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
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> (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;
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> (d) the family in Canada and the dislocation to the family that removal would cause;
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> (e) the family and community support available to the appellant; and
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> (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