) must surely be the perceived gravity, from a Canadian point of view, of the offence the person has been found to have committed and not the actual consequence of that finding as determined under foreign domestic law.

open to lead evidence of the particulars of the offence of which the person under inquiry was convicted. ... Such particulars might so narrow the scope of the conviction as to bring it within the terms of the Canadian offence.

… the validity or the merits of the conviction is not an issue and the Adjudicator correctly refused to consider representations in regard thereto.

Hill v. Canada (Minister of Employment and Immigration) (1987), 1 Imm. L.R. (2d) 1 (F.C.A.), at 9, per Urie J.A.:

... equivalency can be determined in three ways: first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences; two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; and three, by a combination of one and two.

Li v. Canada (Minister of Citizenship and Immigration), [1997] 1 F.C. 235 (C.A.), at 249, 256-258, per Strayer J.A.:

It appears from the jurisprudence that the second way of determining equivalency, as suggested by Urie J.A., is particularly useful where there is insufficient evidence of the legal scope of foreign offence or where it appears that the comparable Canadian offence is narrower than the foreign offence. In such a case it is permissible for the adjudicator to consider evidence as to the acts actually committed by the offender and for which he was convicted abroad. This approved second way also points up the fundamental test of equivalence: would the acts committed abroad and punished there have been punishable here?

A comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences.

What must be compared are the factual and legal criteria for establishing the offence both abroad and in Canada. It is not necessary to compare the adjectival law by which a conviction might or might not be entered in each country. … The [*Immigration*] Act does not contemplate a retrial of the case applying Canadian rules of evidence. Nor does it contemplate an examination of the validity of the conviction abroad. This is so whether the Canadian standards of procedure or evidence sought to be applied are based on the Charter, statute, or common law. … While proceedings in Canada under the *Immigration Act* must no doubt be conducted in accordance with the Charter, it is not inappropriate for Canadian tribunals to recognize and accept the validity of foreign legal systems without measuring them against the Charter. … an adjudicator should not compare the procedural or evidentiary rules of the two jurisdictions, even if the Canadian rules are mandated by the Charter.

Where the Foreign Law is Available

The starting point for equivalency is a comparison of the wording of the foreign and Canadian statutes with a view to determining the "essential elements" or "ingredients" of the respective offences. This also entails a comparison of any "defences" available in each jurisdiction.[5]

The provisions need not be identical, nor is their wording determinative of the issue. While detailed proof of exact equivalency is not required, the essential elements of an offence committed outside Canada must be similar to one known in Canada.

> In general, the essential elements of an offence are those components of an offence usually consisting of the *actus reus* and *mens rea*, which must be proven for a finding of guilt.[6]

One cannot assume the equivalence to an alleged foreign offence of which the essential elements are not known..[7]

It might be in a given case that a number of Canadian provisions are found to be equivalent. There is no legal requirement to find the equivalent that is "most similar" and make the decision with respect to that provision only.[8]

If the essential elements correspond or *are equivalent in all relevant respects* to those of the Canadian offence, or *if the foreign offence is "narrower" than the Canadian offence*,[9] then it is possible to make a finding of equivalency unless the person can argue

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5 *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235 (C.A.), at 258.

6 *Popic, Bojan v. M.C.I.* (F.C.T.D., no. IMM-5727-98), Hansen, September 14, 2000. The Court held that the visa officer erred by importing into the analysis considerations which are not relevant to a determination of the essential elements of the offence of "false pretences" or "fraud", namely that like all residents of Germany, the applicant knew he must pay for public transit and that being caught three times is quite exceptional.

7 In *Maleki, Mohammed Reza v. M.C.I.* (F.C.T.D., no. IMM-570-99), Linden, July 29, 1999. Reported: *Maleki v. Canada (Minister of Citizenship and Immigration)* (1999) 2 Imm. L.R. (3d) 272 (F.C.T.D.), the applicant had been convicted of entering Greece illegally. His DROC refusal letter stated that this offence, if committed in Canada, would constitute an offence under section 94 of the *Immigration Act* and that the applicant would be inadmissible under paragraph 19(2)(*a.1*) of the *Immigration Act*. The text or an adequate description of the relevant Greek statute was not provided to the immigration officer or to the Court. On the evidence available, there were no reasonable grounds on which to decide that there was equivalence in the Canadian and Greek offences.

8 *M.C.I. v. Brar, Pinder Singh* (F.C.T.D., no. IMM-6318-98), Campbell, November 23, 1999.

9 In *Lam, Chun Wai v. M.E.I.* (F.C.T.D., no. IMM-4901-94), Tremblay-Lamer, November 14, 1995, the Court held that since the scope of the crime of extortion in Canada was wider than the Hong Kong provision dealing with blackmail, it was not necessary for the adjudicator to go beyond the wording of the

that there are relevant defences available with respect to the offence in Canada which were not available in the foreign jurisdiction. Although the elements of the Canadian offence must include within them the elements of the foreign offence, they need not be identical.

Where the foreign offence is "broader" than the Canadian offence, it may still be possible to make a finding of equivalency if, based on the evidence, the facts as proven establish that all of the elements of the Canadian offence were contained in the acts committed by the person. In other words, evidence can be adduced that the actual activity for which the person was convicted abroad falls within the scope of the Canadian offence. Where such evidence is not adduced or available, it may not be possible to establish equivalency.[10]

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statute in order to determine whether the essential elements of the offence in Canada had been proven in the foreign proceedings.

[10] In *Brannson v. Canada (Minister of Employment and Immigration*, [1981] 2 F.C. 141 (C.A.), the proposed Canadian equivalent related to mailing letters and circulars, whereas the U.S. offence was broader and referred to mailing any matter or thing whatever (for the purpose of executing a scheme to defraud). In other words, a person could be convicted of the U.S. offence in question even if the materials transmitted or delivered were neither letters nor circulars. No evidence was introduced at the inquiry, however, as to what the applicant had mailed.

In *Hill, Errol Stanley v. M.E.I.* (F.C.A., no. A-514-86), Hugessen, Urie, MacGuigan, January 29, 1987. Reported: *Hill* v. *Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 1 (F.C.A.), the definition of theft as it pertains in the Texas statute was not produced before the adjudicator; the Court could not conclude that Texas law included the important additional requirement that the taking be "without colour of right", which was an essential ingredient of the offence of theft in Canada. Therefore, equivalency had not been established. The Court also noted that, although it might have been possible to adduce evidence confirming that the applicant did not have a factual foundation for a colour of right defence, there was no evidence adduced before the adjudicator to allow for this analysis and hence there could be no finding of equivalency.

In *Steward v. Canada (Minister of Employment and Immigration)*, [1988] 3 F.C. 487 (C.A.), the Oklahoma offence of first-degree arson did not make reference to a "colour of right" defence and it was found to be wider in scope than subsection 389(1) of the *Criminal Code*, as it encompassed the burning of property through negligence or inadvertence, which is covered by section 392 of the *Code*. On the meagre facts established by the record, however, it was impossible to determine which Canadian provision was the applicable one, and thus equivalency had not been established. See also *Lei, Alberto* v. *S.G.C.* (F.C.T.D., no. IMM-5249-93), Nadon, February 21, 1994. Reported: *Lei* v. *Canada (Solicitor General)* (1994), 24 Imm. L.R. (2d) 82 (F.C.T.D.), where, since the U.S. offence of reckless driving was wider than the Canadian offence, without evidence as to the circumstances which resulted in the charge in the state of Washington, no finding of equivalency could be made.

In *Li, supra,* footnote 5, the Court determined that the Canadian offence under paragraph 426(1)(*a*) of the *Criminal Code* was much narrower than section 9 of the Hong Kong *Prevention of Bribery Ordinance* in view of the rather restrictive interpretation given to "corruptly" by the Supreme Court of Canada. While it may have been possible to demonstrate through particulars of the Hong Kong charges, or from the evidence from the trial there, that in fact what the appellant did would also constitute an offence within the Canadian provision, such evidence was not led before the adjudicator.

No equivalency exists where the foreign offence is "broader" and the particulars of the offence committed would not bring the offence within the description of the Canadian offence, i.e., the person's actions would not render them culpable in Canada.

Similarly, if there is no equivalency of defences and the defences available in Canada are "broader" than those available in a foreign jurisdiction, this could result in a finding that there is no equivalency.[11] It would still be open to the Minister to establish, based upon an analysis of the particular facts which gave rise to the conviction in the foreign jurisdiction, that the person would not have been able to raise the broader Canadian defence. However, in the absence of such evidence and given the existence of broader defences in Canada, equivalency cannot be established.

A consideration of the Canadian and foreign statutes could also entail a consideration of how a particular provision has been interpreted in the respective jurisprudence.[12] However, the procedural or evidentiary rules of the two jurisdictions, including the matter of burden of proof, should not be compared, even if the Canadian rules are mandated by the *Canadian Charter of Rights and Freedoms*. The issue to be resolved in any equivalencing case is not whether the person would have been convicted in Canada, but whether there is a Canadian equivalent for the offence of which the person was convicted outside Canada.

There is no obligation to consider the constitutionality of foreign criminal law. It is not inappropriate for Canadian tribunals to recognize and accept the validity of foreign legal systems without measuring them against the Charter.[13]

While it is not mandatory for the Minister to present evidence of the criminal statutes of the foreign state, proof of foreign law ought to be made if the foreign statutory provisions exist.[14]

Steps in Analysis

For foreign convictions, where the foreign law is available:

1. Has the person been convicted of an offence outside Canada?

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11 *Li, supra,* footnote 5.

12 In *Masasi, Abdullai Iddi v. M.C.I.* (F.C.T.D., no. IMM-1856-97), Cullen, October 23, 1997. Reported: *Masasi v. Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 133 (F.C.T.D.), the Court determined that the adjudicator erred by not addressing the meaning in Canadian and U.S. law of the term "bodily harm", which was found to be an essential element of the offence under consideration (assault). The Court stated: "Clearly, a mere comparison of the words of the two provisions, without examining the legal content of those words, is insufficient in determining equivalency …".

13 In *Li, supra,* footnote 5, the Court rejected the appellant's argument that because the Hong Kong ordinance placed the burden of proving the defence of lawful authority or reasonable excuse on the accused, it offends subsection 11(*d*) of the *Canadian Charter of Rights and Freedoms* (i.e., the presumption of innocence).

14 *Dayan v. Canada (Minister of Employment and Immigration),* [1987] 2 F.C. 569 (C.A.).

2. What are the essential elements or ingredients of the foreign offence?

3. What are the essential elements or ingredients of the suggested Canadian equivalent offence?

4. Are these same elements present in the Canadian offence as in the foreign offence?

- If the essential elements or ingredients correspond in all relevant respects to those of the Canadian offence, there is equivalency – subject to possible defences (see below).

5. If the elements of the foreign and Canadian offences do not correspond:

(a) Is the Canadian offence *broader* than the foreign offence?

- If the elements of the foreign offence are contained within the scope of the Canadian offence, there is equivalency – subject to possible defences (see below).

(b) Is the Canadian offence *narrower* than the foreign offence?

- For equivalency, there must be evidence of the particulars of the foreign offence such that the conduct for which the person was convicted falls within the scope of the Canadian offence.

6. Are there any defences available in relation to either the foreign or Canadian offence?

- If the elements, including defences, of the foreign offence correspond to those of the Canadian offence, there is equivalency.

- If there are relevant defences available in the foreign jurisdiction that are not available under Canadian law, there is equivalency as the Canadian offence is broader than the foreign offence.

- If there are relevant defences under Canadian law that are not available in the foreign jurisdiction, there is no equivalency, unless there is evidence, based on the particular facts which gave rise to the foreign conviction, that the person would not have been able to raise the broader Canadian defence.

Where the Foreign Law Is Not Available

Where there is no evidence of the foreign law, evidence can be adduced as to the factual foundation for the conviction. That evidence will then be examined to determine whether the essential elements or ingredients of the Canadian offence as described in Canada had been proven in the foreign proceedings to secure a conviction or were otherwise established on the facts.[15] In such cases, there must be sufficient evidence before the decision-maker to establish the equivalency of the foreign offence to the Canadian one.[16]

Steps in Analysis

For convictions, where the foreign law is not available:

1. What conduct did the foreign court find that the person engaged in to support the conviction?

2. Is that same conduct punishable under Canadian law?

Malum in se Offences

Where the foreign offence falls within a category referred to as *malum in se,*[17] a strict comparison of all of the elements or ingredients may not be necessary.[18]

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15 In *Hill, supra,* footnote 10, the Court recognized the possibility of establishing equivalency either by analyzing the essential elements or, in the alternative, by adducing evidence as to the factual foundation for the conviction.

16 See, for example, *Moore, Terry Joseph v. M.E.I.* (F.C.A., no. A-501-88), Heald, Hugessen, Desjardins, January 31, 1989, where there was no evidence as to the relevant wording of the U.S. statute and no direct evidence or material from which it could be inferred that the applicant knew that the cheque in his possession had been stolen from the mail. The Court held that the decision in *Taubler v. Canada (Minister of Employment and Immigration),* [1981] 1 F.C. 620 (C.A.) did not support the proposition that the element of specific knowledge required by paragraph 314(1)(*b*) of the *Criminal Code* can be presumed in the absence of any evidence whatsoever. (In *Taubler,* the Court had held that, in the absence of evidence to the contrary, it was presumed that the Austrian law of misappropriation involved the element of *mens rea* and that a conviction under that law indicated that a finding of guilty intent had been made.) See also *Anderson v. Canada (Minister of Employment and Immigration),* [1981] 2 F.C. 30 (C.A.), where it was impossible, based on the scant evidence presented, to define the U.S. offence (grand larceny or attempted grand larceny in the third degree) with any precision and thus determine equivalency.

17 The legal concept of *malum in se* is defined in *Black's Law Dictionary* (6th edition) as follows (in part):

An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc.

18 This exception was referred to in *Button v. Canada (Minister of Manpower and Immigration),* [1975] F.C. 277 (C.A.), at 284, and in *Brannson, supra,* footnote 10, at 144. In *Button,* the Court stated: "... in our view,

The Federal Court of Appeal in *Dayan*,[19] cautioned, however, that

> ... proof of statutory provisions of the law of Israel ought to have been made in this case if such statutory provisions exist. Alternatively, the absence of such provisions in the statute law of that country, if that is the fact, ought to have been established. Reliance on the concept of offences as malum in se to prove equivalency with provisions of our Criminal Code, is a device which should be resorted to by immigration authorities only when for very good reason, established to the Adjudicator's satisfaction, proof of foreign law has been difficult to make and then only when the foreign law is that of a non-common law country. It is a concept to which resort need not be had in the case of common law countries. If it were not for the overwhelming evidence of the applicant's conviction in this case for an offence known to our law [i.e., robbery], I would not have hesitated to grant the application.

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there can be no presumption that the law of a foreign country coincides with a Canadian statute creating a statutory offence, except where the offence falls within one of the traditional offences commonly referred to as *malum in se*." This principle was applied by the Federal Court in *Clarke, Derek v. M.E.I.* (F.C.A., no A-588-84), Thurlow, Hugessen, Cowan, October 31, 1984 in relation to assault and robbery. It was also applied by the adjudicator in *Dayan, supra,* footnote 14 , where no evidence was tendered of the criminal statutes of Israel. The adjudicator determined that the applicant had been convicted in Israel of robbery and that robbery is basically theft with violence and fell within the *malum in se* exception. The Court, at 576-577, endorsed a more sophisticated analysis:

In this case, there was evidence ... that the applicant had been convicted in Israel of either or both of the offences of armed robbery and of robbery. ... at least in common law jurisdictions, they are crimes. We were informed that Israel is a country the system of justice of which is based on the common law ... The essence of the offence of robbery at common law was stealing whether or not such stealing was accompanied by violence, threats of violence or the use of a weapon in its commission. It is a crime because it is an offence which is contrary to society's norms as is reflected in the common law. A statute may codify it simply as such or it may, in the codification, include other ingredients requiring proof before a conviction can be obtained. Theft as described in paragraph 283(1)(a) of the *Code*, is an example of a codification which includes the ingredients requiring proof of taking "fraudulently and without colour of right". ...

We do know ... that the crime of robbery at common law has an essential ingredient "stealing" which the specific statute in Canada, section 302 of the *Code*, also has as its essential ingredient. By definition (section 2 of the *Code*) "steal" means to commit theft. Therefore, by virtue of section 283, the taking must be fraudulent and without colour of right. The transcripts of evidence in the record in this case establish beyond doubt ... that the applicant was a party to a theft of money to which none of the participants had any colour of right and the stealing of which was unlawful as the list of criminal convictions discloses. In all the circumstances, particularly since a weapon was used, it is hard to conceive that a plea of colour of right could succeed. Having accepted all of the evidence including the fact that the applicant had been convicted of robbery in Israel and that a weapon had been used in the commission of the offence, it follows that the Adjudicator was entitled to conclude that he had been convicted of an offence punishable under section 302 of the *Code*.

However, in *Hill, supra,* footnote 10, the Court stated, at 5: "Theft, however, is an offence whose essential elements are not self-evident."

[19] *Dayan, supra,* footnote 14, at 578.

Committing an Offence Outside Canada

The wording of paragraphs 36(1)(c) and 36(2)(*c*) of *IRPA* is different from that found in paragraphs 36(1)(*b*) and 36(2)(*b*), in that the former provisions do not state that the offence for which the person could be punishable in the foreign jurisdiction must constitute an offence in Canada. Rather they provide that the act or omission must constitute an offence in the foreign jurisdiction, and one in Canada. In other words, it appears that there is no requirement that the foreign and Canadian offences must be compared and found to be equivalent,[20] though this issue is not clearly settled in the jurisprudence.

Another difference is that paragraphs 36(1)(*b*) and 36(2)(*b*) apply in cases where there is a conviction outside Canada, whereas paragraphs 36(1)(*c*) and 36(2)(*c*) apply where it is alleged that the person has committed an offence abroad. The latter provision has been relied on in cases where a person has fled justice after being charged but before being tried or where a person has never been charged in the jurisdiction where the offence was committed. It is not clear whether paragraphs 36(1)(*c*) and 36(2)(*c*) were intended to apply to persons who have been convicted of an offence committed in the foreign jurisdiction or who were tried in that jurisdiction but the court chose not to enter a conviction. The Immigration Division has applied the provision in the former case,[21] and the Federal Court appears to have accepted that it can apply in the latter case.[22]

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[20] This approach was taken by the adjudicator in *M.C.I. v. Legault, Alexander Henri* (F.C.A., no. A-47-95), Marceau, MacGuigan, Desjardins, October 1, 1997. Reported: *Canada (Minister of Citizenship and Immigration) v. Legault* (1997), 42 Imm. L.R. (2d) 192 (F.C.A), where the Court set out the adjudicator's analysis without considering whether it was the correct interpretation of the *Immigration Act*. Leave to appeal to the Supreme Court of Canada was refused March 12, 1998. For a more explicit statement on the "double criminality" requirement, see *Zeon, Kyong-U v. M.C.I.* (F.C., no. IMM-7766-04), Campbell, September 29, 2005; 2005 FC 1338. In *Mugesera, supra*, footnote 2, at para. 59, the Supreme Court held that, where the Minister relies on a crime committed abroad (with which the person was charged in Rwanda), a conclusion that the elements of the crime in Canadian criminal law have been made out will be deemed determinative in respect of the commission of crimes under Rwandan criminal law, adding that "No one challenges the fact that the constituent elements of the crimes are basically the same in both legal systems." However, in *Pardhan, Wazir Ali v. M.C.I.* (F.C., no. IMM-936-06), Blanchard, July 20, 2007; 2007 FC 756 and *Timis, Ionita v. M.C.I.* (F.C., no. IMM-1446-07), Blanchard, December 12, 2007; 2007 FC 1303, the Court suggested that the essential elements of the foreign and Canadian offences must be compared to ascertain whether or not the evidence adduced was sufficient to establish equivalency.

[21] In *Timis, supra*, footnote 20, the applicant was convicted *in absentia* yet the Minister proceeded under paragraph 36(1)(*c*); the decision was overturned on other grounds. In *M.P.S.E.P v. Watson, Malcolm* (ID A6-00450), Lasowski, December 18, 2006 (reasons signed January 22, 2007) (*RefLex* Issue 304), the subject of the admissibility hearing was convicted in New York State of the offences of sexual abuse in the third degree and endangering the welfare of a child. The Immigration Division found that the offence of sexual abuse in the third degree is equivalent to the offence of sexual exploitation under section 153 of the Canadian *Criminal Code*. The foreign offence is broader than the Canadian offence, as the latter contains the essential element that the accused be in a position of trust or authority towards the victim. Since the subject of the proceeding was the victim's ninth grade English teacher, he was in a position of trust with respect to the victim. He was therefore found to be a person described in section 36(1)(*b*) of *IRPA.* He was also found to be described in section 36(1)(*c*) of the Act based on the same facts.

[22] In *Magtibay, Brigida Cherly v. M.C.I.* (F.C., no. IMM-2701-04), Blais, March 24, 2005; 2005 FC 397, the Court in the Philippines found that although the applicant's spouse had committed an offence, since the

Steps in Analysis

Where a foreign "commission" is alleged:

1. What conduct did the evidence establish that the person engaged in outside Canada?

2. Was it punishable in the foreign jurisdiction?

3. Is that same conduct punishable under Canadian law?

EVIDENTIARY MATTERS

Foreign Convictions

The Federal Court of Appeal has held that the validity of a foreign conviction on the merits cannot be put in issue.[23]

As stated in *Ward,*[24] the issue is not whether the applicant would have been convicted if the entire facts had been revealed at the trial abroad, or whether he would have been convicted in Canada on those facts; rather the issue is whether there are reasonable grounds to believe, based on the facts at trial and the admissions of the applicant, that the foreign conviction is equivalent to one in Canadian law. Moreover, the Court also rejected the applicant's argument that his offence was political in nature and should not, therefore, be considered.[25]

However, in one decision, the Federal Court held that the adjudicator was required to consider the applicant's allegation that the statements he made to the police that resulted in his conviction in India were given under torture.[26]

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victim pardoned her aggressor, no conviction resulted. An immigration officer found the offence equivalent to sexual assault in Canada and gave no effect to the pardon. The Court held that the immigration officer was correct in not giving effect to the pardon and finding inadmissibility under s. 36(1)(*c*) of *IRPA,* since there was no need to prove a conviction; rather, certain acts must have been committed that render the person inadmissible.

23 *Brannson, supra,* footnote 10, at 145; *Li, supra,* footnote 5, at 256.

24 *Ward, Patrick Francis v. M.C.I.* (F.C.T.D., no. IMM-504-96), Heald, December 19, 1996. Reported: *Ward v. Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 102 (F.C.T.D.). Thus the Court rejected the applicant's argument that he had been coerced into pleading guilty in order to protect his wife and children.

25 *Ward,* ibid., at 10. The Court held: "It has never been the case in Canadian criminal law that, because someone had a particular motive in committing a crime, he or she lacked the intention to commit the act. The applicant in the case at bar, while he may have been motivated to take hostages for political reasons, nonetheless still had the intention to take hostages."

26 *Sian, Jasvir Singh v. M.C.I.* (F.C., no. IMM-1673-02), O'Keefe, September 3, 2003; 2003 FC 1022.

The Federal Court of Appeal has held that a conviction *in absentia* is a conviction.[27] Foreign dispositions in criminal matters may take forms unknown under Canadian law and their effect will have to be determined by the IAD.[28]

If the Canadian offence used for equivalencing is unconstitutional then there can be no equivalent Canadian offence.[29] However, the fact that a foreign conviction is subsidiary to one whose Canadian equivalent has been declared unconstitutional does not extinguish the foreign conviction nor the subsidiary offence (jumping bail) in either country.[30]

Lack of a certificate of conviction, while it leaves something to be desired in the particularity of the evidence, can be overcome by other evidence.[31] The Immigration Appeal Board held that a letter from the Jamaica Constabulary indicating that their records show a conviction was *prima facie* evidence of inadmissibility.[32]

Where value is one of the elements of an offence, the decision-maker should ensure that evidence is adduced as to the respective exchange values on the date of the commission of the offence with which the person is charged abroad before determining the equivalency of the foreign law for such offence with the Canadian law.[33]

The use of the word "convicted" means a conviction that has not been expunged.[34] Paragraph 36(3)(*b*) provides that inadmissibility on the grounds of serious criminality or criminality may not be based on a conviction in respect of which there has been a final determination of acquittal, for example, on appeal to a higher court. Thus, a

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27 *Arnow, Leon Maurice v. M.E.I.* (F.C.A., no. A-599-80), Heald, Ryan, MacKay, September 28, 1981. Leave to appeal to the Supreme Court of Canada was refused, [1982] 2 S.C.R. 603.

28 See, for example, *Drake, Michael Lawrence v. M.C.I.* (F.C.T.D., no. IMM-4050-98), Tremblay-Lamer, March 11, 1999. Reported: *Drake v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 218 (F.C.T.D.), which considered the effect of an "Alford plea" (i.e., a plea bargain, not a confession) in the State of Washington. See also *Sicuro, Fortunato v. M.C.I.* (F.C., no. IMM-695-02), Mosley, March 25, 2004; 2004 FC 461, where the Court considered the effect of the Italian "patteggiamento" process, a form of plea bargain whereby the applicant had agreed to an implied plea of guilty.

29 *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 (T.D.). The applicant had been convicted in New York State of sodomy. The Court held that the Canadian equivalent—section 159 of the *Criminal Code* (prohibiting anal intercourse with persons under 18)—violated sections 7 and 15 of the *Charter*. In *Howard, Kenrick Kirk v. M.C.I.* (F.C.T.D., no. IMM-5252-94), Dubé, January 4, 1996, the Court stated that the IAD does not have the jurisdiction to rule on the constitutionality of any legislation other than the *Immigration Act* (since replaced by *IRPA*). Challenges to the constitutionality of other federal legislation, as it may arise in an appeal before the IAD, must be brought in another forum.

30 *Halm v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 547 (T.D.), at 580-582.

31 *Singleton, George Bruce v. M.E.I.* (F.C.A., no. A-813-83), Thurlow, Mahoney, Stone, November 7, 1983.

32 *Cameron, Beverley Mae v. M.E.I.* (I.A.B. V83-6504), D. Davey, Hlady, Voorhees, September 11, 1984, at 2.

33 *Davis, Kent Douglas* v. *M.E.I.* (F.C.A., no. A-81-86), Urie, Hugessen, MacGuigan, June 19, 1986.

34 *Burgon, supra,* footnote 4.

person may no longer be inadmissible at the time of their hearing before the IAD where their conviction has been overturned on appeal.

Where no issue of an appeal of a conviction is raised at the hearing, the member is entitled to rely on the evidence adduced by the parties. There is no duty to conduct a further inquiry beyond the evidence before the member.[35]

The words "not arising out of a single occurrence" found in paragraph 36(2)(*b*) were interpreted in two Federal Court cases decided in relation to a similarly worded provision under the *Immigration Act.* It was held that an "occurrence" is synonymous with the terms "event" and "incident" and not with "a course of events". Therefore, summary conviction offences which were committed on different dates arose out of different occurrences rather than a single occurrence.[36]

Committing an Offence Outside Canada

While documents such as a foreign police report, arrest warrant, indictment or pre-sentence report can be taken into account, the decision-maker must make an independent evaluation of the evidence presented at the hearing and not simply rely on those documents.

In *Legault*, the Federal Court–Trial Division held that the contents a U.S. federal grand jury indictment and the ensuing arrest warrant, on which the adjudicator relied, did not constitute evidence of the commission of alleged criminal offences.[37] The Federal Court of Appeal overturned this decision and determined that the indictment and warrant for arrest were appropriate pieces of evidence to consider.[38]

In *Kiani*,[39] the adjudicator received in evidence a police report indicating that the applicant had participated in a violent demonstration in Pakistan and had been charged

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35 *Soriano, Teodore v. M.C.I.* (F.C.T.D., no. IMM-2335-99), MacKay, August 29, 2000.

36 *Alouache, Samir v. M.C.I.* (F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995. Reported: *Alouache v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 68 (F.C.T.D.). Affirmed on other grounds by *Alouache, Samir v. M.C.I.* (F.C.A., no. A-681-95), Strayer, Linden, Robertson, April 26, 1996. In this case, the applicant was convicted of three offences that occurred on different dates. The applicant argued that these convictions arose out of a single occurrence, namely a marital dispute. The Court did not accept this argument as the breakdown of the applicant's marriage was "a course of events" and not a single occurrence. Compare with *Libby, Tena Dianna v. M.E.I.* (F.C.A., no. A-1013-87), Urie, Rouleau, McQuaid, March 18, 1988. Reported: *Libby v. Canada (Minister of Employment and Immigration)* (1988), 50 D.L.R. (4th) 573 (F.C.A.), where the Court held that the applicant's original charge of theft and his failure to report for fingerprinting in connection with that charge arose out of the same occurrence.

37 *Legault, Alexander Henri v. S.S.C.* (F.C.T.D., no. IMM-7485-93), McGillis, January 17, 1995. Reported: *Legault v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 255 (F.C.T.D.).

38 *Legault* (F.C.A.), *supra,* footnote 20.

39 *Kiani, Raja Ishtiaq Asghar v. M.C.I.* (F.C.T.D., no. IMM-3433-94), Gibson, May 31, 1995. Reported: *Kiani v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 269 (F.C.T.D.).

with criminal offences as a result. The applicant acknowledged his participation and claimed he had lost a leg as a result of a gunshot wound. The Federal Court–Trial Division held that the adjudicator had sufficient evidence on which to reasonably conclude that the applicant's testimony that he was not guilty of the charges was neither credible nor trustworthy. Moreover, the adjudicator had made an independent determination on the basis of the evidence before him and did not simply rely on the police report. In upholding the Trial Division decision in *Kiani*, the Federal Court of Appeal[40] commented that the facts before the adjudicator in this case were more extensive than in *Legault*, and noted that, in any event, the Court of Appeal had reversed the Trial Division decision in *Legault*.

In *Ali*,[41] the Court held that the majority of IAD erred in appearing to consider there to be a burden on the applicant to establish his version of the events, including the self-defence argument. The burden of proof rested with the Minister, including the burden to disprove self-defence. The majority also erred in speculating, in the face of a lack of expert evidence, regarding whether the fatal wound was inflicted accidentally or intentionally.

In *Bertold,*[42] the Court held that the IAD erred in admitting into records relating to outstanding charges in Germany, as they were obtained contrary to the laws of Germany, and thus their admission would thus contravene sections 7 and 8 of the *Canadian Charter of Rights and Freedoms.*

Section 133 of *IRPA* provides that, pending the disposition of their claim or if refugee protection is conferred, a refugee claimant who came into Canada directly or indirectly from the country in respect of which the claim is made, cannot be charged under *IRPA* or the *Criminal Code* for using false documents or misrepresentation in relation to coming into Canada. The Federal Court–Trial Division has held that, where a Convention refugee uses a false passport to come to Canada, that would not give rise to inadmissibility.[43] In another case, the Federal Court held that the reprieve covers only fraudulent documents obtained for the purpose of entering Canada, and does not extend to the use of other fraudulent documents.[44]

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40 *Kiani, Raja Ishtiaq Asghar v. M.C.I.* (F.C.A., no. A-372-95), Isaac, Linden, Sexton, October 22, 1998.

41 *Ali, Abdi Rahim v. M.C.I.* (F.C.T.D., no. IMM-2993-99), Gibson, July 20, 2000.

42 *Bertold, Eberhard v. M.C.I.* (F.C.T.D., no. IMM-5228-98), Muldoon, September 29, 1999. Reported: *Bertold v. Canada (Minister of Minister of Citizenship and Immigration)* (1999), 2 Imm. L.R. (3d) 46 (F.C.T.D.).

43 In *Vijayakumar, Nagaluxmy v. M.C.I.* (F.C.T.D., no. IMM-4071-94), Jerome, April 16, 1996. Reported: *Vijayakumar v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 176 (F.C.T.D.), the Court held that since the applicant's (sponsored) husband used a false passport to get out of Sri Lanka unharmed, not to defraud immigration officials, he had not committed an offence as contemplated by subparagraph 19.1(*c.1*)(ii) of the *Immigration Act*.

44 *Uppal, Harminder Singh v. M.C.I.* (F.C., no. IMM-2663-05), Layden-Stevenson, March 15, 2006; 2006 FC 338.

Relevant Time for Determining Inadmissibility

The facts at the time of the offence must be assessed based on the Canadian law as it reads at the time of the admissibility hearing or appeal to the IAD. Thus a person may no longer be inadmissible as a result of changes to the *Criminal Code* occurring after their criminal conviction.

In *Robertson*[45] the applicant was ordered deported pursuant to paragraph 19(1)(*c*) of the *Immigration Act* based on a 1971 conviction of possession of stolen property valued at more than $50, an offence which carried a maximum of 10 years' imprisonment. However, the *Criminal Code* was subsequently amended such that that penalty applied to stolen goods exceeding $200, which amendment was in force at the time of the inquiry in 1978. (According to the evidence, the retail value of the stolen property in question did not exceed $150, and the wholesale value was approximately $45 to $60; thus the maximum punishment at the time would have been imprisonment for two years.) In setting aside the deportation order, the Federal Court of Appeal stated:

> In my opinion, 19(1)(c) can only be used to deport a person where that person has been convicted of an offence for which the maximum punishment at the date of the deportation order is ten years. The word "constitutes" in the present tense supports this view.

Conversely, a person may not have been inadmissible at the time of their conviction, but has become so as a result of a subsequent amendment to the *Criminal Code*.

In *Ward*,[46] at the time of the applicant's conviction in Ireland of the offence of false imprisonment, the Canadian equivalent offence, namely forcible confinement, carried a term of imprisonment of five years, whereas at the date of the deportation order, the offence provided for a term of imprisonment not exceeding 10 years. The Federal Court–Trial Division held that there was no reason to distinguish the principle enunciated in *Robertson*, and that the adjudicator had not erred in considering the (more severe) punishment for the offence as of the date of the deportation order.

The Federal Court–Trial Division has held that an amendment to the *Immigration Act* could render someone inadmissible based on an earlier conviction that would not

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[45] *Robertson v. Canada (Minister of Employment and Immigration)*, [1979] 1 F.C. 197 (C.A.). See also *Weso, Mohamed Omar v. M.C.I.* (F.C.T.D., no. IMM-516-97), Cullen, April 21, 1998.

[46] *Ward, supra*, footnote 24. In the related Immigration Appeal Board decision of *Reyes v. Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 148 (I.A.B.), there was the added complication that the foreign offence was not equivalent to an indictable offence in Canada at the time the application for permanent residence was filed, but became one prior to the conclusion of the processing of the application. The Board held that such an offence could not bring the applicant within the ambit of section 19 and that the visa officer could not apply amendments to the *Criminal Code* enacted after the filing of the application to the detriment of the applicant.

have attracted inadmissibility before the amendment.[47] However, an amendment to *Immigration Act* between the time of the admissibility hearing (at which a removal order was issued) and the time the appeal was heard, was held not to accrue to the benefit of the person, who would no longer have been inadmissible as a result of the amendment. The Federal Court of Appeal stated that unless Parliament has clearly indicated otherwise, the correctness of the adjudicator's decision must be measured by the law in force at the time of the decision.[48]

Section 44 Report as a Limiting Factor

The report must specify the offence committed outside Canada and the equivalent offence under an Act of Parliament.[49] However, it is not a requirement that "the specific facts must be precisely as alleged in the report providing the requirements of natural justice are complied with."[50]

The Federal Court of Appeal has held that an adjudicator is not bound to consider only the putative Canadian equivalent(s) set out in the report. The adjudicator may consider other Canadian equivalents if the appropriate equivalent leads to the person being described in the provision of the *Immigration Act* cited in the report.[51]

In *Uppal,* the Federal Court held that there is nothing in *IRPA,* the Regulations or the *Immigration Division Rules* to suggest that a section 44 report cannot be amended. Substituting a different Canadian equivalent offence does not require that the report be returned to the Minister for a fresh determination where the substitution conforms to the description of the act in question.[52]

In *Drake,*[53] the applicant had been convicted *in absentia,* in 1992, in the State of Washington of child molestation. In 1993, an adjudicator made a deportation order for subparagraph 27(1)(*a.1*)(i) of the *Immigration Act,* and did not rule on the subparagraph 27(1)(*a.1*)(ii) allegation. In 1994, a U.S. judge vacated the *in absentia* conviction and the applicant pleaded guilty to the charges on which the earlier conviction had been based.

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47 *Kanes, Chellapah v. M.E.I.* (F.C.T.D., no. IMM-1918-93), Cullen, December 14, 1993. Reported: *Kanes v. Canada (Minister of Employment and Immigration)* (1993), 22 Imm. L.R. (2d) 223 (F.C.T.D.); *Cortez, Rigoberto Corea v. S.S.C.* (F.C.T.D., no. IMM-2548-93), Rouleau, January 26, 1994. Reported: *Cortez v. Canada (Secretary of State)* (1994), 23 Imm. L.R. (2d) 270 (F.C.T.D.).

48 *Bubla v. Canada (Solicitor General),* [1995] 2 F.C. 680 (C.A.).

49 *Timis, supra,* footnote 20.

50 *Eggen v. Canada (Minister of Manpower and Immigration),* [1976] 1 F.C. 643 (C.A.), at 645. See also *Canada (Minister of Manpower and Immigration) v. Brooks,* [1974] S.C.R. 850, at 854-55. In *Villanueva Perez, Eduardo v. M.C.I.* (F.C., no. IMM-2398-06), Phelan, November 27, 2006; 3006 FC 1434, the Court found that the report was sufficiently unclear such that the applicant did not have proper notice of the issues required to be addressed.

51 *Clarke, supra,* footnote 18.

52 *Uppal, supra,* footnote 44.

53 *Drake, supra,* footnote 28.

The appeal before the IAD was postponed from 1994 until 1998. The IAD quashed the deportation order based on subparagraph 27(1)(*a.1*)(i), but made a new deportation order based on subparagraph 27(1)(*a.1*)(ii), which allegations had never been abandoned. The Federal Court–Trial Division did not accept the applicant's main submission that he had not been properly informed of the nature of the proceedings before the IAD.

Discharges and Pardons

Foreign discharges or pardons are not necessarily recognized in Canada. The legislation providing for the expunging of a conviction should be accorded respect where the laws and the legal system are similar to Canada's.[54] The Federal Court of Appeal in *Saini*,[55] endorsed the following statement of the law with respect to the effect to be given to a foreign discharge or pardon:

> [24] To summarize, our jurisprudence requires that three elements must be established before a foreign discharge or pardon may be recognized: (1) the foreign legal system as a whole must be similar to that of Canada; (2) the aim, content and effect of the specific foreign law must be similar to Canadian law; and (3) there must be no valid reason not to recognize the effect of the foreign law.

The Court also held that in the absence of evidence as to the motivating considerations which led to the grant of a pardon by another state jurisdiction, the Board is not bound by the pardon. The principles in *Saini* continue to be applied under *IRPA.* This topic is discussed in more detail below.

Effect of a Discharge

In *Fenner*,[56] the respondent was given a deferred sentence after a conviction in the State of Washington of the offence of "negligent homicide by means of a motor vehicle". This meant that at the end of a period of probation he could request the opportunity to withdraw his guilty plea and have the charge dismissed, which is, in fact, what occurred. The Immigration Appeal Board decided that this procedure, unknown to Canadian law, was not equivalent to an absolute or conditional discharge and that the conviction in the first instance remained part of the applicant's record.

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54 *Burgon*, *supra,* footnote 4.

55 *Canada (Minister of Citizenship and Immigration) v. Saini*, [2002] 1 F.C. 200 (F.C.A.). The Court also held that the crime in question, hijacking, is so serious that it provided a solid rationale to depart from the principle that a pardon granted by another jurisdiction, whose laws are based on a similar foundation as in Canada, should be recognized in Canada.

56 *M.E.I. v. Fenner, Charles David* (I.A.B. V81-6126), Campbell, Tremblay, Hlady, December 11, 1981.

Effect of a Pardon

The granting of a pardon in another country does not necessarily render the person concerned admissible to Canada. The Federal Court of Appeal considered the effect of a pardon in a foreign jurisdiction in *Burgon*.[57] The Court concluded that in using the word "convicted" in the inadmissibility provisions, Parliament meant a conviction that has not been expunged pursuant to any other legislation it had enacted. The Court further held that when the laws and legal system of the foreign country are substantially similar to those of Canada in purpose, content and result, effect should be given to a foreign pardon unless there is good reason not to do so.

> The further question to consider is whether the U.K. legislation, which is similar in purpose, but not identical to the Canadian law, should be treated in the same way. In both countries, certain offenders are granted the advantage of avoiding the stigma of a criminal record so as to facilitate their rehabilitation. There is no good reason for Canadian immigration law to thwart the goal of this British legislation, which is consistent with the Canadian law. Our two legal systems are based on similar foundations and share similar values. …
>
> Unless there is some valid basis for deciding otherwise, therefore, the legislation of countries similar to ours, especially when their aims are identical, ought to be accorded respect. While I certainly agree with Justice Bora Laskin that the law of another country cannot be "controlling in relation to an inquiry about criminal convictions to determine whether immigration to Canada should be permitted" (see Minister of Manpower and Immigration v. Brooks, [1974] S.C.R. 850, at page 863), we should recognize the laws of other countries which are based on similar foundations to ours, unless there is a solid rationale for departing therefrom. …

In the case of *Lui*,[58] the Federal Court–Trial Division found that the scope of Hong Kong's *Rehabilitation of Offenders Ordinance* is much narrower than that of the

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[57] *Burgon, supra,* footnote 4, at 61-62, 63. The Court had to consider the application of the United Kingdom *Powers of Criminal Courts Act, 1973*, which provided that a person who was convicted of an offence (like Burgon's offence) and received a probation order was deemed not to be convicted of the offence. In the Court's view, Burgon was not considered convicted under United Kingdom law; therefore, because the United Kingdom and Canadian legal systems were so similar, there was no conviction for purposes of the *Immigration Act*. In *Barnett, John v. M.C.I.* (F.C.T.D., no. IMM-4280-94), Jerome, March 22, 1996. Reported: *Barnett v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 1 (F.C.T.D.), where the Court considered the United Kingdom *Rehabilitation of Offenders Act, 1974*, which provided that, where a person was convicted and sentenced for certain offences and was then rehabilitated, the conviction was expunged. The Court applied the rationale in *Burgon* and found that, although there were differences in the two pieces of legislation, the effect was the same: under both statutes, the person could not be said to have been convicted. Therefore, Barnett was not considered to have been convicted in the United Kingdom and he was not convicted for purposes of the *Immigration Act*.

[58] *Lui, Wing Hon* v. *M.C.I.* (F.C.T.D., no. IMM-2783-95), Rothstein, July 29, 1997. Reported: *Lui v. Canada (Minister of Citizenship and Immigration)* (1997), 39 Imm. L.R. (2d) 60 (F.C.T.D.), at 63-64.

Criminal Records Act of Canada. The effect of the latter legislation, subject to very few exceptions pertaining to certain provisions of the *Criminal Code,* is to vacate a conviction if the National Parole Board grants a pardon and to remove any disqualification to which the person so convicted is, by reason of the conviction, subject by virtue of the provision of any Act of Parliament. While, in a general sense, the purpose of the Hong Kong Ordinance is similar in nature, the Court found that its effect and operation were subject to numerous restrictions and exceptions. In particular, the conviction is not to be treated as spent with respect to the operation of a law providing for a disqualification as a result of the conviction. Alternatively, the Court found that if the Hong Kong Ordinance should be recognized, all of its provisions should be recognized, and therefore, by its terms, the Hong Kong conviction would not be spent.

In overturning the decision of the Trial Division, the Federal Court of Appeal in *Saini*[59] summarized the law with respect to the effect that is to be given to a foreign discharge or pardon as follows:

> [24] … our jurisprudence requires that three elements must be established before a foreign discharge or pardon may be recognized: (1) the foreign legal system as a whole must be similar to that of Canada; (2) the aim, content and effect of the specific foreign law must be similar to Canadian law; and (3) there must be no valid reason not to recognize the effect of the foreign law.

The Court went on to elaborate on these requirements, and the Canadian law regarding pardons, as follows:

> [29] … The systems must be "similar" not "somewhat similar". There is a substantial difference between the two tests; it is not a trivial distinction. Of course, that does not mean that the two systems must be identical, for no two legal systems are. It does require, however, that there be a strong resemblance in the structure, history, philosophy and operation of the two systems before its law will be given recognition in this context.
>
> [30] Moreover, the similarity of the systems must normally be proved by evidence to that effect, except perhaps in the rare situation where it is obvious. … it is not enough to assume, without evidence, as the Motions Judge has done, that another country's system is "somewhat similar" to ours. …
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> [31] … we must further examine the aim, content and effect of the specific legislation in question to determine if it is consistent with Canadian law and, more precisely, Canadian immigration law … We must first explore the similarity of the aim and rationale of Canadian law to the foreign law respecting pardons. It seems clear that the aims of the Canadian laws are to eliminate the potential future effects of convictions … Although it may be that the goals

[59] *Saini, supra,* footnote 55.

and rationale for pardoning provisions around the world are similar, there must be evidence of that adduced. …

[32] Second, we must address the content of Canadian laws as compared to the foreign law regarding pardons, which includes the process as well as the factual basis upon which it may be granted. Canadian pardons, when granted, are almost invariably administered under the Criminal Records Act, … a legislative scheme formulated by Parliament, which outlines provisions regarding the guidelines, procedures and effects of pardons. The Criminal Code contains provisions authorizing the Governor in Council to grant free or conditional pardons … Even in the extremely rare circumstances where the royal prerogative is invoked, established formal procedures are used to assess applicants and make recommendations to the Crown, which may grant or deny the pardon.

[33] It is significant that, with any pardon in Canada, whether granted under the Criminal Records Act, the Criminal Code, or the royal prerogative of mercy, a detailed and thorough process determines whether a pardon may or may not be granted to an applicant. …

[34] … Without evidence, this Court cannot draw a conclusion that the content of the pardon law and procedure was similar to ours …

[35] Third, we must explore the effect of a pardon in Canada as compared to the effect of the foreign pardon. The Supreme Court of Canada discussed the meaning and effect of a Canadian pardon in Therrien (Re), 60 … The Court … focussed on the effect of pardons under the Criminal Records Act. It explained that a pardon under the Criminal Records Act "removes any disqualification to which the person is subject by virtue of any federal Act or regulation made thereunder" (at paragraph 116). Importantly, however, the Court held that a convicted person cannot deny having been convicted and that such a pardon does not wipe out the conviction itself; it only limits its negative effects. …

[40] It was clearly decided in Smith61 and Therrien that a Canadian pardon only removes the disqualifications resulting from a conviction, and does not erase the conviction itself. We would note that free pardons may also be granted in Canada, which are expressly deemed by the Criminal Code to erase the conviction as if it had never existed (see s. 748(2)). Importantly, however, a free pardon can only be granted by the Governor in Council where a person has been wrongly convicted, and even then, there are established procedures that must be followed. …

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60 *Therrien (Re),* [2001] S.C.R. 35.

61 *Smith v. Canada (Minister of Citizenship and Immigration),* [1998] 3 F.C. 144 (T.D.).

> [41] Even if a foreign jurisdiction has a legal system similar to ours, the enquiry is not complete. … Canadian immigration law cannot be bound by the laws of another country, even where that foreign law's mirror our own. There will still be situations where Canadian immigration law must refuse to recognize the laws of close counterparts.
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> [42] Thus, we must assess the third requirement of Burgon, that there was, "no good reason for Canadian immigration law to thwart the goal of [the] British legislation". This Court expressly stated in that case that we ought to respect the legislation of countries similar to ours, "unless there is some valid basis for deciding otherwise" or there is a "solid rationale" for not doing so. …
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> [43] In our view, the seriousness of the offence can be considered under this third requirement. … The gravity of the crime of highjacking is obvious; it is universally condemned and punished severely. Although there is no evidence of the particular circumstances of this offence, highjacking is an offence that is always very serious. …It is clear that highjacking is considered to be among the most serious of criminal offences. …
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> [44] In our view, the gravity of the offence can and should be considered when deciding whether or not to give effect to a foreign pardon. Even if the Pakistani legal system were similar, and even if the pardon were given under a law similar to Canadian law, the conviction in this case was for an offence so abhorrent to Canadians, and arguably so terrifying to the rest of the civilized world, that our Court is not required to respect a foreign pardon of such an offence.

The Federal Court has considered the application of these principles in several cases. In one case, the Federal Court held that an acquittal based solely on a pardon by the victim of a crime is not similar to that of Canadian law and should not be recognized in Canada.[62]

Rehabilitation

Paragraph 36(3)(*c*) of *IRPA* provides that paragraphs 36(1)(*b*) and (*c*) and 36(2)(*b*) and (*c*) – i.e., foreign convictions and offences committed outside Canada – do not constitute inadmissibility for permanent residents or foreign nationals, if they:

- satisfy the Minister that they have been rehabilitated after the *prescribed period* in accordance with section 17 of the *Immigration and Refugee Protection Regulations*; or

[62] *Magtibay*, *supra*, footnote 22.

- are a member of a *prescribed class* that are deemed to have been rehabilitated, in accordance with section 18 of the Regulations.

Section 17 of the Regulations provides that, after a period of 5 years from the completion of any sentence imposed or from the commission of an offence, a person will no longer be inadmissible if the person is able to satisfy the Minister that he or she has been rehabilitated, provided that the person has not been convicted of a subsequent offence other than a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

Deemed rehabilitation under section 18 of the Regulations is triggered by the passage of a period of time after the completion of a sentence or the commission of an offence, as the case may be, without having to apply to the Minister. Deemed rehabilitation does not apply to persons who are inadmissible on the ground of serious criminality. Persons inadmissible on the ground of serious criminality, as well as others who do not qualify for deemed rehabilitation, can apply to the Minister for individual rehabilitation under Regulation 17.

Section 18 of the Regulations sets out three prescribed classes of persons who can qualify for deemed rehabilitation:

> (a) persons convicted outside Canada of only one offence that, if committed in Canada, would constitute an indictable offence (including a "hybrid" offence) punishable in Canada by a sentence of less than 10 years, and they meet the following requirements:
>
> - at least 10 years have elapsed since the completion of their sentence
> - they have not been convicted in Canada of an indictable offence
> - they have not been convicted in Canada of any summary conviction offence in the last 10 years or more than one summary conviction offence in the 10 years before that (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
> - they have not in the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
> - they have not in the 10 years before that been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence
> - they have not committed an act described in section 36(2)(*c*)

(b) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences, and they meet the following requirements:

- at least 5 years have elapsed since completion of their sentences
- they have not been convicted in Canada of an indictable offence
- they have not been convicted in Canada of a federal offence in the last 5 years (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the 5 years before that been convicted in Canada of more than one summary conviction offences (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the last 5 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have been convicted outside Canada of an offence referred to in s. 36(2)(*b*) that, if committed in Canada, would constitute an indictable offence
- they have not committed an act described in section 36(2)(*c*)

(c) persons who have committed only one act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence (including a "hybrid" offence), punishable in Canada by a maximum sentence of less than 10, and they meet the following requirements:

- at least 10 years have elapsed since the commission of the offence
- they have not been convicted in Canada of an indictable offence
- they have not been convicted in Canada of any summary conviction offence in the last 10 years or more than one summary conviction offence in the 10 years before that (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)

- they have not in the 10 years before that been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence
- they have not been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence

There is very little jurisprudence from the Federal Court interpreting the deemed rehabilitation provision.[63] Unlike individual rehabilitation (under section 18 of the Regulations), which is at the discretion of the Minister, it is arguable that the deemed rehabilitation provisions can be applied by the IAD.

As under section 17 and 18 of the Regulations, one of the criteria for rehabilitation in the predecessor sections 19(1)(*c.1*) and 19(2)(*a.1*) of the *Immigration Act*, was that at least five years have elapsed "since the expiration of any sentence imposed for the offence." For immigration purposes, the IAD held that "any sentence imposed" would include any period of incarceration, probation or the suspension of a privilege.[64]

The Minister of Public Safety and Emergency Preparedness must decide the question of rehabilitation. Reasons are required to be provided for decisions of this nature.[65] The Minister can delegate the power to determine rehabilitation.[66]

The IAD held, with respect to the predecessor provision, that it did not have jurisdiction to determine whether a person has or has not been rehabilitated.[67] The same would appear to hold true for section 17 of the Regulations, which specifies that it is the Minister who must be satisfied. Rehabilitation is, however, a factor which the IAD can consider in the exercise of its discretionary jurisdiction.

The Federal Court–Trial Division held in *Dance,*[68] that a person is inadmissible until such time as the Minister has made a positive determination with respect to

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63 See, for example, *Driessen, Kenneth Leroy v. M.C.I.* (F.C., no. IMM-9044-04), Snider, November 1, 2005; 2005 FC 1480.

64 *Shergill, Ram Singh v. M.E.I.* (IAD W90-00010), Rayburn, Arpin, Verma, February 19, 1991.

65 *Thamber, Avtar Singh v. M.C.I.* (F.C.T.D., no. IMM-2407-00), McKeown, March 12, 2001, in *obiter*, citing *Baker v. M.C.I.*, [1999] 2 S.C.R. 817 (S.C.C.). The Court held that the Minister erred by not considering relevant evidence (the fact that the applicant had not reoffended for a period of ten years) and by coming to an unreasonable conclusion, given the totality of evidence.

66 See section 6(2) of *IRPA.* This power was also found in section 121 of the former *Immigration Act*.

67 *Crawford, Haslyn Boderick v. M.E.I.* (I.A.B. T86-9309), Suppa, Arkin, Townshend (dissenting), May 29, 1987. Reported: *Crawford v. Canada (Minister of Employment and Immigration) (*1987), 3 Imm. L.R. (2d) 12 (I.A.B.).

68 *Dance, Neal John v. M.C.I.* (F.C.T.D., no. IMM-366-95), MacKay, September 21, 1995. The Court stated, at 6, 8:

In my opinion, under s-s.8(1) [of the *Immigration Act*] the onus rests on the applicant at all times to establish that he has a right to be admitted to Canada, even, as in this case, where he has done all that could

rehabilitation. In that case, there was no evidence before the adjudicator that the Minister had done so.

Offences Committed Outside Canada by Minors

In Canada, a young offender is someone who is 12 years of age or older but less than 18 years of age. The applicability of section 36(3)(*e*) of *IRPA*, dealing with the *Young Offenders Act* and *Youth Criminal Justice Act*, to foreign convictions is not clear. There is a dearth of jurisprudence on this topic.[69]

In a decision which considered the applicability of the former *Immigration Act*, where there was no provision dealing specifically with young offenders, the Federal Court held that since the person convicted abroad for crimes committed as a minor was tried in adult court, that constituted a conviction under that Act.[70] In another decision,[71] however, the Court took a different position:

> … since the Applicant was 17 years at the time of his conviction, he could not, under normal circumstances, be found guilty of an "offence" in Canada "punishable by indictment". This is so because he would have been dealt with in Canada as a "young person" under the Young Offenders Act.

A decision of the Immigration Division found a person to be inadmissible based on a conviction of sexual abuse in New York State, despite the fact that the person was 17 at the time of his conviction.[72] The member held that the fact that there, unlike Canada, a young offender starts in adult court and must apply to be sentenced as a youth

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be expected of him to obtain the necessary approval of his rehabilitation, without any success because of apparent delays on the part of the respondent's department and its processes.

... there was no evidence before him [the adjudicator] that the Minister had in fact positively approved, that is, that the Minister had been satisfied, that the applicant had rehabilitated himself.

The Court urged the Minister, however, to complete the processing of the application for permanent residence and the request for Ministerial approval of rehabilitation before executing the deportation order.

69 According to information posted on the Citizenship and Immigration Canada website, Internet: <http://www.cic.gc.ca/english/information/applications/guides/5312E2.asp>, a young offender is not inadmissible if he or she was treated as a young offender in a country which has special provisions for young offenders, or was convicted in a country which does not have special provisions for young offenders but the circumstances of the conviction are such that he or she would not have received an adult sentence in Canada. However, a young offender would be inadmissible if he or she was convicted in adult court in a country that has special provisions for young offenders, or was convicted was convicted in a country that does not have special provisions for young offenders but the circumstances of the conviction are such that he or she would have been treated as an adult in Canada.

70 *M.C.I. v. Dinaburgsky, Yuri* (F.C., no. T-234-04), Kelen, September 29, 2006; 2006 FC 1161. The Court referred to the decision in *De Freitas, Devon Alwyn v. M.C.I.* (F.C.T.D., no. IMM-4471-97), Muldoon, November 12, 1998.

71 *Wong, Yuk Ying v. M.C.I.* (F.C.T.D., no. IMM-4464-98), Campbell, February 22, 2000.

72 ID A8-00152, Tessler, February 4, 2009 (*RefLex* Issue 351).

was irrelevant. If convicted in Canada of sexual assault, a young person might be subject to sentencing as an adult. The fact that the imposition of an adult sentence might be a rare outcome did not diminish the fact that a sentence of ten years' imprisonment might be imposed. The member referred to the decision in *Potter*,[73] which held:

> … had the offence been committed in Canada, could [the person] have been convicted of an offence in respect of which he might have been proceeded against by way of indictment in Canada, and whether, if convicted in Canada, he might have been imprisoned for a maximum term of ...

Legal Validity

If the appeal from the removal order is based on the first ground of appeal, that is, on any ground of appeal that involves a question of law or fact, or mixed law and fact, the IAD will have to determine whether the removal order is valid in law.

An appellant may argue that they were wrongly convicted. The IAD has held that it cannot go behind the conviction in considering the legal validity of the removal order.[74] However, in assessing the legal validity of the removal order, the IAD may consider whether the conviction was accurately categorized by the Immigration Division member as falling within subsection 36(1) of *IRPA*.

Discretionary Jurisdiction

Where the refusal is valid in law, the IAD may consider whether or not sufficient compassionate or humanitarian considerations exist to warrant the granting of special relief in light of "all the circumstances of the case", pursuant to section 67(1)(*c*) of *IRPA*. For a detailed discussion of the IAD's discretionary jurisdiction see Chapter 9.

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73 *Potter v. Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 609 (C.A.).

74 *Encina, Patricio v. M.C.I.* (IAD V93-02474), Verma, Ho, Clark, January 30, 1996.

CASES

Chapter Nine

Discretionary Jurisdiction

Introduction

In the majority of cases, an appeal against a removal order does not involve a challenge to its legal validity. In the usual case, the appeal is based on the discretionary jurisdiction of the Appeal Division. An appeal based on discretionary jurisdiction requires "the exercising of a special or extraordinary power which must be applied objectively, dispassionately and in a *bona fide* manner after carefully considering relevant factors".[1] Discretionary jurisdiction is not to be confused with equitable jurisdiction involving the application of equitable doctrines such as "clean hands".[2] Discretionary jurisdiction is a statutory power properly exercised where it is *bona fide*, uninfluenced by irrelevant considerations, and where it is not arbitrary or illegal.[3]

The statutory provision for the determination of discretionary relief in removal order appeals under *IRPA* is different than the provisions in the former *Immigration Act.* Whereas in the former legislation, depending on the person's status, the test was either "all the circumstances of the case" or "compassionate or humanitarian considerations", in *IRPA*, those two tests have been merged. The wording in paragraph 67(1)(c), subsection 68(1) and subsection 69(2) of *IRPA* tasks the IAD member with determining whether *"sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.* In addition, the concept of *"the best interests of a child directly affected by a decision"* has been incorporated into the legislation.

The cases that are decided under the Appeal Division's discretionary jurisdiction typically involve criminality, misrepresentation, failure to comply with terms and conditions of landing or failure to comply with residency obligation. In any of these cases, where the Appeal Division exercises its discretionary jurisdiction in favour of the appellant, it may, pursuant to section 67 of the *IRPA*, allow the appeal and quash the removal order or it may, pursuant to section 68 of the *IRPA*, direct that the execution of the removal order be stayed. Conversely, where the Appeal Division exercises its discretionary jurisdiction against the appellant and neither allows the appeal or stays the removal order, it will, pursuant to section 69 of the *IRPA*, dismiss the appeal.

The Appeal Division may exercise its discretionary jurisdiction on an individual basis, that is, differently for each person who is affected by the disposition of the appeal.

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1 *Grewal, Gur Raj Singh* v. *M.E.I.* (IAB 86-9106), Arkin, Sherman, Bell, November 17, 1989, at 2, applying *Boulis* v. *M.M.I.*, [1974] S.C.R. 875, at 877.

2 *Mundi* v. *M.E.I.*, [1986] 1 F.C. 182 (C.A.).

3 *Boulis, supra,* footnote 1.

For example, in one case where the appellant, his wife and their three children were ordered removed from Canada after having been granted permanent residence, by reason of the appellant's misrepresentation, the Appeal Division found that the wife and children had done nothing wrong and were "innocent victims of the folly of [the appellant]" and that they were well established in Canada. While acknowledging the objective of family unity, the Appeal Division held that there are limits to the extent to which that objective may override the need to maintain the integrity of the immigration system. Accordingly, the Appeal Division exercised its discretionary jurisdiction in favour of the wife and children, but not in favour of the appellant.[4]

Statutory Provisions

To **allow an appeal**, the Immigration Appeal Division (IAD) must be satisfied in accordance with subsection 67(1) of *IRPA* that, at the time the appeal is disposed of,

> (a) the decision appealed is wrong in law or fact or mixed law and fact;
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> (b) a principle of natural justice has not been observed: or
>
> (c) *other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.* (emphasis added)

To **stay a removal order**, the IAD in accordance with subsection 68(1),

> must be satisfied, *taking into account the best interest of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.* (emphasis added)

Subsection 69(2) provides the following with respect to an **appeal by the Minister**:

> 69(2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, *taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case*, it may make and may stay the applicable removal order, or dismiss the appeal, despite being

[4] *Kalay, Surjit S.* v. *M.C.I.* (IAD V94-02070, V94-02074, V94-02075, V94-02076, V94-02077), Clark, Ho, Verma, November 28, 1995. The panel found that not only had the appellant knowingly and deliberately violated the Act, given evasive testimony, and minimized his responsibility for the misrepresentation, but that he had an unimpressive work history and no firm plans for employment in the future.

satisfied of a matter set out in paragraph 67(1)(a) or (b). (emphasis added)

Paragraph 3(3)(f) of *IRPA* provides the following:

(3) This Act is to be construed and applied in a manner that

(f) complies with international human rights instruments to which Canada is signatory.

Sufficient humanitarian and compassionate considerations in light of all the circumstances of the case:

The Appeal Division has held that the phrase "all the circumstances of the case" under the former *Act* is not unconstitutionally vague. In considering all the circumstances, the Appeal Division exercises its discretion within the statutory context. The nature of the task the Appeal Division performs requires a very broad grant of discretion. The provision contemplates the realization of a valid social objective, namely, relief from the hardship that may be caused by the pure operation of the law relating to removal. In the words of the Appeal Division: "The interplay of individual and social interests is complex, and is particular to the circumstances of the individual appellant. In these cases there are no generic tests equally applicable to all appellants which might then justify a more detailed and less flexible grant of discretion."[5] The leading case for discretionary relief in removal order appeals is *Ribic*.[6] The Supreme Court of Canada, in its decisions in *Chieu*[7] and *Al Sagban*.[8] confirmed the appropriateness of the *Ribic* factors and held that the Appeal Division is entitled to consider the factor of potential foreign hardship when the Appeal Division exercises its discretionary jurisdiction in removal order appeals, provided that the likely country of removal has been established by the appellant on a balance of probabilities. The Supreme Court stated that the factors set out in *Ribic*[9] remain the proper ones for the IAD to consider. Similarly and most

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5 *Machado, Joao Carneiro John* v. *M.C.I.* (IAD W89-00143), Aterman, Wiebe, March 4, 1996, at 91.

6 *Ribic, Marida* v. *M.E.I.* (IAB 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985.

7 *Chieu* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3. Appeal from a judgment of the Federal Court of Appeal, [1999] 1 F.C. 605 (C.A.), (F.C.A., no. A-1038-96), Linden, Isaac, Strayer, December 3, 1998, affirming a decision of the Trial Division, (F.C.T.D., no. IMM-3294-95), Muldoon, December 18, 1996, affirming a decision of the Immigration Appeal Division, IAD W94-00143, Wiebe, October 30, 1995, [1995] I.A.D.D. No. 1055 (QL), dismissing the appellant's appeal from a removal order.

8 *Al Sagban* v.*Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4. Appeal from a judgment of the Federal Court of Appeal, (1998), 48 Imm. L.R. (2d) 1, (F.C.A., no. A-724-97), Linden, Isaac, Strayer, December 3, 1998, reversing a judgment of the Trial Division, [1998] 1 F.C. 501, (F.C.T.D., no. IMM-4279-96), Reed, October 15, 1997, setting aside a decision of the Immigration Appeal Division, IAD V95-02510, Clark, Dossa, N. Singh, November 13, 1996, [1996] I.A.D.D. No. 859 (QL), dismissing the appellant's appeal from a removal order.

9 *Ribic*, *supra*, footnote 6.

recently, the SCC in *Khosa*[10], upheld the exercise of the IAD's discretion, and again noted the appropriateness of the IAD in considering each of the *Ribic* factors. The SCC also confirmed that the IAD should be given considerable deference in how it exercises its discretionary relief.

In the *Ribic* case, the Immigration Appeal Board set out factors to be considered in the exercise of its discretionary discretion. These factors were as follows:

> (a) the seriousness of the offence or offences leading to the removal order;
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> (b) the possibility of rehabilitation or, alternatively, the circumstances surrounding the failure to meet the conditions of admission;
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> (c) the length of time spent, and the degree to which the appellant is established in, Canada;
>
> (d) the family in Canada and the dislocation to the family that removal would cause;
>
> (e) the family and community support available to the appellant; and
>
> (f) the degree of hardship that would be caused to the appellant by the appellant's return to his or her country of nationality.

These factors are not exhaustive and the way they are applied and the weight they are given may vary according to the particular circumstances of the case.[11] The SCC in *Khosa* cited with approval the IAD's acknowledgement of the non-exhaustive nature of the factors and that the weight to be attributed to the factors will vary from case to case[12].

The Federal Court of Appeal[13] held that once there is evidence that relates to a *Ribic* factor, the IAD must consider that *Ribic* factor in its reasons. The IAD is obliged to consider all of the relevant factors raised by the evidence, even when the appellant has not presented these factors in his submissions as a basis for staying the deportation order. The IAD is not, however, obliged to elicit the evidence in relation to the *Ribic* factors.

The language of "all the circumstances of the case," in the former *Act* was held to contemplate not only consideration of the appellant's circumstances, but also consideration of the appellant's case. It puts the appellant in his broader context and brings into play the good of society, as well as that of the appellant. The exercise of

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10 *Canada (Citizenship and Immigration)* v. *Khosa*, 2009 SCC 12.

11 In deciding a stay application, Justice Pelletier in *Olaso, Tristan Jose* v. *M.C.I.* (F.C.T.D., no. IMM-3090-00), Pelletier, July 20, 2000, noted that the applicant confused considering all factors and giving them equal weight "as it is for the Appeal Division to assign weights to the various factors based on the case which is before it."

12 *Khosa*, *supra*, footnote 10.

13 *M.C.I.* v. *Ivanov, Leonid* (F.C.A., no A-409-06), Nadon, Swexton, Sharlow, October 3, 2007; 2007 FCA 315.

discretion requires that social considerations be taken into account, together with every extenuating circumstance that can be presented in favour of the appellant.[14] The language of the section is also open-ended: "the circumstances of the case which the Appeal Division must consider are not limited, it must consider all the circumstances of the case, not just some of them."[15]

The SCC in *Khosa* confirmed that discretionary relief pursuant to s.67(1)(c), is a power to grant exceptional relief, in recognition of the hardship that may come from removal[16].

While the *IRPA* has combined the test of "all the circumstances of the case" with "humanitarian and compassionate considerations", the case law considering "all the circumstances of the case" under the previous legislation continues to be applicable and relevant under the *IRPA*. For a further discussion on the merging of the two tests, please refer to individual chapters as to how this has been interpreted with respect to a particular ground of inadmissibility.

Seriousness of Offences

Generally, serious offences that involve, for example, the use of violence and form a pattern of criminal conduct will weigh heavily against an appellant. Conversely, minor offences that do not involve the use of violence and are of an isolated nature will weigh less heavily against an appellant. In relation to its examination of the nature, gravity and pattern of offences, and its assessment of the risk of the appellant's reoffending, the Appeal Division will consider evidence of the appellant's rehabilitation as illustrated in section 9.3.2.

The appellant's entire criminal record may be taken into consideration on an appeal from a removal order. In one case, however, the Appeal Division gave little weight to offences the appellant had committed when a juvenile as they were not of particular gravity in themselves and it was not likely that they would have led to the issuance of a removal order; moreover, they were not related to the major offence which had given rise to the appeal before the Appeal Division.[17]In another case, the Appeal Division[18] held that the appellant's youth record was admissible in evidence, and did consider it as part of the overall evidence. The Appeal Division held that the youth record was an adult record by operation of subsection 119(9) of the *Youth Criminal Justice Act*, (*YCJA*) as the appellant had re-offended as an adult during the period of access to his youth record. The Appeal Division noted that the *YCJA* represents a change from the former *Young Offenders Act* in that the balancing of interests favours more disclosure

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14 *Canepa* v. *M.E.I.*, [1992] 3 F.C. 270 (C.A.), at 286.

15 *Krishnapillai, Thampiyah* v. *M.C.I.* (IAD T96-03882), Aterman, Boire, D' Ignazio, April 24, 1997, at 6.

16 *Khosa, supra*, footnote 10.

17 *Moody, Mark Stephen* v. *M.E.I.* (IAD V93-01012), Clark, June 10, 1994.

18 *Farah, Yousuf Ali Noor* v. *M.C.I.* (IAD TA3-01953), Sangmuah, February 16, 2005,

than under the former Act. Given the ongoing nature of the appellant's behavior in re-offending, his weak ties to Canada and his slim prospect of rehabilitation, the Appeal Division held that there were insufficient grounds to grant discretionary relief.

The Federal Court, *Younis*[19] in overturning the Appeal Division's decision for having taken into consideration the appellant's criminal conviction in Youth Court, noted that youth criminal records are generally not accessible, but that the *YCJA* provides for exceptions during a "Period of Access", three years for summary convictions and five years for indictable offences. As it was not clear whether the youth conviction had proceeded summarily or by indictment, the Appeal Division erred in admitting the appellant's youth record which was more than three years, but within five years after his sentence was completed as a young person. The Court held that although the IAD is not bound by technical rules of evidence (*IRPA*, s. 175(1)), this does not give the IAD authority to admit a youth criminal record where the second conviction falls outside the Period of Access. Such release would not only breach of s. 118 of the *YCJA*, it would also breach procedural fairness at the IAD. The Court agreed with the IAD's decision in Atkinson, [1998] I.A.D.D. No. 171. (3) The IAD also erred in taking into consideration the "Report to Crown Counsel", in that the IAD failed to make the necessary distinction between the fact that the proposed charges were mere allegations and that the Applicant had not been convicted of the offences. The absence of any discussion regarding the reliability and credibility of the Report also constituted an error by the IAD.

The time of commission of the criminal offence is a neutral fact even where it was committed shortly after the appellant's arrival in Canada. A serious offence is serious wherever committed according to the Federal Court-Trial Division in *Pushpanathan*.[20]

Protect the Health and Safety of Canadians and Maintain the Security of Canadian Society

In exercising its discretionary jurisdiction, the Appeal Division has regard to the objective in section 3(h) of the Act which is "to protect the health and safety of Canadians and maintain the security of Canadian society". This objective is taken into consideration in examining the nature, gravity and pattern of the crime or crimes for which the appellant has been convicted and ordered removed from Canada, as well as the degree to which the appellant has been successful in rehabilitating himself or herself (see section 9.3.2.). In *Furtado*,[21] considering the similar objective set out in the former *Immigration Act*, the Appeal Division concluded that, "maintaining and protecting the good order of society includes the removal or exclusion of persons whose activities work against peaceful harmony under constituted authority in Canada. The good order of Canadian society is inextricably linked to the rule of law in general and not just obeying the Criminal Code." In this particular case, the panel found that "wanted repeated

[19] *Younis, Ahmed* v. *M.C.I.* (F.C., no. IMM-5455-07), Russell, August 12, 2008; 2008 FC 944.

[20] *Pushpanathan, Velupillai* v. *M.C.I.* (F.C.T.D., no. IMM-1573-98), Sharlow, March 19, 1998.

[21] *Furtado, Valentina Cordeiro* v. *M.C.I.* (IAD T99-00276), Sangmuah, December 23, 1999.

violations of the criminal law by an individual, irrespective of the seriousness of the offences involved, undermines the rule of law, and, *ipso facto*, undermines the good order of Canadian society." While the specific wording "protect the good order of Canadian society" under the former Act has been omitted from the new Act, the conclusions of the IAD in that case may be applicable under the *IRPA* as well.

In the case of an appellant who had been convicted of possession of cocaine for the purpose of trafficking, for example, the Immigration Appeal Board stated that bearing in mind its role as guardian of the public interest and its primary obligation to protect the public, the evidence was inadequate to support the conclusion that the appellant should not be removed from Canada.[22]

Similarly, in the case of an appellant ordered removed following his conviction of an unregistered restricted weapon and uttering threats, the Appeal Division found that the appellant was a member of a criminal Tamil gang which created fear and intimidation in his community and found that to be a factor which weighed heavily against him[23].

Likewise, in the case of an appellant with 13 convictions, most of which were related to drinking and driving, the Appeal Division found that the appellant had not addressed his serious drinking problem. While the fact that he had been a permanent resident of Canada for almost 20 years weighed in his favour, this was outweighed by his poor rehabilitation prospects and the risk he posed to the safety of Canadian society.[24]

As indicated above, when dealing with a specific case, the Appeal Division considers the gravity of the offences for which the appellant has been convicted, as well as the appellant's overall pattern of conduct. Where there are serious offences involved, but they are isolated incidents arising in extenuating circumstances, the Appeal Division may grant discretionary relief.

Thus, in one case, the Appeal Division quashed the removal order against an appellant who had been convicted of sexual assault and incest where there were overwhelming extenuating circumstances and the appellant did not pose a threat to society.[25]

Likewise, in another case where the appellant had been convicted twice of aggravated assault, the Appeal Division took into account the fact that the offences were isolated events, not indicative of the appellant's normal character and conduct, and that

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22 *Labrada-Machado, Ernesto Florencia* v. *M.E.I.* (IAB 87-6194), Mawani, Wright, Gillanders, November 13, 1987 (reasons signed January 29, 1988).

23 *Kuhendrarajah, Sanjeev* v. *M.C.I.* (IAD TA1-22360), November 12, 2002 (reasons signed February 20, 2003).

24 *Reyes, Jose Modesto* v. *M.C.I.* (IAD TA4-01291), Sangmuah, Bousfield, Roy, June 20, 2005.

25 *Franklin, Cheryl* v. *M.E.I.* (IAD M91-04378), Durand, Angé, Brown, June 9, 1991.

there were no other convictions indicating that the appellant had a basically criminal disposition.[26]

Similarly, where the appellant's criminal involvement was serious, but brief and behind him, the Appeal Division concluded that the appellant was rehabilitated and posed little risk to the Canadian public. On that basis, the removal order was stayed.[27]

By contrast, where serious offences and a pattern of criminal conduct are involved, the Appeal Division has refused to grant discretionary relief. Thus, for example, in a case where the appellant's mother and sister resided in Canada and the appellant himself had lived here since the age of three, the majority of the Immigration Appeal Board panel weighed the series of convictions against the appellant, his years of drug and alcohol abuse, his failed attempts at rehabilitation and his broken relationships, together with the need to protect other individuals in society, and concluded that protection of the Canadian public outweighed the appellant's wanting another opportunity to demonstrate that he could obey the law.[28]

In another case, taking into account as one of all the circumstances the fact that the appellant had abused the Canadian judicial and penitentiary systems by deliberately committing criminal offences to avoid the execution of Canada's immigration laws, the Immigration Appeal Board found that the appellant had failed to show sufficient reason why he should not be removed from Canada.[29]

In a case where the decision had been made on three occasions to allow the appellant to remain in Canada notwithstanding his criminal convictions, the Appeal Division concluded that by the appellant's own conduct, he had shown himself to pose a danger to the safety and good order of Canadian society.[30]

In another case, the Appeal Division found insufficient positive factors in the appellant's favour to offset the negative factors against him. The negative factors included the seriousness of the offences of which he had been convicted, namely sexual assault and sexual interference involving children; the abuse of a position of trust

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[26] *Dhaliwal, Sikanderjit Singh* v. *M.E.I.* (IAD T89-07670), Townshend, Bell, Weisdorf, June 7, 1990. In this case the Appeal Division also noted to the appellant's benefit that his demeanour at the hearing was positive, that he had a good employment record, and that he was responsible for providing for a wife and child.

[27] *Hassan, John Omar* v. *M.C.I.* (IAD V95-00606), McIsaac, November 1, 1996.

[28] *McJannet, George Brian* v. *M.E.I.* (IAB 84-9139), D. Davey, Suppa, Teitelbaum (dissenting), February 25, 1986 (reasons signed July 17, 1986).

[29] *Toth, Bela Joseph* v. *M.E.I.* (IAB 71-6370), Townshend, Teitelbaum, Jew, March 21, 1988 (reasons signed September 1, 1988), aff'd *Toth, Joseph* v. *M.E.I.* (F.C.A., no. A-870-88), Mahoney, Heald, Stone, October 28, 1988.

[30] *Hall, Othniel Anthony* v. *M.E.I.* (IAD T89-05389), Spencer, Ariemma, Chu, March 25, 1991, aff"d *Hall, Othniel Anthony* v. *M.E.I.* (F.C.A., no. A-1005-91), Stone, Létourneau, Robertson, July 6, 1994.

involved in the commission of the offences; the impossibility of isolating the appellant from, or monitoring his contact with, children; and the continued risk to children.[31]

The Federal Court[32] has upheld the IAD's refusal to grant discretionary relief to an appellant with 26 convictions for criminal offences including organized auto theft, leasing autos with fraudulent documents and possession of forged instruments including CIC stamps and seals. The IAD member concluded the offences were very serious because of their organized and repetitive aspects and because they victimized many individuals and organizations. He had no difficulty changing his identity when it suited him, indicative of criminal sophistication.

Similarly, the Federal Court[33] upheld the Appeal Division's dismissal of an appeal for an appellant with 80 charges of fraud. Although no violence was used, the victims were old and vulnerable persons. The Appeal Division considered the seriousness of the offences, and the possibility of rehabilitation, and continued to review all the other *Ribic* factors.

Circumstances Surrounding Conviction and Sentencing

The mandate of the Appeal Division in hearing an appeal from a removal order is not to retry the offence of which the appellant has been convicted[34]. In deciding the case, the Appeal Division does not turn its mind to the sufficiency of the sentence; nor does it exact a greater penalty through removal. It examines the circumstances surrounding the offence - not for the purpose of imposing punishment, but rather for the purpose of truly assessing all the circumstances of the case.[35] In considering the gravity of a sentence the panel should consider the evidence in the record to determine whether the sentence in the case was longer or shorter than sentences imposed in other cases involving similar offences.[36] Further, the length of the sentence that is imposed is not the only criterion relevant to assessing the serious of an offence.[37]

The SCC in *Khosa* considered the fact that the criminal court judge had sentenced Mr. Khosa without the benefit of hearing evidence from him, whereas the IAD had heard direct testimony. The SCC therefore confirmed the IAD's discretion to make a different

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31 *Graeili-Ghanizadeh, Farshid* v. *M.C.I.* (IAD W93-00029), Wiebe, June 3, 1994.

32 *Kravchov, Pavel* v. *M.C.I.* (F.C., no. IMM-2287-07), Harrington, January 25, 2008; 2008 FC 101.

33 *Capra, Gheorghe* v. *M.C.I.* (F.C., no. IMM-1333-05), Blais, September 27, 2005; 2005 FC 1324.

34 In *M.C.I.* v. *Hua, Hoan Loi* (F.C.T.D., no. IMM-4225-00), O'Keefe, June 28, 2001. The Court concluded that the Appeal Division did not exceed its jurisdiction where the panel concluded that although it could not go behind the appellant's criminal conviction, the evidence persuaded the panel that the appellant had "discharged the onus to prove why he maintains his innocence in the face of his conviction".

35 *Setshedi, Raymond Lolo* v. *M.E.I.* (IAD 90-00156), Rayburn, Goodspeed, Arpin, April 16, 1991 (reasons signed August 13, 1991).

36 *Pushpanathan, supra*, footnote 20.

37 *Murray, Nathan* v. *M.C.I.* (F.C.T.D., no. IMM-4086-99), Reed, September 15, 2000.

assessment than that of the criminal court judge, on the issue of rehabilitation and remorse. The SCC noted that the IAD has a mandate different from that of the criminal courts. "The issue before the IAD was note the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence."[38]

In exercising its discretionary discretion in one case involving an appeal by a Convention refugee, the Appeal Division considered whether or not the removal of the appellant would be disproportionate to the harm the appellant had caused in violating the Act.[39]

In examining the circumstances of the offence or offences, the Appeal Division may consider the judge's comments on sentencing, as well as the length of sentence imposed on the appellant. Where appropriate, the Appeal Division has examined the circumstances surrounding both conviction and sentencing. In one such case involving a Convention refugee, in allowing the appeal under compassionate or humanitarian considerations, the Appeal Division found it conceivable, having regard to the appellant's addiction, his dependency on persons who gave him the drugs he needed, and the complicated circumstances at the relevant time, that the appellant may have been convicted of an offence he did not commit. While this factor had no bearing on the legal validity of the removal order, it weighed in the appellant's favour in the Appeal Division's exercise of its discretionary jurisdiction.[40]

In one case where a removal order had been issued against an appellant on the basis of a conviction for sexual interference with his 12-year-old stepson, the Appeal Division examined and found somewhat ambiguous the circumstances surrounding the conviction; the stepson had admitted lying to the court about the appellant's having molested him a number of times, but the stepson's testimony was not explored since the appellant then pleaded guilty following a recess in the proceedings.[41]

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38 *Khosa, supra*, footnote 10.

39 *Kabongo, Mukendi Luaba* v. *M.C.I.* (IAD T95-02361), Aterman, April 30, 1996.

40 *Lotfi, Khosro* v. *M.C.I.* (IAD T95-00563), Muzzi, October 26, 1995. In this case, the Appeal Division also noted the very lenient sentence the appellant had received for cooperating with the police; his five-year drug- and crime-free life; and the fact that Canada was the only country in which he had any kind of establishment and a chance for a future.

41 *Spencer, Steven David* v. *M.C.I.* (IAD V95-01421), Lam, November 19, 1996. The Appeal Division noted that, in the unusual circumstances of the case, the offence was at the low end of the scale in severity, and it gave some weight to the fact that the Minister had determined the appellant not to be a danger to the public. It also considered of relevance the fact that the appellant had committed the offence while in a troubled marriage, caring for two difficult children, which led him to attempt suicide more than once. In the opinion of the Appeal Division, the appellant did not pose a high risk of reoffending and the removal order was stayed.

Outstanding Criminal Charges

Having regard to the presumption of innocence of an accused person, the general rule is that the Appeal Division may not consider outstanding criminal charges in exercising its discretionary jurisdiction. For example, in one case where the Immigration Appeal Board attempted, in its reasons, to base its decision only on evidence unrelated to the existence of outstanding criminal charges against the appellant, but referred to those charges in the last paragraph of its reasons, the Federal Court of Appeal found it unfair to the appellant and referred the matter back to the Board for a rehearing.[42] In *Bertold*,[43] the Federal Court-Trial Division concluded that evidence with repect to outstanding foreign criminal charges should not have been admitted by the Appeal Division panel as they could not be used to impugn the appellant's character or credibility.

Similarly, the Federal Court found that the Appeal Division erred with regard to reliance on evidence relating to withdrawn charges. While the Appeal Division had ruled that the evidence of the withdrawn charges was inadmissible, the Appeal Division nevertheless referred to this evidence in finding that the applicant had committed serious criminal offences and in deciding that he was a member of a criminal gang.[44]

As a departure from the general rule, however, it may be permissible, on very special facts, for the Appeal Division to take outstanding charges into account as one of all the circumstances of the case. The issue of outstanding criminal charges usually arises as a result of the appellant's referring to them in testifying at the hearing. In one case, for example, the Appeal Division took into consideration an incident that gave rise to the appellant's being charged with, but not yet convicted of, a number of offences that the appellant admitted having committed. The circumstances of the incident had been adduced during direct examination of the appellant and of other witnesses who testified on behalf of the appellant and counsel for the appellant had submitted that the appellant wanted to be open with the Appeal Division and to provide a complete record of his criminal activities by making the Appeal Division aware of the charges.[45]

Victim-Impact Evidence

Under paragraph 175(1))(c) of *IRPA*, the Appeal Division has discretion to determine the credibility and trustworthiness of evidence. This discretion extends to the

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42 *Kumar, James Rakesh* v. *M.E.I.* (F.C.A., no. A-1533-83), Heald, Urie, Stone, November 29, 1984.

43 *Bertold, Eberhard* v. *M.C.I.* (F.C.T.D., no. IMM-5228-98), Muldoon, September 29, 1999.

44 *Veerasingam, Kumanan* v. *M.C.I.* (F.C., no. IMM-4870-04), Snider, November 26, 2004; 2004 FC 1661. The Court noted that a distinction must be drawn between the reliance on the fact that someone has been charged with a criminal offense, and reliance on the evidence that underlies the charges in question. The fact that someone has been charged with an offense proves nothing: it is simply an allegation. In contrast, the evidence underlying the charge may indeed be sufficient to provide the foundation for a good-faith opinion that the individual poses a present or future danger to others in Canada. (at paragraph 3).

45 *Waites, Julian Martyn* v. *M.E.I.* (IAD V92-01527), Ho, Clark, Singh, April 28, 1994 (reasons signed June 28, 1994).

admissibility of victim-impact evidence where the Appeal Division takes into account the prejudicial effect on the appellant and the probative value of such evidence.

In one case where the Appeal Division had ruled inadmissible testimony concerning the impact of the second-degree murder committed by the appellant, on the basis that it would have no probative value, the Federal Court—Trial Division found that the Appeal Division had acted within its jurisdiction and that the exercise of its discretion had not been unreasonable. The Appeal Division had been cognizant of the serious nature of the crime and the fact that the victim had several children.[46]

In another case where the appellant had been convicted of manslaughter and the respondent had attempted to introduce victim-impact evidence, the Appeal Division held that such evidence was inadmissible. The majority stated that the evidence was inadmissible where it was produced only to demonstrate emotional trauma caused by the appellant's conduct. The purpose of deportation was not to impose further punishment. Victim-impact evidence is properly considered by a judge upon sentencing.[47]

In other cases, however, the Appeal Division has admitted victim-impact evidence, for example from members of the victim's family, where the appellant had been convicted of manslaughter in the death of his wife.[48] In another case, where the appellant had been convicted of aggravated assault on his wife, the Appeal Division allowed the wife to testify about how the assault had affected her and her two sons.[49]

In a case where the appellant had been convicted of aggravated assault while another member of his gang shot and killed the victim, the Appeal Division admitted letters from members of the victim's family which were tendered as victim-impact statements. However, the Appeal Division gave little weight to the letters: one of the letters focused on the impact of the victim's death, for which the appellant was not responsible; the other letter related to events leading up to the victim's death and it had been written for the purpose of objecting to the appellant's release on full parole.[50]

The Federal Court commented on the use of victim impact information in *Sivananansuntharam, Sivakumar v. M.C.I.* [51] The appellant was involved with a co-

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46 *M.C.I.* v. *Jhatu, Satpal Singh* (F.C.T.D., no. IMM-2734-95), Jerome, August 2, 1996.

47 *Pepin, Laura Ann* v. *M.E.I.* (IAD W89-00119), Rayburn, Goodspeed, Arpin (dissenting), May 29, 1991.

48 *Muehlfellner, Wolfgang Joachim* v. *M.E.I.* (IAB 86-6401), Wlodyka, Chambers, Singh, October 26, 1988, rev'd on other grounds: *Muehlfellner, Wolfgang Joachim* v. *M.E.I.* (F.C.A., no. A-72-89), Urie, Marceau, Desjardins, September 7, 1990.

49 *Williams, Gary David* v. *M.E.I.* (IAD W91-00014, V92-01459), Singh, Wlodyka, Gillanders, July 27, 1992 (reasons signed October 23, 1992). Application for leave to appeal dismissed: *Williams, Gary David* v. *M.E.I.* (F.C.A., no. 92-A-4894), Mahoney, December 21, 1992.

50 *Inthavong, Bounjan Aai* v. *M.E.I.* (IAD V93-01880), Clark, Singh, Verma, March 1, 1995. Nevertheless, based on all the circumstances of the case, including the likelihood that the appellant would reoffend, the Appeal Division dismissed the appeal.

51 *Sivananansuntharam, Sivakumar v. M.C.I* (F.C.T.D., no. IMM-1648-02), O'Keefe, March 27, 2003; 2003 FCT 372.

accused in the kidnapping and killing of his business partner. The victim was attacked by nine men, beaten, tortured, and set on fire while alive. The appellant pled guilty to kidnapping. In refusing to grant the appellant discretionary relief, the Appeal Division emphasized the seriousness of the offence, the terrible impact that the offence ultimately had on the victim, and held that the factors in the appellant's favour did not overcome these negative factors. The Federal Court found that the Appeal Division had appropriately had regard to all the relevant factors.

Rehabilitation –

Burden of Proof

Where the offences of which the appellant has been convicted are serious, the appellant is required to present compelling evidence of rehabilitation.[52] Thus, where the appellant's offence is of a serious nature and the appellant shows a lack of remorse, these factors may outweigh evidence of the appellant's establishment in Canada and the appellant's claim of being rehabilitated.[53] However, the Federal Court has overturned the IAD where the IAD dismissed the appeal finding that the appellant had not proved on a balance of probabilities that he had rehabilitated himself. The Court found that the *Ribic* factor refers to a possibility of rehabilitation, rather than the proof of rehabilitation.[54]

Assessment of Risk

In assessing the risk an appellant poses to Canadian society, the Appeal Division takes into account evidence such as comments by judges on sentencing and by members of the National Parole Board in their reasons for decision, as well as reports by parole officers, psychologists and psychiatrists.[55] In making the assessment, the Appeal Division has regard to the societal interests set out in section 9.3.1.1.

The assessment of risk raises three important issues: the seriousness of the criminal conduct (canvassed in section 9.3.1.); the degree to which the appellant has demonstrated rehabilitation; and the support system available to the appellant (addressed in section 9.3.5.). The last two issues are related to the likelihood of the appellant's reoffending.[56] Thus, for example, in one case, citing its responsibility for protecting the

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[52] *Tolonen, Pekka Anselmi* v. *M.E.I.* (IAD V89-01195), Wlodyka, Singh, Gillanders, June 8, 1990. See also *Gagliardi, Giovanni* v. *M.E.I.* (IAB 84-6178), Anderson, Chambers, Howard, July 17, 1985 (reasons signed October 15, 1985) where the panel held that compelling reasons must be advanced before the Board will stay or quash a removal order.

[53] *Mothersill, Charlene Fawn* v. *M.E.I.* (IAD W89-00184), Wlodyka, Arpin, Wright, November 23, 1989.

[54] *Martinez-Soto, Rigoberto Antonio v M.C.I.* (F.C., no. IMM-435-08), Mandamin, July 17, 2008; 2008 FC 883.

[55] See, for example, *Muehlfellner, supra*, footnote 48.

[56] *Ramirez Martinez, Jose Mauricio (a.k.a. Jose Mauricio Ramirez)* v. *M.E.I.*, (IAD T95-06569), Bartley, January 31, 1997, at 3.

health, safety and good order of Canadian society and having regard to the few positive factors in the appellant's favour, the seriousness of the offences involved and, in particular, the appellant's lack of remorse and continuing membership in a gang, indicating little likelihood of rehabilitation, the Appeal Division determined that the appellant was not entitled to discretionary relief.[57]

In another case, where the appellant had been ordered removed from Canada as a result of convictions for assault, sexual assault, and sexual assault with a weapon, the Federal Court found that the Appeal Division had clearly had regard to all the circumstances of the case. The majority of the Appeal Division had found the appellant to be a danger to society: she had not rehabilitated herself; she expressed no remorse for the offences she had committed; and the only impediment to her reoffending might be her physical disability. On that basis, the Appeal Division dismissed the appeal.[58]

The Federal Court found that the Appeal Division erred when it based its conclusion on the risk of re-offending simply on the fact that the appellant had re-offended once and ignored other evidence to the contrary.[59]

Indicia of Rehabilitation

The *indicia* of rehabilitation include "credible expressions of remorse, articulation of genuine understanding as to the nature and consequences of criminal behaviour and demonstrable efforts to address the factors that give rise to such behaviour".[60]

Remorse and Understanding of Nature and Consequences of Conduct

In an appeal of a removal order resulting from a conviction for sexual assault, the Appeal Division extensively canvassed the issue of remorse. It noted that remorse "envisages more than a simple show of acknowledgement and regret for the offending deed." The panel set out a number of non-exhaustive indicators of remorse in cases such as the one before it: whether the appellant has personally accepted what he has done is wrong; the appellant's conduct and demeanor at the appeal hearing; and the appellant undertaking to make personal commitments to correct his offending behaviour and to take meaningful steps at making reparations to either the victim and/or society.[61]

Generally, where an appellant expresses remorse for criminal conduct and the Appeal Division finds the expression of remorse credible, that factor will be considered

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57 *Huang, She Ang (Aug)* v. *M.E.I.* (IAD V89-00937), Wlodyka, Gillanders, Singh, September 24, 1990, aff'd on another ground, *Huang, She Ang* v. *M.E.I.* (F.C.A., no. A-1052-90), Hugessen, Desjardins, Henry, May 28, 1992.

58 *Vetter, Dorothy Ann* v. *M.E.I.* (F.C.T.D., no. IMM-760-94), Gibson, December 19, 1994.

59 *Varone, Joseph v M.C.I.* (F.C.T.D., no. IMM-356-02), Noel, November 22, 2002; 2002 FCT 1214.

60 *Ramirez*, s*upra*, footnote 56.

61 *Balikissoon, Khemrajh Barsati* v. *M.C.I.* (IAD T99-03736), D'Ignazio, March 12, 2001.

to the appellant's advantage. Where, however, the Appeal Division finds the expression of remorse to be lacking in credibility, that factor generally will be considered to the detriment of the appellant. Thus, for example, in one case where the appellant had been convicted of sexual assault on his stepdaughter and the Appeal Division found that the appellant only acknowledged a problem out of expediency; his protestations of remorse appeared begrudging and rang hollow; and he did not undergo treatment, it concluded that the appellant was basically an untreated offender and had not demonstrated an appreciable degree of rehabilitation.[62]

In the case of an appellant who had pleaded guilty to forcible confinement of, and assault with a weapon on, his common-law wife, the Appeal Division dismissed the appeal. In its view, the appellant's attempt at the hearing to minimize or deny the extent of his involvement amounted to a form of denial, indicating that he had not come to terms with his criminal conduct. There was no evidence that he was remorseful and the Appeal Division was not satisfied that he would not commit domestic violence in the future.[63]

Similarly, the Appeal Division dismissed an appeal where the appellant was convicted of assault and assault causing bodily harm to his wife. His wife, with whom he was reconciled and who wanted him to remain in Canada, testified that there were other incidents of domestic abuse which she had not reported to the police. The Appeal Division found that the appellant viewed himself as the victim of his wife's infidelity. He had little insight into his behavior, his expressions of remorse were contrived he had not taken steps toward rehabilitation and there was a risk that he would offend.[64]

The Appeal Division dismissed an appeal where the appellant had been convicted of sexual assault on an eight-year-old child whom he abused for a period of four years. Based on the evidence, the Appeal Division found that the appellant showed no remorse and that he was an untreated sexual offender who posed a high risk of reoffending.[65]

In contrast, the Appeal Division granted a stay of execution of the deportation order to an appellant convicted of sexual assault. In addition to a lengthy residence in Canada, he had a long-term supportive relationship and four children. The best interests of the children weighed heavily in his favour. He had a serious anger control problem, however the Appeal Division found that he appeared to have rehabilitated himself. He had successfully completed an anger management course and appeared to be sincerely remorseful for his past criminal conduct.[66]

The mere passage of time without the appellant's having further convictions, together with marked changes in the appellant's lifestyle, will not necessarily be viewed as persuasive evidence that the appellant is in control of the problems which caused him

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62 *Ramirez*, *supra*, footnote 56.

63 *Duong, Thanh Phuong* v. *M.C.I.* (IAD T94-07928), Band, June 13, 1996.

64 *Martins, Jose Vieira v. M.C.I.* (IAD TA1-10066), MacPherson, October 29, 2002.

65 *Chand, Naresh* v. *M.C.I.* (IAD V93-03239), Clark, Ho, Lam, July 24, 1995.

66 *Wright, Sylvanus Augustine v. M.P.S.E.P.* (IAD TA5-07157), Band, May 10, 2007.

to react violently on previous occasions, particularly where the appellant has expressed no remorse for his criminal conduct and has not taken any anger management courses or undergone counseling.[67]

The Federal Court – Trial Division upheld the exercise of the Appeal Division's discretionary jurisdiction in one case where the Appeal Division had considered the appellant's attitude. In the view of the Court, the Appeal Division had considered all the relevant circumstances and what the Appeal Division had characterized as the appellant's "obnoxious" attitude at the hearing was but one of the factors taken into consideration.[68]

Demonstrable Efforts to become Rehabilitated

In support of a claim of rehabilitation, psychological, psychiatric or medical evidence is often filed. In general, as part of its assessment of rehabilitation and the risk of the appellant's reoffending, the Appeal Division views as favourable to the appellant's case the appellant's understanding of, and efforts made to address, any underlying factors that have contributed to the past criminal conduct. Thus, where alcohol or drug abuse has played a role in such conduct, for example, it will tend to weigh in favour of the appellant that he or she has sought and received treatment for, and abstained from, substance abuse.

In one case where the appellant had been convicted of manslaughter in circumstances where alcohol was involved, the Appeal Division found that the appellant had successfully rehabilitated himself as, among other things, he had abstained from consuming alcohol for five years.[69]

However, in another case where the appellant had been convicted of manslaughter for killing his lover with an axe during a psychotic episode brought on by heavy drinking, the Appeal Division decided against granting discretionary relief after considering the appellant's particular circumstances. The offence was out of character for the appellant, but the sentencing judge and the National Parole Board were concerned about a possible reoccurrence should the appellant, an alcoholic, fail to abstain from alcohol. The appellant did give up drinking, but suffered a relapse on one occasion while on parole. In the opinion of the psychologist who was treating the appellant, the appellant was not likely to suffer another relapse, and for the psychosis to develop again, further long-term, chronic alcohol abuse would be required. However, the Appeal Division was not satisfied that the relapse was an isolated event. There was a nexus between the appellant's alcoholism and the potential for the commission of further offences. The extremely serious nature of the offence, the circumstances in which it occurred and the appellant's subsequent relapse, together with the circumstances and precipitating factors,

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67 *Nguy, Chi Thanh* v. *M.C.I.* (IAD T95-01523), Band, March 8, 1996.

68 *Galati, Salvatore* v. *M.C.I.* (F.C.T.D., no. IMM-2776-95), Noël, September 25, 1996.

69 *Nic, Vladimir* v. *M.E.I.* (IAD V89-00631), Gillanders, Chambers, MacLeod, March 7, 1990.

supported a conclusion of serious risk of serious harm to the community in the event of the appellant's reoffending.[70]

The Appeal Division quashed the removal order against an appellant who had been landed in Canada shortly after his birth, the youngest of six children, and who later in life had been convicted of assault causing bodily harm and of conspiracy to traffic in cocaine, in which his three brothers had been co-conspirators. As a result of the charges, the appellant stopped abusing alcohol and cocaine. The Appeal Division relied on a psychological assessment indicating that the appellant posed a low risk of recidivism and balanced all of the factors, including the length of time the appellant had lived in Canada and the support available to him in the community, to find in favour of the appellant.[71]

In the case of an appellant who had been ordered removed from Canada on the basis of his criminal record consisting of 22 prior convictions, including narcotics convictions, the Appeal Division found that the appellant, who claimed to have committed crimes to support his drug habit, had not taken adequate steps to deal with this addiction. Therefore, he had not rehabilitated himself and he continued to be a risk.[72]

Even where the Appeal Division concludes that an appellant is unlikely to reoffend, if it finds that the appellant has not adequately addressed the issue of a drug dependency and that he has not taken the necessary steps to stabilize his life through work or the acquisition of job skills, the Appeal Division may only be prepared to stay the execution of the removal order against the appellant and to impose terms and conditions on the appellant's continued stay in Canada.[73]

Mental Illness

Where an appellant suffers from psychiatric illness that predisposes the appellant to commit criminal offences, it is likely to weigh in the appellant's favour that the appellant is being treated and taking medication to control the symptoms of the illness. Thus, for example, in one case where the appellant, a Convention refugee, was ordered removed from Canada for having been convicted of mischief, the Appeal Division took into account, as part of the compassionate or humanitarian considerations, the fact that

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70 *Sandhu, Kaura Singh* v. *M.C.I.* (IAD T93-02412), Leousis, February 22, 1996 (reasons signed June 21, 1996).

71 *Manno, Marco* v. *M.C.I.* (IAD V94-00681), Clark, March 9, 1995 (reasons signed May 23, 1995).

72 *Barnes, Desmond Adalber* v. *M.C.I.* (IAD T95-02198), Band, November 3, 1995 (reasons signed November 9, 1995).

73 *Dwyer, Courtney* v. *M.C.I.* (IAD T92-09658), Aterman, Wright, March 21, 1996. In this case, the Appeal Division took into account in favour of the appellant that the appellant's father had psychologically and physically abused him as a child and that the abuse had contributed significantly to the appellant's drifting into crime.

the appellant, who suffered from manic depression, had committed the offence while off medication because of side effects, but subsequently changed medication.[74]

In accepting the joint recommendation of the parties to stay the execution of a removal order, the Appeal Division took into account that the appellant suffered from schizophrenia, and his offences were all related to that illness. He was willing to enter into a program to receive medical and psychiatric assistance, he was well-established in Canada, had a 13-year-old son, extended family, and no close family members or support in Jamaica and he now had a vested interest in taking his medication.[75] In contrast, where the appellant refused to accept psychiatric help and necessary medication and was likely to return to a life of crime without medical intervention, the Appeal Division found that the appellant posed a serious danger to society.[76]

Similarly, the Appeal Division noted that a stay of execution of a removal order should be granted only when the panel has some confidence that it will or can be honoured by the appellant and that it serves a purpose. The appellant was a long-term resident of Canada, however there was little evidence of any attempts to engage in counseling or treatment programs for his drug addiction or other mental health problems. Given that he had been unwilling and unable to abide by any requirements imposed by authorities in the past, and would almost certainly breach the terms of a stay of execution, the Appeal Division dismissed the appeal.[77] In another case, the Appeal Division took into consideration, in the case of a mentally ill appellant convicted, among other offences, of assault on staff while he was in a psychiatric facility and objecting to taking medication, the fact that the appellant's father sought permanent guardianship of his son to ensure his son's continued care in a long-term group home that would assist in his medical treatment.[78]

The Federal Court of Appeal found that an appellant who resided in Canada since early childhood, had no establishment outside of Canada and suffered from chronic paranoid schizophrenia did not have an absolute right to remain in Canada. The appellant in that case, had a record of prior assaults and medication was not able to control his mental illness. The Appeal Division had concluded there was a very high probability that the appellant would re-offend and the offence would involve violence.[79]

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74 *Habimana, Alexandre* v. *M.C.I.* (IAD T95-07234), Townshend, September 27, 1996 (reasons signed October 31, 1996).

75 *Aldrish, Donovan Anthony v. M.C.I.* (IAD TA5-02148), Hoare, February 9, 2006 (reasons signed March 15, 2006).

76 *Salmon, Kirk Gladstone* v. *M.E.I.* (IAD T93-04850), Bell, September 20, 1993.

77 *McGregor, Colin James* v. *M.C.I.* (IAD TA5-11936, Collison, March 30, 2006.

78 *Agnew, David John* v. *M.C.I.* (IAD V94-02409), Singh, Verma, McIsaac, June 6, 1995.

79 *Romans, Steven* v. *M.C.I.* (F.C.A., no. A-359-01), Décary, Noël, Sexton, September 18, 2001 affirming *Romans Steven* v. *M.C.I.* (F.C.T.D., no. IMM-6130-99), Dawson, May 11, 2001, affirming a decision of the Immigration Appeal Division, IAD T99-066694, Wales, November 30, 1999, dismissing the appellant's appeal from a removal order.

The Appeal Division may make procedural accommodations for a mentally ill appellant pursuant to the *Chairperson's Guideline on Vulnerable Persons*[80]**.** The Appeal Division accommodated an appellant suffering from schizophrenia by holding the hearing in the psychiatric facility in which he resided under the jurisdiction of the Ontario Review Board.[81]

Establishment in Canada

As a general principle, it tends to weigh in the appellant's favour that the appellant has resided for a significant period of time, and become firmly established, in Canada. Conversely, a short period of residence in, and tenuous connection with, Canada will tend to weigh against the appellant. Factors of relevance are generally: the "length of residence in Canada; the age at which one comes to Canada; length of residence elsewhere; frequency of trips abroad and the quality of contacts with people there; where one is educated, particularly in adolescence and later years; where one's immediate family is; where one's nuclear family lives and the ties that members of the nuclear family have with the local community; where the individual lives; where his friends are; the existence of professional or employment qualifications which tie one to a place, and the existence of employment contracts." [82]

Admission to Canada at an early age and a long period of residence in the country, while factors to be taken into account, are not cause for the automatic granting of discretionary relief. All the relevant factors must be considered. Faced with an appellant who had a serious criminal record, the Immigration Appeal Board decided against granting relief in view of its fundamental responsibility to protect Canadian society.[83]

While the accumulation of property may be one factor to consider in all the circumstances of the case, particularly in assessing the hardship that may arise from removal, it does not outweigh all the other factors that are relevant in determining establishment.[84]

Being imprisoned nearly the entire time[85] or failing to achieve anything despite having lived in Canada for a significant period of time may weigh against the appellant, [86] as may failure to find employment, develop close family relationships, and accept

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80 Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the Immigration and Refugee Board of Canada, issued by the Chairperson pursuant to Section 159(1)(h) of the IRPA, IRB, Ottawa, December 15, 2006**.**

81 *Evdokimov, Gennady* v. *M.P.S.E.P.* (IAD TA4-13689), Stein, July 31, 2007.

82 *Archibald, Russell* v. *M.C.I.* (F.C.T.D., no. IMM-4486-94), Reed, May 12, 1995, at 10.

83 *Birza, Jacob* v. *M.E.I.* (IAB 80-6214), Howard, Chambers, Anderson, April 4, 1985 (reasons signed October 15, 1985).

84 *Archibald*, *supra*, footnote 82.

85 *Baky, Osama Abdel* v. *M.E.I.* (IAB 74-7046), Scott, Hlady, Howard, December 15, 1980.

86 *Hall, Gladstone Percival* v. *M.E.I.* (IAB 80-9092), Glogowski, Benedetti, Tisshaw, January 29, 1981 (reasons signed March 30, 1981).

responsibility for the care and support of a child.[87] Having no family in Canada and not becoming established in the country despite working at various jobs will not assist the appellant either.[88]

Where the appellant's lack of establishment is directly relates to his mental disability, the absence of standard *indicia* of establishment is therefore understandable and should not be used negatively against the appellant. The appellant's efforts to establish, taking into account his disability, are, nevertheless relevant. In this case, the panel considered the appellant's efforts to establish himself in light of how he has coped with his disability and how he has responded to the support that has been offered to him.[89]

In the case of an appellant who suffered from Borderline Personality Disorder, the appellant's lack of establishment in Canada in terms of employment or ownership of assets did not weigh heavily against him in light of his mental disability.[90]

Family Members in Canada

Having family members in Canada is not in and of itself sufficient to justify the granting of special relief; however, significant dislocation to family members as a result of an appellant's removal from Canada is generally viewed as a positive factor in an appellant's case. For example, the Appeal Division noted as a positive factor the fact that the appellant's extended family in Canada would be devastated if he were removed.[91]

Children are often the family members affected by the removal of an appellant. For a further discussion on this topic, please refer to section 9.3.7. Best Interests of a Child.

Family and Community Support

In addressing the issue of rehabilitation discussed in section 9.3.2., and as part of its assessment of the likelihood of the appellant's reoffending, the Appeal Division considers evidence of support from family, friends and the community that is available to the appellant. Evidence of strong support is generally viewed as a factor in the appellant's favour. Therefore, it is usually to the appellant's advantage that family members, friends and members of the appellant's community come forward to testify at the appellant's hearing. Where there is no such show of support and no reasonable

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87 *Frangipane, Giovanni* v. *M.M.I.* (IAB 75-10227), D. Davey, Benedetti, Tisshaw, March 19, 1981.

88 *Larocque, Llewellyn* v. *M.E.I.* (IAB 81-9078), Davey, Teitelbaum, Suppa, June 22, 1981.

89 *Maxwell, Lenford Barrington* v. *M.C.I.* (IAD T98-09613), Kelley, March 29, 2000.

90 *Jones, Martin Harvey v. M.C.I.* (IAD V99-00408), Workun, April 12, 2005.

91 *Aldrish*, supra, footnote 75.

explanation given, the Appeal Division may draw an inference adverse to the appellant's case.[92]

In one case where an appellant had been convicted of possession of heroin for the purposes of trafficking, and of possession of cocaine, the Appeal Division took into consideration, among other things, the fact that he presented 23 letters of support from friends, co-workers and his wife's family, though not from his own who were against his marriage.[93]

In contrast, the Appeal Division dismissed the appeal against removal of a 71-year-old appellant who had lived in Canada for some 47 years where, apart from the support of his common-law spouse, the appellant had little or no support and he did not have much to show for all the years he had resided in Canada.[94]

Hardship

In exercising its discretionary power, the Appeal Division may look at hardship to the appellant caused by removal from Canada. Hardship the appellant potentially faces upon removal may take two forms: first, the hardship caused by being uprooted from Canada where the appellant may have lived many years and become well established; and second, hardship caused by being removed to a country with which the appellant may have little or no connection.

As noted in section 9.3., the Supreme Court of Canada in *Chieu*[95] and *Al Sagban*[96] overturned decisions of the Federal Court of Appeal in those cases. The Supreme Court

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92 *Okwe, David Vincent* v. *M.E.I.* (F.C.A., no. A-383-89), Heald, Hugessen, MacGuigan, December 9, 1991. In this case, the Federal Court held that the Appeal Division could not draw an adverse inference and conclude that the appellant had no family and community support based on the absence of family members at the hearing since there was other evidence that the appellant had friends and relatives in Canada who were willing to assist him; the relationship between the appellant and his wife and her family was good; a supportive letter written by the appellant's mother-in-law was on the record; the appellant's wife had just had her tonsils removed and could not talk and the appellant had requested, but was denied, a postponement to enable the appellant's wife and mother-in-law to attend the hearing.

93 *Thandi, Harpal Singh* v. *M.C.I.* (IAD V94-01571), Ho, March 31, 1995. The Appeal Division also took into account the fact that the appellant had accepted responsibility for his actions; he had not used drugs or alcohol since his arrest; and his wife was expecting a child, which would assist him in his efforts to abstain from using drugs. In all the circumstances, the Appeal Division concluded that the appellant posed a low risk of reoffending and it granted a stay of the removal order against him.

94 *Courtland, Pleasant Walker* v. *M.C.I.* (IAD V93-02769), Verma, October 19, 1994 (reasons signed February 1, 1995). The appellant in this case had been ordered removed from Canada as a result of offences such as indecent assault, gross indecency and incest committed against his children and stepchildren for at least 22 years. He had not demonstrated any remorse for what he had done or success in rehabilitating himself. The Appeal Division acknowledged that he had been away from his country of nationality for many years, but found that, if he were to suffer any hardship there, it would be of a financial nature only.

95 *Chieu*, *supra* footnote 7.

96 *Al Sagban*, *supra* footnote 8.

in its decisions made a clear statement on the Appeal Division's jurisdiction to consider the factor of potential foreign hardship when the Appeal Division exercises its discretionary jurisdiction in removal order appeals. Decisions of the Federal Court, the Immigration Appeal Board (the predecessor of the Appeal Division) and the Appeal Division with respect to considering foreign hardship rendered prior to the Supreme Court decisions must be read in context of the law as it stood at the time of the particular decisions and may no longer be good law. The Supreme Court decision in *Chieu* contains an extensive review of the history of the application of foreign hardship

The onus is on a permanent resident facing removal to establish the likely country of removal, on a balance of probabilities. It is only in those cases where the Minister disagrees with an individual's submissions as to the likely country of removal that the Minister would need to make submissions as to why some other country is the likely country of removal, or as to why a likely country of removal cannot yet be determined. In the case of Convention refugees, it is less likely that a country of removal will be ascertainable. For example, where the appellant was a Convention refugee from Sri Lanka, Sri Lanka was not considered as a country of removal.[97] But permanent residents who are not Convention refugees will usually be able to establish a likely country of removal, thereby permitting the Appeal Division to consider any potential foreign hardship they will face upon removal to that country.

In dismissing the appeal of a mentally ill appellant, the Appeal Division noted that the appellant's life could scarcely be more tragic in Scotland than it was in Canada.[98]

The Act requires the Appeal Division to consider "all the circumstances", not just some of the circumstances. Therefore, the Appeal Division may consider positive and negative conditions in the country of removal, including such factors as the availability of employment or medical care, where relevant. If an appellant alleges that there are substantial grounds to believe that he or she will face a risk of torture upon being removed to a country, the Appeal Division will have to consider the implications of the decisions in *Suresh* and *Ahani*.[99]

In *Chandran,*[100] the Federal Court-Trial Division upheld a decision of the Appeal Division where the panel while dismissing the appeal recognized as a positive factor that

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97 *Balathavarajan, Sugendran* v. *M.C.I.* (F.C.A., no A-464-05), Linden, Nadon, Malone, Octoer 19,2006; 2006 FCA 340. The Federal Court upheld the IAD decision. The certified question for the FCA read: "Is a Deportation Order, with respect to a permanent resident who has been declared to be a Convention refugee, which specifies as sole country of citizenship the country which he fled as a refugee, sufficient without more to establish that country as the likely country of removal so that *Chieu* applies and the IAD is required to consider hardship to the Applicant in that country on an appeal from a Deportation Order?" The FCA answered the certified question in the negative.

98 *McGregor, supra*, footnote 77.

99 *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, and *Ahani* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, were released by the Supreme Canada on January 11, 2002, at the same time as *Chieu* and *Al Sagban* were released.

100 *Chandran, Rengam* v. *M.C.I.* (F.C.T.D., no. IMM-126-98), Rothstein, November 26, 1998.

the appellant had been transfused in Canada with blood that was tainted with Creutzfield-Jakob disease. The appellant had argued that Canada should be responsible for his care if he contracted the disease.

Best Interests of a Child

As a result of *IRPA*, the Appeal Division has a statutory mandate to consider best interests of a child as part of the exercise of its discretionary jurisdiction. However, the analysis of the principle pursuant to the statute does not differ appreciably from the analysis that was undertaken before *IRPA.*[101]

Since the Supreme Court of Canada rendered in 1999 its decision in *Baker,*[102] the IAD has been citing *Baker* as authority for the proposition that children's best interests must be considered and given substantial weight in removal order appeals. Even prior to Baker, the Appeal Board and the Appeal Division gave consideration to the best interests of a child. Thus, the fact of being successfully established in Canada and having a child who is a Canadian citizen in need of medical care that is provided free of cost in Canada are circumstances that may weigh in the appellant's favour.[103] The Immigration Appeal Board has held that having Canadian-born children is just one factor to be considered in all the circumstances of the case.[104]

The Supreme Court of Canada in *Baker*[105] considered the situation of a woman with Canadian-born, dependent children ordered deported. She was denied an exemption by an immigration officer, based on humanitarian and compassionate considerations under subsection 114 of the Act, from the requirement that an application for permanent

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101 In *Bolanos, Jonathan Christian* v. *M.C.I.* (F.C., no. IMM-6539-02), Kelen, September 5, 2003; 2003 FC 1032, the Court rejected the applicant's position that the law now requires a more detailed assessment of the best interests of a child directly affected by an H & C application than was expressed in the decisions made in the wake of the decision in *Baker.* The Court concluded that subsection 25(1) of IRPA is a codification of the decision in *Baker* and nothing in its wording indicates that Parliament intended to require a more detailed assessment of the best interests of the child than the one set out by the Supreme Court in that case. As such, cases concerning subsection 114(2) of the former *Immigration Act* that post-date *Baker* remain applicable to H & C applications made under *IRPA.*

102 *Baker* v. *Canada (M.C.I.),* [1999] 2 S.C.R. 817 (L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie; Cory and Iacobucci, concurring in part, July 9, 1999), allowing appeal from judgment of the Federal Court of Appeal, [1997] 2 F.C. 127 (C.A.), dismissing an appeal from a judgment of the Federal Court–Trial Division (1995), 31 Imm. L.R. (2d) 150 (F.C.T.D.), dismissing an application for judicial review.

103 *Mercier, Rachelle* v. *M.E.I.* (IAB 79-1243), Houle, Tremblay, Loiselle, November 17, 1980.

104 *Sutherland, Troylene Marineta* v. *M.E.I.* (IAB 86-9063), Warrington, Bell, Eglington (dissenting), December 2, 1986.

105 *Baker* v. *Canada (M.C.I.)*(S.C.C., no. 25823), L'Heureux-Dubé, Gonthier, McLachlin, Bastarache and Binnie; Cory and Iacobucci, concurring in part, July 9, 1999 allowing appeal from judgment of the Federal Court of Appeal, [1997] 2 F.C. 127 (F.C.A.), dismissing an appeal from a judgment of the Federal Court–Trial Division (1995), 31 Imm.L.R. (2d) 150 (F.C.T.D.), dismissing an application for judicial review.

residence be made from outside Canada. In considering the certified question,[106] the Court concluded that "the decision-maker should consider children's best interests as an important factor, give them substantial weight, and be alert, alive and sensitive to them. That is not to say that children's best interests must always outweigh other considerations, or that there will not be other reasons for denying an H & C claim even when children's interests are given this consideration. However, where the interests of children are minimized, in a manner inconsistent with Canada's humanitarian and compassionate tradition and the Minister's guidelines, the decision will be unreasonable".

In *Legault*,[107] a case involving an H& C application, the Federal Court of Appeal held that "the mere mention of the children is not sufficient. The interests of the children is a factor that must be examined with care and weighed with other factors. To mention is not to examine and weigh." The Court went on to consider another question: Did *Baker* create a *prima facie* presumption that the children's best interests should prevail, subject only to the gravest countervailing grounds? It answered that question in the negative and concluded that the children's interests are not superior to other factors that must be considered

In cases prior to *IRPA*, in assessing the "best interests" of an appellant's child, the Appeal Division considered that the appellant was not residing with the child, the other parent (the child's mother) was the primary care giver and that the child was not financially or otherwise dependent on the appellant. Also considered was the frequency and nature of the appellant's visits with the child as well as the emotional attachment between the child and the appellant.[108]

In another case, the Appeal Division determined that it was in the best interests of the appellant's baby daughter that she be brought up by both parents. However, this was premised upon the appellant's rehabilitation, as it was not in the child's best interests to have an alcoholic father who is subject to frequent incarceration because of criminality actively involved in the child's life.[109]

Another factor that may be taken into account to the benefit of the appellant is having a parent in Canada who is in need of care[110] or parents in need of the financial support provided by the appellant.[111]

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[106] The following question was certified as a serious question of general importance under subsection 83(1) of the Act: "Given that the Immigration Act does not expressly incorporate the language of Canada's international obligations with respect to the International Convention on the Rights of the Child, must federal immigration authorities treat the best interests of the Canadian child as a primary consideration in assessing an applicant under s. 114(2) of the Immigration Act?"

[107] *M.C.I.* v. *Legault, Alexander Henri* (F.C.A., no. A-255-01), Richard, Décary, Noël, March 28, 2002; 2002 FCA 125.

[108] *M.C.I.* v. *Vasquez, Jose Abel* (IAD T95-02470), Michnick, October 23, 2000 (reasons signed December 19, 2000).

[109] *Krusarouski, Mihailo* v. *M.C.I.* (IAD T99-04248), Sangmuah, November 30, 2001.

[110] *Dean, Daniel Shama* v. *M.E.I.* (IAB 86-6318), Anderson, Goodspeed, Ahara, February 18, 1987 (reasons signed May 15, 1987).

In one case, however, where the appellant had misrepresented her marital status and had both a Canadian-born child, and a parent dependent on her for assistance in everyday activities, the Appeal Division found that there were insufficient grounds to warrant the granting of discretionary relief. Concerning the dependent parent, the Appeal Division noted that she had family members other than the appellant in Canada who could assist her.[112]

In one of the early post-*IRPA* decisions,[113] the Appeal Division concluded that the new test in *IRPA* does not require that more weight or greater priority be assigned to the best interests of a child; it simply requires that this factor be taken into account.

The Federal Court of Appeal in *Hawthorne*,[114] another H & C application case, considered the benefits that a child would enjoy if the child were allowed to stay in Canada. In that case, Décary J.A. stated that a decision-maker who is considering the best interests of a child "may be presumed to know that living in Canada can offer a child many opportunities and that, as a general rule, a child living in Canada with her parent is better off than a child living in Canada without her parent."[115] As such, the best interests of the child will usually favour non-removal of the parent. It is unnecessary for a decision-maker to make a specific finding to that effect because "such a finding will be a given in all but a very few, unusual cases".[116] The decision-maker must, however, determine "the likely degree of hardship to the child caused by the removal of the parent and to weigh this degree of hardship together with other factors, including public policy considerations, that militate in favour of or against the removal of the parent."[117]

Legault and *Hawthorne* were applied by the Federal Court-Trial Division in *Eugenio*[118] where the Court concluded that the best interests of the child is an important factor but not a determinative one to be considered by the IAD in removal order appeal cases. In allowing the application challenging the decision of the IAD made under the former *Immigration Act*, the Court found that the panel did not analyze the issue of best interests from the point of view of the applicant's child as references to the child in the reasons for decision "merely state that the IAD took the interests of the child into account, but there is not even a cursory mention of the hardship the child might face upon her father's removal."

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111 *Yu, Evelyn* v. *M.C.I.* (IAD T95-05259), Wright, February 29, 1996 (reasons signed July 18, 1996), rev'd on other grounds, *M.C.I.* v. *Yu, Evelyn* (F.C.T.D., no. IMM-1264-96), Dubé, June 6, 1997.

112 *Olarte, Josephine* v. *M.C.I.* (IAD V93-02910), Clark, Verma, Lam, February 14, 1995.

113 *Nguyen, Ngoc Hoan* v. *M.C.I.* (IAD WA2-00112), Wiebe, July 4, 2003.

114 *M.C.I.* v. *Hawthorne, Daphney and The Canadian Foundation for Children (Intervener*), [2003] 2 FC 555.

115 *Vasquez, supra*, footnote 108.

116 *Krusarouski, supra*, footnote 109.

117 *Krusarouski, supra*, footnote 109.

118 *Eugenio, Jose Luis* v. *M.C.I.* (F.C., no. IMM-5891-02), Kelen, October 15, 2003; 2003 FC 1192.

The Federal Court in *Ye*[119] dealt with whether the IAD considered the best interests of the applicant's newborn Canadian child and found that the Appeal Division did not weigh the best interests of the child in China against the best interests of the child in Canada. The Appeal Division considered the age of the child, the lack of close family in Canada, and the fact that the child's father lives in China. The Federal Court found that the Appeal Division was "alert, alive and sensitive" to the interests of the children.

In *Singh*[120] the Federal Court-Trial Division relied on *Hawthorne* to conclude that the IAD's "analysis of the child's best interests was adequate in the circumstances. It considered the respective benefits and disadvantages to the child of Ms. Singh's removal or non-removal. I cannot characterize its decision as dismissive of the child's best interests."

The Federal Court of Appeal in *Thiara*[121] confirmed that *Legault*[122] was not overruled by *De Guzman*,[123] and that the best interests of the child is an important factor which must be given substantial weight, but it is not the only factor. The FCA specifically dealt with the effect of paragraph 3(3)(f) of IRPA[124], and the effect of that provision on the exercise of discretion regarding humanitarian and compassionate considerations. The FCA held that IRPA s.3(3)(f) does not require than an officer exercising discretion under IRPA s.25, specifically refer to and analyze the international human rights instruments to which Canada is a signatory. It is sufficient if the officer addresses the substance of the issues raised.[125]

The Federal Court has considered the impact of custody orders. In *McEyeson*[126] the Court concluded that the "position taken by the IAD was "alert, alive and sensitive" to

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119 *Ye, Ai Hua* v. *M.C.I.* (F.C.T.D., no. IMM-740-02), Pinard, January 21, 2003; 2003 FCT 23.

120 *Singh, Rajni* v. *M.C.I.* (F.C., no. IMM–2038–03), O'Reilly, December 19, 2003; 2003 FC 1502. The Immigration Appeal Division case was decided under the former *Immigration Act*. See also *Lin, Yu Chai* v. *M.C.I.* (F.C.T.D., no. IMM-3482-02), Pinard, May 23, 2003; 2003 FCT 625, a removal order appeal based on an entrepreneur's failure to comply with terms and conditions of landing, the Court found that the "lengthy and thoughtful analysis made by the IAD indicates clearly that it was at all times alert, alive and sensitive to the minor applicant's best interests."

121 *Thiara, Monika* v. *M.C.I.* (F.C.A., no. A-239-07), Noel, Nadon, Ryer, April 22, 2008; 2008 FCA 151.

122 *Legault, supra,* footnote 107.

123 *De Guzman*, 2005 FCA 436.

124 This Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory.

125 The Federal Court of Appeal reiterated this principle in *M.C.I.* v. *Okoloubu, Ikenjiani Ebele* (F.C.A., no. A-560-07), Noel, Nadon, Trudel, October 27, 2007; 2007 FC 1069.

126 *McEyeson, Barbara* v. *M.C.I.* (F.C.T.D., no. IMM-4155-01), Russell, June 12, 2003; 2003 FCT 736**.** In an earlier decision *Cilbert, Valverine Olivia* v. *M.C.I.* (F.C.T.D., no. IMM-5420-99), Nadon, November 17, 2000, the Federal Court in a review of a decision by an immigration officer refusing an exemption from the requirement to obtain an immigrant visa to land from within Canada concluded that the officer erred in relying on a conclusion by the Alberta Court of Queen's Bench in the context of a custody hearing to evaluate the best interests of the applicant's child. See also *Reis, Josepha Maria Dos* v. *M.C.I.* (F.C.T.D., no. IMM-6117-00), O'Keefe. March 22, 2002; 2002 FCT 317 where

the best interests of the child because, as it indicated in its decision, it looked to the Ontario Court as the most appropriate forum to consider and pronounce upon those interests and regarded *Baker, supra*, as the correct authority to follow when deciding whether the Applicant should remain in Canada."

The Federal Court of Appeal in *Idahosa*[127] held that a court order from the Ontario Court of Justice, granting her temporary custody of her children and an order prohibiting their removal from Ontario did not operate to stay her removal under IRPA.[128] In another Federal Court case[129], the Court found that the IAD did not err in its assessment of the effect of a family court judge's order who had determined that it was in the children's best interest to have regular visitation from the appellant. The Court held that an order granting access for visitation cannot be interpreted as preventing the appellant's removal. If the parent to whom access is granted is unable to access his children due to medical conditions, absence from Canada or a jail sentence, it does not necessarily follow that the order has been disobeyed.

The Court in *Baker* did not address the issue as to whether the IAD will need to consider the best interests of a child who does not reside in Canada.[130] In *Irimie,*[131]

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the Court in a H & C application case considered the impact of the loss of support payments if the applicant was removed from Canada in determining the best interests of the child.

127 *Idahosa, Eghomwanre Jessica* v. *M.P.S.E.P.* (F.C.A., no. A-567-07), Sexton, Evans, Ryer, December 23, 2008. The Ontario Court judge had specifically noted that the Court was not dealing with her immigration status.

128 See also *M.C.I. and M.P.S.E.P.* v. *Arias Garcia, Maria Bonnie* (F.C.A., no. A-142-06), Desjardins, Noel, Pelletier, March 16, 2007; 2007 FCA 75, where the Court answered in the negative the question "Could a judgment by a provincial court refusing to order the return of a child in accordance with the *Convention on the Civil Aspects of International Child Abduction*, [1989] R.T. Can. No. 35, and section 20 of *An Act respecting the Civil Aspects of international and Interprovincial Child Abduction*, R.S.Q. c. A-23.01 (ACAIICA) have the effect of directly and indirectly preventing the enforcement of a removal order which is effective under the *Immigration and Refugee Protection Act*, S.C. .2001 c. 27 (IRPA)?

129 *Bal, Tarlok Singh* v. *M.C.I.* (F.C., no IMM-1472-08), de Montingyn, October 17, 2008; 2008 FC 1178.

130 The issue was touched on by way of *obiter* in a decision of the Federal Court-Trial Division in *Qureshi, Mohammad* v. *M.C.I.* (F.C.T.D., no. IMM-277-00), Evans, August 25, 2000. The case involved a judicial review of an immigration officer's negative decision on a subsection 114(2) application. The applicants were a husband and wife and their five year old son, Arman, all of whom were failed refugee claimants, and an infant son born in Canada. The Court found that the officer was not "alert, alive and sensitive to" the best interests of the Canadian born child, even taking into account his recent birth. The Court had this to say about Arman: "…I do not have to decide whether it can be inferred from the reasons for decision that the officer adequately considered the best interests of the older child, Arman, who is not a Canadian citizen. However, in my opinion, a decision-maker exercising the discretion conferred by subsection 114(2) cannot ignore the best interests of children in Canada, simply because they are not Canadian citizens."

131 *Irimie, Mircea Sorin* v. *M.C.I.* (F.C.T.D., no. IMM-427-00), Pelletier, November 22, 2000. In paragraph 20 of the judgment, the Court stated "that 'attentiveness and sensitivity to the importance of the rights of children, to their best interests, and to the hardship that may be caused to them by a negative decision' must be read to include all of the children of the individuals in question, both Canadian and foreign. To hold otherwise is to say that the humanitarian and compassionate needs of Canadian children of particular parents are more worthy of consideration than those of the non-

Pelletier, J. decided that the principles in *Baker* should apply to all of the children of the individual in question, both Canadian and foreign children. This should be contrasted with the Federal Court of Appeal decision in *Owusu*[132] where in dismissing the appeal the Court stated "we must not be taken to have affirmed the Applications Judge's view that an immigration officer's duty to consider the best interests of a H & C applicant's children is engaged when the children in question are not in, and have never been to, Canada. This interesting issue does not arise for decision on the facts of this case and must await a case in which the facts require it to be decided." The Court went on to note that in *Baker* the Supreme Court made no mention of Ms. Baker's four other children residing in Jamaica, nor did it comment on any consideration that the immigration officer gave or failed to give to the best interests of the children who did not reside in Canada.

Circumstances of Misrepresentation

The inadvertent or careless nature of the misrepresentation is one factor among many others which the Appeal Division may consider in dealing with a request for discretionary relief in cases where an appellant is under a removal order for misrepresentation of a material fact.[133] Generally, inadvertent or careless misrepresentation is treated more favourably than is misrepresentation of an intentional nature. Thus, for example, where an appellant mistakenly believes that her divorce has been finalized and holds out that she is single, and the Appeal Division finds the misrepresentation to have been inadvertent or careless rather than intentional, this finding may mitigate the misrepresentation.

In one case, where the appellant had genuinely attempted to comply with immigration requirements before leaving his country and where he had played a passive role in events by retaining and relying on immigration consultants there, which resulted in his being admitted to Canada as a permanent resident with no apparent dependants, the Appeal Division considered these circumstances together with other factors weighing in his favour and granted discretionary relief from the removal order.[134]

In another case, where the appellant had misrepresented her marital status when she applied to come to Canada under the Foreign Domestic Program and later applied for permanent residence, the Appeal Division in exercising its discretionary jurisdiction in favour of the appellant took into consideration that although the misrepresentation had been deliberate and ongoing, it had not caused any additional effort by immigration officials. There was a policy or practice by immigration officers to allow persons in the

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Canadian children of the same parents. It is understandable that distinctions be drawn between those children for legal purposes: it would be 'inconsistent with Canada's humanitarian and compassionate tradition' to suggest that there are humanitarian distinctions to be drawn between them based upon citizenship."

[132] *Owusu, Samuel Kwabena* v. *M.C.I.* (F.C., no. A-114-03), Evans, Strayer, Sexton, January 26, 2004; 2004 FCA 38.

[133] *Villareal, Teodor* v. *M.C.I.* (F.C.T.D., no. IMM-1338), Evans, April 30, 1999.

[134] *Ng, Wai Man (Raymond)* v. *M.C.I.* (IAD V95-01846), Bartley, November 8, 1996.

Program who had misrepresented their marital status to come forward and be exempted from any repercussions, but the appellant had not been aware of it and had therefore experienced additional hardship.[135]

The Appeal Division allowed an appeal brought under the former Act on the following facts. The appellant's mother had sponsored his application for permanent residence as a member of the family class. Since the appellant's mother was illiterate and the appellant knew little or nothing about Canadian immigration procedures, they retained the services of an immigration consultant on whom they relied for advice. While awaiting the outcome of his application for permanent residence, the appellant had applied for, and obtained, a Minister's permit. The immigration consultant assured the appellant that he was permitted to marry while under a Minister's permit. Later, when the appellant received his record of landing after getting married, he read and signed it, but failed to notice that he was listed as single. The Appeal Division was satisfied that the misrepresentation was more likely than not, innocent and at worst, negligent; the lack of intent to misrepresent went to the quality of the misconduct; and it was a circumstance the Appeal Division could take into account.[136]

In a case, where the appellant had a grade-six education and a limited knowledge of English, a travel agency had prepared his application for permanent residence. The appellant was unaware of the implications of failing to disclose that he had two children. The Appeal Division exercised its discretion in favour of the appellant and allowed the appeal after finding that the appellant had not planned to deceive immigration authorities. While noting that ignorance of the requirements of the Act and the Regulations was no excuse, the Appeal Division concluded that the lack of planning did mitigate the seriousness of the breach.[137]

Even where the Appeal Division finds the misrepresentation to be intentional, it may, taking into account all the relevant circumstances of the case, grant discretionary relief. For example, in one case involving misrepresentation where the appellant claimed to have no dependants when in fact he had a son born out of wedlock, the appellant testified that he did not disclose the existence of his son to immigration officials because he did not consider a child born out of wedlock to be his child. Rejecting the appellant's explanation, the Appeal Division found that the appellant's misrepresentation was intentional. However, the Appeal Division took into consideration that his and his family's shame and humiliation had contributed to his decision not to disclose the birth of

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[135] *Espiritu, Flordelina* v. *M.C.I.* (IAD W94-00060), Wiebe, February 20, 1995.

[136] *Balogun, Jimoh* v. *M.C.I.* (IAD T94-07672), Band, November 16, 1995. The Appeal Division also took into account the fact that the appellant had been in Canada for five years; he was married and had two children; he was very close to his mother, his uncle, and his stepfather; he had been steadily employed; and he was a person of strong character with high moral and religious values.

[137] *Pagtakhan, Edwin del Rosario* v. *M.C.I.* (IAD W95-00014), Wiebe, March 22, 1996. In reaching its decision, the Appeal Division also considered that the appellant had worked hard to establish himself in Canada; there was a strong bond between the appellant and his parents whom he supported financially and helped in other ways; he was steadily employed; and he had made a significant contribution to the community as a volunteer.

his son. It also took into consideration that the appellant expressed regret at not having told the truth.[138]

In contrast, the Federal Court upheld the Appeal Division's decision when it determined that the applicant's intentional misrepresentation in not disclosing a son born out of wedlock and his attempts to mislead the tribunal militated strongly against him. The Appeal Division concluded that in order to maintain the integrity of Canada's immigration system, this offence, although not a criminal offence, must be taken seriously.[139]

Where the appellant had represented herself to be widowed with no family on repeated occasions when in fact she had a husband and three children, the Federal Court upheld the Appeal Divisions' finding that this was not an innocent misrepresentation.[140] When the misrepresentation is deliberate, the IAD will consider the integrity of the Canadian immigration system. When the misrepresentation is continuous, the seriousness of the deliberate misrepresentation will weigh heavily against the appellant.[141]

In the case of deliberate misrepresentations, the Appeal Division will consider evidence of remorse by the appellant. In one case,[142] the Appeal Division found that the appellant was remorseful. The other factors in the appellant's favour were that he had been in Canada for 12 years, his partner relied in part on his income to raise their two children and she attested to his parenting activities. The high degree of establishment and the best interests of the children were considered together with the appellant's remorse. In contrast, where the appellant applied to come to Canada as a live-in-caregiver using a false name and date of birth and stated that she was not married when she was, the Appeal Division found that she continued to deny the Minister's allegations and showed no remorse, There were insufficient positive factors in her favour and the appeal was dismissed.[143]

Where a removal order is made against the appellant on the basis of misrepresentation, the fact that the appellant signed the application for permanent

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138 *Cen, Wei Huan* v. *M.C.I.* (IAD V95-01552), McIsaac, July 23, 1996. It also weighed in the appellant's favour that he was steadily employed, responsible and hard-working. Consequently, the Appeal Division concluded that the appellant had established that he should not be removed from Canada.

139 *Badhan, Inderjit* v. *M.C.I.* (F.C., no. IMM -736-03), Martineau, July 30, 2004; 2004 FC 1050. The Federal Court noted that the Appeal Division had appropriately considered the positive factors in the appellant's favour and had not ignored evidence.

140 *Mendiratta, Raj* v. *M.C.I.* (F.C. no. IMM-5956-04), Tremblay-Lamer, February 24, 2005; 2005 FC 293. The appellant, other than evidence of her relationship with her Canadian grandchildren, did not adduce other evidence in her favour, and the appeal was dismissed by the IAD.

141 *Angba, Bartholemy* v. *M.C.I.* (IAD MA4-02658), Guay, December 8, 2006, where the appellant continued to deny his misrepresentation until the third day of the hearing. See also *Purv, Lucian Nicolai* v. *M.C.I.* (IAD MA3-09798), Fortin, January 19, 2005, where the appellant initially obtained status as the sponsored spouse of a woman he had divorced.

142 *Mohammad, Sami-Ud-Din* v. *M.C.I.* (IAD VA3-01399), Kang, December 2, 2003.

143 *Dissahakage, Dinesha Chandi* v. *M.C.I.* (IAD VA5-02066), Lamont, December 13, 2007.

residence without a thorough interview and without the benefit of appropriate interpretation is irrelevant in law. However, those facts may be considered in all the circumstances of the case.[144]

Circumstances of Failure to Comply with Conditions of Landing

As with the circumstances surrounding misrepresentation, the Appeal Division examines the circumstances surrounding an appellant's failure to comply with the conditions of landing. In this context, the inadvertent nature of the failure to comply with terms and conditions is a relevant factor for the Appeal Division to consider. For example, in the case of dependent family members of an entrepreneur who failed to fulfill the conditions of landing, the Appeal Division has allowed the appeal. In one case,[145] where the appellants came to Canada as accompanying family members of a permanent resident in the entrepreneur class, their father failed to meet his obligations. The appellants were estranged from their father and had accumulated significant debt in their attempt to support themselves and attend university. The appellants were found to be hardworking individuals and their appeal was allowed. Similarly, in another case,[146] the appellant arrived in Canada as a dependent of his father, who failed to respect the conditions of his landing as an entrepreneur. The family left Canada and the appellant returned to Canada. The Appeal Division, in allowing the appeal, found that the appellant had integrated into Canadian life, and took into account that the decision to leave Canada was made by the appellants' parents when he was 17 years old, and that he was stateless.)

In contrast, the Federal Court upheld the Appeal Divisions' finding not to consider the appeals of the children separately from the parents in a case where the Appeal Division found that the parents took part in a sham arrangement to try to fulfill the conditions of the entrepreneur category. While there were positive factors in favour of the children, these elements did not outweigh the importance which must be given to the integrity of maintaining the conditions in the entrepreneur class.[147]

Similarly, where the appellant failed to comply with the terms and conditions of his landing as an entrepreneur, even though he had sufficient funds, and used the money instead to purchase a house, sell it and purchase a larger one, the Appeal Division dismissed the appeal. The Appeal Division noted that the entrepreneur class was created in order to promote Canada's economic development and held that ordering a stay would call into question not only the integrity of the program, which is designed to attract entrepreneurs to Canada, but also the integrity of the entire Canadian immigration system.[148]

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144 *Nguyen, Truc Thanh* v. *M.C.I.* (IAD T96-01817), Townshend, October 4, 1996 (reasons signed November 4, 1996).

145 *Noueihed et al* v. *M.P.S.E.P.*(IAD MA6-03238), Hudon, July 3, 2007 (reasons signed July 6, 2007).

146 *Hamad, Ahmad Afif* v. *M.C.I.* (IAD MA4-04211), Patry, June 28, 2005.

147 *Chang, Chun Mu* v. *M.C.I.* (F.C., no. IMM-2638-05, Shore, February 14, 2006; 2006 FC 157.

148 *Touchan, Said et al.* v. *M.C.I.* (IAD MA3-08463 et al.), Patry, February 14, 2005.

In considering special relief for an entrepreneur, the Appeal Division will also consider the efforts made by the entrepreneur to fulfill the conditions of landing. For example, in one case, the Appeal Division found that despite the entrepreneur's conscientiousness and diligence, circumstances out of his control hindered compliance.[149] Evidence of continuing efforts of a substantial nature to meet the investment and business requirements may be considered.[150]

A stay of removal may be granted in order to allow the entrepreneur more time to fulfill the conditions.[151]

Circumstances of failure to comply with Residency Obligation

As with circumstances surrounding the misrepresentation or the failure to comply with conditions of landing, the Appeal Division examines the circumstances surrounding an appellant's failure to comply with the residency obligation. This is a type of removal order in which the Appeal Division did not consider discretionary jurisdiction prior to IRPA.

In one of the early post-IRPA decisions, the Appeal Division commented on this new discretionary jurisdiction, as follows:

> While the case at hand is a removal appeal, it is a removal appeal grounded in a new type of inadmissibility, one not previously considered by the Division. While general principles governing the Division's exercise of discretionary relief, relied upon and applied for many years, continue to be useful and relevant, the specific appropriate considerations within this new area must be identified and tailored so as to be relevant to the fundamental nature of the appeal. Appropriate considerations must recognize the needs of the parties and provide for a degree of objectivity and consistency in the area while recognizing that unique facts present themselves in every appeal. It is also imperative to consider the objectives of the current Act as articulated in section 3 of the current Act. In my view, the Ribic factors continue to be a useful, general guideline in the exercise of discretion. **Other relevant considerations,**

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149 *Liu, Kui Kwan* v. *M.E.I.* v. (IAD V90-01549), Wlodyka, August 20, 1991.

150 *De Kock* v. *M.C.I.* (IAD V96-00823), Clark, December 17, 1996, the appellant was granted a two-year stay in order to try and fulfill the conditions. He submitted evidence to show a guaranteed $100,000 investment, the acquisition of a business licence, and the proven track record of his proposed business in other locations. In *Luthria* v. *M.C.I.* (IAD T93-03725), Aterman, September 9, 1994, the appellant had made some effort to establish a business, but was unsuccessful. The panel acknowledged the uphill struggle because of the recession, but found the appellant's efforts were not strenuous enough to warrant equitable relief. In *Maotassem, Salim Khalid* v. *M.C.I.* (IAD T97-00307), Maziarz, December 17, 1997, the appellant had twice tried to comply with the conditions and the businesses failed for reasons beyond his control. The evidence failed to establish that the appellant was then on the road to becoming able to meet the terms and conditions and therefore no special relief was granted.

151 *Vashee, Gautam Bapubhai* v. *M.C.I.* (F.C., no. IMM-7172-04), Kelen, August 15, 2005, 2005 FC 1104.

> **in the context of an appeal from a removal order based on an appellant's failure to meet his/her residency obligations include an appellant's initial and continuing degree of establishment in Canada, his or her reasons for departure from Canada, reasons for continued, or lengthy, stay abroad, ties to Canada in terms of family, and whether reasonable attempts to return to Canada were made at the first opportunity**.[152] (emphasis added)

The *Kuan* decision was cited with approval by the Federal Court,[153] affirming that an individual's intention throughout the periods of extended residency outside Canada is a relevant factor in the H&C assessment.

Similarly, the Appeal Division[154] held that the following factors are relevant in assessing discretionary relief in a removal order appeal based on a failure to comply with residency obligation:

- the length of time an appellant lived in Canada and the degree to which he was established in Canada, before leaving;
- the continuing connections the appellant has to Canada, including connections to family members here;
- the appellant's reasons for leaving Canada, any attempts made to return to Canada, and the appellant's reasons for remaining outside of Canada;
- the appellant's circumstances while away from Canada;
- whether the appellant sought to return to Canada at the first reasonable and available opportunity;
- hardship and dislocation to family members in Canada if the appellant is removed from or is refused admission to Canada;
- hardship to the appellant if removed from or refused admission to Canada.

The Appeal Division has found that the *indicia* of an intention to abandon Canada which were considered under the former Act continue to be relevant to the exercise of the Appeal Division's discretionary jurisdiction under IRPA, although a finding of "abandonment" is no longer necessary.[155]

The Appeal Division has noted that a stay of execution of the removal order is an unlikely outcome in an appeal where the person is being ordered removed for failure to comply with residency obligation. The Appeal Division noted that in appeals involving

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[152] *Kuan* v. *Canada (M.C.I.)*, 34 Imm. L.R. (3d) 269 at paragraph 36. See also *Wong, Yik Kwan Rudy* v. *M.C.I.* (IAD VA2-03180), Workun, June 16, 2003.

[153] *Angeles, Antoio Ramirez* v. *M.C.I.* (F.C., no. IMM-8460-03), Noel, September ; 2004 FC 1257.

[154] *Berrada, Touria El Alami and El Alams, Sarah* v. *M.C.I.* (IAD MA3-06335 et al.), Beauchemin, November 15, 2004, citing with approval, *Kok, Yun Kuem & Kok,* v. *Kwai Leung M.C.I.,* (VA2-02277), Boscariol, July 16, 2003.

[155] *Wong, supra*, footnote 152; *Yu, Ting Kuo* v. *M.C.I.* (IAD VA2-03077), Workun, June 16, 2003.

criminality where there is evidence of rehabilitation, conditions tailored to monitor and support rehabilitation can be imposed. Similarly where a person has been landed subject to terms and conditions and has failed to fulfill any of those conditions, staying the departure order to give the person an opportunity to do so might be appropriate. However, in the case of a breach of the residency requirements, there is no issue as to monitoring for rehabilitation purposes.[156]

Review of stay of execution

Pursuant to s.68(4) of the IRPA, if the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

On a review of a stay of execution of a removal order, the Appeal Division is required to consider the additional circumstances of the appellant's (the respondent's) conduct while under the stay.[157] The Appeal Division will also consider the seriousness of the breaches of the conditions of the stay and the demonstrated rehabilitation.

In one case, where there had been several serious breaches of the conditions of the stay, and the appellant had failed to demonstrate rehabilitation, the Appeal Division denied the respondent's request to have the appeal dismissed. Finding that the positive factors still outweighed the negative ones, however, the Appeal Division extended the stay for a further two years.[158]

Where the parties made a joint recommendation to extend the stay of execution of the removal order, the Appeal Division declined to follow that recommendation, cancelled the stay and allowed the appeal instead where it felt that a continuation of the stay was not warranted. Finding that with the exception of missing one reporting and reporting late on three occasions, the appellant had complied with the conditions of the stay, undergone counseling and treatment programs, had not re-offended and was well on his way to rehabilitation.[159]

In another case, the appellant testified that the problems he had encountered during the period of the stay (failure to appear) were as a result of experiencing a relapse to a manic phase of his bipolar disorder, but that he was now taking his medication and complying with his reporting conditions. The Appeal Division concluded that if the

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[156] *Thompson, Gillian Alicia* v. *M.C.I.* (IAD TA3-00640), MacPherson, November 12, 2003, at paragraph 15. The Appeal Division went on to note that there may be exceptional circumstances where a stay is warranted, for example, in a borderline case involving best interests of a child.

[157] *Liedtke, Bernd* v. *M.E.I* (IAD V89-00429), Verma, Wlodyka, Gillanders, November 26, 1992.

[158] *Simas, Manuel Fernand* v. *M.P.S.E.P.* (IAD T99-11275), Bousfield, May 30, 2006.

[159] *Madan, Buland Iqal* v. *M.C.I.* (IAD V98-00137), Mattu, September 8, 2004 (reasons signed October 7, 2004).

appellant continued to take steps to control his bipolar disorder, he would not be a threat to himself or others and the stay of execution of the removal order was extended.[160]

For a review of conditions of stays and breaches of conditions (for example, "keep the peace and be of good behavior"), please refer to Chapter 10.

Continuing nature of discretionary jurisdiction

Prior to the passage of the IRPA, the discretionary jurisdiction of the Appeal Division was considered to be of a continuing nature in removal cases. Accordingly, the Appeal Division had jurisdiction to reopen an appeal from a removal order on discretionary grounds only, to receive more evidence.[161] To justify a reopening, the tendered evidence needed only be such as to support a conclusion that there was a reasonable possibility, as opposed to probability, that the evidence could lead the Appeal Division to change its original decision. The scope of the Appeal Division's power to reopen an appeal has been curtailed by IRPA. Pursuant to section 71 of IRPA, the IAD on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.

Section 71 provides: The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.[162]

The FCA[163] has confirmed several lower Federal Court and Appeal Division[164] decisions, holding that section 71 of IRPA extinguished the continuing "equitable jurisdiction" of the Appeal Division to reopen an appeal against a deportation order, except where the Appeal Division has failed to observe a principle of natural justice. The FCA considered, among other things: (i) the Appeal Division's ongoing jurisdiction to

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160 *Edge, Geoffrey Paul* v. *M.C.I.* (IAD TA0-07584), Hoare, January 17, 2005 (reasons signed February 11, 2005).

161 *Grillas* v. *M.M.I.*, [1972] SCR 577, 23 DLR (3d) 1; *M.E.I.* v. *Clancy, Ian* (F.C.A., no. A-317-87), Heald, Urie, MacGuigan, May 20, 1988.

162 In *Mustafa, Ahmad* v. *M.C.I.* (IAD VA1-02962), Wiebe, February 13, 2003 the panel concluded that section 71 of IRPA does not apply to sponsorship appeals. The applicable law is that set out in *Chandler* v. *Alberta Association of Architects*, [1989] 2 S.C.R. 848.

163 *Nazifpour, Shahin* v. *M.C.I.* (F.C.A., no. A-20-06), Evans, Linden, Nadon, February 8, 2007; 2007 FCA 35.

Jessani, Sadrudin Karmali Janmohamed v. *M.C.I.* (IAD T98-00535), Sangmuah, May 14, 2003; *Ebrahim, Aziza Ahmed* v. *M.C.I.* (IAD V96-01583), Boscariol, December 27, 2002; *Bajwa, Pritpal Singh* v. *M.C.I.* (IAD VA1-00840), Wiebe, November 26, 2002; *Ye, Ai Hua* v. *M.C.I. 2004 FC 964; Griffiths* v. *Canada* (Minister of Citizenship and Immigration) 2005 FC 971; *Nazifpour* v. *Canada* (Minister of Citizenship and Immigration) 2005 FC 1694; *Baldeo, Naipaul* v. *M.C.I.* (F.C. no. IMM-8987-04), Campbell, January 26, 2006; 2006 FC 79). In *Baldeo*, the appellant argued that at the IAD, the immigration consultant did not call evidence from family members as to the hardship that would be caused by the removal of the appellant. The IAD held that there was insufficient evidence to conclude the immigration consultant was incompetent which, if found, would amount to a breach of natural justice.

reopen for new evidence prior to IRPA; (ii) general legal principles governing jurisdiction to reopen or rehear; (iii) refugee claims cannot be reopened for new evidence; (iv) the presumption of implied exclusion in statutory interpretation principles; (v) information available to Parliamentarians during passage of Bill C-11 (for example, CIC's Clause-by-Clause Assessment and CBA's submissions); and (vi) an interpretation of s. 71 which removes the Appeal Division's right to reopen is consistent with the statutory objective to remove criminals efficiently, and it is difficult to see what other purpose s. 71 could have.

The Appeal Division has had several occasions to deal with the scope of section 71 of IRPA. It has held that an application to reopen a removal order appeal dismissed under the former *Immigration Act* heard on the day *IRPA* came into force is governed by *IRPA* pursuant to section 190 of *IRPA* as it was pending or in progress before the coming into force of this section.[165] An application to reopen a removal order appeal abandoned under the former *Immigration Act* filed after *IRPA* came into force is governed by *IRPA*. Section 71 applies and not the less restrictive test under the IAD Rules which existed under the former *Immigration Act*.[166]

The Appeal Division has also considered what constitutes a breach of natural justice. Section 71 refers to a past failure to observe a principle of natural justice, and does not confer jurisdiction to reopen appeals where the Appeal Division anticipates that not doing something may lead to a failure to observe a principle of natural justice. The failure to observe a principle of natural justice must have occurred in the course of, or in conjunction with, the disposition of the appeal.[167]

The Appeal Division has found that a failure on the part of the appellant to attend his oral review after a notice was sent to his correct mailing address and after he was contacted by telephone was not a breach of natural justice within the meaning of section 71.[168]

The Appeal Division has held that a represented appellant being unaware that he could submit reference letters to support his appeal and positive changes to the appellant's life after his appeal being dismissed does not substantiate an allegation of a breach of natural justice.[169]

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[165] *Lu, Phuong Quyen* v. *M.C.I.* (IAD M95-04752), di Pietro, January 10, 2003.

[166] *Bump, James Edward* v. *M.C.I.* (IAD VA2-00458), Wiebe, April 16, 2003. See also *Phillip, Richard Don* v. *M.C.I.* (IAD TA1-03488), Kalvin, February 24, 2003.

[167] *Ebrahim, supra,* footnote 164. See also *Baldeo, supra,* footnote 164.

[168] *Ishmael, Gregory* v. *M.P.S.E.P.* (IAD T99-07831), Band, December 11, 2008. The Appeal Division held that the Notice to Appear was not a nullity because it was issued in 2005 pursuant to the former Immigration Act; nor was the abandonment decision a nullity because it was made under the former Act. As the appeal was initiated in 1999, it was required by section 192 of IRPA to be continued under the former Act.

[169] *Bajwa, supra,* footnote 164.

The Appeal Division has also held that the failure to consider country conditions at the initial removal order appeal hearing prior to the Supreme Court of Canada's decision in *Chieu* and subsequent change in the law does not operate retroactively to invalidate a proceeding which was decided prior to the new development.[170]

The Appeal Division has also found that the failure to include a rehabilitation provision in the order dismissing the appeal did not constitute a breach of natural justice.[171]

In a case reviewed and upheld by the Federal Court[172], the Appeal Division denied the appellant's motion to re-open, finding that there had been no breach of natural justice. The Federal Court found that the appellant was essentially seeking, through his application to reopen, to make arguments on the merits under the cover of a violation of the principles of natural justice. The Court concluded that authorizing the Minister's representative to file evidence the day of the hearing did not contribute to a breach of the principles of natural justice. The Court took into consideration that the applicant was informed of the nature of the document and did not object to the document's filing at the hearing and, in the Court's opinion, that evidence was not a determinative factor in the Appeal Division's decision.

The wording of section 71 indicates that in some instances, the IAD may decline to reopen a removal order appeal even if there was a failure to observe a principle of natural justice as "courts have retained the right to deny discretionary relief for a variety of reasons, including misconduct on the part of the applicant, waiver, *laches*, and where the remedy would serve no practical purpose or would be futile."[173]

While the English text of section 71 states that the Appeal Division may reopen an appeal if it is satisfied that "it" failed to observe a principle of natural justice, the French text does not expressly require the failure to arise from an act or omission by the IAD.[174]

In *Huezo Tenorio*[175] it was necessary for the Appeal Division to consider whether it has jurisdiction to consider an application to reopen where the foreign national is removed from Canada after the application is made. The panel concluded that the IAD did not lose jurisdiction as long as the application was made prior to the foreign national "leaving" Canada.

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170 *See Lawal, Kuburat Olapeju* v. *M.C.I.* (IAD TA0-05064), Whist, December 12, 2002 and *Lopez, Hector Rolando Andino* v. *M.C.I.* (IAD W97-00095), Wiebe, May 28, 2003.

171 *Lu, Chi Hao* v. *M.C.I.* (IAD T89-01499), Waters, June 11, 2003.

172 *Juste, Dewitt Frédéric* v. *M.C.I.* (F.C. No. IMM-4658-07), Blanchard, May 27, 2008; 2008 FC 670.

173 *Pacholek, Iwona* v. *M.C.I.* (IAD T94-02591), Sangmuah, December 23, 2003. See also *Mobile Oil Canada Ltd.* v. *Canada Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202.

174 *Haye, Kenroy Barrington* v. *M.C.I.* (IAD MA0-06673), Lamarche, February 6, 2003.

175 *Huezo Tenorio, Alex Ernesto* v. *M.C.I.* (IAD VA2-01982), Wiebe, March 31, 2003.

Cases

Chapter Ten

Remedies & Conditions of a Stay

Section 63 appeal remedies

Regulation 229 of the *Immigration and Refugee Protection Regulations* (the "IRP Regulations")[1] provides that there are three types of removal orders, namely, departure orders, exclusion orders and deportation orders.

There are prescribed remedies available to appellants who have a right of appeal to the Immigration Appeal Division,[2] and who have appealed the issuance of a removal order to the Immigration Appeal Division pursuant to section 63 of the *Immigration Refugee Protection Act* (the "*IRPA*"). These remedies take the form of ways the Immigration Appeal Division may dispose of an appeal. Section 66 of *IRPA* prescribes that after considering the appeal of a decision, the Immigration Appeal Division shall: a) allow the appeal in accordance with section 67, b) stay the removal order in accordance with section 68, or c) dismiss the appeal in accordance with section 69.

To **allow an appeal**, the Immigration Appeal Division must be satisfied in accordance with subsection 67(1) that, at the time the appeal is disposed of,

- (a) the decision appealed is wrong in law or fact or mixed law and fact;
- (b) a principle of natural justice has not been observed: or
- (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Subsection 67(2) provides that where the Immigration Appeal Division allows an appeal,

> it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

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1 *Immigration and Refugee Protection Regulations*, SOR/2002-227, June 11, 2002.

2 Although not expressly mentioned in *IRPA*, the Immigration Appeal Division can dismiss an appeal for lack of jurisdiction if the appellant is not a person with a right of appeal under section 63 of *IRPA*. There is also no right of appeal where the appellant is described in section 64 of *IRPA*. The subject of right of appeal is discussed in Chapter 2.

To **stay a removal order** in accordance with subsection 68(1), the Immigration Appeal Division

> must be satisfied, taking into account the best interest of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

If a **stay** is requested and the facts suggest that there is reason to consider a stay, then, if reasons for decision are given by the panel,[3] the appellant is entitled to know why a stay was not granted where the appeal is dismissed.[4] Where there is a joint recommendation that a stay be granted, the Immigration Appeal Division should not reject that submission and dismiss the appeal unless there are good reasons to do so.[5]

Subsection 69(1) provides that the Immigration Appeal Division shall **dismiss an appeal** if it does not allow the appeal or stay the removal order, if any.

Subsection 69(2) provides for an appeal by the Minister. For a discussion of this type of appeal, see Chapter 12.

Conditions – generally

Where the Immigration Appeal Division stays a removal order,[6] paragraph 68(2)(a) of *IRPA* provides for the imposition of prescribed (mandatory) conditions and non-prescribed (non-mandatory) conditions that the Immigration Appeal Division considers necessary.[7] Non-prescribed conditions may be varied or cancelled by the Immigration Appeal Division; there is no statutory authority for the Immigration Appeal Division to vary or cancel prescribed conditions.[8]

Regulation 251 sets out the following prescribed conditions that must be imposed by the Immigration Appeal Division in all stay orders:

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[3] *Immigration Appeal Division Rule* 54(1) provides that the Immigration Appeal Division must provide to the parties, together with the notice of decision, written reasons for a decision that stays a removal order.

[4] *Lewis, Lynda v. M.C.I.* (F.C.T.D., no. IMM-5272-98), Simpson, August 5, 1999.

[5] *Nguyen, Thi Ngoc Huyen v. M.C.I.* (F.C.T.D., no. IMM-567-99), Lemieux, November 3, 2000.

[6] Pursuant to paragraph 68(2)(b) of *IRPA* all conditions imposed by the Immigration Division are cancelled where the Immigration Appeal Division stays a removal order.

[7] Under the former *Immigration Act*, the nature and content of "terms and conditions" are not prescribed by law but rather are those that "the Appeal Division may determine" pursuant to subsection 74(2) of the former *Immigration Act*. The phrase "terms and conditions" has been replaced in *IRPA* by the simpler term, "conditions".

[8] Paragraph 68(2)(c) of *IRPA*.

- to inform the Department and the Immigration Appeal Division in writing in advance of any change in the person's address;
- to provide a copy of their passport or travel document to the Department or, if they do not hold a passport or travel document, to complete an application for a passport or a travel document and to provide the application to the Department;
- to apply for an extension of the validity period of any passport or travel document before it expires, and to provide a copy of the extended passport or document to the Department;
- to not commit any criminal offences;
- if they are charged with a criminal offence, to immediately report that fact in writing to the Department; and
- if they are convicted of a criminal offence, to immediately report that fact in writing to the Department and the Division.

In imposing a particular length of stay or reconsideration period, some members of the Immigration Appeal Division address the gravity of the criminal record or the particular offence for which a removal order was issued while other members address the need for the appellant to continue his or her course of rehabilitation over a specified period. Stays are often from one year up to five years, although it is becoming more common to see the maximum stay period not exceeding three years.

The stay and the conditions of the stay (including the requirement to keep the Minister and the Immigration Appeal Division aware of the appellant's current contact information) continue in full force and effect until the Immigration Appeal Division disposes of the appeal by order under sections 67 (allow the appeal) or 69 (dismiss the appeal) of *IRPA*; that is, it does not automatically lapse at the "end" of the stay period.[9]

Conditions – specific

Because appellants tend not to seek judicial review of specific conditions imposed as part of a stay order there is little judicial authority on conditions within the immigration field.[10] The purposes served by imposing conditions in a stay are many, but the conditions must be complied with for the appellant to have the removal order

[9] *Theobalds, Eugene v. M.C.I.* (F.C.T.D., no. IMM-588-97), Richard, January 29, 1998. See also *Leite, Jose Carvalho v. M.C.I.* (F.C., no. IMM-6850-04), von Finckenstein, July 14, 2005; 2005 FC 984.

[10] However, there have been a number of decisions on the meaning of the condition; "keep the peace and be of good behaviour". See for example: *Cooper, Stanhope St. Aubyn v. M.C.I.* (F.C., no. IMM-10455-04), MacTavish, September 14, 2005; 2005 FC 1253, *M.C.I. v. Stephenson, Glendon St. Patrick* (F.C., no. IMM-6297-06), Dawson, January 23, 2008; 2008 FC 82 and *Bailey, Samuel Nathaniel v. M.C.I.* (F.C., no. IMM-48-08), Martineau, August 8, 2008; 2008 FC 938. For a different approach see *M.P.S.E.P. v. Ali, Shazam* (F.C., no. IMM-3517-07), Campbell, April 3, 2008; 2008 FC 431.

quashed, and the appeal allowed. One purpose may be to ensure the safety of the Canadian public and to promote the rehabilitation of the appellant.

There should be a nexus between the non-mandatory conditions imposed and the reasons for the granting of the stay. The non-mandatory conditions should be relevant to the particular appellant and case being decided. It is also important that any condition being imposed be precise as there are consequences for failing to comply with a condition.

In *Williams*,[11] the applicant was addicted to crack cocaine and was mentally ill (paranoid schizophrenia). He was ordered deported in July 2002. In April 2003, the Immigration Appeal Division granted a four-year stay, with conditions. In August 2005, the Minister brought an application to cancel the stay because the applicant breached several conditions. Subsequent to the Minister's application, the applicant was convicted of two criminal offences involving assaults against peace officers and was found not criminally responsible on account of a mental disorder for two other identical charges. In March 2005, the Ontario Review Board (ORB) ordered his detention at the Queen Street Mental Health Centre. The Immigration Appeal Division in deciding to cancel the stay, found that the circumstances of the applicant's release were within the jurisdiction of the ORB and that there was no reliable mechanism to bring him back before the Immigration Appeal Division. The Court found that the Immigration Appeal Division misapprehended its broad jurisdiction as there was no reason why the Immigration Appeal Division could not impose a condition under *IRPA,* paragraph 68(2)(a), which requires that, upon the applicant being discharged by the ORB, he report to the Immigration Appeal Division in order to satisfy the Immigration Appeal Division that his rehabilitation and other circumstances are such that he does not pose a danger to the Canadian public.

If an appellant does not comply with a condition, the appellant may be brought before the Immigration Appeal Division for a reconsideration of the stay. Also, the Minister, pursuant to subsection 68(4) of *IRPA* and *Immigration Appeal Division Rule* 27 may as noted below file an application that the appeal be cancelled.

Non-mandatory conditions often imposed include, but are not limited to, the following:

> Report to the Department (in person) (by telephone) (in writing) at Canada Border Services Agency at (insert) on (insert) and every (insert) month(s) thereafter on the following dates:
>
> (insert)
>
> The Appellant shall report (in person) (by telephone) (in writing). The reports are to contain details of the appellant's:

[11] *Williams, Carlton Anthony v. M.C.I.* (F.C., no. IMM-7519-05), Rouleau, November 20, 2006; 2006 FC 1402.

- employment or efforts to obtain employment if unemployed;
- current living arrangements;
- marital status or common-law relationships;
- attendance at any educational institution and any change in that attendance;
- attendance at meetings of Alcoholics Anonymous, or any other drug or alcohol rehabilitation program;
- participation in psychotherapy or counseling (please specify type);
- meetings with parole officer, including details of any violations of the conditions of parole;
- other relevant changes of personal circumstances;
- other (specify);

Make reasonable efforts to seek and maintain full time employment and IMMEDIATELY report any change in employment.

Engage in or continue psychotherapy or counseling. **NOTE**: *IF YOU WITHDRAW YOUR CONSENT TO THE FOREGOING CONDITION, YOU MUST BRING AN APPLICATION TO THE IAD FORTHWITH TO HAVE THIS CONDITION REMOVED. (NOTE: THIS CONDITION SHOULD ONLY BE IMPOSED WITH THE APPELLANT'S PRIOR CONSENT)*

Attend a drug or alcohol rehabilitation program. **NOTE**: *IF YOU WITHDRAW YOUR CONSENT TO THE FOREGOING CONDITION, YOU MUST BRING AN APPLICATION TO THE IAD FORTHWITH TO HAVE THIS CONDITION REMOVED. (NOTE: THIS CONDITION SHOULD ONLY BE IMPOSED WITH THE APPELLANT'S PRIOR CONSENT)*

Make reasonable efforts to maintain yourself in such condition that:

- your (name condition, eg. chronic schizophrenia or alcoholism) will not cause you to conduct yourself in a manner dangerous to yourself or anyone else; and
- (b) it is not likely you will commit further offences.

Not knowingly associate with individuals who have a criminal record or who are engaged in criminal activity.

Not own or possess offensive weapons or imitations thereof.

Respect all parole conditions and any court orders.

Refrain from the illegal use or sale of drugs.

Keep the peace and be of good behaviour.

Consent to Conditions

There are certain conditions for which the consent of the appellant may be required before the condition can be imposed. Usually, the conditions for which consent may be required are those which deal with the *Charter* rights of the appellant.[12] So, for example, in the list of conditions above, the condition for the appellant to "attend a drug or alcohol rehabilitation program" the consent of the appellant should be requested.

The *Rogers*[13] case which dealt with medical treatment as a term of a probation order raised serious *Charter* concerns with respect to non-consensual orders. It appears reasonable to conclude from this case that the Immigration Appeal Division may impose random drug testing as a condition of a stay provided the appellant gives a free and informed consent to this measure. The Immigration Appeal Division, when considering appeals of persons who have been engaged in criminal activity caused by an abuse of narcotics, has in a limited number of appeals imposed random drug testing as a condition of a stay.[14]

Reconsideration of a Stay

Where the Immigration Appeal Division has stayed a removal order appeal, it may vary or cancel any non-prescribed condition, and it may cancel the stay on application or on its own initiative.[15] The Immigration Appeal Division also may at any time, on application or on its own initiative, reconsider the appeal. Rule 26 of the *Immigration Appeal Division Rules* governs the procedure for a reconsideration of an appeal where a removal order is stayed. Proper notice of the reconsideration must be given to the appellant and to the Minister.[16] Where submissions are requested of the

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[12] Under the former *Immigration Act* provisions, the Immigration Appeal Division held that it had the jurisdiction to order an appellant to undergo psychological and psychiatric treatment: *Johnson, Bryan Warren v. M.E.I.* (IAD T89-01143), Sherman, Townshend, Ariemma, November 22, 1989.

[13] *R. v. Rogers* (1990), 61 C.C.C. (3d) 481 (B.C.S.C.).

[14] The IAD imposed on consent random drug testing in *Dwyer, Courtney v. M.C.I.* (IAD T92-09658), Aterman, Wright, March 21, 1996 and *Torres-Hurtado, Jose Lino v. M.C.I.* (IAD V94-00745), Ho, Lam, Clark, December 15, 1994.. See also *Farquharson v. Canada (Public Safety and Emergency Preparedness)*, 2006 CanLII 62209 (I.R.B.).

[15] Paragraph 68(2)(d) of *IRPA*.

[16] See *M.C.I. v. Vincenzo, Palumbo* (F.C., No. IMM-1190-07), Shore, October 16, 2007; 2007 FC 1047 and *M.C.I. v. Charabi, Marwan Mohamad* (F.C., no. IMM-7225-05), Blais, August 17, 2006; 2006 FC 996.

parties, the Immigration Appeal Division must not make a decision on the reconsideration before the time has expired for the parties to provide their submissions.[17]

In *Stephenson,*[18] the Minister challenged a decision of the Immigration Appeal Division to allow a reconsideration without holding an oral hearing. The Court held that the Immigration Appeal Division erred by failing to specifically mention the *Ribic* factors or by failing to consider the seriousness of the offence that lead to the removal order, failing to consider the existence of any exceptional reasons for allowing the appeal flowing from his establishment in Canada, the circumstances of his family in Canada, and the degree of hardship if returned to Jamaica.

In *Newman*,[19] the Minister challenged a decision of the Immigration Appeal Division to allow a reconsideration where the Immigration Appeal Division emphasized the fact that the respondent had not committed any criminal offences in the preceding five years and his rehabilitation continued to weigh in his favour. The Court noted however that the Immigration Appeal Division failed to explain how the evidence relating to the respondent's conduct over the recent years supported a finding of rehabilitation and allowed the application.

Cancellation of a Stay due to a Subsequent Conviction

Subsection 68(4) of *IRPA* deals with the cancellation of a stay where an appellant has been convicted of another offence that is referred to in the subsection 36(1) of *IRPA* "serious criminality" inadmissibility provision. Subsection 68(4) reads as follows:

> If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

Rule 27 of the *Immigration Appeal Division Rules* governs the procedure that the Minister must follow in giving the Notice of Cancellation. This provision has a significant impact on appellants convicted of subsection 36(1) offences while on a stay. This provision replaces the subsection 70(6) former *Immigration Act* "danger opinion" provision.

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[17] *Sivananthan, Sanjeevan v. M.C.I.* (F.C., no. IMM-99-05), MacTavish, September 20, 2005; 2005 FC 1294.

[18] *M.C.I. v. Stephenson, Glendon St. Patrick* (F.C., no. IMM-6297-06), Dawson, January 23, 2008; 2008 FC 82. See also *Ivanov, Leonid v. M.C.I.* (F.C., no. IMM-7131-05), Kelen, September 1, 2006; 2006 FC 1055.

[19] *M.P.S.E.P. v. Newman, Colin Anthony,* (F.C., no. IMM-5642-06), O'Reilly, November 13, 2007; 2007 FC 1150. See also *M.P.S.E.P. v. Philip, Lennox* (F.C., no. IMM-1139-06), Dawson, September 14, 2007; 2007 FC 908.

For subsection 68(4) to apply: 1) the Immigration Appeal Division must have stayed a removal order against the appellant; 2) the appellant must have been found inadmissible on grounds of serious criminality or criminality; and 3) the appellant must have been convicted of another offence referred to in subsection 36(1) of *IRPA* – serious criminality – after the stay was granted by the Immigration Appeal Division.

In *Hardyal,*[20] the Immigration Appeal Division rejected the Minister's position that it had no jurisdiction to consider whether or not to accept the Minister's Notice of Cancellation as according to the Minister the stay was cancelled and the appeal was terminated by operation of law upon the providing of the Notice. The Immigration Appeal Division treated the Notice as an application pursuant to sections 42 to 45 of the *Immigration Appeal Division Rules* and held that once a stay has been granted, it can only be cancelled by the Immigration Appeal Division pursuant to paragraph 68(2)(d) of *IRPA.*

In *Ramnanan,*[21] the Federal Court confirmed that the Immigration Appeal Division has the jurisdiction to consider constitutional questions generally and to grant relief, in light of its general power under *IRPA*, subsection 162(1), to hear and determine "all questions of law and fact, including questions of jurisdiction". However the Immigration Appeal Division did not err in finding that it did not have jurisdiction to decide the constitutionality of *IRPA*, subsection 68(4). Any decision-making power under subsection 68(4) of *IRPA* is strictly factual. If a determination is made by the Immigration Appeal Division that subsection 68(4) applies, based on established facts, the Immigration Appeal Division automatically loses jurisdiction to hear the appeal.

No Right of Appeal to the Immigration Appeal Division

An appellant will not have a right to appeal a removal order to the Immigration Appeal Division where section 64 of *IRPA* applies. For a discussion of the circumstances where an appellant loses the right to appeal a removal order to the Immigration Appeal Division, see Chapter 2.

Confidentiality applications & applications for non-disclosure

Immigration Appeal Division proceedings are usually held in public. There is a provision of *IRPA*, however, which allows the proceedings, on application, to be held in the absence of the public. This provision, which applies to all Divisions of the Board, is more detailed and extensive than section 80 of the former *Immigration Act*.

Section 166 of *IRPA* reads,

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[20] *Minister of Citizenship and Immigration v. Hardyal, Shaneeza* (IAD T97-04344), D'Ignazio, April 15, 2003.

[21] *Ramnanan, Naresh Bhoonahesh v. M.C.I. and M.P.S.E.P.* (F.C., no. IMM-1991-07), Shore, April 1, 2008; 2008 FC 404.

Proceedings before a Division are to be conducted as follows:

(a) subject to the other provisions of this section, proceedings must be held in public;

(b) on application or on its own initiative, the Division may conduct a proceeding in the absence of the public, or take any other measure that it considers necessary to ensure the confidentiality of the proceedings, if, after having considered all available alternate measures, the Division is satisfied that there is

(i) a serious possibility that the life, liberty or security of a person will be endangered if the proceeding is held in public,

(ii) a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure outweighs the societal interest that the proceeding be conducted in public, or

(iii) a real and substantial risk that matters involving public security will be disclosed;

(c) subject to paragraph (d), proceedings before the Refugee Protection Division and the Immigration Division concerning a claimant of refugee protection, proceedings concerning cessation and vacation applications and proceedings before the Refugee Appeal Division must be held in the absence of the public;

(d) on application or on its own initiative, the Division may conduct a proceeding in public, or take any other measure that it considers necessary to ensure the appropriate access to the proceedings if, after having considered all available alternate measures and the factors set out in paragraph (b), the Division is satisfied that it is appropriate to do so;

(e) despite paragraphs (b) and (c), a representative or agent of the United Nations High Commissioner for Refugees is entitled to observe proceedings concerning a protected person or a person who has made a claim to refugee protection; and

(f) despite paragraph (e), the representative or agent may not observe any part of the proceedings that deals with information or other evidence in respect of which an application has been made under section 86, and not rejected, or with information or other evidence protected under that section.

Rule 49 of the *Immigration Appeal Division Rules* governs the procedure to be followed where a person wants a proceeding held in the absence of the public or wants the Immigration Appeal Division to make an order to ensure the confidentiality of the proceedings.

Section 86 of *IRPA* provides for a request by the Minister for the Immigration Division or the Immigration Appeal Division to make an order for the non-disclosure of information. In response to the decision of the Supreme Court of Canada decision in *Charkaoui*[22] the non-disclosure provisions were replaced on March 5, 2008 to comply with the *Charte*r issues dealt with by the court. Section 86 reads as follows:

> 86 The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, apply for the non-disclosure of information or other evidence. Sections 83 and 85.1 to 85.5 apply to the proceeding with any necessary modifications, including that a reference to ``judge'' be read as a reference to the applicable Division of the Board.

As set out in subsection 86, the Immigration Appeal Division is to apply sections 83 and 85.1 to 85.5 of *IRPA* with any modifications that the circumstances require In *Burko*,[23] the Minister brought an application for non-disclosure of information under section 86 of *IRPA*. The Immigration Appeal Division, with the guidance of *Garievi*,[24] concluded that disclosure of some of the material could be made safely while there were other portions of the material that ought not to be disclosed and in respect of which a non-disclosure order could be made. The Minister could respond to that conclusion by withdrawing the material that could be safely disclosed, in which case the material would not be disclosed or considered by the Immigration Appeal Division when the merits of the appeal were heard and considered, or the Minister could leave the material before the panel, and it would be disclosed to the appellant as part of the material provided to the appellant.

Abandonment

Pursuant to subsection 168(1) of *IRPA*, the Immigration Appeal Division may declare an appeal from a removal order to be abandoned. This provision applies to all Divisions of the Board, and with respect to all appeals to the Immigration Appeal Division. Under the former *Immigration Act*, abandonment under section 76 was restricted to removal order appeals. Except for the expansion of the applicability of subsection 168(1), this subsection has not resulted in a significant change from the practice and procedure of the Immigration Appeal Division under the former *Immigration Act*. The Immigration Appeal Division may declare an appeal abandoned at a hearing where an appellant "is in default in the proceedings" as set out in subsection 168(1), or it may hold a show cause hearing to rule on abandonment.

Subsection 168(1) of *IRPA* reads as follows:

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[22] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (February 23, 2007).

[23] *Burko, Volodymyr v. M.C.I.* (IAD TA2-22767), Workun, August 27, 2004. *Burko* is the only section 86 application made so far to the Immigration Appeal Division,

[24] *Gariev, Viatcheslav v. M.C.I.* (F.C. no. IMM-5286-02), Dawson, April 6, 2004; 2004 FC 531.

> 168. (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.

In *Ali*,[25] the Court reviewed the decision of the Immigration Appeal Division where it deemed the applicant's appeal abandoned after he failed to appear for a hearing and to provide his address and contact information as required by the conditions of a stay of removal imposed by the Immigration Appeal Division. The Court ruled that nothing in either *IRPA* or the *Immigration Appeal Division Rules* requires that the Immigration Appeal Division hold a show cause hearing to rule on abandonment, unlike the situation that applies before the Refugee Protection Division.

However, in *Nguyen (*also referred to as *Hung)*, based on the facts of that case (counsel was to attend a pre-hearing conference without the applicant, but he was absent for medical reasons), the Court found that the Immigration Appeal Division had committed a fundamental error in declaring the claim abandoned without giving the applicant or his counsel an opportunity to explain why they had not appeared, and that the panel had acted in a manner contrary to the principles of natural justice.[26]

In *Ishmael*,[27] the Court noted that Justice Lemieux in *Nguyen* did not find, as a general principle, that the Immigration Appeal Division must invite an appellant to explain why his case should not be declared abandoned in every situation where the appellant failed to attend a hearing. The Court commented that, Justice Lemieux found that natural justice required that the applicant be given an opportunity because of the unique circumstances of his case: the illness of counsel denied the person concerned his right to attend the hearing; and, thus, have someone represent his interests.

The Immigration Appeal Division's preferred practice is to hold a show cause hearing or conference, in the same way as the Refugee Division is required to hold one.

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[25] *Ali, Abdul Ghani Abdulla v. M.C.I.* (F.C., No. IMM-1633-08), de Montigny, December 5, 2008; 2008 FC 1354.

[26] *Nguyen, Lam Hung* v. *M.C.I.* (F.C. no. IMM-3331-03), Lemieux, July 19, 2004; 2004 FC 966. See also *Dubrézil,Patrick v. M.C.I.* (F.C. no. IMM-4321-05), Noël, February 7, 2006, 2006 FC 142. The Immigration Appeal Division applied these decisions in a reopening application where an appellant missed his hearing and had his appeal abandoned after being hospitalized just before the hearing date: *Siteram, Anthony v. M.P.S.E.P.* (IAD TA2-03542), MacLean, December 31, 2008.

[27] *M.C.I. and M.P.S.E.P. v. Ishmael, Gregory George* (F.C., no. IMM-1984-06), Shore, February 27, 2007; 2007 FC 212. Pursuant to the court order, the Immigration Appeal Division reconsidered the reopening application and denied the reopening in *Ishmael, Gregory v. M.P.S.E.P.* (IAD T99-07831), Band, December 11, 2008.

Reopening a Removal Order Appeal

Section 71 of *IRPA* provides that the Immigration Appeal Division on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice. See Chapter 9 for further on this provision.

Transition provisions

Sections 190, 192, 196 and 197 of *IRPA* provides as follows:

> 190. Every application, proceeding or matter under the former Act that is pending or is in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.
>
> 192. If a notice of appeal has been filed with the Immigration Appeal Division immediately before the coming into force of this section, the appeal shall be continued under the former Act by the Immigration Appeal Division of the Board.
>
> 196. Despite section 192, an appeal made to the Immigration Appeal Division before the coming into force of this section shall be discontinued if the appellant has not been granted a stay under the former Act and the appeal could not have been made because of section 64 of this Act.
>
> 197. Despite section 192, if an appellant who has been granted a stay under the former Act breaches a condition of the stay, the appellant shall be subject to the provisions of section 64 and subsection 68(4) of this Act.

Where subsection 196 and 197 of *IRPA* apply, appeals that would otherwise be governed by the provisions of the former *Immigration Act* will be subject to the provisions of section 64 and subsection 68(4) of *IRPA.* This may result in the appeal being dismissed as a result of the application of section 64 (see also chapters 2, 7 and 8) or the stay being cancelled by operation of law and the appeal being terminated pursuant to subsection 68(4) discussed earlier in this chapter.

Where subsections 197 of *IRPA* applies then subsection 68(4) and/or section 64 of *IRPA* may apply to terminate the appellant's appeal. The operation of subsection 68(4) is not contingent on the applicability of subsection 64 of *IRPA.*[28]

In *Singh*, the Federal Court of Appeal found that the appropriate interpretation of the time of the breach, as regards subsection 197 of *IRPA*, is the time of the offence. Subsection 197 is retrospectively applicable to a case in which an offence occurred prior

[28] *Hyde, Martin R. v. M.C.I.* (F.C.A., no. A-570-05), Evans, Linden, Noël, November 20, 2006; 2006 FCA 379.

to June 28, 2002, but the conviction occurred after the coming into force of *IRPA*. The court concluded that the presumption against retrospectivity does not apply to subsection 197 because that provision is designed to protect the public.[29]

[29] *Singh, Sukhdev v. M.C.I.* (F.C.A., no A-210-05), Linden, Noël, Sexton, December 9, 2005; 2005 FCA 417.

CASES

Chapter Eleven

The Charter and the IRPA

Introduction

The Immigration Appeal Division (IAD) is called upon to consider constitutional questions in a variety of contexts. This chapter reviews the legislation and jurisprudence relating to constitutional challenges in removal order appeals before the IAD.

The Charter and the Jurisdiction of the Immigration Appeal Division

The Courts have issued judgments indicating under what circumstances administrative tribunals may consider issues related to the *Canadian Charter of Rights and Freedoms*[1] (the Charter) and when tribunals may grant Charter remedies. Specifically, the Charter contains three provisions that can be used as grounds for claiming an infringement of Charter rights. Each one will be examined individually.

Subsection 24(1)

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The jurisdiction of the IAD to grant a remedy pursuant to this section depends on whether the IAD is considered a court of competent jurisdiction in the context in which it is being asked to provide a remedy. The entire body of case law indicates that this section does not confer new jurisdiction on any tribunal. A tribunal is competent under subsection 24(1) if it has jurisdiction over the person, the subject-matter and the remedy sought, pursuant to a legal source separate from the Charter.[2] This raises the prospect of the IAD being recognized, in specific circumstances, as a "court of competent jurisdiction," provided it is authorized under the *Immigration and Refugee Protection Act*[3] (IRPA) to grant the remedy sought.

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

2 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75.

3 S.C. 2001, c. 27, as amended.

In *Borowski,*[4] an adjudicator found that the legislative provision that permits the court to appoint a lawyer in certain types of investigations and not in others was discriminatory and inconsistent with the right to equality set out in section 15 of the Charter. He therefore appointed a lawyer to represent the person concerned. The Federal Court Trial Division ruled that an adjudicator could choose not to take into consideration a provision of the former *Immigration Act*[5] inconsistent with the Charter but could not provide a remedy within the meaning of subsection 24(1) of the Charter.

In *Howard,*[6] the remedy sought was to have the deportation order quashed. The applicant had challenged the constitutionality of certain provisions of the *Young Offenders Act,*[7] a conviction under which had led to the deportation of a permanent resident. A stay of the deportation order had been granted but had been subsequently cancelled by the Appeal Division. The Federal Court upheld the Appeal Division's decision that it did not have jurisdiction to rule on the constitutional arguments and stated that neither the adjudicator nor the Appeal Division was, in the matter at hand, a court of competent jurisdiction within the meaning of subsection 24(1) of the Charter because the former *Immigration Act* did not grant authority to rule on the constitutionality of the *Young Offenders Act.*

In *Mahendran,*[8] a panel of the Refugee Division determined that it did have jurisdiction to grant a remedy pursuant to subsection 24(1) of the Charter for abuse of process resulting from delay to make an application to vacate refugee status. The panel declined, however, to grant any relief.

Subsection 24(2)

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

This subsection provides for a remedy by means of the inadmissibility of evidence. It is intrinsically linked to subsection 24(1); consequently, the comments made above regarding subsection 24(1) are relevant here as well.

The task then would be to determine first, whether the evidence the tribunal has been asked to set aside was obtained in a manner that infringed Charter rights and second,

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4 *Canada (Minister of Employment and Immigration) v. Borowski*, [1990] 2 F.C. 728 (T.D.).

5 R.S.C. 1985, c. I-2. [repealed]

6 *Howard, Kenrick Kirk v. M.C.I.* (F.C.T.D., no. IMM-5252-94), Dubé, January 4, 1996; see also *Halm v. M.E.I.* (1991), 172 N.R. 315 (F.C.A.).

7 R.S.C. 1985, c. Y-1 [repealed]

8 *Mahendran: M.C.I. v. Mahendran* (CRDD U98-01244), Chan, Joakin, Singer; 26 October 1998.

whether the use of that evidence would likely bring the administration of justice into disrepute. Three factors bear on whether the administration of justice has been brought into disrepute: (1) the impact that use of the evidence might have on the fairness of the proceeding; (2) the seriousness of the infringement of rights; and (3) the consequences of not admitting the evidence. These factors were developed in criminal proceedings,[9] but it is likely that they would apply to administrative matters as well if properly adapted.

Examples of a subsection 24(2) remedy being used by administrative tribunals are few; however, in *Bertold*,[10] the Federal Court Trial Division referred the case back to the Appeal Division, among other things, because the Division had admitted evidence from criminal and investigation files from Germany, obtained through the illegal, fraudulent and deceptive schemes of a third party in violation of sections 7 and 8 of the Charter. The Court stated that this evidence should have been excluded pursuant to subsection 24(2) of the Charter, thus confirming that the Appeal Division had jurisdiction to do so.

Subsection 52(1)

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The jurisdiction of certain administrative tribunals, including the IAD, to consider constitutional challenges and rule on violations of the rights guaranteed by the Charter, under subsection 52(1) of the *Constitution Act, 1982*,[11] has been well established for several years now.[12] The Supreme Court of Canada confirmed this position in *Nova Scotia (WCB)*[13] and clarified the issue of the jurisdiction of administrative tribunals to

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[9] *R. v. Collins*, [1987] 1 S.C.R. 265, at 280-1; *R. v. Ross*, [1989] 1 S.C.R. 3, at 15; *R. v. Genest*, [1989] 1 S.C.R. 59, at 83.

[10] *Bertold, Eberhard v. M.C.I.* (F.C.T.D., no. IMM-5228-98), Muldoon, September 29, 1999. In this case, the documents had been obtained from the German authorities. The Appeal Division did not accept the appellant's argument that the documents had been obtained in a manner that infringed his rights guaranteed by the Charter. The argument was based on the decision in *Schreiber v. Canada (Attorney General)*, [1998] S.C.R. 841, in which the Supreme Court of Canada held that it is the law of the country where the information is found that governs the issue whether and how it may be obtained. The judgment of the Federal Court was not the clearest of judgments. The Court appears to have found that the German authorities had, upon request of Canadian immigration authorities, only confirmed information they had received from a certain Langreuther, a creditor of the appellant who had harassed and threatened the appellant. The judgment does not shed any light with respect to determining how the evidence was obtained in a manner that infringes sections 7 and 8 of the Charter. The Court did not make any pronouncement on the issue whether the evidence was likely to bring the administration of justice into disrepute.

[11] Schedule B of the *Canada Act 1982* (1982, U.K., c. 11).

[12] See the Supreme Court of Canada trilogy: *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; and *Cuddy Chicks, supra*, footnote 2.

[13] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; 2003 SCC 54.

declare inoperative legislative provisions that infringe or deny rights guaranteed by the Charter. In that case, the Supreme Court stated as follows in paragraph 3 of its decision:

> Administrative tribunals which have jurisdiction – whether explicit or implied – to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law. To the extent that the majority reasons in *Cooper* […], are inconsistent with this approach, I am of the view that they should no longer be relied upon.

In *Cooper*,[14] the Supreme Court had considered a number of factors and concluded that the Canadian Human Rights Commission did not have the jurisdiction to rule on constitutional questions, despite the jurisdiction it was granted by its enabling statute to decide questions of law. In *Nova Scotia (WCB)*, at paragraphs 35, 36 and 48 of the decision, the Supreme Court explained that it is not a question of determining whether, under the tribunal's enabling statute, Parliament or the legislature intended the tribunal to apply the Charter, but rather of determining whether the statute grants the tribunal the jurisdiction, either explicit or implied, to decide questions of law. If such is the case, the tribunal will be presumed to have the jurisdiction to decide these questions in light of the Charter, unless the legislator has explicitly removed that power from the tribunal.

It is also useful to note that the Supreme Court of Canada, in *Nova Scotia (WCB)*, clearly set out the procedure to be followed by an administrative tribunal in cases involving a challenge to the constitutionality of a provision of its enabling statute. The Court stated as follows in paragraph 33 of its decision:

> […] this Court has adopted a general approach for the determination of whether a particular administrative tribunal or agency can decline to apply a provision of its enabling statute on the ground that the provision violates the *Charter*. This approach rests on the principle that, since administrative tribunals are creatures of Parliament and the legislatures, their jurisdiction must in every case "be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought": *Douglas College*, *supra*, at p. 595; see also *Cuddy Chicks*, *supra*, at pp. 14-15. When a case brought before an administrative tribunal involves a challenge to the constitutionality of a provision of its enabling statute, the tribunal is asked to interpret the relevant *Charter* right, apply it to the impugned provision, and if it finds a breach and concludes that the provision is not saved under s. 1, to disregard the provision on constitutional

[14] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

> grounds and rule on the applicant's claim as if the impugned provision were not in force.

Given that section 162 of the IRPA confers upon each Division of the IRB the "sole and exclusive jurisdiction to hear and determine all questions of law and fact…" it can be presumed, according to the principles enunciated in *Nova Scotia (WCB),* that the IAD has the jurisdiction to hear and decide questions regarding the constitutionality of the law it applies unless the presumption is rebutted in any given circumstances. This approach to constitutional challenges before the IAD has been confirmed by the Federal Court.[15]

With respect to the IAD, in some circumstances, the Court has found that the presumption is rebutted in that the legislature has explicitly removed the jurisdiction of the IAD to consider the constitutionality of certain provisions of IRPA. In *Kroon*,[16] the Court held that the IAD lacked the power to consider a constitutional challenge to section 64[17] of IRPA. This section removes the right of appeal in cases where the appellant has been found to be inadmissible on grounds of security (section 34 of the IRPA), violating human or international rights (section 35 of the IRPA), serious criminality (subsection 36(1) of the IRPA, as qualified by subsection 64(2)[18]) or organized criminality (section 37 of the IRPA). The Court stated:

> [32] Applying the reasoning of *Martin* to the present case, I am satisfied that the IAD lacks the power to determine the constitutionality of section 64 of IRPA. There is simply nothing in the legislation which either expressly or implicitly grants this jurisdiction. On the contrary, the challenged provisions expressly limit the jurisdiction of the IAD insofar as they remove any right of appeal to the tribunal by a permanent resident who has been found to be inadmissible on grounds of serious criminality. In my view, Parliament could not have been more clear in its intention to limit the IAD's jurisdiction with respect to individuals who fall within paragraph 36(1)(a) of the Act. I do not read *Martin* as overruling this Court's decision in Reynolds wherein it was held that although the IAD had exclusive jurisdiction to consider questions of law and determine its own jurisdiction, its general powers did not extend to finding that a statutory section which contained an express limitation on its jurisdiction was unconstitutional.

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[15] See, for example, *Ramnanan, Naresh Bhoonahesh v. M.C.I and M.P.S.E.P.* (F.C. no. IMM-1991-07), Shore, 1 April 2008; 2008 FC 404; *Ferri, Loreto Lorenzo v. M.C.I* (F.C. no. IMM-9738-04), Mactavish, 22 November 2005; 2005 FC 1580. A question was certified in this case, but the appeal was not pursued.

[16] *Kroon, Andries v. M.C.I.* (F.C. no. IMM-4119-03), Rouleau, 14 May 2004; 2004 FC 697.

[17] 64. (1) No appeal may be made by a permanent resident or a foreign national or the sponsor of a foreign national where the permanent resident or foreign national has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

[18] 64. (2) Inadmissibility on the ground of serious criminality is in respect of a crime that was punished in Canada by a term of imprisonment of at least two years.

> [33] In the present case, once the factual determination was made that the applicant was inadmissible for serious criminality, a decision the applicant does not dispute, the IAD lost any mandate to hear an appeal. Since the IAD does not have the power to decide legal questions arising under section 64, it therefore has no power to hear constitutional challenges to that provision.[19]

In *Ferri*,[20] the Federal Court dealt with a constitutional challenge to subsection 68(4)[21] of IRPA which provides that an appeal is cancelled by operation of law in certain circumstances where a stay of a removal order had been granted and the appellant is subsequently convicted of an offence referred to in subsection 36(1). The Court agreed with the IAD decision that it did not have jurisdiction to consider the constitutionality of this section. The Court stated:

> [39] I am of the view that while the IAD may have a general power to decide questions of law and jurisdiction necessary for the resolution of cases coming before it, the effect of the wording of subsection 68(4) is to expressly limit the jurisdiction of the IAD in relation to individuals in Mr. Ferri's situation to the determination of whether the facts of an individual case bring the appellant within the wording of the provision, thus rebutting the presumption in favour of Charter jurisdiction.
>
> [40] That is, the IAD's jurisdiction is limited to answering the following questions:
>
> - Is the individual in question a foreign national or permanent resident?
> - Has the individual previously been found to be inadmissible on grounds of serious criminality or criminality?
> - Has the IAD previously stayed a removal order made in relation to that individual?
> - Has the individual been convicted of another offence referred to in subsection 36(1)?
>
> [41] If the answer to each of these questions is in the affirmative, as is admittedly the case here, then the section is clear:

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19 *Kroon, supra*, footnote 16 at paragraphs 32-33; followed in *Magtouf, Mustapha v. M.C.I.* (F.C. no. IMM-5470-06), Blais, 3 May 2007; 2007 FC 483.

20 *Ferri, supra,* footnote 15.

21 68(4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

> the IAD loses jurisdiction over the individual, with the stay being cancelled and the appeal being terminated by operation of law.[22]

This decision was affirmed in *Ramnanan*.[23]

The Charter – General Principles

Removal order appeals can raise constitutional questions in a variety of ways. The most frequently invoked sections of the Charter before the IAD are sections 7, 12 and 15. To begin, the general principles applicable to each of these sections will be briefly canvassed.[24]

Section 7

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This is the section most often used to support constitutional arguments before the IAD. The section has two components. First is the phrase "right to life, liberty and security of the person." These three elements are often argued together, but they can be separated, and an infringement of one of the three alone constitutes an infringement of the first component of section 7.[25] As to the second component, the principles of fundamental justice include as a minimum the principles of natural justice, but are not synonymous with those principles because they also include substantial guarantees. Whether a principle is a principle of fundamental justice depends on the nature, sources, rationale and essential role of the principle in the judicial process and our legal system. "Principles of fundamental justice" can be interpreted as including a great many things. They will take on concrete meaning as the courts consider allegations of section 7 infringements.[26]

Section 12

> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

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22 *Ramnanan*, *supra*, footnote 15 at paragraphs 39-41.

23 *Ramnanan*, *supra*, footnote 15.

24 Each of these sections has been extensively interpreted by the Courts. The general principles set out in this paper regarding the interpretation of these sections are not meant to be exhaustive.

25 *Singh*, *supra*, footnote 2, at 205.

26 *Re Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.

Punishment is cruel and unusual if it is so excessive as to outrage standards of decency.[27] Torture will always be fundamentally unjust as it could never be an appropriate punishment, however egregious the offence.[28]

Section 15

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Equality entails more than treating in a similar manner persons in similar situations. Consideration has also to be given to the content of the Act, its purpose and its effect on those to whom it applies and those to whom it does not.[29]

Equality within the meaning of section 15 has a more specific objective than simply eliminating distinctions; its objective is to eliminate discrimination. To determine whether there has been discrimination on grounds related to personal characteristics of an individual or group, it is necessary to examine not only the legislative provision, but also the larger social, political and legal context.[30]

Section 1

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 does not come into play unless the person invoking the Charter (that is, the appellant before the IAD) establishes that there has been an infringement of a right he or she is guaranteed by the Charter. It is then up to the government to show that, based

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[27] *R. v. Smith*, [1987] 1 S.C.R. 1045

[28] *Suresh v. Canada (Minister and Citizenship and Immigration)*, [2002] 1 S.C.R. 3; 2002 SCC 1 at paragraph 51.

[29] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 167; see also *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where the Supreme Court of Canada held that a legislative omission can infringe the right guaranteed under section 15 of the Charter. In this case, the employment of the appellant had been terminated because of his homosexuality. He turned to the Human Rights Commission of Alberta, created by the *Individual's Rights Protection Act*, and the Commission informed him that he could not bring a complaint as sexual orientation was not one of the grounds enumerated in the Act. In a liberal interpretation, the Supreme Court of Canada read sexual orientation into the enumerated grounds of discrimination prohibited by the Act and concluded that this omission by the Legislator constituted a negation of the right of homosexuals to the equal benefit and protection of the law.

[30] *R. v. Turpin*, [1989] 1 S.C.R. 1296, at 1329.

on a balance of probabilities, the limitation of rights is reasonable.[31] The test for determining the "reasonableness" of the limitation is based on a proportionality test between the objective in question, which must be sufficiently important to justify the limitation of a right, and the means chosen, which must be such that the right is impaired as little as possible.[32]

The Charter and Removal

Section 7

As to the constitutionality of legislative provisions allowing the deportation of permanent residents because of criminal activity, the predominant position[33] of the Federal Court and the Federal Court of Appeal has been that deportation does not infringe section 7 of the Charter.

In determining whether or not the removal of a permanent resident or foreign national from Canada engages section 7 of the Charter, the Supreme Court of Canada, in a series of recent cases, has adopted a contextual approach to this determination. In order to understand the recent Supreme Court cases, it is necessary to look at how the law has developed, particularly the Federal Court of Appeal and the Supreme Court of Canada decisions in *Chiarelli*.[34]

In *Chiarelli*, the Federal of Court of Appeal determined that deportation for serious offences cannot be considered a deprivation of liberty. In *Hoang*,[35] the Court

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[31] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[32] *Ibid*.

[33] *Powell v. M.C.I.* (F.C. no. IMM-4964-03), 13 August 2004; 2004 FC 1120. See also *Nguyen v. M.E.I.* (1993), 18 Imm. L.R. (2d) 165 (F.C.A), where Marceau J. implied in contrast that deportation could constitute a deprivation of liberty. See also *Farhadi, Jamshid v. M.C.I.* (F.C.T.D., no. IMM-3846-96), Gibson, March 20, 1998, at 9, where the Federal Court concluded that the necessary factual foundation to support a Charter argument was absent, but nevertheless referred to the words of Mr. Justice Marceau in *Nguyen*. It is interesting to note Mr. Justice Gibson's conclusion in this case, namely that, to respect the principles of natural justice and fairness, the applicant had the right to a pre-removal risk assessment, in addition to the procedure already followed leading to the issuance of the opinion as to danger under subsection 70(5) of the former *Immigration Act.* In *Barre, Mohamed Bulle v. M.C.I.* (F.C.T.D., no. Imm-3467-98), Teitelbaum, July 29, 1998, Mr. Justice Teitelbaum refused to follow this approach and he reached the contrary conclusion that the former *Immigration Act* did not impose such a requirement. In *Jeyarajah, Nishan Gageetan v. M.C.I.* (F.C.T.D., no. IMM-6057-98) Denault, December 15, 1998, Mr. Justice Denault followed the decision in *Barre* in the context of an application for an interim stay of removal. At the same time, the applicant had brought an action for a declaration that, in the absence of a risk assessment of return independent from the procedure leading to the issuance of an opinion under subsection 70(5) infringed the rights guaranteed under sections 7 and 12 of the Charter. The Federal Court Trial Division dismissed the action and the appeal against this decision was likewise dismissed by the Federal Court of Appeal.

[34] *Chiarelli v. Canada (Minister of Employment and Immigration.)*, [1990] 2 F.C. 299 (C.A); *Chiarelli v. Canada (Minister of Employment and Immigration.)*, [1992] 1 S.C.R. 711.

[35] *Hoang v. M.E.I.* (1990), 13 Imm. L.R. (2d) 35; (F.C.A., no. A-220-89), Urie, MacGuigan, Linden, November 30, 1990; *(1990)*, 13 Imm L.R. (2d) 35 at 6.

reiterated its position: "[. . .] deportation [. . .] is not to be conceptualized as a deprivation of liberty." While it concluded in *Chiarelli* that the deportation of permanent residents did not infringe the right guaranteed by section 7 of the Charter, the Supreme Court of Canada did not uphold the ruling of the Federal Court of Canada, namely that deportation was not a deprivation of liberty. Sopinka J. instead based his conclusions on the second component of section 7:

> [. . .] The Federal Court of Appeal [. . .] held that deportation for serious offences is not to be conceptualized as a deprivation of liberty. I do not find it necessary to answer this question, however, since I am of the view that there is no breach of fundamental justice.[36]

He added at page 733:

> Thus in determining the scope of the principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.

The IAD made determinations in a number of cases[37] that were along the same lines as the ruling of the Supreme Court of Canada in *Chiarelli*. The jurisprudence of the Federal Court Trial Division was divided on the issue of whether deportation infringes the right to life, liberty and security of the person,[38] an issue on which the Supreme Court of Canada did not rule in *Chiarelli.*

In *Suresh,*[39] *Medovarski,*[40] *Charkaoui #1*[41] and *Charkaoui #2*[42] the Supreme Court of Canada clarified somewhat how to approach the question of whether or not section 7 is engaged in removal cases. Based on the case law, the principle emerges that removal *per se* does not engage section 7, but features of a removal may.

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[36] *Chiarelli*, *supra*, footnote 34, at 732.

[37] See, for example, *Kelly, Rolston Washington v. M.E.I.* (IAD T93-04542), Bell, December 1, 1993; *Fernandes, Jose Paulo Arruda v. M.C.I.* (IAD T89-584), Teitelbaum, Wiebe, Ramnarine, May 4, 1994. Application for judicial review dismissed: *Fernandes, Jose Paulo Arruda v. M.C.I. (*F.C.T.D., no. IMM-4385-94), Joyal, November 22, 1995; *Machado, Joao Carneiro John v. M.E.I.* (IAD W89-00143), Aterman, Wiebe, March 4, 1996.

[38] *Canepa v. Canada (Minister of Employment and Immigration),* [1992] 3 F.C. 270 (C.A); *Romans, Steven v. M.C.I.* (F.C.T.D., no. IMM-6130-99), Dawson, May 11, 2001; *Powell v. M.C.I.* (F.C. no. IMM-4964-03), Gibson, 13 August 2004; 2004 FC 1120.

[39] *Suresh*, *supra*, footnote 28.

[40] *Medovarski v. Canada (Minister of Citizenship and Immigration),* [2005] 2 S.C.R. 539; 2005 SCC 51.

[41] *Charkaoui v. Canada (Minister of Citizenship and Immigration),* [2007] 1 S.C.R. 350; 2007 SCC 9.

[42] *Charkaoui v. Canada (Minister of Citizenship and Immigration),* 2008 SCC 38.

In its judgment in *Suresh*, the Supreme Court of Canada rejected the position of the Federal Court of Appeal,[43] namely, that even if Mr. Suresh were at risk of torture upon his return to Sri Lanka, there was no infringement of section 7 of the Charter because Canada is merely an "involuntary intermediary" when it deports a person to a country where his or her life, liberty and security of the person are threatened. In rejecting this position, the Court stated:

> […] where Canada's participation is a necessary precondition for the deprivation and the deprivation is an entirely foreseeable consequence of Canada's participation, the Government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.
>
> […]
>
> There is always the question […] of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.[44]

In *Medovarski*, the Court cited *Chiarelli* for the principle that non-citizens do not have an unqualified right to enter or remain in Canada. It then stated that: "Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.[45]"

In *Charkaoui #1*, the Court was faced with the question of the constitutionality of the provisions of IRPA setting out the process for determining whether security certificates were reasonable and the process for detention and release of persons who are subject to the security certificates. In determining that section 7 of the Charter was engaged, the Court stated that:

> - *Medovarski* thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the deportation of a non-citizen in the immigration context may not in itself engage s. 7 of the Charter, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture may do so.
> - In determining whether s. 7 applies, we must look at the interests at stake rather than the legal label attached to the impugned legislation.

Finally, recently in *Charkaoui #2*, the Supreme Court reiterated that determining whether or not section 7 is engaged is not an exercise in deciding which area of law is invoked. Rather, one must look to the "the severity of the consequences of the state's

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[43] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 (C.A.).

[44] *Suresh*, *supra*, footnote 28 at paragraphs 54-55.

[45] *Medovarski*, *supra*, footnote 40 at paragraph 46.

actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life."[46]

Based on these Supreme Court of Canada cases, it can be stated that deportation in and of itself does not infringe the rights guaranteed under section 7 of the Charter. However, each case must be decided on its own particular facts, and depending on the consequences that deportation might have for the person, the rights protected by section 7 could be engaged.

Before leaving section 7, it should be noted that children who are Canadian citizens do not have standing[47] to challenge the deportation of their parents on constitutional grounds. They are not subject to a removal order, and their departure from Canada with their parents results from a personal decision, with no government intervention.[48]

Section 12

In *Chiarelli,*[49] the Supreme Court of Canada upheld the Federal Court of Appeal's ruling that the deportation of permanent residents for serious offences does not infringe the right to protection from cruel and unusual treatment or punishment guaranteed by section 12 of the Charter. It supported the position taken by the Federal Court of Appeal that deportation is not imposed as a punishment.[50] Deportation could, however, be considered cruel and usual "treatment":

> Deportation may, however, come within the scope of a "treatment" in s. 12. The *Concise Oxford Dictionary* (1990) defines treatment as "a process or manner of behaving towards or dealing with a person or thing [...]." It is unnecessary, for the purposes of this appeal, to decide this point since I am of the view that the deportation authorized by ss. 27(1)(*d*)(ii) and 32(2) is not cruel and unusual.[51]

Sopinka J. added at page 736:

> The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by

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46 *Charkaoui, supra,* footnote 42, at paragraph 53.

47 *Skapinker: Law Society of Upper Canada v. Skapinker,* [1984] 1 S.C.R. 357.

48 *Langner, Ewa Pawlk J. v. M.E.I.* (F.C.T.D., no. T-3027-91), Denault, July 12, 1994. See also *Fernandes, Jose Paulo Arruda v. M.C.I. (*F.C.T.D., no. IMM-4385-94), Joyal, November 22, 1995 and *Dwyer, Courtney v. M.C.I.* (IAD T92-09658), Aterman, Wright, March 21, 1996.

49 *Chiarelli, supra,* footnote 34.

50 See, for example, *Hurd v. Canada (Minister of Citizenship and Immigration),* [1989] 2 F.C. 594 (C.A).

51 *Chiarelli, supra,* footnote 34, at 735.

> imprisonment of five years or more, cannot be said to outrage standards of decency. (see 11.3.1.1, section 12)

In a subsequent case, *Canepa*,[52] the Federal Court of Appeal considered the issue of whether the deportation of a permanent resident subject to subparagraphs 27(1)(*d*)(i) and (ii) of the former *Immigration Act* constituted cruel and unusual "treatment" within the meaning of section 12 of the Charter and concluded that it did not. The Court noted that an appeal on equitable grounds renders the order reversible, depending upon an assessment of the appellant's personal qualities and faults. After analyzing the reasons given by the Appeal Division, the Court found:

> The foregoing indicates a careful and balanced examination of the appellant's claim to remain in Canada from an equitable rather than a legal point of view. It seems to me that it is the very kind of inquiry mandated by Gonthier J. in *Goltz* [*R. c. Goltz*, [1991] 3 S.C.R. 485] [at page 505], involving an "assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence in itself with the particular circumstances of the offence and the personal characteristics of the offender." I find nothing "grossly disproportionate as to outrage decency in those real and particular circumstances."[53]

In *Lei*,[54] the IAD ruled that the loss of permanent residence status for failure to comply with residency obligations cannot be characterized as treatment that is so excessive as to outrage standards of decency.

Based on the case law, it is therefore possible to envisage that the deportation of a permanent resident for reasons other than the commission of serious offences could, in some circumstances, constitute cruel and unusual "treatment." Even when deportation is for the perpetration of serious crimes, removal to the country of origin could, in certain circumstances, constitute an infringement of section 12 of the Charter. The comments regarding the implications of *Chieu*[55] and *Suresh*[56] under the section regarding discretionary jurisdiction also apply to section 12 of the Charter.

Section 15

The deportation of permanent residents has also been challenged on the basis of the right to equality guaranteed by section 15 of the Charter, in that subparagraph

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[52] *Canepa*, *supra*, footnote 38.

[53] *Canepa*, *supra*, footnote 38, at 284.

[54] *Lei, Manuel Joao v. M.P.S.E.P.* (IAD VA4-01999), Mattu, 20 July 2006.

[55] *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; 2002 SCC 3.

[56] *Suresh*, *supra*, footnote 28.

27(1)(*d*)(ii) and subsection 32(2) of the former *Immigration Act* provided for the deportation of persons convicted of an offence punishable by imprisonment for five years or more, regardless of the circumstances of the offence or the offender (analogous to the criminality provisions in IRPA). The Supreme Court of Canada made a definitive ruling on this issue in *Chiarelli*,[57] namely that the Charter itself provides for different treatment of citizens and permanent residents:

> As I have already observed, s. 6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.[58]

Residency Obligations

In *Chu*,[59] the Court dealt with the question of the constitutionality of the retroactive application of the residency obligation requirements found in section 28 of IRPA. In that case the Federal Court (endorsed on appeal) cited *Chiarelli*[60] for the proposition that non-citizens do not have an unqualified right to enter or remain in the country. The Court concluded that while the appellant's presence in Canada may have been desirable for personal reasons, it was not grounded upon a right that would engage section 7 of the Charter.

Limitations on the right of appeal

The IRPA contains provisions limiting or removing the right of appeal in some cases. For example, subsections 64(1) and (2) remove an appeal right for appellants who were found to be inadmissible on grounds of security, violating human or international rights, serious criminality (if punished by a term of imprisonment of at least two years) or organized criminality. Also, section 68(4) stipulates that an appeal for which a stay had been granted is automatically terminated by the operation of law if the appellant is subsequently convicted of another offence referred to in section 36(1). These provisions limit or remove the jurisdiction of the IAD to hear or decide an appeal.

The constitutionality of both of these provisions has been challenged as being contrary to section 7 of the Charter. The Court has consistently held that the IAD <u>does not</u> have jurisdiction to entertain constitutional challenges with respect to these sections

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[57] *Chiarelli*, s*upra*, footnote 34.

[58] *Chiarelli*, *supra*, footnote 34, at 736. See also *Gonzalez, Norvin Ramiro v. M.C.I.* (F.C. no. IMM-1158-06); Shore, 26 October 2006; 2006 FC 1274 at paragraph 51.

[59] *Chu, Kit Mei Ann v. M.C.I.* (F.C. no. IMM-121-05), Heneghan, 18 July 2006; 2006 FC 893 reasons of Madame Justice Heneghan endorsed on appeal without further comment in *Chu, Kit Mei Ann v. M.C.I*,(F.C.A. no A-363-06), Décary, Linden, Sexton; 29 May 2007; 2007 FCA 205

[60] *Chiarelli*, s*upra*, footnote 34.

of the Act. This issue is fully canvassed earlier in this chapter in the section on jurisdiction.

In addition to the jurisdictional issue, the courts have ruled on the substantive issue of whether the removal of an appeal right violates the Charter. The Courts have consistently held that a removal of a right to appeal does not violate the Charter.

The leading case is *Medovarski*[61] wherein the Supreme Court of Canada rejected a constitutional challenge to section 196 of IRPA. This section is a transitional provision which discontinued any appeal filed under the former *Immigration Act* for persons for whom subsection 64(1) of the IRPA would apply. The Court cited *Chiarelli*[62] for the proposition that deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the Charter and then stated:

> 47. Even if liberty and security of the person were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice. The humanitarian and compassionate grounds raised by Medovarski are considered under s. 25(1) of the *IRPA* in determining whether a non-citizen should be admitted to Canada. The *Charter* ensures that this decision is fair: e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Moreover, *Chiarelli* held that the s. 7 principles of fundamental justice do not mandate the provision of a compassionate appeal from a decision to deport a permanent resident for serious criminality. There can be no expectation that the law will not change from time to time, nor did the Minister mislead Medovarski into thinking that her right of appeal would survive any change in the law. Thus for these reasons, and those discussed earlier, any unfairness wrought by the transition to new legislation does not reach the level of a *Charter* violation.[63]

Previously, in *Williams*,[64] a permanent resident had filed his appeal under paragraphs 70(1)(*a*) and (*b*) of the former *Immigration Act*, but before the appeal was heard,[65] the Minister issued a danger-to-the-public certificate under subsection 70(5) of the former *Act*. Strayer J., writing for the Court, began by pointing out the effects of such a certificate, one of which is to deprive the permanent resident of his or her right of appeal before the Appeal Division. He then distinguished a limitation of the right of

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61 *Medovarski, supra,* footnote 40. Also see *Kroon*, *supra,* footnote 16.

62 *Chiarelli, supra*, footnote 34.

63 *Medovarski, supra,* footnote 40 at paragraph 47.

64 *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A)

65 See also *Ibraham v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J 1559 (T.D.), in which the Federal Court Trial Division ruled that where the Minister issues a certificate of danger to the public after the hearing but before the Appeal Division has made its decision, there is no violation of section 7 of the Charter because that approach is not inconsistent with the principles of fundamental justice.

appeal from deportation *per se*. Finally, while recognizing that the Court had itself made different rulings on the matter,[66] he concluded that even though he had to agree that the Minister's opinion resulted in the deportation of a permanent resident, the right to liberty and security of the permanent resident guaranteed by section 7 of the Charter was not affected.

THE CHARTER AND DISCRETIONARY JURISDICTION

Country of Removal – Potential foreign hardship

Introduction

With regard to the removal itself, prior to the decision of the Supreme Court of Canada in *Chieu*,[67] the IAD was, more often than not, able to dispose of constitutional arguments concerning removal quite easily since, according to the jurisprudence, they were premature inasmuch as the Minister could not determine the country of removal until the IAD had decided the appeal.[68] Arguments that removal would infringe Charter-protected rights were therefore made before the Federal Court on judicial review or on an application to stay a removal order.

In *Chieu*, and the Supreme Court of Canada modified somewhat the decisions rendered by the Federal Court of Appeal with respect to this issue. In order to understand the developments in this area, it is important to set out a brief history.

Historical Context (pre-Chieu)

In *Hoang*,[69] the appellant had been determined to be a refugee from Vietnam and had subsequently obtained permanent resident status. On appeal from a deportation order that followed convictions for serious crimes, the Appeal Division, in its assessment of the circumstances of the case, refused to take into account the country to which the appellant would be removed, even though the Minister's representative had clearly stated during the hearing that the Department intended to remove the appellant to Vietnam. The appellant argued that his deportation violated the rights he was guaranteed by sections 7 and 12 of the Charter.

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[66] The Court cited decisions in which it had ruled that deportation did not constitute a deprivation of liberty: *Hoang, supra,* footnote 35, at 41; *Canepa, supra*, footnote 38, at 277; and *Barrera v. Canada (Minister of Employment and Immigration),* [1993] 2 F.C. 3 (C.A), at 16. Regarding decisions to the effect that deportation does or might in some circumstances constitute a deprivation of liberty, the Court cited: *Chiarelli, supra*, footnote 34; *Nguyen, supra,* footnote 33.

[67] *Chieu, supra* footnote 55.

[68] *Barrera, supra*, footnote 66. See also *Chieu v. Canada (Minister of Citizenship and Immigration),* [1999] 1 F.C. 605 (C.A); *Hoang, supra,* footnote 35.

[69] *Hoang, supra,* footnote 35.

The Federal Court of Appeal was called on to distinguish between the removal of permanent residents and the removal of refugees, in that it must be presumed that a person who has obtained refugee status will be persecuted if returned to the country of origin. The Court recognized that the outcome would be different, but maintained the position it had taken in *Chiarelli*,[70] namely that deportation for serious crimes is not an infringement of liberty. As to the claim of infringement of the right guaranteed by section 12 of the Charter, the Court fell back on its decision in *Hurd*,[71] namely that deportation does not constitute punishment: "Deportation for committing serious offences does not infringe the rights guaranteed by s. 7 or s. 12, as it is not to be conceptualized as a deprivation of the right to liberty or punishment."[72]

The decision in *Barrera*[73] confirmed the position taken by the Federal Court of Appeal that deportation for serious crimes does not constitute a deprivation of liberty and therefore does not violate section 7 of the Charter, regardless of the status the person might have acquired in Canada, that is, permanent resident, refugee, or both. In this particular case, the Court also reiterated its position that deportation does not constitute punishment within the meaning of section 12 of the Charter. However, the issue before the Court was whether the deportation of a Convention refugee constituted cruel and unusual "treatment" within the meaning of section 12 (an issue that the Supreme Court of Canada had raised in *Chiarelli* but did not determine) and, by extension, the constitutionality of section 53 of the former *Immigration Act*, which governed the removal of Convention refugees.

The Federal Court of Appeal upheld the Appeal Division's finding that it was premature to rule on these two issues because no ministerial decision had yet been made to deport the refugee to a country in which his life or freedom would be in jeopardy. It opined that the execution of a removal order is a decision to be made by the Minister, and removal of a refugee will not proceed unless the Minister determines that the refugee is a person who is a danger to the public. However, the Minister cannot make a decision regarding the country to which the refugee would be removed until the issue of deportation has been resolved by the Appeal Division.[74]

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[70] *Chiarelli*, *supra*, footnote 34. Note that the Supreme Court of Canada did not confirm the position taken by the Federal Court of Appeal in this regard. It found, however, that there was no violation of section 7 because deportation for serious crimes is not inconsistent with the principles of fundamental justice.

[71] *Hurd*, *supra*, footnote 50. In that case, it was argued that deportation violated paragraph 11(*h*) of the Charter which reads as: "Any person charged with an offence has the right if finally acquitted of the offence, not to be tried […] or punished for it again."

[72] *Hoang*, *supra*, footnote 35, at 41.

[73] *Barrera*, *supra*, footnote 66.

[74] *Barrera*, *supra*, footnote 66, at 23.

Present approach (post-Chieu)

In 2002, the Supreme Court of Canada rendered an important decision in *Chieu*.[75] The issue in this case was whether the factor of potential foreign hardship should be considered in the IAD's exercise of its equitable jurisdiction. As stated above, before the decision in *Chieu*, the question of the potential country of removal and hardship was often treated as premature in the sense that the Minister could not decide on the country of removal until such time as the removal order was upheld. In *Chieu*, the board member had considered potential foreign hardship but had accorded it minimal weight due to the fact it was premature for the division to take into account conditions in the appellant's country of origin. The Court reversed this decision, indicating that:

> …the I.A.D. is entitled to consider potential foreign hardship when exercising its discretionary jurisdiction under s. 70(1)(b) of the Act, provided that the likely country of removal has been established by the individual being removed on a balance of probabilities.[76]

The Supreme Court of Canada distinguished the treatment of permanent residents from that of refugees, in particular, on the basis that refugees benefit from express legal protection (section 53 of the former Act and section 115 of IRPA) against removal to a country where they believe their life or freedom would be threatened. The Court expressed it in these terms: "[…] there is no need for absolute consistency in how the Act deals with Convention refugees and non-refugee permanent residents."[77]

In light of the Supreme Court of Canada decision, *Chieu*, the case of a permanent resident must be treated differently from that of a protected person. In *Chieu*, the Court noted that the country of removal is generally known in respect of a permanent resident who is not a refugee,[78] and the IAD must examine all the difficulties the permanent resident could encounter following his or her removal to the country of probable destination, including the situation in that country. With respect to a refugee, the Supreme Court of Canada did not specifically exclude the possibility that the IAD may take into account the likely country of removal, if it is known. However, the Court recognized that often the likely country of removal in the case of protected person cannot be determined in view of section 115 of IRPA which sets out the principle of non-refoulement.

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[75] *Chieu, supra*, footnote 55.

[76] *Chieu, supra*, footnote 55 at paragraph 90.

[77] *Chieu, supra*, footnote 55 paragraph 87.

[78] This is not generally the case with regard to protected persons, given the principle of non-refoulement set out in section 115 of the IRPA. See *Atef v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 86 (Trial Division).

Hardship in country of removal – Charter challenges

In determining hardship, the IAD is sometimes called upon to decide Charter arguments based on the appellant's removal being contrary to sections 7 or 12 of the Charter. The approach in assessing Charter violations in the context of removal was commented on in *Suresh.*[79] The *Suresh* approach was clarified in *Malmo-Levine*[80] and followed in subsequent IAD cases.

In *Suresh*, the constitutional validity of paragraph 53(1)(*b*) of the former *Immigration Act* was challenged to the extent that the provision did not prohibit the Minister of Citizenship and Immigration from removing a person to a country where the person might be at risk of being tortured. The Supreme Court of Canada ruled that the provision is not unconstitutional as long as the principles of fundamental justice are observed. However, the Minister, in exercising the discretionary power conferred on her under paragraph 53(1)(*b*) of the former Act, must act in accordance with the principles of fundamental justice guaranteed under section 7 of the Charter. These principles require a balancing process, the result of which may vary from case to case. In principle, when the evidence reveals the existence of a serious risk of torture, the refugee must not be removed. The balancing process requires that various factors be taken into consideration such as "[…] the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada."[81]

Based on the decision of the Court, it is clear that the refugee must meet a preliminary criterion, which is to establish *prima facie* that he or she could be at risk of torture if deported. To the extent that this criterion is met, certain procedural safeguards apply; in particular, the refugee must be informed of the evidence against him or her; subject to any privilege attaching to certain documents or the existence of other valid grounds for limiting disclosure, all the evidence on which the Minister is basing his decision must be disclosed to the refugee; and the Minister must give written reasons for decision with respect to all the relevant issues.

In *Suresh*, the Court also determined that provisions 19(1)(*e*)(iv)(C), 19(1)(*f*)(ii) and 19(1)(*f*)(iii)(B) [equivalent to sections 34(1)(c) and 34(1)(f) of IRPA], which had been challenged on the basis that they infringed freedom of expression and freedom of association guaranteed under subsections 2(*b*) and 2(*d*) of the Charter, were constitutional.

The case of *Malmo-Levine*[82] was a criminal case wherein the Supreme Court had to determine the constitutionality of criminalizing simple possession of marijuana. In so doing, the majority of the Court commented at paragraph 143 on the balancing process enunciated in *Suresh* as follows:

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[79] *Suresh, supra,* footnote 28.

[80] *R. v. Malmo-Levine*; *R. v. Caine* [2003] 3 S.C.R. 571; 2003 SCC 74.

[81] *Suresh, supra,* footnote 28 at paragraph 45.

[82] *Malmo-Levine, supra,* footnote 80

> 143 In short, after it is determined that Parliament acted pursuant to a legitimate state interest, the question can still be posed under s. 7 whether the government's legislative measures in response to the use of marihuana were, in the language of *Suresh*, "so extreme that they are *per se* disproportionate to any legitimate government interest" (para. 47 (emphasis added)). As we explain below, the applicable standard is one of gross disproportionality, the proof of which rests on the claimant.

In *Romans* (2003),[83] the Federal Court concluded that the IAD had erred in law by failing to consider Charter-protected rights in exercising its discretionary jurisdiction. Mr. Romans had his appeal heard before the IAD three times and considered by the Federal Court on two occasions. In order to understand how this happened, it is important to set out the evolution of this case.

A deportation order had been issued by the Immigration Division against Mr. Romans, a permanent resident, for criminality, as he was a person referred to in paragraph 27(1)(*d*) of the former *Immigration Act*. The IAD first dismissed his appeal in 1999. As a result of the decision of the Federal Court of Appeal in *Chieu*, the IAD did not take into consideration the conditions in the country of removal in rendering its decision (the Supreme Court of Canada later set aside the decision of the Federal Court of Appeal on this issue).

At the judicial review of the IAD's decision, Mr. Romans argued that his deportation would be contrary to the principles of fundamental justice set out in section 7 of the Charter as he had been granted landing at the age of 18 months and suffered from chronic paranoid schizophrenia. The Federal Court dismissed the application for judicial review.[84] It concluded that it could not distinguish Mr. Romans' case from the decision rendered by the Supreme Court of Canada in *Chiarelli*.[85] The Federal Court of Appeal upheld the Federal Court's decision.[86]

Subsequent to the Federal Court of Appeal's decision, the Supreme Court of Canada rendered its decision in *Chieu*. Therefore, in light of that decision, the IAD allowed an application to reopen the appeal wherein it would examine, among other things, the difficulties the appellant would encounter if removed. At the reopening of the appeal, Mr. Romans wanted to present constitutional arguments. The IAD decided that the appellant could not challenge the constitutional validity of the removal order because, in the context of a reopened hearing, the IAD jurisdiction was limited to the exercise of its discretionary power.

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[83] *Romans, Steven Anthony v. M.C.I.* (F.C., IMM-358-03), Russell, December 29, 2003.

[84] *Romans, Steven Anthony v. M.C.I.* (F.C.T.D., IMM-6130-99), Dawson, May 11, 2001.

[85] *Chiarelli*, *supra*, footnote 34.

[86] *Romans, Steven Anthony v. M.C.I.* (F.C.A., A-359-01), Décary, Noël, Sexton, September 18, 2001.

The Federal Court quashed the IAD's decision because, while the Division had assessed foreign hardship, it had failed to address the infringement of section 7 Charter rights raised by the appellant.[87] The Court rejected the argument that the IAD did not have an obligation to analyse the Charter arguments presented, but that it only had an obligation to exercise its discretion and perform its statutory duty within the terms of the Charter and in accordance with the principles of fundamental justice.

As a result of the Federal Court quashing the second IAD decision, the case was heard for a third time in 2005 before the IAD (*Romans* 2005).[88] This time, the IAD stayed the removal order for three years. The tribunal opined that despite the bleak prospect of the appellant's rehabilitation, the appellant should be given more time to pursue treatment in Canada given the foreign hardship he would occur if returned to Jamaica and the fact that he was a long-term resident of Canada. The approach adopted by the panel in this case has been followed in subsequent IAD cases and merits mention.

In *Romans* (2005), the IAD considered what the proper approach is with respect to evaluating foreign hardship in the context of the non-exhaustive factors enumerated in *Chieu*. The panel indicated that despite the fact it is foreign hardship that will, in most cases, trigger the proportionately analysis mandated by *Suresh*[89] and other cases, it does not mean that foreign hardship is a freestanding basis for non-removal, divorced from the other discretionary factors. The tribunal continued, stating that:

> However, where the IAD, after conducting the balancing process mandated by section 7 of the Charter, finds that the potential foreign hardship an appellant faces is grossly disproportionate to parliament's interest in removing the appellant and is therefore not in accordance with the principles of fundamental justice, it is difficult to see how the other factors in *Chieu* can overcome such a fundamental breach of the appellant's rights under section 7….In any event, where, after conducting the fundamental justice balance, the IAD finds that the potential foreign hardship is not grossly disproportionate to the government interest in executing the removal order, the level of foreign hardship must still be weighed against the other discretionary factors.[90]

In deciding to stay the removal order for three years, the panel concluded that the appellant's removal would not contravene the principles of fundamental justice as his removal would not be grossly disproportionate to the goal of protecting the public. However, when the hardship that the appellant would face if removed to Jamaica was weighed with the other discretionary factors, particularly the fact he was a long-term

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87 *Romans*, s*upra*, footnote 83.

88 *Romans, Steven Anthony v. M.C.I.* (IAD file no. T99-06694), Sangmuah; 15 September 2005.

89 *Suresh*, s*upra*, footnote 28.

90 *Romans*, s*upra*, footnote 88 at paragraph 17.

resident of Canada, the panel determined that a stay was appropriate. The approach used in *Romans* has been adopted in other IAD cases.[91]

In *Thanabalasingham,*[92] the same Board member who decided *Romans*, without citing *Romans* specifically, dismissed a removal order appeal and adopted a similar approach to assessing hardship as he had used in *Romans*. The Federal Court[93] upheld the decision finding that the IAD had made no reviewable error, including with respect to the hardship analysis, although the issue before the court was the board member's assessment of the evidence rather than specifically the legal framework he had adopted.

In a recent case, in dismissing a removal order appeal, the IAD clearly described the Charter balancing process that is conducted in the context of assessing hardship. The tribunal stated that:

> [74] What is being weighed or balanced in the circumstances of this case by way of a Charter balancing analysis is whether the contemplated deportation of the appellant in his specific circumstances is a grossly disproportionate means for the government to use in order to meet its legitimate objectives of protecting the Canadian public from being harmed by the potential criminal conduct of the appellant. The onus is on the appellant to establish in the circumstances the disproportionately of means used by the state to attain its legitimate objects, and that the same violates the principles of fundamental justice.[94]

The tribunal in that case also found that it should consider the issue of hardship against two possible countries of removal, Jamaica and Panama. It opined that while there was not conclusive evidence as to which one of the countries the appellant would be removed, it was clear that it would be one of the two and, as such, it proceeded to assess potential hardship upon return to either country.

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91 See, for example, *Sambasivam v. M.P.S.E.P.* (IAD TA5-14898), Ahlfeld, 31 March 2007 wherein the tribunal concluded that a removal to Sri Lanka in the circumstances of the appellant, who was inadmissible for serious criminality, would not contravene section 7 of the Charter. In dismissing the appeal, the Board accepted that the appellant suffered from a serious mental illness, the mental health facilities in Canada are superior to those in Sri Lanka, and there was a problem of the availability of the medications he required in Sri Lanka, but found that his removal would not result in disproportionate hardship as there was no evidence that the appellant had actually availed himself of the resources available to him in Canada. Also see *Samuels, Miguel Alfonso v. M.P.S.E.P.* (IAD TA4-06288), Band, 26 September 2008.

92 *Thanabalasingham, Kaileshan v. M.C.I.* (IAD TA2-04078), Sangmuah, 6 January 2006.

93 *Thanabalasingham, Kaileshan v. M.P.S.E.P.* (F.C. no. IMM-421-06), Gauthier, 5 June 2007; 2007 FC 599.

94 *Samuels, supra,* footnote 91 at paragraph 74.

The Federal Court has indicated, as the Board did in *Romans* (2005), that hardship is not a freestanding basis for non-removal. In *Bielecki*,[95] the Court stated that the issue is whether there are sufficient humanitarian and compassionate considerations to stay the removal order weighed in the context of all the circumstances of the case, of which hardship is but one factor.

As for an appeal filed by a protected person against a removal order, based on the principle of non-refoulement set out in section 115 of the IRPA, the country of removal is not generally known at the time of the appeal. Consequently, where the country of removal is not known, constitutional arguments made before the IAD in relation to such removal orders may be premature. It is therefore the Minister's decision to execute a removal order that could infringe Charter-protected rights and thus be the subject of a constitutional challenge.

However, if the Minister clearly indicates an intention during an appeal to effect removal to a particular country, case law indicates that the IAD must then, as in the case of a permanent resident, consider the difficulties the protected person could face in the probable country of removal without, however, reconsidering the application for protection, which comes under the jurisdiction of the Refugee Protection Division. In *Chieu*, the Supreme Court of Canada ruled clearly on this issue, stating as follows:

> Only the C.R.D.D. has the jurisdiction to determine that an individual is a Convention refugee. The I.A.D. cannot make such a finding, nor does it do so when it exercises its discretion to allow a permanent resident facing removal to remain in Canada. When exercising its discretionary jurisdiction, the I.A.D. does not directly apply the *1951 Geneva Convention*, which protects individuals against persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Instead, the I.A.D. considers a broader range of factors, many of which are closely related to the individual being removed, such as considerations relating to language, family, health, and children. Even when examining country conditions, the I.A.D. can consider factors, such as famine, that are not considered by the C.R.D.D. when determining if an individual is a Convention refugee. These foreign concerns are weighed against the relevant domestic considerations in making the final decision as to the proper exercise of the I.A.D.'s discretion. […]

If a permanent resident has a refugee claim before the C.R.D.D. at the same time that he or she is appealing a removal order to the I.A.D., the I.A.D. holds the appeal in abeyance until the C.R.D.D. has determined the refugee claim. As the intervener I.R.B. submits at para. 34 of its factum:

> This sequencing of cases enables the C.R.D.D. to determine if the person is a Convention refugee. The I.A.D. can then consider this decision as one of the many factors in assessing "all the

[95] *Bielecki, Fabian v. M.C.I.* (F.C. no. IMM-2465-07), Gibson, 4 April 2008; 2008 FC 442.

> circumstances of the case". This procedure respects the separation of the adjudicative functions of the two Divisions and the exclusive jurisdiction of the C.R.D.D. to determine Convention refugee status.

I agree. […][96]

The Federal Court jurisprudence has continued this distinction between considering hardship for protected persons when the country of removal is known, but not otherwise. In *Soriano,*[97] a removal order appeal involving a Convention Refugee, the Court reversed an IAD decision dismissing the appeal and determined that the IAD was obligated to consider hardship given that the country of removal had been established as El Salvador. Likewise, in *Thanabalasingham,*[98] the Federal Court upheld a decision of the IAD wherein it had considered hardship in the case of a Convention refugee. In that case, the minister had taken the steps required in section 115 to overcome the principle of non-refoulement and had identified the country of removal as Sri Lanka. In *Balathavarajan*[99] the Federal Court of Appeal distinguished *Soriano* in that the appellant was a Convention refugee and the Minister had not specified the country of removal nor had taken the necessary steps to prepare a danger opinion pursuant to section 115 of IRPA. In the circumstances, the Court stated that assessing hardship "would have been a hypothetical and speculative exercise."[100]

Other challenges

In removal order appeals, the IAD has jurisdiction to allow the appeal for humanitarian and compassionate considerations pursuant to section 67(1)(c)[101] of IRPA. The former *Immigration Act*, section 70(1)(b), also conferred equitable jurisdiction on the IAD to allow an appeal "on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada." Although the wording of the two sections is different, it is instructive to look at some of the challenges involving the former act.

In *Ostojic,*[102] it was argued that paragraph 70(1)(*b*) of the former *Immigration Act* was inconsistent with the right guaranteed by section 12 of the Charter in that paragraph

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96 *Chieu, supra*, footnote 55 at pp. 129 and 130.

97 *Soriano, Omar Alexander Merino v. M.C.I.* (F.C. no. IMM-2957-02), Campbell, 24 April 2003; 2003 FCT 508.

98 *Thanabalasingham, supra*, footnote 93.

99 *Balathavarajan, Sugendran v. M.C.I.* (F.C.A. no. A-464-05), Linden, Nadon, Malone, 19 October 2006; 2006 FCA 340.

100 *Ibid* at paragraph 9.

101 67(1)(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

102 *Ostojic, Stevo* v. *M.E.I.* (IAD T93-02051), Goebelle, Weisdorf, Rotman, February 24, 1994.

70(1)(b), the purpose of which is to mitigate the severity of a deportation order, is vague and imprecise, primarily because it did not establish any criteria to be considered by the Appeal Division, specifically the criterion of long-term residency.

The Appeal Division relied on the comments made by Gonthier J. in *Nova Scotia Pharmaceutical Society* to reject that argument:

> [L]aws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights.[103]

Relying on *Canepa,*[104] the Appeal Division also rejected the argument that long-term residency should be a predominant factor in evaluating all the circumstances of the case. In that case, the Federal Court of Appeal had ruled that long-term residency does not grant any legal status that would support a distinction between long-term and other permanent residents.

In *Machado,*[105] it was also argued that the wording of paragraph 70(1)(*b*) of the former *Immigration Act* is vague and imprecise in that the lack of criteria related to the phrase "having regard to all the circumstances of the case" leads to the arbitrary application of discretionary power in the case of a decision that can deprive the appellant of the right to liberty and security of the person, which must be considered inconsistent with the principles of fundamental justice. The argument was dismissed by relying on the same case law cited above.

The Charter and Unreasonable Delays

This argument has been used primarily in criminal proceedings to assert the right of an accused to be tried within a reasonable time in accordance with paragraph 11(*b*) of the Charter. If the argument is accepted, the result is a stay of criminal proceedings. In the wake of the Supreme Court of Canada's decision in *Askov,*[106] where Cory J. stated

[103] *R.v Nova Scotia Pharmaceutical Society,*[1992] 2 S.C.R 606. at 641-2.

[104] *Canepa, supra,* footnote 38.

[105] *Machado, supra,* footnote 37.

[106] *Askov v. The Queen,* [1990] 2 S.C.R. 1199.

that a delay of six to eight months between the committal for trial and the actual trial is the outer limit of reasonableness, several attempts were made to use the unreasonable delay argument before the various divisions of the IRB.

Two elements are required to sustain such an argument: the person who is the subject of the proceedings must show, first, that he or she has suffered prejudice or an injustice as a result of the delay and, second, that the prejudice constitutes an infringement of a Charter right.

In *Chan,*[107] several years passed after the deportation order was issued without the Minister's acting on it because of the absence of identity papers and a lack of co-operation by the appellant himself and the authorities of the country to which he was to be deported. The appellant argued that the unreasonable delay in executing the deportation order had caused him psychological and emotional stress, since he did not know when, or even if, he would be removed, and that this infringed his rights guaranteed under sections 7 and 12 of the Charter. The Appeal Division, after reviewing the Department's efforts to execute the removal order and the appellant's personal situation, rejected the argument because the evidence did not show that there had been an injustice or that the appellant had sustained prejudice because he was not deported.

In *Chiarelli,*[108] in the absence of evidence of prejudice to the appellant, the Appeal Division did not accept the argument that the 14 months it took the Minister to issue the security certificate and order an inquiry into the matter infringed his right guaranteed under section 7 of the Charter.

Higher courts have not been asked to rule on matters where unreasonable delay in the hearing of an appeal before the Appeal Division was used as an argument. However, in *Akthar,*[109] it was argued that the right guaranteed by section 7 of the Charter was infringed because of the two-and-a-half-year delay between the initial refugee claim and the tribunal's decision. The Federal Court of Appeal made a clear distinction between a person claiming refugee status and a person accused of a criminal offence; the former benefits from no presumption, whereas the latter is presumed to be innocent. The Court did not, however, rule out the possibility that an unreasonable delay in being heard might constitute an infringement of the right guaranteed by section 7 of the Charter. The Court stated:

> In the first place, the applicants are not at all in the same legal position as an accused person. This, of course means that they do not enjoy the specific protection afforded by paragraph 11(*b*) of the Charter. That in itself is not conclusive, for it is well accepted that the

[107] *Chan, Ngorn Hong v. M.E.I. (IAD V90-00287), Wlodyka, Guillanders, Verma, July 31, 1992*

[108] *Chiarelli, Joseph v. M.E.I.* (IAD T89-07380), Weisdorf, Fatsis, Chu, May 19, 1993; the appellant did not make this argument before the Federal Court of Appeal, *supra*, footnote 34 or before the S.C.C., *supra*, footnote 34.

[109] *Akthar v. Canada (Minister of Employment and Immigration),* [1991] 3 F.C. 32 (C.A).

specific dispositions of section 11 are only particular applications of the principles of fundamental justice enshrined in section 7.[110]

It added, however, that in non-criminal cases any infringement of the Charter based on a delay must be supported by evidence that the person making the claim suffered prejudice or an injustice attributable to the delay.

In *Urbanek*,[111] the Federal Court of Appeal held that the delay in hearing the claim, which resulted in the claimant's not being granted refugee status because of a change in circumstances in his country of origin, did not constitute prejudice.

The Charter – Procedural Considerations

Notice

Section 52 of the *Immigration Appeal Division Rules*[112] (the Rules) requires that a notice of constitutional question be provided to the attorney general of Canada and the attorney general of each province no later than 10 days before the argument will be made if an appellant wishes to challenge the constitutional validity, applicability or operability of a legislative question. The form and content of the notice is set out in the rule and includes the relevant facts to be relied upon and a summary of the legal argument to be made. If the constitutional arguments are not aimed at invalidating a legislative provision, as, for example, in the case of an argument of unreasonable delay, notice to the attorneys general is not required.

If notice to the attorneys general is not given in circumstances where it is required by the Rules, the Appeal Division may either adjourn the hearing to allow the parties to meet the requirements of the Rules,[113] order that the notice period be changed, or refuse to hear the constitutional arguments.[114]

Hearing Considerations

The Appeal Division may hear the appeal on its merits before hearing arguments based on the Charter because, if the decision is favourable, Charter arguments need not be made.[115]

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[110] *Ibid.*, at 38.

[111] *Urbanek, Kristian v. M.E.I.* (F.C.A., no. A-22-90), Hugessen, MacGuigan, Desjardins, June 19, 1992.

[112] DORS/2002-230.

[113] *Mursal v. M.C.I.* (F.C. IMM-3360-02), Gibson, 25 August 2003; 2003 FC 995.

[114] *Carpenter, Herbert Wayne v. M.C.I.* (IAD V94-02423), Clark, January 3, 1997; *Gonsalves, Gwendolyn Barbara v. M.C.I.* (F.C.T.D., no. IMM-1992-96), Muldoon, May 9, 1997; *Magtouf, supra*, footnote 19.

[115] *Singh v. M.E.I.* (1991), 14 Imm. L.R. (2d) 126 (F.C.T.D.); *Bissoondial v. M.E.I.* (1991), 14 Imm. L.R. (2d) 119 (F.C.T.D.); *Gayle, Everton Simon v. M.C.I.* (IAD T94-02248), Hopkins, June 5, 1995.

Finally, a full hearing is not necessarily required if a constitutional question is raised. In *Hamedi*,[116] the Federal Court upheld a decision that was made by way of a preliminary ruling based solely on written submissions where a constitutional argument had been raised before the IAD.

[116] *Hamedi, Marzia v. M.C.I.* (F.C. no. IMM-6293-05), O'Reilly, 2 October 2006; 2006 FC 1166.

CASES

Chapter Twelve

Appeals by the Minister

Introduction

Pursuant to section 63(5) of the *Immigration and Refugee Protection Act* (the "IRPA "), the Minister may appeal to the Immigration Appeal Division (IAD) from a decision made by an Immigration Division (ID) member made at an admissibility hearing.

Relevant Legislative Provisions

63(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.

67(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time the appeal is disposed of,

- the decision appealed is wrong in law or fact or mixed law and fact;
- a principle of natural justice has not been observed; or
- other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

(2) If the Immigration Appeal Division allows the Appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision maker for reconsideration.

69(1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.

(2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).

(3) If the Immigration Appeal Division dismisses an appeal made under subsection 63(4) and the permanent resident is in Canada, it shall make a removal order.

Admissibility Hearings

When the Minister refers a case to the ID under subsection 44(2) of the IRPA, the ID must hold a hearing to determine whether the permanent resident or foreign national who is the subject of the subsection 44(1) report is inadmissible. Depending on the panel's finding with respect to inadmissibility, it must, under section 45 of the IRPA, authorize the person to enter or remain in Canada or make the applicable removal order under the Immigration and Refugee Protection Regulations (IRPR). According to section 44(2), the Minister may, in certain cases, declare the person inadmissible and make a removal order without referring the case to the ID.

Subsection 44(2) and paragraph 45(d) of the IRPA provide that the Minister or the ID, as the case may be, may make a removal order against a permanent resident or a foreign national who is inadmissible on one or more of the grounds set out in sections 34 to 42 of the IRPA. The jurisdiction of the Minister or the ID over inadmissibility and removals is determined by subsection 44(2) and section 45 of the IRPA, as well as by sections 227, 228 and 229 of the IRPR, which also specify the appropriate removal order in each case. Subsections 44(2) of the IRPA and 228(1) of the IRPR list the cases that fall within the Minister's jurisdiction, while subsections 227(1) and 229(1) of the IRPR list those within the ID's jurisdiction. Section 45 of the IRPA sets out the decisions that the ID may make at the conclusion of a hearing.

Those who are the subject of a report under subsection 44(1) of the IRPA may try to enter Canada at a port of entry or may already be in Canada. The former Immigration Act provided for classes of inadmissible persons at the port of entry and grounds justifying the removal of persons who were already in Canada, as well as a separate hearing and removal process. The IRPA does not distinguish between grounds of inadmissibility and the hearing and removal process applicable to those seeking to enter Canada (port of entry cases) and those who are already in Canada (inland cases). Parliament grouped together and reproduced in section 45 of the IRPA the decisions that could be made under the former Immigration Act in port of entry and inland cases.

Removal Orders

Section 223 of the IRPR provides that there are three types of removal orders: departure orders, exclusion orders, and deportation orders.

Subsections 228(1), 228(2) and 229(1) of the IRPR specify the applicable removal order depending on the ground of inadmissibility and determine the cases in which the Minister and the ID have jurisdiction to make the removal order. It should be noted that the panel has no discretion concerning the order to be made; if, for example, the person concerned is inadmissible on two grounds, under paragraphs 34(1)(c) and 40(1)(a) of

IRPA (security grounds and misrepresentation respectively) two removal orders must be made- a deportation order and an exclusion order. A removal order against a refugee protection claimant is conditional under subsection 49(2) of IRPA.

Issues Pertaining to Admissibility

Various issues arise before the Immigration Appeal Division when the Minister appeals the decision by an ID member that a person who was the subject of an admissibility hearing is not inadmissible. Some of the issues that have arisen in appeals by the Minister pursuant to section 63(5) of IRPA include:

- whether the respondent is inadmissible for misrepresentation pursuant to paragraph 40(1)(a) of IRPA,[1]
- whether the respondent is described in s.34(1)(f) of IRPA (member of an organization that engaged in terrorism),[2]
- whether the respondent is inadmissible on grounds of serious criminality,[3]
- whether the respondent is inadmissible on grounds of organized criminality.[4]

Nature of a Section 63(5) Hearing

The burden of proof on a balance of probabilities rests with the Minister; in order to succeed on appeal the Minister must demonstrate that the ID decision is wrong in law or fact or mixed law and fact.[5] The panel is to base its decision on "evidence …that it considers credible or trustworthy in the circumstances"[6]. A hearing before the IAD is a hearing *de novo* and additional evidence that was not before the ID may be taken into

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1 See *M.P.S.E.P.* v. *Zhai, Ning* (IAD VA6-02206), Ostrowski, March 6, 2007; *M.P.S.E.P.. v. Amin, Imran Chaudhary* (IAD VA6-00292), Lamont , March 14, 2007.

2 See *M.P.S.E.P.* v. *Abramishvili, Givi*, (IAD VA5-01125), Nest, January 16, 2007; *M.P.S.E.P.* v. *Singh, Jasvir* (IAD VA5-00776), Workun, June 22, 2005; *M.P.S.E.P.* v. *Seyed, Zia Mushtaq* (IAD VA6-00066), Ostrowski, March 12, 2007. See the following Federal Court cases: *M.C.I.* v. *Qureshi, Mohammad* (F.C., no. IMM-1565-07), Phelan, October 15, 2007; 2007 FC 1049; *Memon, Javed* v. *M.C.I.* (F.C. no. IMM-4674-07), Zinn, May 14, 2008; 2008 FC 610.

3 See *Amin, supra,* footnote 1.

4 See *M.P.S.E.P.* v. *Chung, Jae Kwon* (IAD VA6-02680), Shahriari, July 23, 2007. See the decision of the Federal Court in *Contreras Mendoza, Roberto Ernesto* v. *M.P.S.E.P.* (F.C. no. IMM-1160-07), de Montigny, September 19, 2007; 2007 FC 934.

5 Subsection 67(1) IRPA.

6 Paragraph 175(1)(c) IRPA.

account.[7] In practice, however, often no new evidence is adduced and the matter proceeds on the basis of the record and written submissions from both parties.

The Remedies Available

The IAD can do one of three things with the appeal- it can allow the appeal, it can stay any removal order made or it can dismiss the appeal.[8]

Allowing an appeal

Section 67 sets out the circumstances for allowing the appeal of the Minister. There are two applicable grounds of appeal:

- the decision of the ID was wrong in law or fact or mixed law and fact;[9]
- A principle of natural justice had not been observed by the ID.[10]

If the IAD allows the appeal then there are two available remedies as provided in s.67(2). First, the IAD shall set aside the original decision of the ID and substitute its own decision which includes the making of a removal order. As an example: if the ID had decided that the person was not inadmissible to Canada and did not issue a removal order against the person, then the IAD in allowing the appeal of the Minister would set aside the decision of the ID and make a removal order. Second, the IAD could refer the matter back to the ID for reconsideration. This second remedy may be used when there is insufficient evidence from the admissibility hearing for a determination.

Dismissing the appeal

Where the IAD finds that the member of the ID was correct in his or her decision, the appeal by the Minister can be dismissed pursuant to section 69 of *IRPA*.

> s.69(1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.
>
> (2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and

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[7] See *Contraras Mendoza, supra,* footnote 4, where the Court confirms the *de novo* jurisdiction of the IAD.

[8] Section 66 IRPA.

[9] S. 67(1)(a).

[10] S. 67(1)(b).

> compassionate considerations warrant special relief in light of all the circumstances of the case, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).

Subsection 69(2) incorporates the concept of deemed appeal found in subsection 3(3) of the *Immigration Act*. The situation is as follows: in a usual removal order appeal, a permanent resident or protected person could appeal a removal order to the IAD on legal grounds or on the grounds that there are sufficient humanitarian and compassionate considerations that warrant the granting of special relief. The legislation, therefore, needs to set up provisions that allow a streamlined process whereby when the IAD allows a Minister's appeal and issues a removal order against a permanent resident or protected person then the IAD can take into account humanitarian and compassionate considerations in the same proceeding. If this were not done then the person would have to file a separate appeal to have those matters heard and there would be two proceedings consecutively heard as opposed to dealing with both matters in the same proceedings. In the *Immigration Act*, this was done through a deemed appeal. Under *IRPA*, it is not a deemed appeal as much as a consideration of humanitarian and compassionate considerations in a Minister's appeal. Although different in approach the result is essentially the same.

First, under s.69(2) the ability to consider humanitarian and compassionate considerations only applies to Minister's appeals that affect permanent residents or protected persons. Second, if the IAD is satisfied that sufficient reasons exist, then despite the fact that there were errors with the ID decision, the IAD can do one of two things. The IAD can make the removal order that should have been made and then stay the order pursuant to s.68 or it can dismiss the appeal outright which means that there is no removal order against the person.

CASES