REMOVAL ORDER APPEALS

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CHAPTER 1

1. INTRODUCTION

1.1. INTRODUCTION

A person may be ordered removed from Canada by a senior immigration officer or an adjudicator if that person is inadmissible to Canada or, in other cases, is removable from Canada. A person is inadmissible to Canada if he or she is described in section 19 of the *Immigration Act* (the "Act")[1] and a person is removable from Canada if he or she is described in section 27 of the Act.

Pursuant to section 70, the Act provides a right of appeal[2] to the Appeal Division for four categories of persons against whom a removal order,[3] or a conditional removal order,[4] has been issued. The four categories of persons are:

1. permanent residents or persons in possession of a valid returning resident permit;[5]

2. Convention refugees who are not permanent residents;[6]

3. persons in possession of a valid immigrant visa at the time that they were denied admission at a port of entry;

4. persons in possession of a valid visitor's visa at the time that they were denied admission at a port of entry.[7]

---

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

2 There are exceptions, however, as set out in subsection 70(5) of the Act.

3 The definition of a removal order is found in subsection 2(1) of the Act. This section defines a removal order as follows:

> "removal order" means a departure order, an exclusion order or a deportation order;

4 The definition of a conditional removal order is found in subsection 2(1) of the Act. This section defines a conditional removal order as:

> "conditional removal order" means a conditional departure order or a conditional deportation order;
>
> "conditional departure order" means a conditional departure order issued under subsection 28(1), paragraph 32.1(3)(b) or subsection 32.1(5) that has not become effective under subsection 28(2) or 32.1(6);
>
> "conditional deportation order" means a conditional deportation order made under subsection 32.1(2), (3) or (4), 73(2) or 74(1) or (3) that has not become effective under subsection 32.1(6);

5 Subsection 70(1) of the Act.

6 Paragraph 70(2)(a) of the Act.

7 Valid immigrant visa holders and valid visitor visa holders have a right of appeal pursuant to paragraph 70(2)(b) which provides as follows:

Where a removal order has been appealed to the Appeal Division, the execution of the removal order is stayed until the appeal has been heard and disposed of by the Appeal Division.[8]

1.2. JURISDICTION OF THE APPEAL DIVISION ON REMOVAL ORDER APPEALS

The grounds of appeal for all four categories of persons with a right of appeal to the Appeal Division are found in section 70 of the Act. The statutory provision which contains the two grounds of appeal for the first category of persons, that is, permanent residents or persons in possession of a valid returning resident permit, is subsection 70(1). Subsection 70(1) provides as follows:

> 70(1) Subject to subsections (4) and (5), where a removal order or conditional removal order is made against a permanent resident or against a person lawfully in possession of a valid returning resident permit issued to that person pursuant to the regulations, that person may appeal to the Appeal Division on either or both of the following grounds, namely,
>
> (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
>
> (b) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

For the other categories of persons with a right of appeal to the Appeal Division, subsection 70(3) of the Act applies and it provides as follows:

> (3) An appeal to the Appeal Division under subsection (2) may be based on either or both of the following grounds:
>
> (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
>
> (b) on the ground that, having regard to the existence of compassionate or humanitarian considerations, the person should not be removed from Canada.

In removal order appeals, the determination as to whether a person is a permanent resident or a person in possession of a valid returning resident permit, a Convention refugee who is not a permanent resident, a person in possession of a valid immigrant visa at the time that he or she was denied admission at a port of entry or a person in possession of a valid visitor's visa at the

---

> 70(2) Subject to subsections (3) to (5), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who
> ...
> (b) seeks landing or entry and, at the time that a report with respect to the person was made by an immigration officer pursuant to paragraph 20(1)(a), was in possession of a valid immigrant visa, in the case of a person seeking landing, or a valid visitor's visa, in the case of a person seeking entry.

[8] Paragraphs 49(1)(a) and (b) of the Act.

time that he or she was denied admission at a port of entry is a **jurisdictional** issue. If the person does not belong to one of these four categories, then the Appeal Division dismisses the appeal for lack of jurisdiction. If the person does come within one of these four categories, then the appeal proceeds on one or both of the grounds of appeal. For a detailed discussion of jurisdictional issues, refer to Chapters 2 to 4.

It is important to note that there is a difference in the second ground of appeal between the first category of persons and the remainder of the categories. The second ground of appeal for permanent residents or persons in possession of a valid returning resident permit is based on **"all the circumstances of the case"** whereas for the other three categories of persons with a right of appeal to the Appeal Division the ground is **"having regard to the existence of compassionate or humanitarian considerations".** For a detailed discussion of the Appeal Division's discretionary jurisdiction, refer to Chapter 9.

The Appeal Division also hears appeals by the Minister under section 71 of the Act from a decision made by an adjudicator at an immigration inquiry. Such appeals are not commonly seen by the Appeal Division. For a detailed discussion of section 71 appeals, refer to Chapter 12.

1.3. ATTRIBUTES OF A REMOVAL ORDER APPEAL

The Appeal Division is a quasi-judicial tribunal and a court of record with the powers of a superior court as regards the matters set out in subsection 69.4(3) of the Act. It has the sole and exclusive jurisdiction to hear and determine all questions of law and fact arising in relation to removal order appeals, including questions concerning its jurisdiction.

A removal order appeal is a hearing *de novo* in the sense that the Appeal Division can receive evidence which was not available to the senior immigration officer or the adjudicator at the time the removal order was issued.[9] The Appeal Division is not bound by legal or technical rules of evidence and it may receive and base its decision on evidence considered necessary and credible or trustworthy. [10] As a general rule, the appeal is decided on the facts as they exist at the time of the hearing.

1.4. REMEDIES

The Appeal Division may allow or dismiss a removal order appeal or it may direct that the execution of the removal order be stayed under such terms and conditions as the Appeal Division may determine.[11] If an appeal is allowed, then it may be allowed in law or allowed in the exercise of the discretionary jurisdiction of the Appeal Division, or both. The Appeal

[9] *Labasova, Anna* v. *S.S.C.* (F.C.A., no. A-317-92), Marceau, Décary, Chevalier, July 6, 1994.

[10] Paragraph 69.4(3)(c) of the Act.

[11] Subsections 73(1) and 74(2) of the Act.

Division does not need to give reasons for its decisions in these appeals unless so requested by either of the parties within 10 days after having been notified of the decision.[12]

With the leave of the Court, there can be judicial review of the Appeal Division's decision by the Federal Court—Trial Division.[13]

[12] Subsection 69.4(5) of the Act.

[13] Subsection 82.1(1) of the Act.

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CHAPTER 2

2. DANGER TO THE PUBLIC OPINIONS

2.1. INTRODUCTION

As noted in Chapter 1, certain persons who have been issued a removal order have a right to appeal to the Appeal Division on two grounds. There is an exception[1] to this right of appeal, however, where the Minister has issued an opinion that the person is a "danger to the public".

The relevant statutory provision for this "danger to the public" opinion is found in subsection 70(5) of the *Immigration Act* (the "Act"*)* which subsection came into force on July 10, 1995 with Bill C-44. The text of subsection 70(5) reads as follows:

> 70(5) No appeal may be made to the Appeal Division by a person described in subsection (1) or paragraph (2)(a) or (b) against whom a deportation order or a conditional deportation order is made where the Minister is of the opinion that the person constitutes a danger to the public in Canada and the person has been determined by an adjudicator to be
>
> (a) a member of an inadmissible class described in paragraph 19(1)(c), (c.1), (c.2) or (d);
>
> (b) a person described in paragraph 27(1)(a.1); or
>
> (c) a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed.

The Federal Court of Appeal in *Williams*[2] considered the general impact of a "danger to the public" opinion. The Court concluded that the removal of the right of appeal to the Appeal Division is remedied by the availability of judicial review (that is, the appellant is not without any remedies from the issuance of the removal order), the availability of the Minister's compassionate or humanitarian discretion under subsection 114(2) of the Act, and the availability of a judicial stay. Thus, the removal of appeal rights to the Appeal Division is not a loss of a fundamental right.

2.2. TEST

A review of subsection 70(5) shows that there are two requirements which must be met before the jurisdiction of the Appeal Division to hear an appeal is removed. The first requirement is that the Minister must form an opinion that the person is a danger to the public. The second requirement is that the person must have been determined by an adjudicator to come

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[1] There is another exception to the right of appeal, where a security certificate has been filed under subsection 40.1(1) of the Act. If a certificate is filed, then, pursuant to subsection 70(3.1), "no appeal may be made to the Appeal Division" except to challenge the legal validity of the removal order (paragraph 70(4)(a)). In such cases, there is no right of appeal on the basis of the Appeal Division's discretionary jurisdiction.

[2] *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A). (Leave to appeal to the Supreme Court of Canada denied on October 16, 1997.)

within one of paragraphs 70(5)(a), (b) or (c). These provisions are for serious criminality either inside, or outside, Canada.

In most cases, after giving the parties an opportunity to be heard, the Appeal Division is able to determine if it has jurisdiction to hear the appeal by a review of the deportation order and the Minister's opinion. If there is a Minister's opinion that the person is a danger to the public and the deportation order issued by the adjudicator is based on a determination that the person was one of the class of persons referred to in paragraphs 19(1)(c), (c.1), (c.2) or (d), 27(1)(a.1), or 27(1)(d), as required by paragraph 70(5)(a), (b) or (c), then the Appeal Division dismisses the appeal for lack of jurisdiction.

However, there is an interesting issue with respect to the determination that the person is a person described in paragraph 27(1)(d) as required by paragraph 70(5)(c). Paragraph 27(1)(d) provides as follows:

> 27. (1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who ...
>
> (d) has been convicted of an offence under any Act of Parliament, other than an offence designated as a contravention under the Contraventions Act, for which a **term of imprisonment of more than six months has been, or five years or more may be, imposed**. [emphasis added]

The requirement under paragraph 70(5)(c) is that the person be a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a **term of imprisonment of 10 years or more may be imposed**. It is important to note that the terms of imprisonment are different in paragraphs 70(5)(c) and 27(1)(d). In situations where an adjudicator finds that the person is a person described in paragraph 27(1)(d), the issue which must be addressed is whether the adjudicator must make the further finding that the person was convicted of an offence for which a term of imprisonment of 10 years or more may be imposed, or whether the Appeal Division can make that further finding.

The Federal Court—Trial Division has considered this issue in the *Athwal*[3] case. In *Athwal*, the adjudicator had found that the person was a person described, *inter alia,* in subparagraph 27(1)(d)(i),[4] in that he had been convicted of an offence for which a term of

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[3] *Athwal, Balbinder Singh v. M.C.I.* (F.C.T.D., no. IMM-1458-96), Dubé, January 23, 1997.

[4] This was the predecessor to the current paragraph 27(1)(d) which came into effect on August 1, 1996. Paragraph 27 (1)(d) reads as follows:

> 27. (1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who
>
> (d) has been convicted of an offence under any Act of Parliament for which a term of imprisonment of

imprisonment of more than six months had been imposed, and ordered his deportation. The adjudicator did not rule on whether the offence was one "for which a term of imprisonment of ten years or more may be imposed," as set out in paragraph 70(5)(c). Mr. Athwal had filed an appeal from the deportation order with the Appeal Division. The Minister subsequently filed an opinion, pursuant to subsection 70(5) of the *Act*, that the person constituted a danger to the public. The Appeal Division dismissed the appeal for lack of jurisdiction pursuant to paragraph 70(5)(c) of the Act, holding that the appellant "has been determined by an adjudicator to be a person described in paragraph 27(1)(d) of the *Immigration Act* who has been convicted of an offence for which a term of imprisonment of ten years or more may be imposed..." [5]

The Federal Court—Trial Division found that the Appeal Division had erred in dismissing the appeal for lack of jurisdiction. The Court held that the Appeal Division cannot look at the term of imprisonment for the purpose of paragraph 70(5)(c), since this is solely within the adjudicator's jurisdiction:[6]

> The subsection stipulates very clearly that the determination must be made by an adjudicator. There are no provisions in the Act authorizing the Appeal Division to substitute its own decision for that of the arbitrator. (sic)

The Appeal Division's decision to dismiss the appeal for lack of jurisdiction was quashed. There was a certified question in *Athwal* which the Minister appealed to the Federal Court of Appeal. The question was the following: **"Under s. 70(5)(c) of the *Immigration Act,* must an adjudicator specifically find that a person described in paragraph 27(1)(d) is also a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed, before s. 70(5)(c) will be effective to remove the Applicant's appeal to the Immigration Appeal Division, or can this finding be made by the Immigration Appeal Division in the course of determining whether it has jurisdiction to proceed with the appeal?"**

The Federal Court of Appeal answered the certified question as follows: "**Under s.70(5)(c), a finding that a person has been convicted of an offence for which a term of imprisonment of ten years or more may be imposed can be made by the Immigration Appeal Division in the course of determining whether it has jurisdiction to proceed with an appeal.**" Accordingly, the appeal was allowed.[7]

As a consequence of *Athwal*, it is clear that the Appeal Division continues to have jurisdiction to hear the appeal where the person is described in paragraph 27(1)(d). The Federal

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> (i) more than six months has been imposed, or
> (ii) five years or more may be imposed (...)

[5] *Athwal, Balbinder Singh v. M.C.I.* (F.C.T.D., no. IMM-1458-96), Dubé, January 23, 1997.

[6] *Athwal, ibid*.

[7] *M.C.I. v. Athwal, Balbinder Singh* (F.C.A., no. A-67-97), Robertson, Denault, Linden, September 11, 1997.

Court of Appeal concluded that because subsection 69.4(2) gives the Appeal Division sole jurisdiction to hear and determine all questions of law, including questions of jurisdiction, with respect to appeals made under section 70, the Appeal Division has jurisdiction to determine whether a person has been convicted of an offence for which a term of imprisonment of 10 years or more may be imposed. It is therefore apparent that the Appeal Division has jurisdiction to determine whether a right of appeal is lost under paragraph 70(5)(c) and in doing so, to determine whether the requirements of this subsection have been met.

2.3. TIMING OF THE OPINION

2.3.1. Transitional Provisions

In Bill C-44, which enacted subsection 70(5), subsection 13(4) contained the transitional provision to deal with appeals of removal orders which had already been filed with the Appeal Division. Subsection 13(4) provided that

> Subsection 70(5) of the Act, as enacted by subsection (3), applies to an appeal that has been made on or before the coming into force of that subsection and in respect of which the hearing has not been commenced, but a person who has made such an appeal may, within fifteen days after the person has been notified that, in the opinion of the Minister, the person constitutes a danger to the public in Canada, make an application for judicial review under section 82.1 of the Act with respect to the deportation order or conditional deportation order referred to in subsection 70(5).

In *Tsang*,[8] the Federal Court Trial Division and then the Federal Court of Appeal had occasion to consider a comparable transitional provision, subsection 15(3), for sponsorship appeals. In that case, the appeal had been filed prior to July 10, 1995, commenced after July 10, 1995 and after the matter was reserved, the Minister filed the opinion. The question for the Court was whether the filing of the opinion after the hearing had commenced resulted in the Appeal Division losing jurisdiction over the appeal. The Federal Court—Trial Division and then the Federal Court of Appeal indicated that the appeal right was extinguished after the opinion was filed, on the basis of the clear statutory wording of the transitional provision that there was no appeal to the Appeal Division if the hearing had not been commenced by July 10, 1995 when Bill C-44 came into effect. As a result, the Minister may – in transitional sponsorship appeals –issue a "danger to the public" opinion at any time before the Appeal Division decides the appeal.

As the provisions of subsections 15(3) and 13(4) are comparable, the same rationale of the Federal Court applies to transitional removal order appeals. If the appeal was filed before July 10, 1995 but commenced after July 10, 1995, then the Minister can issue the opinion at any time until the Appeal Division decides the appeal.[9]

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[8] *Tsang, Lannie Wai Har v. M.C.I.* (F.C.T.D., no. IMM-2585-95), Dubé, February 7, 1996; affirmed in *Tsang, Lannie Wai Har v. M.C.I.* (F.C.A., no. A-179-96), Marceau, Desjardins, McDonald, February 11, 1997.

[9] See *Casiano, Esperidon Sanidad v. M.C. I.* (F.C.T.D., no. IMM-746-96), Dubé, September 20, 1996, where the Court found that where the appeal was filed before July 10, 1995 and the hearing was commenced after that date, the Minister was entitled to file the opinion up to the time of the decision. Also see *Duve, Bharat Dwaj v. M.C.I.* (F.C.T.D., no. IMM-3416-95), McKeown, March 26, 1996, where the Court found subsection 13(4)

2.3.2. Non-Transitional Cases

The timing of the filing of opinions in non-transitional cases has not been resolved. In the usual case, the opinion is filed prior to the commencement of the appeal and the appeal is dismissed for lack of jurisdiction. If the Appeal Division commences the appeal before the opinion is filed, it is not clear from the statutory language whether the Minister's filing of the opinion – at any time until the decision is rendered – results in the extinguishing of the jurisdiction of the Appeal Division to consider the appeal.

2.4. ARGUMENTS MADE ON THE "DANGER TO THE PUBLIC" OPINIONS

2.4.1. Constitutionally Vague

The argument has been made by appellants that the phrase "danger to the public" is constitutionally vague. In *Williams*,[10] the Federal Court of Appeal stated that the test for constitutional vagueness is whether a provision gives sufficient guidance for legal debate. On the basis of this test, the Court concluded that the wording "danger to the public" is not unconstitutionally vague in that it refers to the possibility that a person who has committed a serious crime in the past may seriously be considered to have the potential to re-offend. Even though this requires an assessment of future risk, this is not vague as there is no constitutional mandate that there be an exact predictability of future behaviour.

In addition, the Court considered whether subsection 70(5) engaged interests affecting the life, liberty or security of the person under section 7 of the *Charter of Rights and Freedoms* (the "Charter"). The Court concluded that it did not.

These conclusions by the Court in *Williams* have not been the object of any significant controversy.

2.4.2. Duty to Give Reasons

The argument was also made in the *Williams* case that there was a duty on the Minister to give reasons for the issuance of the "danger to the public" opinion. The Federal Court—Trial Division found, in *Williams,* that such a duty existed on the basis of the rules of natural justice as found in the common law, and on the basis of the rules of fundamental justice pursuant to section 7 of the Charter. The Federal Court of Appeal, in *Williams*, overturned the Federal Court—Trial Division on both of these points and found that there was no duty on the Minister to give reasons.

"clear" and that the Minister was entitled to issue an opinion under subsection 70(5) in a transitional case after the hearing at the Appeal Division had commenced, after July 10, 1995.

[10] *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A). (Leave to appeal to the Supreme Court of Canada denied on October 16, 1997.).

The Supreme Court decisions of *Baker* [11] reopened the question. The decision involved a refusal of an inland application for landing based on humanitarian and compassionate grounds pursuant to subsection 114(2).The Supreme Court held that where the decision had important significance for the individual, some form of reasons was required[12]. Although the duty of fairness required in that context had clearly been expanded, there was a marked divergence of opinion at the Trial Division whether *Baker* should be interpreted as having overruled *Williams.*

Mr. Justice Dubé, in *Ip*[13], relying on the reasoning in *Baker*, specifically addressed the question of whether written reasons were required for a danger opinion:

> I agree with the applicant that written reasons may be no less a requirement in the context of a danger opinion made pursuant to subsection 70(5) of the Immigration Act. This is clearly a case where a decision has enormous significance for the individual and is extremely critical to his future.

In *Atwell*, Mr. Justce Teitelbaum expressed his view that nothing in *Baker* indicated that *Williams* should be disregarded stating, "Danger opinions are not analogous to H&C decisions; the two have totally different significance and contexts."[14] He held that reasons were not required for a subsection 70(5) danger opinion.

2.4.3. Right to an Oral Hearing

Since the coming into force of subsection 70(5), it has been argued that an appellant has a right to an oral hearing before the issuance of the "danger to the public" opinion. The Federal Court—Trial Division has held[15] that there is no requirement for an oral hearing as long as the person affected by the opinion has been given adequate notice of the case that has to be met and afforded the opportunity to respond before the decision is rendered.

In *Bhagwandass*[16], Mr. Justice Gibson considered the effect of the *Baker* decision on *Williams* and concluded that the principles arising from *Baker* regarding the "characterization of the impact of a decision (or opinion) on the individual(s) concerned, the content of the duty of fairness in light of that impact and the applicable standard of review supersede[d] those stated in *Williams* such that they now govern."

The failure to disclose the "Request for Minister's Opinion" and the "Ministerial Opinion Report" before a decision was made, to give Mr. Bhagwandass an opportunity to respond to them, and to include any response he made in the materials forwarded to the Minister's delegate

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[11] *Baker v.Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817.

[12] ibid at para. 43.

[13] *Ip v.Canada (Minister of Citizenship and Immigration),* [2000]F.C.J. No. 152; (2000) 4 Imm. L.R. (3d) 77 (F.C.T.D.).

[14] *Atwell v. Canada (Minister of Citizenship and Immigration)* [2000] F.C.J. No. 1710.

[15] *Casiano, Esperidon Sanidad v. M.C. I.* (F.C.T.D., no. IMM-746-96), Dubé, September 20, 1996.

[16] *Bhagwandass v. Canada (Minister of Citizenship and Immigration)* [2000] 1 F.C. 619 (F.C.T.D.) at para. 24.

was found to constitute a breach of the duty of fairness. The Federal Court of Appeal[17] affirmed the Trial Division decision. Since the Court of Appeal decision, it has been accepted that failure to provide reasons[18] and failure to provide the two reports as well as an opportunity to respond to them[19] are breaches of procedural fairness.

2.4.4. Other

The Federal Court of Appeal in *Williams* indicated that subsection 70(5) confers on the Minister a discretion based on subjective terms, that is, whether the Minister is "of the opinion" that the appellant is a danger to the public. Therefore, the Court concluded that the scope of judicial review of the Minister's opinion is limited to the grounds of bad faith, error of law or acting on the basis of irrelevant considerations.

In *Nguyen*,[20] the Federal Court—Trial Division found that the Minister's delegate had taken into account extrinsic evidence which had not been provided to the appellant and had taken into consideration irrelevant factors. Because of these two factors, the Minister's opinion was quashed and the judicial review application allowed.

On a stay of removal application, the Federal Court—Trial Division in *Thompson*[21] considered the meaning of the phrase "danger to the public". The Court considered the legislative scheme in which subsection 70(5) was found and determined that in order for the Minister to form an opinion under subsection 70(5) the Minister must have some evidence that the appellant is a "present or future danger to other persons in Canada". The fact of the conviction alone is an insufficient basis for the issuance of the opinion.

Another important issue which arises in subsection 70(5) cases is the jurisdiction of the Appeal Division to hear arguments against the validity of a "danger to the public" opinion. The Appeal Division has considered its jurisdiction in the case of *Reynolds*[22] and in that case determined that the Appeal Division has jurisdiction to consider constitutional arguments as to the substantive validity of subsection 70(5), but does not have jurisdiction to consider constitutional challenges with respect to the process of issuing a "danger to the public" opinion. Such challenges must be brought to the Federal Court—Trial Division rather than the Appeal Division.

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[17] *Bhagwandass v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 341 (F.C.A.).

[18] *Mullings v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 956 (F.C.T.D.) at para. 20.

[19] See for example, *Rueca v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 876 (F.C.T.D.) and *Hotaki v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 865 (F.C.T.D.).

[20] *Nguyen, Duc Luc v. M.C.I.* (F.C.T.D., no. IMM-1683-96, Gibson, May 26, 1997.

[21] *Thompson, James Lorenzo v. M.C.I.* (F.C.T.D., no. IMM-107-96), Gibson, August 16, 1996.

[22] *Reynolds, Lloyd Baldwin v. M.C.I.* (IAD T94-06607), Aterman, Bartley, D'Ignazio, March 18, 1997.

On judicial review of this decision of the Appeal Division, the Federal Court—Trial Division held[23] that the tribunal had exclusive jurisdiction to consider questions of law and to determine its own jurisdiction pursuant to subsection 69.4(2) of the Act in relation to a removal order, but that its general power did not extend to finding that a statutory provision [subsection 70(5)] which contained an express limitation on its jurisdiction was unconstitutional. That would be to ignore an express limitation that Parliament has placed on its jurisdiction.

2.5. "DANGER TO THE PUBLIC" AND STAYS OF REMOVAL

There is also provision for the situation where the Appeal Division has already considered a removal order appeal and has put the appellant on a stay (see Chapter 10 for Remedies and Terms and Conditions of a Stay). Subsection 70(6) of the *Immigration Act* provides that a stay of execution is of no effect, and the Appeal Division cannot review the stay, where three criteria have been met. First, the Minister is of the opinion that the appellant has breached the terms and conditions of the Appeal Division's stay. Second, the Minister is of the opinion that the appellant is a danger to the public. Third, the appellant was determined by an adjudicator to be a member of an inadmissible class described in paragraphs 19(1)(c), (c.1), (c.2) or (d), a person described in paragraph 27(1)(a.1), or a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of 10 years or more may be imposed.

[23] *M.C.I. v. Reynolds* (F.C.T.D., no. IMM-1339-97), Jerome, December 15, 1997, 42 Imm. L.R. (2d) 175. This case was followed by the Trial Division in *Barletta v. Canada (Minister of Citizenship and Immigration)* [1999] F.C.J. No. 1897. Although there was an appeal, it was dismissed for mootness. *Barletta v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 339 (F.C.A.).

CHAPTER 2

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CHAPTER 3

3. PERMANENT RESIDENCE

3.1. HOW THE ISSUE ARISES

3.1.1. Right of Appeal

Permanent residents and persons "lawfully in possession of a valid returning resident permit" may appeal to the Appeal Division against a (conditional) removal order.[1] Thus the issue of whether the appellant is a permanent resident is jurisdictional; that is, the Appeal Division may only hear the appeal if the appellant is a permanent resident.

> The question ... of determining whether a person is or is not a permanent resident is ... fundamental to the exercise of the board's jurisdiction.[2]

This issue may arise in appeals against orders made under various provisions of the *Immigration Act* (the "Act").

3.1.2. Section 19 of the *Immigration Act*

A removal order may be made against a person who seeks to return to Canada as a permanent resident, where the adjudicator does not accept that the person is a permanent resident. These orders are usually made on the basis that the person is an immigrant without a visa, that is, on the basis that the person is seeking to establish permanent residence in Canada and has failed to comply with the requirement to obtain a visa before appearing at a port of entry.[3] In such cases, where the person files an appeal with the Appeal Division, the Appeal Division may decide whether the person is a permanent resident in determining whether it has jurisdiction to hear the appeal.[4]

3.1.3. Subsection 27(1) of the *Immigration Act*

Subsection 27(1) of the Act provides the grounds on which a permanent resident may be removed from Canada. Different grounds of removal apply to persons who are not permanent residents.

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1 Subsection 70(1) of the Act.

2 *Selby: Canada (Minister of Employment and Immigration) v. Selby*, [1981] 1 F.C. 273, 110 D.L.R. (3d) 126 (C.A).

3 The subsection 20(l) report and order would be based on paragraph 19(2)(d) and subsection 9(l) of the Act.

4 *Webber, Kenneth Jimmy v. M.E.I.* (I.A.B. 78-9125), Weselak, Benedetti, Teitelbaum, June 14, 1978 and *Selby*, *supra*, footnote 2.

Where a person is reported under subsection 27(1) of the Act, the Minister must establish that the person concerned is a permanent resident in order for a removal order to be made.[5] If the adjudicator does not issue a removal order based on a finding that the person concerned is not a permanent resident, the Minister may appeal that decision to the Appeal Division.[6] In some cases where a removal order has been made against a person reported under subsection 27(1) as a permanent resident, the Minister has still argued that the appellant is not a permanent resident, and therefore the Appeal Division has no jurisdiction to hear the appeal.[7]

3.1.4. Subsection 27(2) of the *Immigration Act*

Subsection 27(2) of the Act provides for the removal from Canada of persons other than permanent residents.

Where the person concerned is reported under subsection 27(2) of the Act, as a non-permanent resident, the person may successfully argue at the inquiry that he or she is a permanent resident. In that case, the adjudicator will not make a removal order, and the Minister may choose to appeal that decision to the Appeal Division.[8]

If the person concerned is found by the adjudicator not to be a permanent resident and to be a person described in subsection 27(2) of the Act, a removal order will be made. Where the person concerned appeals to the Appeal Division against the removal order, the issue of permanent resident status may be raised again. The Appeal Division may determine whether the appellant is a permanent resident in deciding whether it has jurisdiction to hear the appeal.[9] In this case, if the appellant is found to be a permanent resident, the appeal will be allowed in law: a permanent resident cannot be found described in subsection 27(2) of the *Immigration Act*.

3.2. RELEVANT STATUTORY PROVISIONS

3.2.1. Subsection 2(1) of the *Immigration Act*

"Permanent resident" is defined as:

> ... a person who
>
> (a) has been granted landing,
>
> (b) has not become a Canadian citizen, and

---

5 See Chapter 1.

6 Pursuant to section 71 of the Act. See Chapter 12.

7 Refer to section 3.3.2 "Effect of Misrepresentations on Landing".

8 Pursuant to section 71 of the Act. Otherwise, the Minister may report the person again under subsection 27(1) of the Act.

9 *Selby*, *supra*, footnote 2. See also, *Tattoli, Giovanni v. M.E.I.* (I.A.B. T80-9146), D. Davey, Teitelbaum, Tremblay, September 10, 1980, where the Board held that *Selby* also applies to removal orders based on section 27 of the Act.

(c) has not ceased to be a permanent resident pursuant to section 24 or 25.1,[10]

and includes a person who has become a Canadian citizen but who has subsequently ceased to be a Canadian citizen under subsection 10(1) of the *Citizenship Act*, without reference to subsection 10(2) of that Act.

In order for a person to be a permanent resident, the person must meet all the requirements in paragraphs (a), (b), and (c) of the definition of a permanent resident.

"Landing" is defined as:

... lawful permission to establish permanent residence in Canada.

"Canadian citizen" is defined as

... a person who is a citizen within the meaning of the *Citizenship Act*.

3.2.2. *Immigration Act*

Section 24 reads as follows:

24. (1) A person ceases to be a permanent resident when

(a) that person leaves or remains outside Canada with the intention of abandoning Canada as that person's place of permanent residence; or

(b) a removal order has been made against that person and the order is not quashed or its execution is not stayed pursuant to subsection 73(1).

(2) Where a permanent resident is outside Canada for more than one hundred and eighty-three days in any one twelve month period, that person shall be deemed to have abandoned Canada as his place of permanent residence unless that person satisfies an immigration officer or an adjudicator, as the case may be, that he did not intend to abandon Canada as his place of permanent residence. 1976-77, c. 52, s. 24.

Section 25 reads as follows:

25. (1) Where a permanent resident intends to leave Canada for any period of time or is outside Canada, that person may in prescribed manner make an application to an immigration officer for a returning resident permit.

(2) Possession by a person of a valid returning resident permit issued to that person pursuant to the regulations is, in the absence of evidence to the contrary, proof that the person did not leave or remain outside Canada with the intention of abandoning Canada as his place of permanent residence. 1976-77, c. 52, s.25.

[10] Section 25.1 of the Act has not been proclaimed in force.

3.2.3. *Citizenship Act*

Section 10 reads as follows:

> 10. (1) Subject to section 18 but notwithstanding any other section of this Act, where the Governor in Council, on a report from the Minister, is satisfied that any person has obtained, retained, renounced or resumed citizenship under this Act by false representation or fraud or by knowingly concealing material circumstances,
>
> (a) the person ceases to be a citizen, or
>
> (b) the renunciation of citizenship by the person shall be deemed to have had no effect,
>
> as of such date as may be fixed by order of the Governor in Council with respect thereto.
>
> (2) A person shall be deemed to have obtained citizenship by false representation or fraud or by knowingly concealing material circumstances if the person was lawfully admitted to Canada for permanent residence by false representation or fraud or by knowingly concealing material circumstances and, because of that admission, the person subsequently obtained citizenship. 1974-75-76, c. 108, s. 9.

3.3. LANDING

If a person has not been granted landing, that person is not a permanent resident. Normally, an immigrant visa is issued to an immigrant[11] by a visa officer outside Canada once it has been determined that the applicant and the applicant's dependants meet the requirements of the Act and *Immigration Regulations, 1978 (*the "Regulations"*)*.[12] The purpose of the visa is to identify the holder as an immigrant who in the opinion of the visa officer meets the requirements of the Act and the Regulations.[13] The immigrant then presents the visa to an immigration officer at a port of entry, who may then grant landing if the immigration officer is satisfied that the immigrant and the immigrant's dependants are admissible to Canada.[14] The officer dates, signs

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[11] Defined in subsection 2(1) of the Act as "... a person who seeks landing".

[12] Subsection 9(4) of the Act and paragraph 6 (1)(a) of the Regulations:

> 9(4) Subject to subsection (5), where a visa officer is satisfied that it would not be contrary to this Act or the regulations to grant landing or entry, as the case may be, to a person who has made an application pursuant to subsection (1) and to the person's dependants, the visa officer may issue a visa to that person and to each of that person's accompanying dependants for the purpose of identifying the holder thereof as an immigrant or a visitor, as the case may be, who, in the opinion of the visa officer, meets the requirements of this Act and the regulations.
>
> 6. (1) ...where a member of the family class makes an application for an immigrant visa, a visa officer may issue an immigrant visa to the member and the member's accompanying dependants if
>
> (a) he and his dependants, whether accompanying dependants or not, are not members of any inadmissible class and otherwise meet the requirements of the Act and these Regulations;

[13] Subsection 9(4) of the Act.

and stamps the immigrant visa, which then becomes the record of landing. The officer will also stamp the immigrant's passport.

3.3.1. Inland Applications for Landing

Persons who apply for landing in Canada must obtain a waiver of the requirement to obtain an immigrant visa[15] outside Canada before they may be granted landing. Visas are by definition issued by visa officers outside of Canada, and thus can only be obtained outside of Canada.[16] Waivers, to allow processing of the application from within Canada, may be granted based on the existence of humanitarian or compassionate considerations.[17] Most such cases involve spouses.

The issue of when a person becomes a permanent resident has arisen in "inland" cases. Since the decision of the Federal Court of Appeal in *Sivacilar*,[18] the Federal Court had held that a person has a right to remain in Canada provided that the processing of the person's application has otherwise been completed, once the waiver has been granted.[19] In such cases it was held that the Appeal Division had jurisdiction to hear the appeal. However, there was uncertainty as to whether events subsequent to the grant of landing would affect the right to remain in Canada, and whether the right to remain was in fact a right to be landed.[20] The Trial Division has held that the granting of an order-in-council waiver could result in the right to be landed,[21] and it was in some cases treated as though it granted landing.[22]

As it was decided in 1996, in the case of *Dass*[23], the Federal Court of Appeal has clarified that the only effect of the Order-in-Council is to waive the requirement to apply for a visa outside Canada. The application for permanent residence cannot be legally considered and approved

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14 Paragraph 14(2)(a) of the Act.

15 Subsection 9(1) of the Act provides that every immigrant must apply for, and obtain, a visa.

16 Refer to definition of "visa" and "visa officer" in subsection 2(1) of the Act.

17 Pursuant to subsection 114(2) of the Act.

18 *Sivacilar v. Canada (Minister of Employment and Immigration)* (1984), 57 N.R. 57 (F.C.A.).

19 *Ho, Kwong Man v. M.E.I.* (F.C.T.D., no. T-1051-86), Jerome, July 25, 1986; *Dawson v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm. L.R. (2d) 37 (F.C.T.D.); *Ferreyra, Francisco Medardo Rosa v. M.E.I.* (F.C.T.D., nos. T-1017/1018-92), Reed, September 8, 1992; *Silva v. Canada (Minister of Citizenship and Immigration)* (1995), 36 Imm. L.R. (2d) 259 (F.C.T.D.).

20 Refer to memo regarding *Nagra, Harjinderpal Singh v. M.C.I.* (F.C.A., no. A-859-92), Muldoon, November 15, 1995, prepared by C. J. Christiaens for a presentation to the Immigration Section of the Canadian Bar Association.

21 See *Dawson, supra*, footnote 19 and *Dass v. Canada (Minister of Employment and Immigration),* [1993] 2 F.C. 337 (T.D.).

22 See *Timbo, Chernor v. M.C.I.* (F.C.T.D., no. IMM-4628-94), Jerome, November 27, 1995, where a removal order made under subsection 27(2) of the Act was set aside and the Minister was ordered to issue landing documents.

23 *Canada (Minister of Employment and Immigration) v. Dass*, [1996] 2 F.C. 410 (C.A.).

until the waiver is granted. Hence, an applicant cannot acquire a right to be landed upon the granting of the waiver. Nor can the waiver be considered to grant permanent residence, as the Governor-in-Council has no authority to do so. The request for a waiver does not constitute a decision of an immigration officer. Further, an immigration officer may only grant landing if the immigration officer is satisfied that to do so would not be contrary to the Act and the *Regulations.* Any new circumstances affecting admissibility may be considered up to the time the decision is made and given to the applicant. It is not up to the Court to go through the immigration officer's file to determine when a decision was made. The decision is made when formal notice of that decision has been delivered to the parties. Normally, a decision to grant landing is communicated to the applicant by delivering to the applicant a written Record of Landing, signed by an immigration officer.

Prior to the Court of Appeal's decision in *Dass*, the decisions of the Immigration and Refugee Board and the courts focussed on the wording of the request for a waiver from the Governor-in-Council from the requirements of subsection 9(1) of the *Act.* Now, the wording of that request is no longer relevant. Normally, unless a Record of Landing has been issued to the applicant, the applicant is not a permanent resident, and the application for permanent residence may be refused on the basis of a failure to comply with the requirements of the Act and the Regulations.

3.3.1.1. Ministerial Power of Exemption

Since the original decision in *Dass*, the wording of subsection 114(2) of the Act has been amended.[24] The Governor-in-Council has given the Minister the power to exempt any person from the requirements of the Regulations or otherwise facilitate that person's admission to Canada on the basis of humanitarian or compassionate considerations.[25] Since the same power that was originally given to the Governor-in-Council has now been given to the Minister, it would appear that the same reasoning, above, would apply to the granting of a waiver by the Minister. Certainly, the Federal Court of Appeal's reasoning concerning the communication of the decision to land through the delivery of a Record of Landing would also apply to a case involving a Minister's exemption.

To date, there have been two decisions in which the Minister's exemptions from the requirement to comply with subsection 9(1) of the Act have been considered.[26] Both of these decisions predate the Court of Appeal's decision in *Dass* and focus on the wording of the request for the waiver. In one case, the Federal Court—Trial Division held that *Sivacilar* continued to apply to such applications,[27] and that the Minister could not refuse to grant landing if circumstances changed after the waiver was granted. This decision should be interpreted in light of the Court of Appeal's decision in *Dass*, including the Court's interpretation of the *Sivacilar* decision.

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24 Subsection 102(11) of S.C. 1992, c. 49 (in force on February 1, 1993).

25 Section 2.1 of the *Immigration Regulations, 1978*, enacted by SOR/93-44, on February 1, 1993.

26 *Silva, supra*, footnote 19 and *Cumar, Jai v. M.C.I.* (F.C.T.D., no. IMM-1072-95), Reed, January 30, 1996.

27 *Silva*, *supra*, footnote 19.

3.3.2. Effect of Misrepresentations on Landing

3.3.2.1. Landing Granted by Reason of a Misrepresentation[28]

The Minister has argued that a person who has misrepresented a material fact which would have precluded his or her admission to Canada is not a "permanent resident" as that term is defined in section 2(1) of the Act and consequently, the person does not have a right of appeal to the Appeal Division. In particular, the argument focusses on the interpretation of the phrase "has been granted landing" in the definition of "permanent resident". The argument is made that such a person has not been granted landing as the person was not granted "lawful permission to establish permanent residence in Canada" by reason of the misrepresentation.

In two recent judgments, *Seneca*[29] and *Jaber*,[30] the Federal Court of Appeal has rejected the argument of the Minister and has concluded that such persons, who had misrepresented a material fact, were permanent residents with a right of appeal to the Appeal Division. In *Pownall*,[31] the Federal Court—Trial Division has also recently considered the situation where a person was granted landing by misrepresenting his identity. Mr. Justice Evans, citing *Seneca* and *Jaber*, confirmed that Mr. Pownall, although he had misrepresented a material fact as to his identity, was a permanent resident with a right of appeal to the Appeal Division. The Federal Court of Appeal found no error and dismissed the Minister's appeal.[32]

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28 Refer also to Chapter 5.

29 *M.C.I. v. Seneca, Danilo Ramos* [1999] 247 N.R. 397 (F.C.A.) (F.C.A., no. A-261-98), Isaac, McDonald, Sexton, September 29, 1999.

30 *Jaber, Isam v. M.C.I.* [2000] 1 F.C. 603 (F.C.A.) (F.C.A., no. A-917-97), Marceau, Desjardins, Létourneau, September 30, 1999.

31 *M.C.I. v. Pownall* [1999] F.C.J. No. 1863 (F.C.T.D., no. IMM-6715-98), Evans, November 29, 1999.

32 *Canada (Minister of Citizenship and Immigration) v. Pownall* [2001] F.C.J. No. 565 (F.C.A.).

3.4. CANADIAN CITIZENSHIP

3.4.1. Becoming a Citizen/Proof of Citizenship

A permanent resident may become a citizen[33]

(a) if they are 18 years of age,

by accumulating a least three years of residence in Canada within the four years immediately preceding their application for citizenship, and meeting the knowledge requirements for citizenship, as long as there is no deportation order made against the permanent resident and the Governor-in-Council has not made a declaration pursuant to section 20 of the *Citizenship Act*.

(b) if the permanent resident is the minor child of a Canadian citizen,

and an authorized person makes an application on the child's behalf.

The Minister may waive certain requirements on compassionate grounds.[34] Where an application for citizenship is granted, a certificate of citizenship is issued to the applicant.[35]

3.4.2. Ceasing to be a Canadian Citizen[36]

Prior to February 1, 1993, the definition of a permanent resident in subsection 2(1) of the *Immigration Act* made no reference to the loss of citizenship; thus the status of such persons was open to interpretation. In 1992, the Federal Court of Appeal upheld an adjudicator's decision that former permanent residents did not revert to permanent resident status when their citizenship was revoked.[37] The Appeal Division followed this decision in the case of *Luitjens*[38] once it had determined that the definition of permanent resident in force prior to February 1, 1993, applied in that case.

When the *Immigration Act* was amended on February 1, 1993, the definition of "permanent resident" was amended to include reference to persons who had ceased to be Canadian citizens.[39] Under the current definition, a person who ceases to be a Canadian citizen under subsection 10(1) of the *Citizenship Act* is a permanent resident, unless subsection 10(2) of the *Citizenship Act* was relied on in revoking citizenship.

Under subsection 10(1) of the *Citizenship Act*, a person ceases to be a Canadian citizen where his status was obtained or retained "...by false representation or fraud or by knowingly

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33 Section 5 of the *Citizenship Act*, R.S.C. 1985, c. C-29.

34 Subsection 5(3) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

35 Subsection 12(2) of the *Citizenship Act*, R.S.C. 1985, c. C-29.

36 *Luitjens, Jacob v. S.G.C.* (IAD V92-01828), Wlodyka, Singh, Verma, January 7, 1994.

37 *Charran, Deoranie v. M.E.I.* (F.C.A., no. A-427-90), Stone, Isaac, Linden, March 12, 1992.

38 *Luitjens, supra*, footnote 36.

39 S.C. 1992, c.49, subsection 1(6).

concealing material circumstances....” Subsection 10(2) of that Act deems a person to have obtained his citizenship in the manner set out in subsection 10(1) where the person was lawfully admitted to Canada as a permanent resident “...by false representation or fraud or by knowingly concealing material circumstances....” Thus, where citizenship is revoked under this provision, the person reverts to the status of permanent resident, unless the false representation, fraud or concealment of material circumstances related to the person’s admission to Canada as a permanent resident.

In the latter case, once citizenship is revoked, the person would be reportable under subsection 27(2) of the *Immigration Act* as being neither a Canadian citizen nor a permanent resident. Such a person would not have a right of appeal to the Appeal Division as a permanent resident.[40]

Where the person reverts to the status of permanent resident, he may be reported and called to inquiry under any of the provisions of subsection 27(1) of the *Immigration Act*. He will then have the same appeal rights as a permanent resident.

3.5. CEASING TO BE A PERMANENT RESIDENT (LOSS OF STATUS)

Section 24 of the *Immigration Act* sets out the circumstances in which a person ceases to be a permanent resident. Basically, a person loses this status if the person leaves or remains outside Canada with the intention of abandoning Canada as his or her place of permanent residence, or where the person is ordered removed and the removal order is not quashed or stayed by the Appeal Division.

3.5.1. Intention to Abandon Canada

3.5.1.1. Presumption: subsection 24(2) of the *Immigration Act*

Where a permanent resident is outside Canada for more than 183 days in any 12-month period, that person is deemed to have abandoned Canada as his or her place of permanent residence.[41] However, this deeming provision acts as a presumption which may be overcome if the appellant establishes that he or she did not intend to abandon Canada. Subsection 24(2) of the Act places the onus on the appellant to satisfy the adjudicator or immigration officer that the appellant did not intend to abandon Canada as his or her place of permanent residence.[42] The Appeal Division can review an adjudicator’s decision under subsection 24(2).[43]

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40 The person may, however, have a right of appeal if covered by other provisions of section 70 of the Act (e.g. a Convention refugee who is not a permanent resident).

41 Subsection 24(2) of the Act.

42 *Webber, supra*, footnote 4.

43 *Selby*, *supra*, footnote 2.

3.5.1.2. Intention: paragraph 24(1) of the *Immigration Act*

The case law in this area originates with decisions regarding the loss of Canadian domicile based on the *Immigration Act* as it read prior to April 10, 1978.[44] In the domicile cases the test applied to determine whether domicile had been acquired or lost was essentially whether the person intended to abandon Canada as his or her place of permanent residence.[45] This test was incorporated into the statute when the *Immigration Act, 1976* was proclaimed into force on April 10, 1978, and it has remained the test ever since. While an amendment to the *Immigration Act* which would change the test to "ceases to ordinarily reside" has been passed by Parliament and forms section 14 of S.C. 1992, c. 49, that provision has not yet been proclaimed into force.

The length of time a person has been outside Canada is not alone determinative. The summaries that follow show that the Immigration Appeal Board (the former Board) and the Appeal Division have held that permanent resident status has not been lost where persons have been outside Canada for lengthy periods of time-in one case as long as 24 years. What is key is the ongoing intention of the person to return to Canada.

Status may be lost immediately upon leaving Canada if the person intends to abandon Canada as his or her place of permanent residence.[46] On the other hand, a person may maintain permanent resident status even though the person has been away from Canada for many years, as long as the person never intended to abandon Canada.[47] The intention of the person is determined by examining objective factors which indicate ongoing ties to Canada and an intention to return. Such factors may include assets in Canada, family and other ties to Canada, visits to Canada, etc.. The purpose for which the person left Canada, and whether it was temporary, is an additional factor for consideration. The former Board and the Appeal Division have also considered whether the person was forced to leave and remain outside Canada and how soon to return to Canada.

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[44] Pursuant to subsection 4(3) of the *Immigration Act*, R.S.C. 1952, c. 325 (proclaimed in force on September 15, 1953), Canadian domicile was lost

> by a person voluntarily residing out of Canada with the intention of making his permanent home out of Canada and not for a mere special or temporary purpose, but in no case shall residence out of Canada for any of the following objects cause loss of Canadian domicile, namely,
>
> (a) as a representative or employee of a firm, business, company or organization, religious or otherwise, established in Canada;
>
> (b) in the public service of Canada or of a province thereof; or
>
> (c) as the spouse or the child for the purpose of being with a spouse or parent residing out of Canada for any of the objects or causes specified in paragraph (a) or (b).

[45] See for example, *Allen v. Canada (Minister of Employment and Immigration),* [1979] 1 F.C. 243 (C.A.). This case dealt with the acquisition of domicile. "Place of domicile" was defined in section 2 of the *Immigration Act,* R.S.C. 1952, c. 325 as "the place in which a person has his home or in which he resides or to which he returns as his place of permanent abode and does not mean a place in which he stays for a mere special or temporary purpose."

[46] See, for example, *Malik, Nadim v. M.C.I.* (AD M96-00602), Lajeunesse, October 18, 1996.

[47] See, for example, *Lake, Phyllis Daphne v. M.C.I.* (IAD T95-01109), Townshend, March 26, 1997, where the appellant remained in the U.S. for 24 years.

The appellant in *Selby*[48] was landed on September 25, 1966. He left Canada in 1971 to go to Germany with his wife to allow her to complete her education. He intended to return to Canada in two years; however, his wife did not want to leave when she finished her courses. He remained in Germany to be with his wife and children. In Germany he had a status similar to that of a landed immigrant. He did not work most of the time he was there. In 1977 he was divorced from his wife. He eventually returned to Canada in 1979 when his wife and children returned. The panel found that he had not abandoned Canada as his place of permanent residence. He had always intended to remain a resident of Canada.

In *Hass*,[49] the appellant was landed in Canada in March 1967, but he returned to Germany in 1967 because his mother had been seriously injured in a fall. His mother improved, but she was partially paralyzed and required constant attention. Two months after she passed away in March of 1978, Hass started to prepare to return to Canada. In March 1979, he returned to Canada. His wife and daughter arrived one month later. In May 1979, after an interview with immigration, he and his family returned to Germany because he believed he had to do so pending the outcome of the appeal. He was in Germany at the time of the appeal. The panel found that he was still a permanent resident as he did not leave and remain outside of Canada voluntarily and he intended to return to Canada. The panel found that subsection 24(1) of the *Immigration Act* was made up of two elements: 1) the fact of departure from, and remaining outside, Canada; and 2) the intent to abandon Canada as a place of permanent residence. The panel relied on the earlier decision in *Adams*,[50] a case in which the issue was whether the appellant was "residing in Canada" and thus eligible to be a sponsor. The panel quoted in full the following passage from *Adams* which the Appeal Division has also relied in similar cases:[51]

> The Board also concludes that the two fundamental elements are essential to create a residence and these elements are: (1) bodily residence in a place, and (2) the intention of remaining in that place. It would appear therefore that "residence" is thus made up of fact and intention, the fact of abode and the intention of remaining, and is a combination of facts and intention. Neither bodily presence alone nor intention alone will suffice to create a residence. There must be a combination and concurrence of these elements and when they occur, and at the very moment they occur, a residence is created. It would also appear that "residence" can only be changed by the union of fact and intent and that in order to accomplish or reflect a change of residence there must be intent accompanied by fact. Intent is an element of residence. It is an essential or controlling element and residence involves intent. "Residence" is largely a matter of intent and intent is a material consideration and an important factor and it must be a freely exercised intention, for residence is a result of choice and a residence implies the

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48 *Selby, Brendan Leeson v. M.E.I.* (I.A.B. V79-6047), Glogowski, Campbell, Teitelbaum, May 24, 1979. The only issue before the Federal Court of Appeal in this case was the jurisdiction of the Board to make this decision: *Selby*, *supra*, footnote 2.

49 *M.E.I. v. Hass, Manfred* (I.A.B. 79-6130), Scott, Campbell, Teitelbaum, February 6, 1980.

50 *Adams, Janice May v. M.E.I.* (I.A.B. 78-9455), Weselak, Beneditti, Petrie, October 3, 1978.

51 *Adams, ibid.*, at 9.

> exercise of the exclusive privilege of selection by the individual and thus presence elsewhere through constraint has no effect on it.

In *Baker*,[52] the appellant was granted landing in March of 1975. He had a series of convictions as well as difficulties in relationships, therefore, he decided to return to England to "start over and straighten himself out." His girlfriend moved to England and they were married there. While she borrowed money to return to Canada several times, they claimed never to have had the money to allow the appellant, Mr. Barker to return. When his wife left him in July 1988 and returned to Canada with their children, Mr. Barker sold his furniture, bought a ticket and returned to Canada. On arrival, he voluntarily surrendered his landing record and declared that he had abandoned his status. Further, at his inquiry, he said that he was a permanent resident of England and planned to stay in Canada for two months. The majority of the Appeal Division found that the intention to return must be more than a future wish. In this case the appellant took no serious steps to put this wish into effect

In *Daniels*,[53] the appellant was landed in March 1966 and returned to Scotland in December of 1968 to try to convince his wife to return to Canada. He sold his assets and took all his money with him. His wife refused to return to Canada. The couple separated in November 1976 and he returned to Canada on July 2, 1977, as a visitor. He was reported and ordered deported in 1980; therefore, the panel applied the *Immigration Act*, *1976*. The panel accepted that when he left Canada he did not intend to abandon Canada as his place of permanent residence. However, while he would have preferred to return to Canada, his wife did not wish to do so. Consequently, Mr. Daniels made a difficult choice and chose to remain in Scotland; he would likely not have returned to Canada but for the separation. The residence test in *Adams*[54] was applied, and it was found that, with regard to Mr. Daniel's position in Scotland, both bodily residence and intent to remain were present. Further, unlike *Allen*,[55] he was not forced to leave or remain outside of Canada: his decision was voluntary. The appellant was found not to be a permanent resident.

When the appellant in *Labasova*[56] was landed in Canada, she was engaged to be married to Josef Labas. However, Mr. Labas had to remain in Czechoslovakia to complete his military service. In 1971, the appellant returned to Czechoslovakia to marry Mr. Labas. On her return, her papers were confiscated and she was not able to leave again until 1989. The majority of the Appeal Division did not believe that the appellant sincerely believed that she would be able to return to Canada with her husband given the circumstances in Czechoslovakia at the time of her return. They found that she returned freely and voluntarily to establish herself there, and that she did not leave for a temporary or special purpose. Since she did not have a reasonable hope of returning, she had abandoned Canada as her place of permanent residence.

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52 *Baker, Alan* v. *M.E.I.* (IAD V89-01337), Wlodyka, MacLeod, Gillanders, (dissenting), September 17, 1990.

53 *Daniels, William v. M.E.I.* (I.A.B. T80-9251), D. Davey, Teitelbaum, Tisshaw, November 27, 1980.

54 *Adams, supra,* footnote 50.

55 *Allen, supra*, footnote 45.

56 *M.E.I.* v. *Labasova, Anna* (IAD M91-01092), Durand, Angé, Blumer (dissenting), August 13, 1991.

In *Scarcella*,[57] the appellant was landed in 1966, and was successfully established in Canada when he went to Italy in 1977 for his brother's wedding. His brother did not get married, but instead was incarcerated for a criminal offence. The appellant took over the family olive-oil-press factory and cared for his ill parents in his brother's stead. He remained in Italy, married and had a family. His parents passed away in 1984, and his brother was released in 1988. He tried to return to Canada in 1987, but was admitted only as a visitor. He returned to Italy and tried to regularize his status, but was unable to do so. Finally, he returned to Canada in August of 1990 and remained there continuously. The Appeal Division held that Mr. Scarcella had not intended to abandon Canada as his place of permanent residence, but had always intended to return to Canada. He was found to be a permanent resident.

The appellant in *Oliver*[58] was landed in 1964 and returned to England in 1979-80. He sold his home, two taxis and his interest in a pizza franchise before he left. In 1981 he moved to West Germany to look for work because there were few employment opportunities in Canada. In 1984 he had marital difficulties. His wife was homesick; consequently, she returned to Canada for a year. He travelled to the U.S. and visited his family in Canada. They returned to Germany with him in 1985. In 1991 he returned to Canada because there was an economic downturn in Germany. The Appeal Division held that section 24 of the *Immigration Act, 1976* applied in this case because the appellant had acquired domicile before he left Canada, and the events relating to his loss of status occurred after the *Immigration Act, 1976* had come into force. The Appeal Division held that Mr. Oliver had lost his permanent resident status. While he may have left for a temporary purpose, he did not take any concrete steps to return and establish himself in Canada. He merely had a vague notion that he would return one day.

In *Sarhadi*,[59] the appellant's two sisters and their mother were granted landing in Canada in 1979. When their mother returned to India in 1981 because of poor health, the sisters went with her. They approached the High Commission in New Delhi when they realized their status might be in jeopardy. They were interviewed by different officers on the same day. One sister was given permission to return to Canada; the other was not. The appellant sponsored his mother and sister to Canada again. The application was refused because the sister was then married. On appeal, the appellant argued that his sister was a permanent resident. The Appeal Division found that the sister had not abandoned Canada as her place of permanent residence. Since she was a permanent resident, the refusal was found to be invalid.

The appellant in *Normington*[60] was landed in 1957 and returned to England in 1968. He married in England and returned to Canada for a year with his wife. However, his wife did not want to live in Canada; consequently, he returned to England to be with his family. The marriage failed in 1985, but he did not return to Canada until 1990 because of a lack of money and his emotional state. The Appeal Division found that he had abandoned Canada as his place of

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57 *Scarcella v. Canada (Minister of Employment and Immigration)* (1992), 17 Imm. L.R. (2d) 172 (IAD).

58 *M.E.I. v. Oliver, Andrew* (IAD V91-01882), Wlodyka, September 28, 1992.

59 *Sarhadi, Prabhu Dayal v. M.E.I.* (IAD V92-01621), Singh, Gillanders, Lavery, May 4, 1993.

60 *Normington, Michael Douglas* v. *M.C.I.* (IAD V94-00853), Ho, October 20, 1994.

permanent residence. He made the difficult choice between his family and Canada and was not driven by external necessity.

The person concerned in *Malik*[61] was landed in 1972. She left Canada in 1976 to follow her husband to Mexico where he wished to settle. They sold all their belongings before they left. In 1984 when she separated from her husband, she left Mexico and went to Germany. In 1996 she returned to Canada. The adjudicator found that when she left Canada in October 1976, she abandoned Canada as her place of permanent residence. She ceased to be a permanent resident at that time.

The appellant in *Lake*[62] was granted landing in 1968. She left Canada in 1970, to work for the International Monetary Fund in Washington, D.C., and she remained there for 24 years on a non-immigrant visa. She maintained assets in, and visited Canada. The Appeal Division held that she had not abandoned Canada as her place of permanent residence. The appellant had gone to a country other than her country of origin for the specific purpose of employment and had not shown any intention of taking up permanent residence there.

3.5.1.3. Minors

In the case of minors who leave Canada with their parents, the former Board has held that they have not abandoned Canada if they return to Canada, or demonstrate their intention to return at the first opportunity after they reach the age at which they may form such an intention.[63] The Appeal Division has held that the notion of "first opportunity to return" should be read as the first "reasonable opportunity to return" based on all the circumstances of the case.[64]

A minor is not legally capable of deciding to leave Canada voluntarily; nor can a minor intend to make his or her permanent home outside Canada.[65]

A minor over the age of 14 years is capable of forming an intent.[66] Thus, once over the age of 14 the minor can form an intention not to abandon Canada and having left involuntarily, can form the intention to return.[67]

Where in once case, the minor was not aware that he was a permanent resident when he left Canada, the panel concluded that he could not have formed an intention and thus could not

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61 *Malik*, *supra*, footnote 45.

62 *Lake, supra,* footnote 46.

63 *D'Souza, Troy Anthony v. M.E.I.* (I.A.B. 79-9012), D. Davey, Teitelbaum, Tisshaw, October 8, 1980; *Neves v. Canada (Minister of Employment and Immigration)* (1987), 2 Imm. L.R. (2d) 309 (I.A.B.).

64 *Gooden, Phyllis Muriel v. M.E.I.* (I.A.D. M90-04850), Durand, Blumer, Angé, September 5, 1990.

65 *D'Souza, supra*, footnote 63.

66 *Wynia v. M.M.I.* (I.A.B. 69-1001), Weselak, Glogowski, Bryne, August 11, 1970. In this case the Board held that a minor over 14 years of age is capable of establishing a separate domicile under immigration law.

67 *D'Souza, supra*, footnote 63. This reasoning was applied earlier in *Fryer* regarding the loss of domicile: *Fryer v Minister of Manpower and Immigration* (1972), 5 I.A.C. 159 (I.A.B.).

overcome the presumption that he intended to abandon Canada as his place of permanent residence.[68]

In another case, the Appeal Division held that the appellant had not abandoned Canada even though she was old enough to form an intent when she left Canada. While the appellant was 15 years of age when she left Canada, she was a minor and thus obliged to follow her widowed father. She was financially dependent on her father, and she was "socially and culturally bound to remain with him". She never wanted to stay in Jamaica, although she remained in Jamaica for nine years until her father passed away. Shortly thereafter, she returned to Canada. She returned to Canada at the first reasonable opportunity, and thus had not abandoned Canada as her place of permanent residence.[69]

The appellant in *D'Souza*[70] months later was granted landing in May 1975 and left Canada with his family four months later when he was 11 years old. He returned to Canada with his family in July of 1978 and they were admitted as visitors. The appellant stayed in Canada under his uncle's care when his parents left one month later. The panel held that the appellant never wanted to leave Canada and at the first opportunity after he was old enough to make such a decision, he remained in Canada and let immigration authorities know of his intentions. The appellant had not abandoned Canada as his place of permanent residence.

In *Virgo*[71] the appellant was granted landing in Canada in June of 1968. Two years later, at the age of 13 years he returned to Jamaica with his parents. He did not voluntarily abandon Canada as his place of permanent residence. In Jamaica, he attended school and was dependent on his father until October 1976. At that time he was not capable of exercising a separate intent to return to Canada. From then until he returned to Canada in 1978, he worked full-time and lived with his parents. The appellant claimed he always intended to return to Canada, but needed first to earn money to enable him to return. While in Jamaica, he applied to attend teacher's college there. The panel held that the appellant's actions did not confirm his intention to return. While he did not abandon Canada when he left, he did not return at the first opportunity. He was not a permanent resident.

In *White*[72] the appellant was landed on July 25, 1965. Her parents later divorced. In 1970 when she was 12 years old, her father took her back to Jamaica. She came back to Canada to visit her mother in 1975 and 1977 and was admitted as a visitor each time. She remained a student in Jamaica until 1979, at which time she returned to Canada and discovered that she might still be a permanent resident. The *Immigration Act, 1976* was applied in this case, and the *Adams*[73] case was relied on by the majority of the panel. It was accepted that the appellant had been forced to follow her father when she left Canada. The majority found that the appellant's

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68 *Papadopoulos, Ioannis Georgios v. M.E.I.* (I.A.B. T83-9231), Benedetti, Weselak, Teitelbaum, June 7, 1983.

69 *Gooden, supra,* footnote 64.

70 *D'Souza, supra*, footnote 62

71 *Virgo, Wayne Hoyt* v. *M.E.I.* (I.A.B. T80-9132), D. Davey, Tisshaw, Suppa, September 30, 1980.

72 *M.E.I. v. White, Michelle Hope* (I.A.B. 80-1005), Loiselle, Houle, Tremblay (dissenting), October 22, 1980.

73 *Adams, supra*, footnote 50.

absences from Canada had been fully explained, and that any delay in her returning was not motivated by an intention to abandon Canada as her place of permanent residence. The dissenting member found that the appellant had not rebutted the presumption raised by her absence from Canada for more than 183 days. The member relied on the common law relating to domicile and found that when the appellant returned to Jamaica in 1970, she regained her domicile of origin. Further, she returned to Canada as a visitor and later changed her mind and decided to stay when she realized that she might be able to do so. At no time did she try to return to live with her mother in Canada.

In *Papadopoulos,* the appellant had become a landed immigrant on April 7, 1967. In the summer of 1967 at the age of five years he returned to Greece with his parents. When he returned to Canada in 1981, he came as a visitor and was reported for overstaying his status. At that time, he was not aware that he had been previously landed. The panel distinguished *D'Souza*[74] and determined that that the appellant was not a permanent resident. In the words of the panel: "The appellant...could not form an intention not to abandon Canada as his place of permanent residence as he did not know that he was a permanent resident until 1982."[75]

In another case, the appellant Ms. Neves was landed in Canada as a young child. When she was nine years old, she returned to Portugal with her family. She quit school at age 14, worked for two years and then married. The marriage was not happy. When the couple ran into financial difficulties and sold their house, the appellant convinced her husband to come to Canada to visit in 1984. They entered as visitors on the advice of a travel agent. Her husband returned to Portugal, but she remained in Canada. Based on *D'Souza*,[76] the panel found that she had not lost her status when she left Canada. However, from the time Ms. Neves reached age 14, she did not form an intent to establish her residence in Canada; nor did she exercise that intent at the first opportunity. Thus the appellant had abandoned Canada as her place of permanent residence.[77]

In *Medawi*,[78] the appellant was landed in Canada on March 24, 1965 at the age of 11 years. Fourteen months later, she returned to Brazil with her parents. She returned to Canada with her father as a visitor in 1986 and remained in Canada. The former Board found that she had not intended to abandon Canada as her place of permanent residence. Relying on *Allen*,[79] the Federal Court of Appeal held that the Board erred in law in applying the current law rather than the law in effect when she was landed. The Court held that the issue in this case was whether the appellant, Ms. Medawi had ever acquired domicile under the previous *Immigration Act*. She had been legally landed in Canada; however, she never acquired Canadian domicile and the right to

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74 *D'Souza, supra*, footnote 63.

75 *Papadopoulos, supra*, footnote 68.

76 *D'Souza, supra*, footnote 63.

77 *Neves, supra*, footnote 63.

78 *M.E.I. v. Medawi, Vera Lucia* (F.C.A., no. A-373-89), Mahoney, MacGuigan, Linden, May 27, 1992.

79 *Allen, supra*, footnote 44.

come into Canada as a permanent resident. Hence, the Board did not have jurisdiction to hear her appeal.

In one case, the appellant Ms. Kawal-Henderson was granted landing on March 25, 1969, with her parents. She was seven years old. When her parents divorced, she left Canada with her mother. At that time she was 11 years old. She worked, studied and was married twice in Trinidad. Between 1979 and 1989 she was admitted to Canada several times as a visitor. In 1989 she applied for permanent residence and then converted the application to one for a student visa. She went to university in Winnipeg from 1990 to 1993. She married twice in Canada and was sponsored twice; however, each sponsorship was terminated when her relationships ended. In 1994 she was called to an inquiry for overstaying her status as a visitor. The appellant said she did not know that she was a former permanent resident until her mother gave her a passport with her landing record in it in 1991. The Appeal Division held that by the age of majority, the appellant had "taken up permanent residency in Trinidad". She had both bodily residence and the intention to remain in Trinidad, as required by *Adams*.[80] She did not intend to be a resident of Canada until 1989. She was required to demonstrate a continuing intention to reside in Canada which was exercised at the first opportunity. In order to do so, she would have to have made efforts to return in a timely fashion. She did not require specific knowledge of her status in order to formulate an intention. She ought to have made some inquiries about her status and indicated an interest in residing in Canada. There was no reasonable explanation for the delay in pursuing residency in Canada. The appellant was found not to be a permanent resident.[81]

The person concerned in another case was landed in 1983 at the age of 10 years. In 1986 her mother took her with her to live in the U.S.. At 16, the person concerned was forced to leave home by her mother. She moved in with her boyfriend, who was violent and kept tight control over her. The adjudicator held that she had not abandoned Canada when she left since she was too young to form an intent. Further, she had not lost her status because her lack of financial resources and the constraints imposed by her personal circumstances precluded her return to Canada. She was found to be a permanent resident.[82]

3.5.1.4. Returning Resident Permit

A permanent resident may apply for a returning resident permit before leaving Canada or while overseas.[83] The immigration officer will issue a permit if satisfied that the permanent resident does not or did not intend to abandon Canada as his or her place of permanent residence.

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80 *Adams, supra*, footnote 50.

81 *Kawal-Henderson, Judy v. M.C.I.* (IAD W95-00091), Wiebe, April 4, 1996.

82 *M.C.I. v. Philippeaux, Myriam* (IAD QML96-00225), Lajeunesse, December 3, 1996.

83 Subsection 24(1) of the Act.

The returning resident permit then becomes proof that the permanent resident did not intend to abandon Canada as his or her place of permanent residence.[84] However, this evidence may be overcome by evidence showing that the appellant did intend to abandon Canada.

3.5.2. Removal Orders

A permanent resident also loses his or her status when a removal order has been made against him or her and that order has not been quashed, or its execution stayed, by the Appeal Division.[85]

Until July 10, 1995, paragraph 24(1)(b) of the Act used only the narrow term "a deportation order" and not "a removal order."[86] Thus permanent residence was only lost on the making of a **deportation order**, even though it had been possible to make a **departure order** against a permanent resident since February 1, 1993.

Prior to February 1, 1993, the only type of order that could be made against a permanent resident was a deportation order. On February 1, 1993, the Act was amended to allow for the making of a departure order against permanent residents described in paragraph 27(1)(b) of the *Immigration Act*.[87] However, due to an oversight, paragraph 24(1)(b) of the Act was not amended at that time. While the definition of "removal order" was amended to include "departure order," paragraph 24(1)(b) of the Act continued to refer only to "deportation orders". This oversight was corrected on July 10, 1995[88] when paragraph 24(1)(b) of the Act was amended to refer to "removal orders" and not just "deportation orders". Thus, until July 10, 1995, permanent residents did not lose their status when a departure order was made against them.[89]

3.5.2.1. Timing

In practice, the Department of Citizenship and Immigration often treats a permanent resident under a removal order as a permanent resident until the disposition of his or her appeal; (that is the permanent resident may work and attend school without permission and may continue to reside in Canada). However, a permanent resident loses his or her right to enter Canada once the permanent resident has been found by an adjudicator to be a person described in subsection 27(1) of the Act.[90]

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84 Subsection 24(2) of the Act.

85 Paragraph 24(1)(b) of the Act.

86 The definition of "removal order" includes a departure order.

87 Sections 32 and 32.1 of the Act, as amended by S.C. 1992, c. 49.

88 S.C. 1995, c. 15.

89 Note, however, that subsection 70(1) of the Act always referred to a "removal order;" therefore, permanent residents maintained their right of appeal against the making of a departure order.

90 Subsection 4(1) of the Act.

In recent cases dealing with applications to reopen, the issue of the time at which permanent resident status is lost has been raised.

The Adjudication Division has held that a permanent resident subject to a deportation order who leaves Canada pending the hearing of his appeal before the Appeal Division does not lose his status as a permanent resident.[91]

In *Harrison*,[92] a case in which an appeal had been filed from a removal order, the Appeal Division held that permanent resident status is lost once the Appeal Division[93] disposes of the appeal. Similarly, in *Howard*, the Appeal Division held that the loss of permanent residence results from the disposition of the appeal, not from removal from Canada.[94]

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91 *Jackson, Troy Dylan* (AD 0001-94-00019, 9530-03-0027), Mackie, February 2, 1994.

92 *Harrison, Michael Christopher v. M.C.I.* (IAD V92-01424), Clark, January 31, 1997; aff'd by Canada (Minister of Citizenship and Immigration) v. Harrison, [1998] 4 F.C. 557 (T.D.).

93 This case involved an application to reopen an appeal that had been dismissed for want of prosecution. The issue was the jurisdiction of the Appeal Division to reopen the appeal once the appellant had been removed from Canada.

94 *M.C.I. v. Howard, William Melvin* (IAD V93-02169), Ho, Clark, Lam, January 10, 1996.

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CHAPTER 4

4. VALID VISAS

4.1. INTRODUCTION

As noted in Chapter 1, only certain persons who have had a removal order issued against them have a right to appeal to the Appeal Division. One such category of persons are those who have **"valid immigrant visas"** and those who have **"valid visitor's visas**" at the time of seeking entry or landing. Such persons have a right of appeal under subsection 70(2) of the *Immigration Act* (the "Act") which provides as follows:

> 70(2) Subject to subsections (3) to (5), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who
>
> ...
>
> (b) seeks landing or entry and, at the time that a report with respect to the person was made by an immigration officer pursuant to paragraph 20(1)(a), was in possession of a valid immigrant visa, in the case of a person seeking landing, or a valid visitor's visa, in the case of a person seeking entry.

An appeal to the Appeal Division under this provision can be based on one or both of the two grounds of appeal found in subsection 70(3) of the Act. The first ground of appeal involves a question of law or fact and the second is based on the discretionary jurisdiction of the Appeal Division. Subsection 70(3) provides as follows:

> 70(3) An appeal to the Appeal Division under subsection (2) may be based on either or both of the following grounds:
>
> (a) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
>
> (b) on the ground that, having regard to the existence of compassionate or humanitarian considerations, the person should not be removed from Canada.

A preliminary issue in these appeals is whether the Appeal Division has jurisdiction to hear the appeal. In order to resolve this jurisdictional issue the Appeal Division must ask itself the question "was the appellant in possession of a valid immigrant visa or a valid visitor's visa?" If the Appeal Division decides that the appellant was in possession of such a visa, it can proceed to determine the legal validity of the removal order and to consider the exercise of its discretionary jurisdiction. If the Appeal Division determines that the appellant was not in possession of such a visa, then it has no jurisdiction to hear the appeal and the appeal is dismissed for lack of jurisdiction.

4.2. VALID IMMIGRANT VISA

The Act does not provide a definition of a "valid immigrant visa". Since 1993, there has been significant Federal Court jurisprudence as to the meaning of this phrase and the

circumstances in which it can be said that a person is in possession of a valid immigrant visa so that the person has a right of appeal to the Appeal Division.

The first case in which the meaning of a "valid immigrant visa" was interpreted was the decision of the Federal Court of Appeal in *De Decaro.*[1] The facts of *De Decaro* were not complex. An immigrant visa was issued to Mr. De Decaro. His wife and child received visas as "accompanying dependants". Mr. De Decaro died before coming to Canada. Mrs. De Decaro and the child then arrived and sought landing. Mrs. De Decaro was brought up for inquiry and first the adjudicator, and then the Appeal Division, found that she was admissible to Canada, as she was in possession of a valid immigrant visa which had never been revoked or cancelled.

On appeal, the Federal Court of Appeal disagreed with the Appeal Division and set aside its decision. Mr. Justice Pratte, writing for the majority of the Court, concluded that the visa issued to a person as an accompanying dependant was a "very special type which is issued solely to enable its holder to accompany or follow another person to Canada".[2] This type of visa is conditional and the condition must be fulfilled when the holder of the visa actually applies for admission to Canada at a port of entry.[3] In this case, after the death of her husband, it was impossible for Mrs. De Decaro to fulfill the condition attached to the visa and the visa then ceased to be valid; it was no longer a "valid" visa.[4] Since there was not a "valid" immigrant visa, the matter was not referred back to the Appeal Division which had no jurisdiction to hear the appeal.[5]

In the dissenting judgment, Mr. Justice Marceau disagreed with the approach taken by Mr. Justice Pratte. In his opinion, neither the Act nor the *Immigration Regulations, 1978 (*the "Regulations"*)* makes use of the concept of a valid visa which can become invalid, or the concept of a conditional visa.[6] A review of the statutory scheme leads to the conclusion that landing is a two-stage process. First, a person must obtain an immigrant visa. Second, a person must appear at a port of entry for admission to Canada. It is at this second stage that a final determination will be made as to whether the person is admissible. If there have been changes to the person's status between the time the visa was issued and the time of arrival in Canada or if there are relevant facts which ought to have been disclosed at the time the visa was issued, then the person will not be landed.[7] However, such a person is still in possession of a valid immigrant visa and will therefore have a right of appeal to the Appeal Division.[8]

---

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

2 *De Decaro*, *ibid*., at 413-414.

3 *De Decaro*, *ibid*., at 414.

4 *De Decaro*, *ibid*, at 417.

5 *De Decaro*, *ibid*, at 416-417.

6 *De Decaro*, *ibid*,, at 419.

7 *De Decaro*, *ibid*., at 421-422. See section 12 of the *Regulations*.

8 *De Decaro*, *ibid*., at 424.

The Federal Court of Appeal has recently revisited the principle set out in *De Decaro* in *McLeod.*[9] The facts in *McLeod* were very similar to those in *De Decaro*. The principal applicant died after visas were issued and before remaining members of the family presented themselves at a Canadian port of entry. The Court in *McLeod* reversed its earlier decision in *De Decaro.* The Court reconsidered the majority decision in *De Decaro* and relied on the dissenting judge's opinion and on the judgment in *Hundal*[10] to conclude that a validly issued visa is not invalidated merely by a change in the circumstances in respect of which it was issued following its issuance. It is important to note that the Court in *McLeod* only considered the validity of a visa where there had been a supervening event between the issuance of the immigrant visa and the arrival of the remaining family members at the port of entry.

Subsequent to *De Decaro(*which as noted has been reversed), the Federal Court of Appeal dealt with the issue of a valid immigrant visa again in *Wong*.[11] The facts in *Wong* were similar to those in *De Decaro* in that Ms. Wong, the appellant was also an accompanying dependant. In this case, however, Ms. Wong's father died **before** rather than after, the issuance of the immigrant visas as in *De Decaro*. The Appeal Division had concluded that it had jurisdiction to hear the appeal as Ms. Wong was in possession of a valid immigrant visa. The Court determined that the Appeal Division did not have jurisdiction to hear the appeal. The Court stated that "whatever should be the result where an element upon which the issuance of a visa is based subsequently ceases to exist, we are at least satisfied that, where, as here, the principal reason for the issuance of a visa ceased to exist before its issuance, such a visa cannot be said to be a valid immigrant visa.[12] The Appeal Division's decision was set aside for want of jurisdiction.

In 1995, the Federal Court—Trial Division rendered two judgments which followed the rationale in *De Decaro* and *Wong*. In the first case, in *Bruan,*[13] the Court dealt with a situation where the applicant was being sponsored by his mother as a member of the family class, but she died before the issuance of the immigrant visa. The applicant was issued a visa and arrived in Canada. A removal order was made against him and he appealed to the Appeal Division. The Appeal Division distinguished *De Decaro* and *Wong* and found that a "valid immigrant visa" means a visa which has not expired or has not been revoked. The Appeal Division concluded that it had jurisdiction to hear the appeal. Mr. Justice Nadon concluded that *De Decaro* and *Wong* could not be distinguished, even though the facts were different. The Court indicated that it preferred the reasons of the dissenting judgment in *De Decaro,* but that it felt bound by the reasoning of the majority: where the principal reason for the issuance of the visa ceases to exist prior to its issuance, the visa cannot be said to be a "valid immigrant visa". As a result, the Appeal Division had erred in law in concluding that it had jurisdiction to hear the appeal.

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[9] *McLeod, Beresford and Glenford v. M.C.I.* (F.C.A., no. A-887-96), Isaac, Stayer, Linden, November 6, 1998.

[10] *Canada (Minister of Citizenship and Immigration)* v. *Hundal*, [1995] 3 F.C. 32 (T.D.).

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

[12] *Wong*, *ibid*., at 2. The Court in *Wong* did not have arguments from the respondent and the Court indicated that this greatly hampered the consideration of the issue.

[13] *S.S.C.* v. *Bruan, Marlon* (F.C.T.D., no. IMM-1693-94), Nadon, June 9, 1995.

The second case in which the Federal Court—Trial Division dealt with this issue was *Hundal.*[14] The facts of this case were similar to those in *Bruan* in that the Court was dealing, not with an accompanying dependant, but with a change in the situation of the sponsorship. In this case, Mr. Hundal had been issued an immigrant visa after being sponsored by his wife. Prior to Mr. Hundal's arrival in Canada, his wife signed a statutory declaration withdrawing her sponsorship. An adjudicator issued an exclusion order against Mr. Hundal and Mr. Hundal appealed to the Appeal Division. The Appeal Division concluded that Mr. Hundal was in possession of a valid immigrant visa and allowed the appeal on humanitarian and compassionate grounds.

The argument made by the Minister in *Hundal* was that once the sponsorship was withdrawn, the condition for issuing Mr. Hundal's visa could not be met and the visa ceased to be valid. The respondent's counsel argued that *De Decaro* should not be applied broadly to all situations in which a condition upon which a visa is issued is no longer met because of an event arising after the issuance of the visa; to do so, would be to render the right of appeal to the Appeal Division for valid immigrant visa holders meaningless. The Court agreed and stated that it "seems obvious that *De Decaro* cannot be interpreted to have such broad scope".[15] The Court then went on to define the scope of *De Decaro* and to draw the following conclusions:

1. As a general principle, once a visa has been issued, it remains valid.[16]

2. There are four exceptions to this general principle:

   Exception #1**:** the *De Decaro* exception, where there is a frustration or impossibility of performance of a condition on which the visa was issued. This applies only when it is obvious that a supervening act makes the satisfaction of the condition of the visa impossible.

   Exception #2**:** The *Wong* exception, where there is a failure to meet a condition of the granting of the visa itself before the visa is issued. The essential components of the issued visa were not present before the visa was issued and, therefore, the visa is void *ab initio*.[17]

   Exception #3: where the visa has expired.[18]

   Exception #4: where the visa has been revoked by a visa officer.[19]

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[14] *Hundal, supra,* footnote 10 aff'd by *Hundal v. Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 153 (F.C.A)

[15] *Hundal, ibid*., at 37.

[16] *Hundal, ibid*., at 40.

[17] *Hundal, ibid*., at 41.

[18] *Hundal, ibid*., at 41.

[19] *Hundal, ibid*., at 41.

In analyzing the facts in *Hundal*, the Court was of the view that none of the four exceptions applied. Of particular interest was its view that even though the sponsorship had been withdrawn, it was possible to reinstate it; therefore, it was not an impossibility as contemplated by *De Decaro*.[20] As a result, the Appeal Division did have jurisdiction to hear the appeal and the judicial review application was dismissed.

Recently, the Federal Court of Appeal has revisited this case law in *McLeod*. The Court has reversed its earlier decision in *De Decaro* and so the first exception noted above no longer exists. Thus, an immigrant visa is no longer invalid if there has been a supervening event, such as the death of the principal applicant between the issuance of the immigrant visa and the arrival at a port-of-entry.

In *Oloroso*[21], Mr. Justice Gibson reviewed the case law and questioned whether the "*Wong* exception" was suspect. He relied on the reasoning in *Seneca*[22] which involved similar facts, to conclude that it was not logical to take away the right of appeal to the Appeal Division on the basis that visas were improperly issued, when that was the very issue to be decided. The applicants had obtained immigration visas as husband and wife and two children. It was learned at the port of entry that the principal applicant was legally married to another woman when the purported marriage of the adult applicants took place. An adjudicator made exclusion orders against the applicants. The Appeal Division determined that it had no jurisdiction in the appeals against the exclusion orders, since the applicants were not in possession of valid visas. Moreover, the wife was not a member of the family class.

Refer to Chapter 3 for a discussion of the application of this case-law to the situation of permanent residents.

4.2.1. Appeal Division Jurisprudence

Since the hearing of these cases by the Federal Court of Appeal and the Federal Court—Trial Division, the Appeal Division has addressed the issue of whether an appellant had a valid immigrant visa and therefore, a right of appeal to the Appeal Division under subsection 70(2). Some examples of these cases are provided below.

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[20] *Hundal, ibid*., at 42. There was an earlier case of the Federal Court Trial Division, *Nait-Kaci, Mustapha Hakim* v. *M.C.I.* (F.C.T.D., no. IMM-3796-94), Nadon, April 28, 1995, where Mr. Justice Nadon seems to have come to the same conclusion as it relates to the withdrawal of sponsorship undertakings. In this case, an immigrant visa had been issued before the visa officer was notified that the applicant's wife had cancelled the undertaking of assistance. The Court considered *De Decaro* and *Wong* and stated that the applicant could have appealed the departure notice to the Appeal Division under subsection 70(2).

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

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

4.2.1.1. Sponsorship Undertakings

In *Nagy,*[23] the appellant was issued an immigrant visa as an accompanying dependent spouse. Her husband preceded her to Canada in March 1993. The appellant heard nothing from her husband and she arrived in Canada on November 17, 1993. Her visa was to expire on November 24, 1993. She learned that her husband had returned to Romania and it was obvious that there were marital difficulties. She was examined by an immigration officer on December 12, 1993. The issue for the Appeal Division to determine was whether the appellant was in possession of a valid immigrant visa at the time of the immigration examination. The Minister argued that the appellant was separated from her husband and therefore, at the time of the examination she was not an accompanying spouse. As a result, pursuant to *De Decaro* and *Wong,* she was not in possession of valid immigrant visa and the Appeal Division did not have jurisdiction to hear the appeal.

The Appeal Division did not accept the Minister's argument. The panel reasoned that the husband was landed in Canada and the evidence showed that the marital relationship, which was the foundation of the visa, was not necessarily at an end. In theory, they could be reconciled. Therefore, the conditions of the visa were, or could have been fulfilled. Although not in the exact words of the exception as stated in *Hundal* in section 4.2, the panel appears to have found that the *De Decaro* exception did not apply since it was not impossible to fulfill the condition.

4.2.1.2. Identity

In *Nyame*,[24] the appellant had been issued an immigrant visa in the wrong name and the wrong birth date. The appellant's passport contained the same misinformation. The Appeal Division panel concluded that the appellant was perhaps in violation of sections of the *Immigration Act*, but that this case did not fall within one of the four exceptions set out in the Federal Court decision in *Hundal;* therefore, the appellant was in possession of a valid immigrant visa and the Appeal Division had jurisdiction to hear the appeal.

4.2.1.3. Marriage and Children

The most common scenarios seen in valid immigrant visa cases, is where the appellant was married and or had children when he had been issued an immigrant visa on the basis of being single and with no children.

In two cases, *Li*[25] and *Chung,*[26] the Appeal Division considered the situation where immigrant visas had been issued to the appellants as members of the family class, as unmarried dependent sons, but the appellants married between the date of the applications for permanent residence and the date of issuance of the immigrant visas. In both cases, the Appeal Division

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[23] *Nagy, Ana Delia* v. *M.C.I.* (IAD T94-06633), Bartley, February 27, 1996.

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

[25] *Li, Bing Qian* v. *M.C.I.* (IAD V94-02390), Singh, October 15, 1996. An application for judicial review was dismissed in this case: *Li, Bing Qian v. M.C.I.* (F.C.T.D., no. IMM-4138-96), Reed, January 8, 1998.

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

concluded that the *Wong* exception, as noted in *Hundal,* applied in that a condition of the visa was that the appellants be unmarried (since they were married, they were not members of the family class and could not be sponsored), and therefore, there was a failure to meet a condition of the granting of the visas before the visas were issued. On this basis, the Appeal Division determined that the appellants did not have a valid immigrant visas and the Appeal Division did not have jurisdiction to hear the appeal.

The Appeal Division has treated in cases involving failure to disclose the existence of children differently from cases involving failure to disclose the marriage of the appellant. The reason for the difference in treatment is that a married person is not a member of the family class as a dependant, whereas the existence of children does not have the effect of removing a person from the family class as a dependant.

In *Mohammed*,[27] the appellant, his wife and one child were issued immigrant visas. The appellant did not disclose to the visa officer that he had two other children. The appellant declared his two other children at the port of entry and a removal order was issued against him. The issue for the Appeal Division was to determine whether the appellant, his wife and child had valid immigrant visas within the meaning of subsection 70(2). The panel distinguished *De Decaro* and *Wong* on the basis that, even though there was a failure to disclose the two children, the appellants were still members of the family class. Therefore, the appellants were in possession of valid immigrant visas and the Appeal Division had jurisdiction to hear the appeal.

In *Opina*,[28] the Appeal Division took a similar approach. In this case, the appellant had failed to disclose the existence of his children prior to the issuance of his immigrant visa. The Minister argued that the immigrant visa had been issued to the appellant as an unmarried son with no dependants and therefore, since he did in fact have children, the immigrant visa was not valid. The panel considered the applicable definitions of "dependent son" in the *Immigration Regulations* 1978, and concluded that the existence of children did not automatically place the appellant outside of the family class.

4.2.1.4. Revocation of Visas

As noted in *Hundal*, if an immigrant visa is revoked, then it is not a valid immigrant visa and the person does not have a right of appeal to the Appeal Division. In two recent decisions, the Appeal Division has dealt with the requirements of notice of revocation of a visa to an immigrant visa holder. In both cases, the sponsor had withdrawn the sponsorship prior to the applicant spouse's arrival at the port of entry. In *Lionel*[29]*,* an immigration officer in Canada decided to cancel the appellant's visa, and asked officials at the visa post to "attempt to retrieve" the visa. The appellant was advised by telegram to attend at the High Commission with his passport and visa; however, he was never advised that the visa was no longer valid. He proceeded

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[27] *Mohammed, Khan* v. *M.C.I.* (IAD V94-00788/89/90), Singh, December 20, 1994.

[28] *Opina, Felicismo* v. *M.C.I.* (IAD W94-00112), Wiebe, September 8, 1995.

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

to the port of entry. The Appeal Division held that it was not sufficient to invite the appellant to the visa post for a meeting; the revocation of his visa had to be explicitly conveyed to him. As this was not done, the visa remained valid and the appellant was in possession of a valid visa when he arrived at the port of entry.

In *Hundal,*[30] a visa officer sent a telegram to the appellant at the address she provided to the visa post to notify her of the withdrawal of the sponsorship and the subsequent invalidity of the visa. The appellant claimed not to have received the telegram. The Appeal Division held that the Federal Court—Trial Division decision in *Hundal*[31] was distinguishable from the facts in the case before it as a visa officer had made a decision to cancel the visa and that decision had been communicated to the appellant. Procedural fairness did not require actual notice to the appellant of the revocation of her visa. The visa office had done all that could be expected of it in sending the notice to the address the appellant provided. The appellant was not the holder of a valid visa when she arrived at a port of entry and consequently, she did not have a right of appeal to the Appeal Division.

4.3. VALID VISITOR'S VISA

There are not many appeals to the Appeal Division pursuant to subsection 70(2) on the basis that the appellant is in possession of a valid visitor's visa. As in cases involving a valid immigrant visa, the Appeal Division must determine as a preliminary matter whether it has jurisdiction to hear the appeal. The issue is whether the appellant was in possession of a valid visitor's visa at the time the report under subsection 20(1) was written.

The Federal Court—Trial Division in *He*[32] provided a two-part test for determining whether the person has a valid visitor's visa. The first part of the test is that the appellant must have a valid visa and the second part of the test is that the person must be using the visa for the purpose for which it was intended. Thus, if the person has a visitor's visa, then it is only valid if the person is seeking to enter Canada as a visitor and not if the person is seeking landing in Canada as an immigrant.

The reasoning in *He* was followed by the Appeal Division in *Choi.*[33] In *Choi*, the appellant had a visitor's visa and his stated intention at the time of entering Canada was that "he had come to visit and to seek business opportunities". The panel found on the basis of the evidence before it that there was no bar to a visitor's exploring business opportunities; the two-part test in *He* was met as the appellant had a visitor's visa and was intending to use it for the purpose of visiting Canada. The Appeal Division had jurisdiction to hear the appeal of the removal order.

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

[31] *Hundal, supra,* footnote 10.

[32] *He, Xi* v. *M.C.I.* (F.C.T.D., no. IMM-226-95), McKeown, March 9, 1995.

[33] *Choi, Boo Sung* v. *M.C.I.* (IAD T94-05124), Wright, July 11, 1996.

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CHAPTER 5

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CHAPTER 5

5. REMOVAL FOR MISREPRESENTATION

5.1. INTRODUCTION

The responsibility for satisfying the requirements of the *Immigration Act* (the "Act") and the *Immigration Regulations, 1978* (the "Regulations") to gain admission to Canada rests with the person seeking admission to this country. This requires that an applicant for permanent residence disclose truthfully all material information, and any material change in that information which is relevant to the issuance of the visa. Subsection 9(3) of the Act provides as follows:

> 9.(3) Every person shall answer truthfully all questions put to that person by a visa officer and shall produce such documentation as may be required by the visa officer for the purpose of establishing that his admission would not be contrary to this Act or the regulations.

This responsibility is placed on the applicant at the time of completing the application for permanent residence, and it remains on the applicant at the time of arrival in Canada[1] by virtue of section 12 of the Regulations which imposes the following obligation:

> 12. An immigrant who has been issued a visa and who appears before an immigration officer at a port of entry for examination pursuant to subsection 12(1) of the Act is required
>
> (a) if his marital status has changed since the visa was issued to him, or
>
> (b) if any other facts relevant to the issuance of the visa have changed since the visa was issued to him or were not disclosed at the time of issue thereof,
>
> to establish that at the time of the examination
>
> (c) the immigrant and the immigrant's dependants, whether accompanying dependants or not,
>
> ...

[1] At the port of entry a visa holder must undergo examination as subsection 12(1) of the Act provides that:

> 12.(1) Subject to the regulations, every person seeking to come into Canada shall appear before an immigration officer at a port of entry, or at such other place as may be designated by a senior immigration officer, for examination to determine whether that person is a person who shall be allowed to come into Canada or may be granted admission.

Where an inland application is made, subsections 9(3) and 12(1) of the Act and section 12 of the Regulations are not applicable.

meet the requirements of the Act, these Regulations, ... including the requirements for the issuance of the visa.

Where an immigration officer has information that a permanent resident has breached this obligation in obtaining landing, the person may become the subject of a report issued pursuant to paragraph 27(1)(e) of the Act. As a result of the issuance of the report, an inquiry may be held before an adjudicator. The adjudicator is required to issue a deportation order or a conditional deportation order against the person where the adjudicator determines that the person is described in paragraph 27(1)(e). This decision may be appealed to the Appeal Division pursuant to subsection 70(1) of the Act.

Where an immigration officer has information that a person other than a Canadian citizen or a permanent resident has come into Canada or remains in Canada and is described in paragraph 27(2)(g) of the Act, the person may become the subject of a report issued pursuant to that paragraph. As a result of the issuance of the report, an inquiry may be held before an adjudicator. The adjudicator is required to issue a removal order or a conditional removal order against the person where the adjudicator determines that the person is described in paragraph 27(2)(g). If the person ordered removed is a Convention refugee (but not a permanent resident), the decision may be appealed to the Appeal Division pursuant to paragraph 70(2)(a) of the Act.[2] There are very few appeals related to paragraph 27(2)(g)[3].

5.2. LEGISLATIVE FRAMEWORK

Paragraph 27(1)(e) of the Act provides as follows:

> 27.(1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who
>
> ...
>
> e) was granted landing by reason of possession of a false or improperly obtained passport, visa or other document pertaining to his admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or any other person;

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[2] 70.(2) Subject to subsections (3) to (5), an appeal lies to the Appeal Division from a removal order or conditional removal order made against a person who

> (a) has been determined under this Act or the regulations to be a Convention refugee but is not a permanent resident;

[3] For an example of a Minister's appeal under section 71 where one of the allegations is related to paragraph 27(2)(g), see *Bal, Kanwar Balram Singh* v. *M.E.I.* (IAD V91-00903, V91-00902), Wlodyka, July 10, 1992.

The language of paragraph 27(1)(e) contemplates three instances in which an immigration officer would be required to forward a written report to the Deputy Minister concerning a permanent resident who has been granted landing. These instances arise where a permanent resident has been granted landing: (i) by reason of possession of a false or improperly obtained passport, visa or other document pertaining to his or her admission; (ii) by reason of any fraudulent or improper means; or (iii) by reason of misrepresentation of a material fact, whether exercised or made by the permanent resident or any other person.[4]

Paragraph 27(2)(g) of the Act provides as follows:

> 27.(2) An immigration officer or a peace officer shall, unless the person has been arrested pursuant to subsection 103(2), forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a person in Canada, other than a Canadian citizen or permanent resident, is a person who
>
> ...
>
> g) came into Canada or remains in Canada with a false or improperly obtained passport, visa or other document pertaining to that person's admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or any other person;

5.3. JURISDICTION

The Minister has argued that a person who has misrepresented a material fact which would have precluded his or her admission to Canada is not a "permanent resident" as that term is defined in section 2(1) of the Act and consequently, the person does not have a right of appeal to the Appeal Division. In particular, the argument focusses on the interpretation of the phrase "has been granted landing" in the definition of "permanent resident". The argument is made that such a person has not been granted landing as the person was not granted "lawful permission to establish permanent residence in Canada" by reason of the misrepresentation.

In three recent judgments, *Seneca*[5],and *Jaber*[6] *and Edwards*[7], the Federal Court of Appeal has rejected the argument of the Minister and has concluded that such persons, who had

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[4] *Mohammed, Abu Tayub* v. *M.C.I.* (F.C.T.D., no. IMM-3601-95), MacKay, May 12, 1997. – now reported: *Mohammed* v. *Canada (Minister of Citizenship and Immigration,* [1997] 3 F.C. 299 (T.D.)

[5] *M.C.I.* v. *Seneca, Danilo Ramos* (F.C.A., no. A-261-98), Issac, McDonald, Sexton, September 29, 1999; now reported: *Canada (Minister of Citizenship and Immigration)* v. *Seneca* (1999*)*, 247 N.R. 397 (F.C.A.)

[6] *Jaber, Isam* v. *M.C.I.* (F.C.A., no. A-917-97), Marceau, Desjardins, Létourneau, September 30, 1999; now reported: *Jaber* v. *Canada (Minister of Citizenship and Immigration),* [2000] 1 F.C. 603 (C.A.)

[7] *Canada (Minister of Citizenship and Immigration)* v. *Edwards* (falsely called *Pownall, Lascelles Noel*), (F.C.A., no. A-783-99), Rothstein, Sharlow, Malone, March 13, 2001; 2001 FCA 37

misrepresented a material fact, were permanent residents with a right of appeal to the Appeal Division.

5.4. APPLICATION OF PARAGRAPH 27(1)(e)

5.4.1. Document Pertaining to Admission

One of the grounds upon which an allegation under paragraph 27(1)(e) may be based is where landing was granted by reason of possession of a false or improperly obtained passport, visa or other *document pertaining to the person's admission*. In *Brooks,*[8] the Supreme Court of Canada in interpreting this part of the provision as it then was in subparagraph 19(1)(e)(viii) of the Act[9] held that the Immigration Appeal Board had erred in its finding that only "official" documents were covered by subparagraph 19(1)(e)(viii), and that to be "official" a document had to be expressly mentioned in the Act or Regulations. The Court concluded that the "basic questions are whether the documents are authorized, that is, is their source legitimate, and do they relate to admission to Canada".[10]

5.4.2. Materiality

The materiality of misrepresentations has been the subject of numerous court decisions. In *Brooks,*[11] the Supreme Court of Canada stated at page 873 of its reasons for judgment

> Lest there be any doubt on the matter as a result of the Board's reasons, I would repudiate any contention or conclusion that materiality under s. 19(1)(e)(viii) requires that the untruth or the misleading information in an answer or answers be such as to have concealed an independent ground of deportation. The untruth or misleading information may fall short of this and yet have been an inducing factor in admission. Evidence, as was given in the present case, that certain incorrect answers would have had no influence in the admission of a person is, of course, relevant to materiality. *But also relevant is whether the untruths or the misleading answers had the effect of foreclosing or averting further inquiries, even if*

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

[9] S.C. 1952, c.42. Subparagraph 19(1)(e)(viii) reads as follows:

> 19.(1) Where he has knowledge thereof... an immigration officer... shall send a written report to the Director, with full particulars concerning...
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> (e) any person, other than a Canadian citizen or a person with Canadian domicile, who
>
> ...
>
> (viii) came into Canada or remains therein with a false or improperly issued passport, visa, medical certificate or other document pertaining to his admission or by reason of any false or misleading information, force, stealth or other fraudulent or improper means, whether exercised or given by himself or by any other person...

[10] *Brooks, supra,* footnote 8, at 858.

[11] *Brooks, supra,* footnote 8.

those inquiries might not have turned up any independent ground of deportation. [emphasis added]

Brooks has been followed in numerous cases. In *Hilario,*[12] the appellant failed to disclose to the immigration officer in the Philippines the fact of his religious marriage and two children born of that marriage. The Federal Court of Appeal concluded at page 699 "that the information withheld by the appellant from immigration officials in this case had the 'effect of foreclosing or averting further inquiries' and is thus 'material' within the test set out by Laskin J. in the *Brooks* case." The Court noted that the withholding of information had prevented the immigration officer from making further inquiries which could conceivably have adversely affected the decision as to the appellant's admission to Canada.[13]

The failure of the appellant to list children born out of wedlock in his application for permanent residence was held in *Okwe*[14] to be a misrepresentation of a material fact since its effect was to foreclose inquiries concerning their status and circumstances. The circumstances of those children could, conceivably, be relevant to the determination of the appellant's application for permanent residence.

Clearly a person must accept responsibility for any lack of completeness in the answers provided in the application for permanent residence. In *Khamsei,*[15] the misrepresentation that was the subject of the inquiry consisted of the applicant's failure to provide in his application complete details of his previous applications for a visa to come to Canada. The Federal Court of Appeal held that while materiality is a question of fact, that did not mean that there must be direct evidence that, but for the misrepresentation, the visa would not have been granted. The fact of materiality may be inferred. The Court distinguished between the failure to disclose that a visa had been changed from a visitor's to a student visa which was likely not material and the failure to disclose the refusal of an immigrant visa shortly before the making of a new application, which it concluded was material.

A change in the applicant's circumstances even after the issuance of the visa can be material. In addition, there is a positive "duty of candour" on the applicant to disclose all material facts related to a change in circumstances subsequent to the issuance of the visa. In *Gudino,*[16] the Federal Court of Appeal held that the person's loss of employment[17] was material and should have been disclosed to the immigration officer at the port of entry.

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

[13] The same reasoning is found in *Juayong* v. *Canada (Minister of Employment and Immigration)* (1988), 99 N.R. 78 (C.A.), where the appellant concealed the existence of her spouse and child. In *Adu, Kwame* v. *M.E.I.* (F.C.A., no. A-170-89), Stone, Linden, Isaac, May 13, 1992, the appellant failed to disclose that he had once married in Ghana pursuant to custom, that the marriage had been terminated by custom before he made his application, and further, that he was the father of several children of the marriage. This was held to be misrepresentation of material facts.

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

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

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

Non-disclosure may be found not to be material. In *Medel,*[18] the non-disclosure in question was the fact that the appellant did not tell the immigration officer that the Embassy issuing the visa had requested its return on the ground that it contained an error which the Embassy wanted to correct. The Embassy had not told the appellant the true reason for the request, namely the withdrawal of the sponsorship by the appellant's spouse. The Federal Court of Appeal concluded that the appellant was subjectively unaware that she was holding back anything relevant to her admission, and that this belief was reasonable when all the circumstances were considered *objectively*. The Court noted that this finding might have been different had the Embassy told her the truth.

In *Reyes,*[19] the Immigration Appeal Board concluded that the appellant, a nurse in the Philippines who had failed to disclose her nursing background, had not misrepresented a material fact, but had failed to disclose additional information.

The misrepresentation may be made by another person without the appellant's knowing that the misrepresentation has been made. In *D'Souza,*[20] the appellant's application for permanent residence was error-free. However, his mother's application contained a misrepresentation of a material fact. Because the appellant was her dependant, the misrepresentation was material to the admission of the appellant as well as of his mother.

There is no requirement for *mens rea*.[21] The misrepresentation is not restricted to wilful or intentional misrepresentation of which the appellant must be subjectively aware. Further, there need not be active concealment, as one can misrepresent as easily and effectively by silence as one can by actively stating a mistruth. Similarly, a person who refuses to answer a question and instead allows outdated or false information to be represented as accurate can be found to have misrepresented a material fact.[22]

It has been argued that paragraph 6(1)(a) of the Regulations, which precludes a visa officer from issuing an immigrant visa to an applicant for permanent residence should the applicant have a non-accompanying dependant who falls within an inadmissible class of persons or is otherwise unable to meet the requirements of the Act and the Regulations, is *ultra vires* and is of no force and effect. If this argument had been accepted, then a misrepresentation related to

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[17] The appellant, without the points awarded to him for his arranged employment, did not have sufficient points to qualify for permanent residence as an independent applicant.

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

[19] *Reyes* v. *Canada (Minister of Employment and Immigration)* (1987), 2 Imm. L.R. (2d) 223 (IAB).

[20] *D'Souza* v. *Canada (Minister of Employment and Immigration)*, [1983] 1 F.C. 343 (C.A.).

[21] *Brooks, supra,* footnote 8, at 864-865. See also, *Lim, Poh-Swan* v. *M.E.I.* (IAD V90-01409), Wlodyka, Chambers, Verma, February 14, 1991 (reasons signed June 11, 1991). It has been suggested that the Court in *Medel* v. *Canada (Minister of Employment and Immigration)*, [1990] 2 F.C. 345 (C.A.) introduced a requirement for *mens rea*. This interpretation was rejected in *Mohammed, Abu Tayub* v. *M.C.I.* (F.C.T.D., IMM-3601-95), MacKay, May 12, 1997 now reported*: Mohammed* v. *Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 299 (T.D.) . For an Appeal Division case with a similar conclusion, see *Lam, Chi Ming* v. *M.C.I.* (IAD V94-00972), Clark, October 25, 1994.

[22] *Mohammed, ibid.*

a non-accompanying dependant would not be a material misrepresentation. The Federal Court—Trial Division[23] (affirmed by the Federal Court of Appeal) and the Appeal Division,[24] however, have both rejected this argument and held that paragraph 6(1)(a) of the Regulations is not *ultra vires*. Accordingly, an applicant for permanent residence is legitimately required to disclose the existence and identity of all dependants, accompanying or non-accompanying.

While misrepresentations relating to marital status[25] and dependants[26] are common, the Appeal Division has considered a wide range of misrepresentations to be material, including:

- financial circumstances;[27]
- citizenship;[28]
- marriage of convenience;[29]
- false claim to be an orphan;[30]
- misrepresentation of identity;[31]
- criminal offences outside of Canada;[32]
- crimes against humanity;[33]
- as a deportee, failure to obtain the consent of the Minister to come into Canada,[34]

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[23] *Singh, Ahmar* v. *Her Majesty the Queen* (F.C.T.D., no. T-1495-95), Muldoon, December 2, 1996; aff'd (F.C.A., no. A-1014-96), Isaac, Strayer, Linden, November 6, 1998

[24] *Ramos, Gil Miranda* v. *M.C.I.* (IAD W94-00170), Bartley, Aterman, Wiebe, April 15, 1997.

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

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

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

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

[29] *Kaler, Sukhvinder Kaur* v. *M.C.I.* (IAD T97-06160), Boire, September 28, 1998 (reasons signed January 28, 1999); *Baki, Khaled Abdul* v. *M.C.I.* (IAD V97-02040), Major, December 9, 1998.

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

[31] *Pownall, Lascelles Noel* v. *M.C.I.* (IAD T97-03257), MacAdam, Kalvin, Buchanan, December 3, 1998. See footnote 7.

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

[33] *Mugesera, Léon et al.* v. *M.C.I.* (IAD M96-10465 *et al.*), Duquette, Bourbonnais, Champoux Ohrt, November 6, 1998. The Federal Court-Trial Division concluded that the Appeal Division erred in law in finding that the speech made by Mr. Mugesera constituted a crime against humanity. However, a question was certified for the Federal Court of Appeal. *Mugesera* v. *Canada (Minister of Citizenship and Immigration),* [2001] 4 F.C. 421 (T.D.) .

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

- failure to disclose that their sponsor had died before the visa was issued[35] or before they came to Canada[36],

- misrepresentation as to the date she last left Canada and the length of stay outside Canada[37],

- the material fact that he had made an earlier fraudulent and unsuccessful refugee claim[38].

5.4.3. Canadian Charter of Rights and Freedoms

In *Mohammed,*[39] the Federal Court Trial Division held that the applicant had not established the existence of violations of sections 7, 12 and 15 of the *Canadian Charter of Rights and Freedoms* (the "Charter"). The applicant's complaints centered on the argument that to deport someone for misrepresentation where there was an "innocent and invincible error" constituted a Charter violation.

The Court concluded that section 7 of the Charter was not engaged, for there was no violation of the principles of fundamental justice in the case. There was, in the Court's view, no "absolute liability" offence involved since the applicant had not been charged with a penal or regulatory offence. The Court held that "it is not a principle of fundamental justice that an individual who seeks the benefit of a statutory regime, yet fails for whatever reason to make themselves aware of, or to satisfy, the requirements imposed by that regime, is entitled to special protection or concessions from its enforcement."

The applicant's contention that paragraph 27(1)(e), as interpreted by the Appeal Division, constituted a violation of subsection 15(1) of the Charter in that it discriminated against the illiterate and uneducated was rejected. The Court concluded that ignorance of the law, and the inability to converse in either of Canada's official languages does not constitute a "disability"; nor does it fall within any of the enumerated grounds of discrimination under section 15 of the Charter. Moreover, it does not constitute an "analogous" ground of discrimination.

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[35] *Grewal, Ramandeep Kaur* v. *M.C.I.* (IAD VAO-02149), Clark, November 2, 2000.

[36] *Birdi, Gian Chand et al* v. *M.C.I.* (IAD T98-02278 et al.) Hoare, January 25, 2000.

[37] *Sivagnanasundari, Sivasubramaniam* v. *M.C.I.* (IAD T98-04311), Sangmuah, December 20, 2000.

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

[39] *Mohammed, supra*, footnote 21. For Appeal Division decisions rejecting "absolute liability" and "strict liability" arguments see *Olarte, Josephine* v. *M.C.I.* (IAD V93-02910), Clark, Verma, Lam, February 14, 1995; *Thai, Quoc Vi* v. *M.C.I.* (IAD T96-02438), Aterman, January 24, 1997; and *Situ, Wei Xue* v. *M.C.I.* (IAD T93-09275), Townshend, Aterman, Channan, May 25, 1995.

Finally, the Court rejected the applicant's argument that, in the circumstances, to remove the applicant to Bangladesh on the basis of an innocent and honest error would constitute cruel and unusual treatment in contravention of section 12 of the Charter.

For a detailed discussion of Charter issues, see Chapter 11.

5.5. DISCRETIONARY JURISDICTION

For a discussion of the exercise of discretionary jurisdiction, see Chapter 9. In determining whether in "all circumstances of the case" under paragraph 70(1)(b) of the Act (for a permanent resident facing removal) or having regard to the existence of "compassionate or humanitarian considerations" (for a non-permanent resident Convention refugee facing removal) the appellant should or should not be removed from Canada, relate to the nature of the misrepresentation, in particular whether it was advertent or inadvertent may be considered.[40]

The absence of an interview with a visa officer and a lack of interpretation of the application for permanent residence, while not a proper basis for challenging the legal validity of the removal order, have been found to be factors that ought to be considered in the Appeal Division's exercise of its discretionary jurisdiction.[41]

[40] *Huang, Jing Yuan Ken* v. *M.C.I.* (IAD V95-00934), McIsaac, November 1, 1996.

[41] *Nguyen, Truc Tranh* v. *M.C.I.* (IAD T96-01817), Townshend, October 4, 1996 (reasons signed November 4, 1996). Judicial review of this decision was allowed on other grounds: *M.C.I.* v. *Nguyen* (F.C.T.D., no. IMM-3986-96), Gibson, January 23, 1998.

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CHAPTER 6

6. TERMS AND CONDITIONS OF LANDING

6.1 GENERAL

Permanent residents may be removed from Canada when they are landed subject to certain terms and conditions which they fail to fulfil within the prescribed time periods. A permanent resident has a right of appeal to the Appeal Division from the removal order on two grounds: (1) legal validity of the removal order; and (2) all the circumstances of the case.[1]

Paragraph 27(1)(b) of the *Immigration Act* (the "Act") specifies that if a person was granted landing subject to terms and conditions and has **knowingly contravened** those terms and conditions, that person may be ordered removed from Canada.

A person falls within paragraph 27(1)(b) if the following **two** conditions are met:

(i) the person is a permanent resident of Canada; and

(ii) the person knowingly contravened a term or condition that was imposed at the time of landing.

6.2 KNOWINGLY CONTRAVENED

In essence, the only issue affecting legal validity on an appeal from a removal order for failure to comply with terms and conditions is whether the person **knowingly contravened** the terms and conditions. Knowing contravention does not require an **intention** on the part of the person to contravene; all that is required is that the person clearly understood the terms and conditions and did not fulfil them. The leading case in this area, *Gabriel*,[2] makes it clear that it does not matter that the person fully intended to comply with the conditions and the conditions became impossible to fulfil. It matters only that the person concerned knew the conditions were not met, but continued nonetheless to remain in Canada.

Even though a condition is impossible to fulfil, so long as the person concerned knew of that condition and, notwithstanding that knowledge, continued to remain in Canada as a permanent resident in breach of that condition, such a person has knowingly contravened a condition which was attached to the grant of landing.

The lack of a requirement of *mens rea* for "knowingly contravened" was clearly reiterated in *Aujla*.[3]

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[1] Subsection 70(1) of the *Immigration Act*.

[2] *Gabriel* v. *Canada (Minister of Employment and Immigration)* (1984), 60 N.R. 108 (F.C.A.).

[3] *Aujla* v. *Canada (Minister of Employment and Immigration)* (1989), 11 Imm. L.R. (2d) 33 (I.A.D.). In this case, the appellant had been sponsored as a fiancée and landed on the condition that she marry the sponsor within 90 days. The appellant was held to have knowingly contravened the condition even though the sponsor refused to marry her and it was clearly not her fault that she could not fulfil the condition of her landing.

The case law shows that the Appeal Division and the Federal Court of Appeal have established that "knowingly contravened," as used in paragraph 27(1)(b) of the Act, means with simple knowledge of the contravention and does not imply *mens rea* or wilful non-compliance.[4]

Paragraph 27(1)(b) of the Act does not violate section 7 of the Charter despite its similarity to an absolute liability offence. It was argued that an appellant has no opportunity to explain lack of compliance with the terms and conditions of landing with respect to legal validity and this is a denial of fundamental justice. The Appeal Division followed the reasoning of the Federal Court in *Mohammed*[5] that it is not a principle of fundamental justice that someone who does not satisfy the requirements of a statutory regime is entitled to special concessions. The Appeal Division found that paragraph 27(1)(b) does not engage section 7 of the Charter.[6]

6.3 IMPOSITION OF TERMS AND CONDITIONS

6.3.1 Relevant Legislative Provisions

Subsection 14(5) requires an immigration officer to impose terms and conditions upon certain classes of immigrants at the time of landing. Subsection 23(1.1) imposes a similar obligation on a senior immigration officer who grants landing to those classes of immigrants. Section 23.1 of the *Immigration Regulations, 1978* (the "Regulations") sets out the actual terms and conditions that must be imposed upon the prescribed classes of immigrants at the time of landing pursuant to subsections 14(5) or 23(1.1).

The classes of immigrants for whom landing must be accompanied by terms and conditions are entrepreneurs and fiancées of sponsors. Subsection 23.1(1) of the Regulations sets out the conditions of an entrepreneur's landing, while subsection 23.1(2) sets out the conditions of a sponsored fiancée's landing.[7]

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[4] See *Baker* v. *M.C.I.* (IAD T93-10044), Townshend, January 28, 1994, where in referring to paragraph 27(1)(b) the Appeal Division stated: "This is a very harsh section, in that the term "knowingly" has been interpreted by the Federal Court of Appeal as meaning merely having knowledge of the contravention of the condition entered into. There is no requirement for *mens rea*, intent, control of the circumstances, or responsibility for the contravention. Mere knowledge is sufficient." In the decision of *El-Rafiaa* v. *M.C.I.* (IAD T95-02564), Leousis, July 17, 1996, the removal order was held to be valid in law even though the appellant honestly, but mistakenly, believed she had married her sponsor in a civil ceremony within the 90 days.

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

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

[7] 23.1(1) Entrepreneurs and their dependants are prescribed as a class of immigrants in respect of which landing shall be granted subject to the condition that, within a period of not more than two years after the date of an entrepreneur's landing, the entrepreneur

(a) establishes, purchases or makes a substantial investment in a business or commercial venture in Canada so as to make a significant contribution to the economy and whereby employment opportunities in Canada are created or continued for one or more Canadian citizens or permanent residents, other than the entrepreneur and the entrepreneur's dependants;

(b) participates actively and on an on-going basis in the management of the business or commercial venture referred to in paragraph (a);

6.3.2 Entrepreneurs

Immigrant entrepreneurs are landed subject to the condition that within two years of their landing they make a significant economic contribution to Canada. This is to be achieved through the purchase, establishment or substantial investment in a business or commercial venture that will make a significant contribution to the economy and will create employment opportunities for one or more persons other than the entrepreneur and the entrepreneur's family. The entrepreneur is also expected to participate actively in the management of the business. Entrepreneurs are expected to furnish immigration officers with evidence of their efforts to comply, and compliance, with these terms and conditions.

Often at issue is what constitutes a "significant contribution to the economy" as set out in the Regulations. Although "significant contribution" is not a defined term, normally an entrepreneur will file a business proposal that sets out the amount and nature of the investment to be made and the employment opportunities to be created. The business plan set out in the proposal is regarded as a benchmark of a significant contribution to the economy.[8] The extent of compliance with the proposal is a measure of the fulfillment of the conditions imposed upon landing. It is acknowledged that the business plan may change from that set out in the original proposal; however, the new plan must comply with the condition that the investment be a significant contribution to the economy.[9]

In considering the appeals of entrepreneurs facing removal, the Appeal Division must assess whether the entrepreneurs understood the conditions of landing. The Appeal Division must be satisfied that the entrepreneur understood what was meant by a significant economic contribution and therefore what was expected of him or her.[10] There is a duty on immigration

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(c) furnishes, at the times and places specified by an immigration officer, evidence of efforts to comply with the terms and conditions imposed pursuant to paragraphs (a) and (b); and

(d) furnishes, at the time and place specified by an immigration officer, evidence of compliance with the terms and conditions imposed pursuant to paragraphs (a) and (b).

(2) Fiancées of sponsors and dependants of fiancées are prescribed as a class of immigrants in respect of which landing shall be granted subject to the condition that

(a) within a period of 90 days after the date of a fiancée's landing, the fiancée marries the sponsor; and

(b) the fiancée furnishes, at the times and places specified by an immigration officer, evidence of compliance with the terms and conditions imposed.

[8] *Sang, Lam Choon* v. *M.E.I.* (F.C.A., no. A-425-91), Hugessen, Linden, Holland, February 18, 1993. It is appropriate to take a business proposal into account in deciding whether the appellant has fulfilled his condition of making a significant economic contribution. In *Lam, Choon Sang* v. *M.E.I.* (IAD W90-00033), Bell, February 20, 1991, the Appeal Division noted that there was no definition of "significant economic contribution", but that common sense dictated that the wording be looked at in concert with the business proposal.

[9] *Haddad, Rick Gordon* v. *M.C.I.* (SAQML-94-01214), Ladouceur, January 19, 1998.

[10] *Lam, Choon Sang* v. *M.E.I.* (IAD W90-00033), Bell, February 20, 1991 (reported as *Sang, Lam Choon* in Federal Court). The issue in this case was whether the appellant knew what was meant by a significant economic contribution and, therefore, what was expected of him. The Appeal Division found that the appellant understood that in investing a couple of thousand of dollars compared to the $110,000 promised in his proposal, he was clearly not making a substantial contribution.

officers to review the business proposal with the entrepreneur to ensure that the entrepreneur understands the proposal and to advise the entrepreneur if the proposal does not meet the requirements of the Regulations.[11] Once it is clear that the entrepreneur stood the conditions that had to be met, it is irrelevant that the entrepreneur fully intended to comply with the condition and that the condition became impossible to fulfill. The removal order is legally valid as long as the entrepreneur understood the conditions, knew the conditions were not met and yet continued to remain in Canada.[12]

Even if the entrepreneur had been previously assured no conditions would be imposed upon him, once terms and conditions are added at the point of landing the entrepreneur must make himself aware of the conditions and cannot plead ignorance of them.[13]

Dependants of the entrepreneur, if landed conditionally themselves, are also subject to removal once the entrepreneur has been found not to have fulfilled the conditions of landing.

6.3.2.1 Discretionary Jurisdiction

If the Appeal Division determines that the entrepreneur knowingly contravened the terms and conditions of landing, then the removal order is valid in law. However, the appeal may also be considered based on "all the circumstances of the case".[14] In considering "all the circumstances" for an entrepreneur, the panel may consider the extent to which the entrepreneur made serious efforts to comply with the terms and conditions. For example, the panel may find that despite the entrepreneur's conscientiousness and diligence, circumstances outside of the entrepreneur's control hindered compliance with the conditions.[15] Evidence of continuing efforts of a substantial nature to meet the investment and business requirements may be considered.[16]

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[11] *Liu, Kui Kwan* v. *M.E.I.* (IAD V90-01549), Wlodyka, August 20, 1991. In this case the appellant was found not to have knowingly contravened the terms and conditions of his landing. The panel cited the failure of the immigration officer to review the business proposal with the appellant and to advise him of the meaning of the term "significant economic contribution". The appellant's first attempt at establishing a business had failed and he subsequently invested in a laundromat. Despite meetings with an immigration officer, he was never alerted to the fact that this investment might not be considered a substantial economic contribution. There is a duty on the immigration officer to assist the entrepreneur and to advise the entrepreneur if the business proposal does not meet the terms and conditions of landing.

[12] *Kim, Mann* v. *M.C.I.* (IAD T98-02335), D'Ignazio, October 7, 1998.

[13] *Radovici, Lucian and Tatiana Mateuteanu v. M.C.I.* (IAD nos. M98-05287, M98-05288), Sivak, October 1, 1999. In this appeal the appellant had been caught between Immigration Quebec officials who exempted him from complying with conditions and Immigration Canada officials who imposed standard terms and conditions at the point of landing. The appellant had not concerned himself with the conditions imposed upon his arrival as he relied upon the assurances of the Quebec officials who approved his visa that conditions would not apply to him.

[14] Please see Chapter 9 for general discussion of factors to be considered for special relief.

[15] *Liu, supra*, footnote 11. The Appeal Division examined how conscientious the appellant had been in his attempt to comply with the terms and conditions and considered all the factors which hindered compliance.

[16] In *De Kock* v. *M.C.I.* (IAD V96-00823), Clark, December 17, 1996, the appellant was granted a two-year stay in order to try and fulfill the conditions. He submitted evidence to show a guaranteed $100,000 investment, the acquisition of a business licence, and the proven track record of his proposed business in other locations. In

The Appeal Division may also consider a breach of procedural fairness by the visa officer as a factor in the exercise of its discretionary jurisdiction.[17]

6.3.3 Fiancées

The most commonly seen paragraph 27(1)(b) removal order appeals are for fiancées. Fiancées of sponsors are landed subject to the condition that the fiancée marry the sponsor within 90 days of landing. In order to contravene this condition, the fiancée need only have understood that the fiancée was to have married the sponsor within 90 days of landing but not have complied with that condition.[18]

6.3.3.1 Discretionary Jurisdiction

If the Appeal Division determines that the removal order is valid in law, that is, that the fiancée did not marry the sponsor within 90 days, the Appeal Division will determine whether to exercise its discretionary jurisdiction: it will determine whether "having regard to all the circumstances of the case", the fiancée should not be removed from Canada.

In the case of a fiancée, among the factors the panel may consider are that the breach of terms and conditions was not the fiancée's fault or that it may have been unreasonable to expect the fiancée to fulfil the condition. For example, where the fiancée has been the victim of abuse at the hands of the sponsor, it would be unreasonable to expect the condition of marriage to be fulfilled.[19] Also, where the fiancée has acted in good faith and fully intended to marry the sponsor, but the sponsor has refused to honour the commitment, the Appeal Division may consider granting special relief. In these situations, the Appeal Division may take into consideration the fact that the fiancée voluntarily reported the inability to comply with the condition.[20]

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.

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

[18] *Aujla, supra,* footnote 3; *Gabriel, supra,* footnote 2.

[19] *Premraj, Mahadi* v. *M.C.I.* (IAD T95-00345), Townshend, May 8, 1996. In this case the sponsored fiancée had been physically and sexually abused by the sponsor. While the removal order was legally valid, as she understood the condition of marriage within 90 days and knew she was in contravention of it, the appeal was allowed on "all the circumstances of the case". The panel took into consideration the fact that the appellant was not at fault in not marrying the sponsor and had suffered abuse at his hands.

[20] *Fang* v. *M.C.I.* (IAD V96-01092), McIsaac, August 14, 1996. The Appeal Division considered that (1) the events were beyond the appellant's control as the sponsor refused to proceed with the marriage; (2) she acted in good faith and had intended to marry the sponsor; and (3) when it became clear she could not fulfill the terms, she sought legal advice.

6.4 VARIATION OF TERMS AND CONDITIONS

6.4.1 Relevant legislative provision

Section 15 provides as follows:

> Where a permanent resident has been granted landing subject to terms and conditions imposed pursuant to subsection 14(5) or (6), the permanent resident may at any time make an application to an immigration officer or to an official of the province, as the case may be, to vary or cancel any of those terms and conditions.

6.4.2 Interpretation of section 15

A permanent resident, landed subject to terms and conditions, may apply to an immigration officer to have those conditions varied or cancelled. It is important to note that the permanent resident does not have a right to apply to the Appeal Division to have those terms and conditions varied. There may be a duty upon the immigration officer to inform a permanent resident of his or her right to make such an application under section 15.[21] An immigration officer can only vary terms and conditions within the confines of allowable conditions set out in the Regulations. On an application to cancel a condition, the Act does not provide criteria for this determination and the immigration officer may consider all the circumstances of the case. The decision of an immigration officer on an application to vary or cancel a condition must be made in accordance with the principles of fairness.

[21] *Liu, supra,* footnote 11. The panel in *Liu* stated that there is a duty upon the immigration officer to inform the person of the right to apply under section 15 to have the terms and conditions varied or cancelled. It referred to *Aujla* as authority for that proposition.

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CHAPTER 7

7. CRIMINAL GROUNDS FOR REMOVAL

7.1. INTRODUCTION

The appeals most frequently heard at the Appeal Division stem from criminality-based removal orders.[1] Of these appeals, the most common involve removal orders against permanent residents.[2] A permanent resident may be ordered removed from Canada if he or she is a person found described in subsection 27(1) of the *Immigration Act* (the "Act"). Paragraph 27(1)(a) incorporates certain criminality provisions from section 19. The following criminality provisions can result in a permanent resident being ordered removed from Canada:

the person is a member of an inadmissible class described in ss. 19(1)(c.2),(d), (e), (f), (g), (k) or (l)	s. 27(1)(a)
- criminality – membership in criminal organization	s. 19(1)(c.2)
- criminality – organized crime	s. 19(1)(d)
- subversion, espionage, terrorism, by individuals and members of a group	ss. 19(1)(e), and (f)
- acts of violence, by individuals and members of a group	s. 19(1)(g)
- danger to security	s. 19(1)(k)
- senior members of governments engaged in gross human rights violations	s. 19(1)(l)
Criminality – equivalent conviction outside Canada (maximum imprisonment 10 years or more)	s. 27(1)(a.1)(i)
Criminality – committed equivalent act outside Canada (maximum imprisonment 10 years or more)	s. 27(1)(a.1)(ii)
Criminality – before being granted landing, convicted in Canada of indictable or hybrid offence (maximum imprisonment less than 10 years)	s. 27(1)(a.2)

[1] Section 70 of the Act.

[2] Subsection 70(1) of the Act gives permanent residents the right to appeal the removal order on one or both of two grounds: (1) the legal validity of the removal order; and (2) all the circumstances of the case.

Criminality – before being granted landing, conviction outside Canada equivalent to s. 27(1)(a.2) (maximum imprisonment less than 10 years)	s. 27(1)(a.3)(i)
Criminality – before being granted landing, committed act outside Canada equivalent to s. 27(1)(a.2)	s. 27(1)(a.3)(ii)
has been convicted of an offence under any Act of Parliament for which a term of imprisonment of more than six months has been imposed, or five years or more may be imposed	s. 27(1)(d)
war criminal (s. 19(1)(j)) who was granted landing subsequent to the coming into force of that paragraph (i.e., S.C. 1987, c. 37, in force October 30, 1987)	s. 27(1)(g)
war criminal who became a member of the inadmissible class in s. 19(1)(j) subsequent to the coming into force of that paragraph (i.e., S.C. 1987, c. 37, in force October 30, 1987)	s. 27(1)(h)

Convention refugees who are not permanent residents and persons with valid visas seeking landing or entry[3] may also be the subject of removal orders based on criminality and have a right of appeal to the Appeal Division[4]. The criminality provisions which may result in the removal of these persons can be found in subsections 19(1) and (2) and subsection 27(2) of the Act.

As noted in Chapter 2, subsection 70(5) eliminates the right of appeal to the Appeal Division of a person facing a removal order based on criminality if the Minister is of the opinion that the person is a danger to the public *and* the person has been found described in any of paragraphs 19(1)(c), (c.1), (c.2), or (d), or paragraphs 27(1)(a.1) or (d).

To trigger the operation of the various grounds of inadmissibility based on a Canadian criminal conviction, the offence much be punishable under an Act of Parliament. Thus a person convicted of criminal contempt of court would not be caught: the punishment for criminal contempt is not codified, instead the power to punish for it is derived from the common law.[5]

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[3] Subsection 70(2) of the Act.

[4] Subsection 70(3) of the Act provides two grounds of appeal for Convention refugees who are not permanent residents and persons with valid visas: (1) the legal validity of the removal order; and (2) the existence of compassionate and humanitarian considerations.

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

7.2. PARAGRAPH 27(1)(a)

As stated above, paragraph 27(1)(a) incorporates several inadmissibility provisions from section 19. Cases involving paragraphs 19(1)(c.2), (d), (e), (f), (g) and (k) rarely come before the Appeal Division. Recently, however, the Appeal Division has seen several cases under paragraph 19(1)(l).

7.2.1. Paragraph 19(1)(l)

Paragraph 19(1)(l) provides as follows:

> 19(1) No person shall be granted admission who is a member of any of the following classes:
>
> (l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations or war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.
>
> 19(1.1) For the purposes of paragraph (1)(l), "senior members of or senior officials in the service of a government" means persons who, by virtue of the position they hold or have held, are or were able to exert a significant influence on the exercise of government power and, without limiting its generality, includes
>
> (a) heads of state or government;
> (b) members of the cabinet or governing council;
> (c) senior advisors to persons described in paragraph (a) or (b);
> (d) senior members of the public service;
> (e) senior members of the military and of the intelligence and internal security apparatus;
> (f) ambassadors and senior diplomatic officials; and
> (g) members of the judiciary.

The enactment of the *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24), which came into force on October 23, 2000, resulted in the repeal of subsection 7(3.76) of the *Criminal Code* and the following consequential amendment to paragraph 19(1)(l) of the Act:

> (l) persons who are or were senior members of or senior officials in the service of a government that is or was, in the opinion of the Minister, engaged in terrorism, systematic or gross human rights violations, or any act or omission that would be an offence under any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

These two provisions, paragraph 19(1)(l) and subsection 19(1.1), raise some interesting issues which the Appeal Division has had to address.

In the past, the Appeal Division had taken two different approaches to interpreting paragraph 19(1)(l). According to one interpretation,[6] paragraph 19(1)(l) and the definition in subsection 19(1.1) raise an *irrebuttable* presumption; that is, once a person falls within one of the categories listed within paragraphs 19(1.1)(a) through (g), a presumption arises that the person is or was able to exert a significant influence on the exercise of government power and the person cannot lead evidence to rebut this presumption. The person would, therefore, be inadmissible under paragraph 19(1)(l). According to the second interpretation,[7] these two statutory interpretations raise a *rebuttable* presumption; that is, a person who falls within one of the enumerated categories may present evidence to the Appeal Division to show that he or she is or was not "able to exert a significant influence on the exercise of government power".

The Federal Court of Appeal[8] has resolved the issue, finding that paragraph 19(1)(l) does not raise a rebuttable presumption. Evidence tendered by an appellant refuting his or her involvement in a regime described in paragraph 19(1)(l) does not rebut the presumption that arises once all the definitional elements of paragraph 19(1)(l) and subsection 19(1.1) have been met. Only the Minister has discretion with respect to the statutory exception in light of all the evidence as to the person's involvement in the regime.

The Appeal Division has found that subsection 19(1.1) and therefore paragraph 19(1)(l) may extend to persons holding positions other than those specifically mentioned in (a) to (g).[9] In those situations there would have to be evidence presented that the person "is or was able to exert a significant influence on the exercise of government power".

As for the designation of a government as one which engaged in terrorism, systematic or gross human rights violations, war crimes or crimes against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*, the Appeal Division has found that "[i]t is clear that ... it is the Minister who determines that a particular government is or was engaged in the prescribed activities set out..."[10] The Appeal Division cannot make that determination. The Federal Court of Appeal also concluded that, in order to apply this provision, it was not necessary for the Minister to first refuse to apply the exemption set out in the provision. The onus was on the

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[6] See *Elmi, Zaheo Abdi* v. *M.C.I.* (IAD M95-06832), Blumer, August 21, 1996 and *St-Amand, Betty* v. *M.C.I.* (IAD M94-07317), Blumer, Durand, Angé, August 24, 1995.

[7] See *Adam, Hawa Ibrahim* v. *M.C.I.* (IAD T95-05027), Townshend, August 16, 1996; *Mursal, Mohamoud Sheikh* v. *M.C.I.* (IAD M96-08958), Ramsay, January 30, 1997; *Karimzada, Mohamad Sharif* v. *M.C.I.* (IAD T96-01020), Townshend, April 11, 1997.

[8] *Canada (Minister of Citizenship and Immigration)* v. *Adam,*[2001] 2 F.C. 337 (C.A.), upholding *M.C.I.* v. *Adam, Hawa Ibrahim* (F.C.T.D., no. IMM-3380-96), Jerome, August 29, 1997.

[9] See *Elmi, supra,* footnote 6 and *St-Amand, supra,* footnote 6.

[10] *Karimzada, supra,* footnote 7.

person to apply, and the person would only be rendered exempt from the application of the provision if the Minister made a positive determination.[11]

Where a person faces removal based on paragraph 19(1)(l), the right of appeal to the Appeal Division is limited by subsection 70(4). Only the legal validity of the removal order may be considered and there is no jurisdiction to grant special relief.[12]

7.3. PARAGRAPHS 27(1)(a.1) and (a.3)

A permanent resident may be removed for acts committed outside of Canada which are offences in Canada and for which he or she was convicted outside of Canada. These two provisions deal with the manner in which foreign convictions and commissions of offences are evaluated and equated to Canadian offences and convictions. For a detailed discussion of criminal equivalency, see Chapter 8.

7.4. PARAGRAPH 27(1)(d)

The most common ground for removal of a permanent resident is that the person has been found described in paragraph 27(1)(d). Paragraph 27(1)(d) provides as follows:

> 27(1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who
>
> ...
>
> (d) has been convicted of an offence under any Act of Parliament, other than an offence designated as a contravention under the *Contraventions Act*, for which a term of imprisonment of more than six months has been, or five years or more may be, imposed;

It is important to note that a person is described if he or she was convicted of an offence for which *either* a term of imprisonment of more than six months has been, *or* five years or more may be imposed. Both conditions need not be met for a permanent resident to fall within this provision.

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[11] *Adam* (F.C.A.), *supra,* footnote 8. The Court held that the words "have satisfied" in the excepting language suggests that a Ministerial exception is to be made before the decision of the visa officer. As the applicant failed to seek a Ministerial exception in a timely fashion, such an exception was no longer available to him.

[12] Where a member of the family class is being refused *admission* by virtue of falling within paragraph 19(1)(l), the sponsor has a right of appeal under subsection 77(3) of the Act, on both grounds of legal validity and humanitarian or compassionate considerations. See *Adam* (F.C.A.)*, supra,* footnote 8.

The most frequent offences involved are those found in the *Criminal Code* and the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19), formerly the *Narcotic Control Act*. It should be noted that legal challenges to a removal order based on paragraph 27(1)(d) are not common. In most cases, the legal validity of the order is conceded and the appeal proceeds on the discretionary jurisdiction of the Appeal Division.

7.4.1. Meaning of "Conviction"

The word "conviction" means a conviction which has not been expunged.[13] For further discussion on convictions, refer to Chapter 8, including the effect of a discharge and a pardon.

Where no issue of an appeal of a conviction is raised at the inquiry (or hearing), the adjudicator (or member) is entitled to rely on the evidence adduced by the parties. There is no duty to conduct an inquiry beyond the evidence before the adjudicator (or member).[14]

7.4.2. The *Contraventions Act*

Under the *Contraventions Act*,[15] which came into force on August 1, 1996, the Governor in Council may make regulations designating federal offences as "contraventions" and enforcement authorities may issue tickets to persons charged with such offences, rather than using procedures under the *Criminal Code*.[16] The *Contraventions Regulations* designate certain offences under the following acts as "contraventions": the *Canada Shipping Act*, the *Department of Transport Act*, the *Government Property Traffic Act*, and the *National Parks Act.*

The offences designated as "contraventions" are relatively minor offences, and paragraph 27(1)(d) of the *Immigration Act* specifically excludes such offences from the list of offences that constitute grounds for removal from Canada.

7.5. LEGAL VALIDITY

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

An appellant may argue that he or she was wrongly convicted. The Appeal Division has held that it cannot go behind the conviction in considering the legal validity of the removal order.[17] However, in assessing the legal validity of the removal order the Appeal Division may

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

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

[15] *Contraventions Act*, S.C. 1992, chap. 47

[16] See *Contraventions Act*, section 8.

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

consider whether the conviction was accurately categorized by the adjudicator as falling within subsection 27(1).

If the conviction which is the basis for the removal order has been overturned on appeal, then the Appeal Division can quash the removal order[18] because the hearing is a hearing *de novo.* However, the Appeal Division does not have to wait for the appeal of the conviction to be heard before disposing of the appeal.[19]

7.6. DISCRETIONARY JURISDICTION

In dealing with a removal order appeal, where the basis of the removal order is one of the criminality provisions, the Appeal Division may also deal with the second ground of appeal; that is, that in *"all the circumstances of the case"* (for permanent residents under subsection 70(1)) or *"having regard to the existence of compassionate or humanitarian considerations"* (for other persons under subsection 70(3)), the person should not be removed from Canada. For a detailed discussion of the Appeal Division's discretionary jurisdiction, see Chapter 9.

[18] See *Kalicharan* v. *Canada (Minister of Manpower and Immigration),* [1976] 2 F.C. 123 (T.D), where the applicant appealed the sentence but not the conviction, and subsequently the sentence appeal was allowed and the applicant was granted a conditional discharge. But see also *Wade, William Jerry* v. *M.C.I.* (F.C.T.D., no. IMM-1021-94), Gibson, August 11, 1994, where the Court distinguished *Kalicharan* in a case where the applicant sought a writ of prohibition to stop the execution of a deportation order based on a conviction that was subsequently quashed on appeal. In overturning the conviction, the appeal court ordered a new trial only on the issue of whether the applicant was guilty of second degree murder or manslaughter; it left beyond doubt the applicant's culpability for a very serious offence.

[19] *Kalicharan*, *ibid*.

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CHAPTER 8
FORMATTING REQUIRED ONES CORRECTIONS ACCEPTED
8. CRIMINAL EQUIVALENCY

8.1. INTRODUCTION

There are several areas in the *Immigration Act* (the "Act") where the issue of equivalency of foreign criminal convictions to Canadian offences arises. If a person is found described in one of the equivalency provisions that render him or her inadmissible to Canada or removable from Canada, a removal order may be issued against that person. As indicated earlier, certain persons (notably, permanent residents) will then have a right of appeal to the Appeal Division from the removal order on both grounds of appeal, that is, that the removal order is not legally valid and that the discretionary jurisdiction of the Appeal Division should be exercised in the appellant's favour.

Paragraphs 27(1)(a.1) and (a.3) are the criminal equivalency provisions for the removal of permanent residents and paragraph 27(2)(a) deals with non-permanent residents inside Canada, while paragraphs 19(1)(c.1) and 19(2)(a.1) and (b) deal with the criminally inadmissible classes at the port of entry and in other contexts. This chapter also canvasses the related provisions dealing with organized crime—paragraphs 19(1)(c.2) and 19(1)(d)—and war crimes and crimes against humanity—paragraph 19(1)(j).

8.2. RELEVANT LEGISLATIVE PROVISIONS

8.2.1. Inadmissible classes

The legislative provisions applicable in criminal equivalency, which render persons inadmissible to Canada, are found in the Act at paragraphs 19(1)(c.1) and 19(2)(a.1) and (b). Related provisions are found in paragraphs 19(1)(c.2), (d) and (j).

(a) very serious offences (minimum 10 years' imprisonment)—foreign convictions or "commissions"

- Subparagraph **19(1)(c.1)(i)** refers to persons who there are reasonable grounds to believe have been *convicted, outside Canada*, of very serious offences. *In Canada* these would be federal offences *punishable by 10 or more years' imprisonment*. (Subject to Ministerial rehabilitation after a five-year post-sentence expiry period.)

- Subparagraph **19(1)(c.1)(ii)** refers to persons who there are reasonable grounds to believe have *committed, outside Canada*, very serious offences. *In Canada* these would be federal offences *punishable by 10 or more years' imprisonment*. (Subject to Ministerial rehabilitation after a five-year post-commission period.)

19.(1)(c.1) persons who there are reasonable grounds to believe

(i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or

(ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

Immigration Act, R.S.C., 1985, c. I-2, s. 19(1)(c.1) (as amended by S.C. 1992, c. 49, s. 11(1) and by S.C. 1995, c. 15, s. 2(1))

(b) less serious offences (up to 10 years' imprisonment)—foreign convictions or "commissions"

- Subparagraph **19(2)(a.1)(i)** refers to persons who there are reasonable grounds to believe have been *convicted, outside Canada*, of less serious offences. *In Canada* these would be federal offences (including "hybrid offences") *punishable by way of indictment by less than 10 years' imprisonment*. (Subject to Ministerial rehabilitation after a five-year post-sentence expiry period.)

- Subparagraph **19(2)(a.1)(ii)** refers to persons who there are reasonable grounds to believe have *committed, outside Canada*, less serious offences. *In Canada* these would be federal offences (including "hybrid offences") *punishable by way of indictment by less than 10 years' imprisonment*. (Subject to Ministerial rehabilitation after a five-year post-commission period.)

19.(2)(a.1) persons who there are reasonable grounds to believe

(i) have been convicted outside Canada of an offence that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years, or

(ii) have committed outside Canada an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years,

except persons who have satisfied the Minister that they have rehabilitated themselves and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

Immigration Act, R.S.C., 1985, c. I-2, s. 19(2)(a.1) (as amended by S.C. 1992, c. 49, s. 11(5) and by S.C. 1992, c. 49, s. 122(a) and (c))

(c) two or more minor offences (summary convictions)

- Subparagraph **19(2)(b)(ii)** refers to persons who there are reasonable grounds to believe have been *convicted, outside Canada*, of two or more minor offences, *not arising out of a single occurrence*. *In Canada* these would be federal offences *punishable by summary conviction*. (Provided that five years have elapsed since any sentence expiry period.)

- Subparagraph **19(2)(b)(iii)** refers to persons who have been *convicted in Canada* of a federal *summary conviction* offence *and* who there are reasonable grounds to believe have been *convicted outside Canada* of an offence that, if committed in Canada, would constitute a federal *summary conviction* offence. (Provided that five years have elapsed since any sentence expiry period.)

19.(2)(b) persons who…

(ii) there are reasonable grounds to believe have been convicted outside Canada of two or more offences, not arising out of a single occurrence, that, if committed in Canada, would constitute summary conviction offences under any Act of Parliament, or

(iii) have been convicted in Canada under any Act of Parliament of a summary conviction offence, other than an offence designated as a contravention under the *Contraventions Act*, and there are reasonable grounds to believe have been convicted outside Canada of an offence that, if committed in Canada, would constitute a summary conviction offence under any Act of Parliament

where any part of the sentences imposed for the offences was served or to be served at any time during the five year period immediately preceding the day on which they seek admission to Canada.

Immigration Act, R.S.C., 1985, c. I-2, s. 19(2)(b) (as amended by S.C. 1992, c. 49, s. 11(5) and by S.C. 1992, c. 49, s. 122(a) and (c), and as further amended by S.C. 1995, c. 15, s. 2(2))

(d) organized crime

- Paragraph **19(1)(c.2)** refers to persons who there are reasonable grounds to believe are or were *members of a criminal organization*.

- Paragraph **19(1)(d)** refers to persons who there are reasonable grounds to believe will commit a criminal offence or will engage in a pattern of criminal activity in concert with others.

19.(1)(c.2) persons who there are reasonable grounds to believe are or were members of an organization that there are reasonable grounds to believe is or was engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence under the *Criminal Code* or *Controlled Drugs and Substances Act* that may be punishable by way of indictment or in the commission outside Canada of an act or omission that, if committed in Canada, would constitute such an offence, except persons who have satisfied the Minister that their admission would not be detrimental to the national interest.

Immigration Act, R.S.C., 1985, c. I-2, s. 19(1)(c.2) (as amended by S.C. 1992,

c. 49, s. 11(1) and by S.C. 1996, c. 19, s. 83)

19.(1)(d) persons who there are reasonable grounds to believe will

(i) commit one or more offences that may be punishable under any Act of Parliament by way of indictment, other than offences designated as contraventions under the *Contraventions Act,* or

(ii) engage in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of any offence that may be punishable under any Act of Parliament by way of indictment.

Immigration Act, R.S.C., 1985, c.I-2, s. 19(1)(d) (as amended by S.C.1992, c. 49, s. 11 and by S.C. 1992, c. 47, s. 77)

(e) war crimes and crimes against humanity

- Between October 30, 1987 (when it came into force) and October 23, 2000 (when it was amended), paragraph **19(1)(j)** referred to persons who there are reasonable grounds to believe have *committed, outside Canada, a war crime or a crime against humanity and* that, if it had been committed in Canada, would have constituted *an offence under Canadian law in force at that time*.

19.(1)(j) persons who there are reasonable grounds to believe have committed an act or omission outside Canada that constituted a war crime or a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code* and that, if it had been committed in Canada, would have constituted an offence against the laws of Canada in force at the time of the act or omission.

Immigration Act, R.S.C., 1985, c. I-2, s. 19(1)(j) (as amended by R.S.C., 1985 (3rd Supp.), c. 30, s. 3 and by 1992, c. 49, s. 11(3))

- As a result of the enactment of the *Crimes Against Humanity and War Crimes Act* (S.C. 2000, c. 24) and the repeal of subsection 7(3.6) of the *Criminal Code,* paragraph **19(1)(j)** was amended as of October 23, 2000, and now refers to "persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act.*" The latter legislation sets out definitions of "war crimes", "crimes against humanity", and "genocide", both within and outside of Canada. In *Varela,*[1] the Federal Court—Trial Division held that the two provisions are "in substance" the same, though not identical.

[1] *M.C.I.* v. *Varela, Jamie Carrasco* (F.C.T.D., no. IMM-2807-00), Gibson, February 14, 2002.

19.(1)(j) persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the *Crimes Against Humanity Act*.

Immigration Act, R.S.C., 1985, c. I-2, s. 19(1)(j) (as amended by S.C., 2000, c. 24, s. 55(1))

8.2.2. Permanent resident removal classes

For the removal of permanent residents there are two applicable criminal equivalency provisions, namely paragraphs 27(1)(a.1) and (a.3). In these cases, the onus on the Minister to establish "commissions" requires a higher standard of proof, namely "based on a balance of probabilities". Pursuant to paragraph 27(1)(a), a permanent resident may also be subject to removal based on the inadmissible classes found in paragraphs 19(1)(c.2) and (d)—organized crime, but not 19(1)(j)—war crimes and crimes against humanity. The inadmissible class found in paragraph 19(1)(j) has to be coupled with a report pursuant to paragraph 27(1)(g) or (h).

(a) very serious offences (minimum 10 years' imprisonment)—foreign convictions or "commissions"

- Subparagraph **27(1)(a.1)(i)** refers to persons who have been *convicted, outside Canada*, of very serious offences. *In Canada* these would be federal offences *punishable by 10 or more years' imprisonment*. (Subject to Ministerial rehabilitation after a five-year post-sentence expiry period.)

- Subparagraph **27(1)(a.1)(ii)** refers to persons who, on a balance of probabilities, have *committed, outside Canada*, very serious offences. *In Canada* these would be federal offences *punishable by 10 or more years' imprisonment*. (Subject to Ministerial rehabilitation after a five-year post-commission period.)

27.(1) ... a permanent resident … who…

(a.1) outside Canada,

(i) has been convicted of an offence that, if committed in Canada, constitutes an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more, or

(ii) has committed, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that would constitute an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence that may be punishable under any Act of Parliament by a maximum term of imprisonment of ten years or more,

except a person who has satisfied the Minister that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be.

Immigration Act, R.S.C., 1985, c. I-2, s. 27(1)(a.1) (as amended by S.C. 1992, c. 49, s. 16(2) and by S.C. 1995, c. 15, s. 5(1))

(b) less serious offences (up to 10 years' imprisonment)

- Paragraph **27(1)(a.3)** refers to persons who, *before landing*, have been *convicted of, or committed, an offence outside Canada* which, if committed *in Canada, would come within* the provisions of *paragraph 27(1)(a.2)*. For foreign "commissions", the act or omission must constitute an offence under the laws of the foreign jurisdiction. (Subject to Ministerial rehabilitation after a five-year post-sentence expiry period or five-year post-commission period, as applicable.)

27.(1) ... a permanent resident … who…

(a.3) before being granted landing,

(i) was convicted outside Canada of an offence that, if committed in Canada, would constitute an offence referred to in paragraph (a.2), or

(ii) committed outside Canada, in the opinion of the immigration officer or peace officer, based on a balance of probabilities, an act or omission that constitutes an offence under the laws of the place where the act or omission occurred and that, if committed in Canada, would constitute an offence referred to in paragraph (a.2),

except a person who has satisfied the Minister that the person has been rehabilitated and that at least five years have elapsed since the expiration of any sentence imposed for the offence or since the commission of the act or omission, as the case may be;

Immigration Act, R.S.C., 1985, c. I-2, s. 27(1)(a.3) (as amended by S.C. 1992, c. 49, s. 16(2))

27.(1)(a.2) [a permanent resident who] before being granted landing, was convicted in Canada of

(i) an indictable offence, or

(ii) an offence for which the offender may be prosecuted by indictment or for which the offender is punishable on summary conviction,

that may be punishable by way of indictment under any Act of Parliament by a maximum term of imprisonment of less than ten years;

Immigration Act, R.S.C., 1985, c. I-2, s. 27(1)(a.2) (as amended by S.C. 1992, c. 49, s. 16(2))

8.2.3. Non-permanent residents in Canada

- Paragraph **27(2)(a)** incorporates, by reference, the criminally inadmissible categories referred to in paragraphs 19(1)(c.1), (c.2), (d) and (j), and 19(2)(a.1) and (b).

27.(2) ... a person in Canada, other than a Canadian citizen or permanent resident, … who

(a) is a member of an inadmissible class, other than an inadmissible class described in paragraph 19(1)(h) or 19(2)(c).

Immigration Act, R.S.C., 1985, c. I-2, s. 27(2)(a) (as amended by S.C. 1992, c. 49, s. 16(6))

8.3. GENERAL PRINCIPLES

8.3.1. Equating the foreign offence to a Canadian federal statute

When assessing the admissibility, or removability, of a person who has been convicted of, or is believed to have committed, an offence outside Canada, one must determine whether the act or activity in question would constitute an offence in Canada. The existence of a conviction *per se* is not determinative of the issue; nor is it a requirement in the case of a "commission" (i.e., an act or omission).

The key to determining criminal inadmissibility lies in accurately equating the foreign offence to a Canadian federal statute, regardless of any differences in names or wording of the statutory offences under consideration. In other words, the act must be found to be an offence as defined by Canadian law.[2]

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

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

To trigger the operation of the various grounds of inadmissibility based on equivalency to a Canadian criminal offence, the equivalent Canadian offence much be punishable under an Act of Parliament. Thus a person convicted of criminal contempt of court would not be caught: the punishment for criminal contempt is not codified, instead the power to punish for it is derived from the common law.[3]

point of view, of the offence the person has been found to have committed and not the actual consequence of that finding as determined under foreign domestic law.

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

8.3.2. Determining equivalence

Leading Federal Court Dicta

Brannson v. Canada (Minister of Employment and Immigration), [1981] 2 F.C. 141 (C.A.), at 152-153, 153-154, per Ryan J.A.:

> Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential elements correspond. One must, of course, expect differences in the wording of statutory offences in different countries.
>
> ... where, as here, the definition of the foreign offence is broader than, but could contain, the definition of an offence under a Canadian statute, it may well be open to lead evidence of the particulars of the offence of which the person under inquiry was convicted. ... Such particulars might so narrow the scope of the conviction as to bring it within the terms of the Canadian offence.

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

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

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

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

8.3.2.1. Where the foreign legislation is available

The starting point is a comparison of the wording of the foreign and Canadian statutes with a view to determining the "essential elements" or "ingredients" of the respective offences. This would also entail a comparison of "defences" available in each jurisdiction.[4]

The provisions need not be identical, nor is their wording determinative of the issue. While detailed proof of exact equivalency is not required, the essential elements of an offence committed outside Canada must be similar to one known in Canada. One cannot assume the equivalence of *Immigration Act* offences, for example, to an alleged foreign offence of which the essential elements are not known.[5]

It might be in a given case that a number of Canadian provisions are found to be equivalent. There is no legal requirement to find the equivalent that is "most similar" and make the decision with respect to that provision only.[6]

A consideration of the Canadian and foreign statutes might well entail a consideration of how a particular provision has been interpreted in the respective jurisprudence.[7] However, the procedural or evidentiary rules of the two jurisdictions, including the matter of burden of proof, need not be compared.[8]

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

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

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

[7] In *Masasi, Abdullai Iddi* v. *M.C.I.* (F.C.T.D., no. IMM-1856-97), Cullen, October 23, 1997. Reported: *Masasi* v. *Canada (Minister of Citizenship and Immigration)* (1997), 40 Imm. L.R. (2d) 133 (F.C.T.D.), the Court determined that the adjudicator erred by not addressing the meaning in Canadian and U.S. law of the term "bodily harm", which was found to be an essential element of the offence under consideration (assault). "Clearly, a mere comparison of the words of the two provisions, without examining the legal content of those words, is insufficient in determining equivalency …". In *Popic, Bojan* v. *M.C.I.* (F.C.T.D., no. IMM-5727-98), Hansen, September 14, 2000, the Court held that the visa officer erred in importing into the analysis considerations that are not relevant to a determination of the element of "false pretences" or "fraud", namely that the applicant, like all residents of Germany, knows they must pay for public transit and that being caught three times is quite exceptional.

[8] In *Li, supra*, footnote 4, the appellant had argued that because the Hong Kong ordinance placed the burden of proving the defence of lawful authority or reasonable excuse on the accused, it offends subsection 11(d) of the *Canadian Charter of Rights and Freedoms* (viz. the presumption of innocence). Mr. Justice Strayer said, at 256:

> What must be compared are the factual and legal criteria for establishing the offence both abroad and in Canada. It is not necessary to compare the adjectival law by which a conviction might or might not be entered in each country. ... The Act does not contemplate a retrial of the case applying Canadian rules of evidence. Nor does it contemplate an examination of the validity of the conviction abroad. This is so whether the Canadian standards of procedure or evidence sought to be applied are based on the Charter, statute, or

If the essential elements *are equivalent in all relevant respects* to those of the Canadian offence, or *if the foreign offence is "narrower" than the Canadian offence*,[9] then it might be possible to make a finding of equivalency unless the person can argue that there are relevant defences available with respect to the offence in Canada which were not available in the foreign jurisdiction. Although the elements of the Canadian offence must include within them the elements of the foreign offence, they need not be identical.

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

> common law. ... While proceedings in Canada under the *Immigration Act* must no doubt be conducted in accordance with the Charter, it is not inappropriate for Canadian tribunals to recognize and accept the validity of foreign legal systems without measuring them against the Charter.

The Court then went on to conclude, at 258, that

> ... in determining the equivalence of offences for the purposes of subparagraph 19(2)(a.1)(i) an adjudicator should not compare the procedural or evidentiary rules of the two jurisdictions, even if the Canadian rules are mandated by the Charter.

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

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

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

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

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

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

Where no issue of an appeal of a conviction is raised at the inquiry (or hearing), the adjudicator (or member) is entitled to rely on the evidence adduced by the parties. There is no duty to conduct an inquiry beyond the evidence before the adjudicator (or member).[12]

Steps in Analysis

For foreign convictions, where foreign legislation is available:

1. Has the person been convicted of an offence?

2. Of what offence (in the foreign jurisdiction) has the person been convicted?

3. What are the essential elements or ingredients of that offence?

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

5. (a) If the Canadian offence coincides with or is broader than the foreign offence, there is equivalency.

(b) If the Canadian offence is narrower than the foreign offence, for equivalency to occur there must be evidence that the actual activity for which the person was convicted fell within the scope of the Canadian offence.

In *Li, supra,* footnote 4, the Court determined that the Canadian offence under paragraph 426(1)(a) of the *Criminal Code* was much narrower than section 9 of the Hong Kong *Prevention of Bribery Ordinance* in view of the rather restrictive interpretation given to "corruptly" by the Supreme Court of Canada. While it may have been possible to demonstrate through particulars of the Hong Kong charges, or from the evidence from the trial there, that in fact what the appellant did would also constitute an offence within the Canadian provision, such evidence was not led before the adjudicator.

[11] *Li, supra,* footnote 4.

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

8.3.2.2. Where the foreign legislation is not available

Where the relevant foreign legislation is not available, evidence can be adduced as to the factual foundation for the conviction. That evidence will then be examined to ascertain whether or not it is sufficient to establish that the "essential elements" or "ingredients" of the offence as described in Canada have been proven in the foreign proceedings or otherwise made out on the facts.[13] In all such cases, however, there must be sufficient evidence before the decision-maker to establish the equivalency of the foreign offence to the Canadian one.[14]

Steps in Analysis

Where foreign legislation is not available:

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

2. Is that same conduct punishable under Canadian law?

8.3.2.3. Where the allegation involves the "commission" of an offence outside Canada

The wording of subparagraph 19(1)(c.1)(ii), as well as of subparagraphs 19(2)(a.1)(ii), 27(1)(a.1)(ii), and 27(1)(a.3)(ii), is different from that found in subparagraph (i) of these respective provisions, in that it does not state that the offence in the foreign jurisdiction must constitute an offence in Canada. What subparagraph (ii) provides is that the act or commission must constitute an offence in the

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

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

foreign jurisdiction, and one in Canada. In other words, it appears that there is no requirement that the foreign and Canadian offences must be equivalent.[15]

Steps in Analysis

Where a foreign "commission" is alleged:

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

2. Was it punishable in the foreign jurisdiction?

3. Is that same conduct punishable under Canadian law?

8.3.2.4. *Malum in se* offences

Where the foreign offence falls within a category referred to as *malum in se,* (i.e., an offence such as murder or robbery which is of such a character as to be an offence in all countries), a strict comparison of all of the elements or ingredients may not be necessary.[16]

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[15] This approach was taken by the adjudicator in *M.C.I.* v. *Legault, Alexander Henri* (F.C.A., no. A-47-95), Marceau, MacGuigan, Desjardins, October 1, 1997. Reported: *Canada (Minister of Citizenship and Immigration)* v. *Legault* (1997), 42 Imm. L.R. (2d) 192 (F.C.A), where the Court set out the adjudicator's analysis without considering whether it was the correct interpretation of the *Immigration Act*. Leave to appeal to the Supreme Court of Canada was refused March 12, 1998.

[16] This exception was referred to in *Button* v. *Canada (Minister of Manpower and Immigration)*, [1975] F.C. 277 (C.A.), at 284, and in *Brannson, supra*, footnote 10, at 144. In *Button,* the Court stated: "... in our view, there can be no presumption that the law of a foreign country coincides with a Canadian statute creating a statutory offence, except where the offence falls within one of the traditional offences commonly referred to as *malum in se*." This principle was applied by the Federal Court in *Clarke, Derek* v. *M.E.I.* (F.C.A., no A-588-84), Thurlow, Hugessen, Cowan, October 31, 1984 in relation to assault and robbery. It was also applied by the adjudicator in *Dayan* v. *Canada (Minister of Employment and Immigration)*, [1987] 2 F.C. 569 (C.A), where no evidence was tendered of the criminal statutes of Israel. The adjudicator determined that the applicant had been convicted in Israel of robbery and that robbery is basically theft with violence and fell within the *malum in se* exception. The Court, at 576-577, endorsed a more sophisticated analysis:

> In this case, there was evidence ... that the applicant had been convicted in Israel of either or both of the offences of armed robbery and of robbery. ... at least in common law jurisdictions, they are crimes. We were informed that Israel is a country the system of justice of which is based on the common law ... The essence of the offence of robbery at common law was stealing whether or not such stealing was accompanied by violence, threats of violence or the use of a weapon in its commission. It is a crime because it is an offence which is contrary to society's norms as is reflected in the common law. A statute may codify

The Federal Court of Appeal in *Dayan*,[17] cautioned, however, that

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

8.4. SPECIFIC RULES AND CONSIDERATIONS

8.4.1. "Reasonable grounds to believe"

The issue as to what is meant by "reasonable grounds to believe", as found in paragraphs 19(1)(c.1) and 19(2)(a.1) and (b), as well as in 19(1)(c.2), (d) and (j), has been dealt with by the Federal Court in various contexts. It has been held to require a standard of proof that is lower than the balance of probabilities.

In *Jolly,*[18] in relation to the provisions dealing with subversives, Thurlow J., speaking for the majority, concluded:

> it simply as such or it may, in the codification, include other ingredients requiring proof before a conviction can be obtained. Theft as described in paragraph 283(1)(a) of the *Code*, is an example of a codification which includes the ingredients requiring proof of taking "fraudulently and without colour of right". ...
>
> We do know ... that the crime of robbery at common law has an essential ingredient "stealing" which the specific statute in Canada, section 302 of the *Code*, also has as its essential ingredient. By definition (section 2 of the *Code*) "steal" means to commit theft. Therefore, by virtue of section 283, the taking must be fraudulent and without colour of right. The transcripts of evidence in the record in this case establish beyond doubt ... that the applicant was a party to a theft of money to which none of the participants had any colour of right and the stealing of which was unlawful as the list of criminal convictions discloses. In all the circumstances, particularly since a weapon was used, it is hard to conceive that a plea of colour of right could succeed. Having accepted all of the evidence including the fact that the applicant had been convicted of robbery in Israel and that a weapon had been used in the commission of the offence, it follows that the Adjudicator was entitled to conclude that he had been convicted of an offence punishable under section 302 of the *Code*.

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

[17] *Dayan, supra,* footnote 16, at 578.

> ... It seems to me that the use by the statute of the expression "reasonable grounds for believing" implies that the fact itself need not be established and that evidence which falls short of proving the subversive character of the organization will be sufficient if it is enough to show reasonable grounds for believing that the organization is one that advocates subversion by force, etc. ...
>
> ... No doubt one way of showing that there are no reasonable grounds for believing a fact is to show that the fact itself does not exist. But even when *prima facie* evidence negativing the fact itself had been given by the respondent there did not arise an onus on the Minister to do more than show that there were reasonable grounds for believing in the existence of the fact. ... it was not necessary for him to go further and establish the fact itself of the subersiveness of the organization.

Thus one need not prove in relation to these provisions that a conviction has been registered or that the offence was actually committed; rather, the Minister must merely prove that there are reasonable grounds for so believing. Evidence which raises a *prima facie* case that the person has been convicted or that the person committed the offence would thus be sufficient.

In *Ramirez,*[19] in the context of the exclusion clauses to the Convention refugee definition, the Federal Court of Appeal stated that "the Canadian approach requires that the burden of proof be on the Government, as well as being on a basis of less than the balance of probabilities." The *Ramirez* test was adopted by the Federal Court—Trial Division in *Halm*,[20] *Legault*[21] and *Kiani*,[22] in relation to paragraph 19(1)(c.1) of the *Immigration Act*.

In *Chiau,*[23] a case that dealt with paragraph 19(1)(c.2), the Court stated:

> The standard or proof required to establish "reasonable grounds" is more than a flimsy suspicion, but less than the civil test of balance of probabilities. And, of course, a much lower threshold than the criminal standard of "beyond a reasonable doubt". It is a *bona fide* belief in a serious possibility based on credible evidence. [footnote omitted]

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[18] *Canada (Attorney General and Minister of Manpower and Immigration)* v. *Jolly,* [1975] F.C. 216 (C.A.), at 226, 228-29.

[19] *Ramirez* v. *Canada (Minister of Employment and Immigration),* [1992] 2 F.C. 306 (C.A.), at 314.

[20] *Halm* v. *Canada (Minister of Employment and Immigration),* [1995] 2 F.C. 331 (T.D.), at 346.

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

[22] *Kiani, Raja Ishtiaq Asghar* v. *M.C.I.* (F.C.T.D., no. IMM-3433-94), Gibson, May 31, 1995. Reported: *Kiani* v. *Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 269 (F.C.T.D.), at 273.

[23] *Chiau* v. *Canada (Minister of Citizenship and Immigration),* [1998] 2 F.C. 642 (T.D.), at 658. The Court of Appeal approved of this formulation in *Chiau* v. *Canada (Minister of Citizenship and Immigration),* [2001] 2 F.C. 297 (C.A.), at 320. These cases mirror the Court of Appeal's holding with respect to the standard applicable in Article 1F of the Convention relating to the Status of Refugees, which refers to "serious reasons for considering". In *Sivakumar* v. *Canada (Minister of Employment and Immigration),* [1994] 1 F.C. 433 (C.A.), at 445: "Both of these standards [i.e., "serious reasons for considering" and "reasonable grounds to believe"] require something more than suspicion or conjecture, but something less than proof on a balance of probabilities."

In *Rudolph,*[24] the Federal Court of Appeal commented in relation to section 19(1)(j):

> ... if the Adjudicator erred it was in imposing too high a standard of proof upon the government and in according to the applicant the benefit of the doubt, something to which paragraph 19(1)(j) does not entitle him.

Subparagraphs 27(1)(a.1)(ii) and 27(1)(a.3)(ii), which refer to permanent residents, require that proof of the foreign "commission" be "based on a balance of probabilities".

8.4.2. Sufficiency of evidence

8.4.2.1. Where there is a foreign conviction

Lack of a certificate of conviction, while it leaves something to be desired in the particularity of the evidence, can be overcome by other evidence.[25] The Immigration Appeal Board has held that a letter from the Jamaica Constabulary indicating that their records show a conviction was *prima facie* evidence of inadmissibility.[26]

Where value is one of the elements of an offence, the decision-maker should ensure that evidence is adduced as to the respective exchange values on the date of the commission of the offence with which the person is charged abroad before determining the equivalency of the foreign law for such offence with the Canadian law.[27]

8.4.2.2. Evidence of "commission"

Where there has been no conviction, the ultimate determination as to equivalency, and thus as to the sufficiency of the evidence relating to the foreign "commission" must be made independently by the competent decision-maker (i.e., visa officer[28] or adjudicator), based on the evidence presented to him or her.

In *Legault*,[29] an adjudicator issued a conditional deportation order under subparagraph 19(1)(c.1)(ii) of the *Immigration Act,* based on a U.S. federal grand jury indictment on a variety of criminal offences and the ensuing arrest warrant. The Federal Court—Trial Division judge overturned the adjudicator's decision, holding that the contents of the indictment and the arrest warrant did not constitute evidence of the commission of the alleged criminal offences. The Federal Court of Appeal disagreed with the Trial Division's analogy to criminal law and found that the adjudicator did not err in taking into account the indictment and arrest warrant, nor did

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[24] *Rudolph* v. *Canada (Minister of Employment and Immigration),* [1992] 2 F.C. 653 (C.A.), at 664.

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

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

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

[28] *Choi, Min Su v. M.C.I.* (F.C.T.D., no. IMM-975-99), Denault, May 8, 2000.

[29] *Legault, supra,* footnote 15, overturning *Legault, supra,* footnote 21. The Trial Division had reasoned that an indictment performs the same function in the United States as it does in Canada in that it is the formal legal document containing the alleged indictable criminal offences upon which the accused will be tried. Thus, it did not constitute evidence and may not be used as evidence by the trier of fact in the criminal proceedings.

the adjudicator fail to make an independent determination of the facts. (Subsection 80.1(5) of the *Immigration Act* provides that adjudicators can base their decisions on evidence considered credible or trustworthy in the circumstances.) The adjudicator's weighing of the evidence was entirely within his discretion and was not unreasonable.

In *Kiani,*[30] the adjudicator received in evidence a police report indicating that the applicant had participated in a violent demonstration in Pakistan and had been charged with criminal offences as a result. The applicant acknowledged his participation and claimed he had lost a leg as a result of a gunshot wound. The Federal Court—Trial Division held that the adjudicator had sufficient evidence on which to reasonably conclude that the applicant's testimony that he was not guilty of the charges was neither credible nor trustworthy. Moreover, the adjudicator had made an independent determination on the basis of the evidence before him and did not simply rely on the police report. In upholding the Trial Division decision in *Kiani,* the Federal Court of Appeal[31] commented that the facts before the adjudicator in this case were more extensive than in *Legault,* and noted that, in any event, the Court of Appeal had reversed the Trial Division decision in *Legault*.

In *Ali*,[32] the Federal Court—Trial Division held that the majority of Appeal Division erred in appearing to consider there to be a burden on the applicant to establish his version of the events, including the self-defence argument. The burden of proof rested with the Minister, including the burden to disprove self-defence. The majority also erred in speculating, in the face of a lack of expert evidence, regarding whether the fatal wound was inflicted accidentally or intentionally.

In *Drake,*[33] the Federal Court—Trial Division held that no error was committed in relying on an "Alford plea" in the United States (i.e., a plea bargain—not a confession) to find that, on the balance of probabilities, the applicant had committed the offence in question, and was thus described in subparagraph 27(1)(a.1)(ii) of the *Immigration Act.*

In *Bertold,*[34] the Federal Court—Trial Division held that the IAD erred in admitting into records relating to outstanding charges in Germany, as they were obtained contrary to the laws of Germany, and their admission would thus contravene sections 7 and 8 of the *Canadian Charter of Rights and Freedoms.*

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30 *Kiani, supra,* footnote 22.

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

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

33 *Drake, Michael Lawrence* v. *M.C.I.* (F.C.T.D., no. IMM-4050-98), Tremblay-Lamer, March 11, 1999. Reported: *Drake* v. *Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 218 (F.C.T.D.).

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

8.4.3. The relevant time for assessing equivalency

The relevant time for determining whether the foreign offence has a Canadian equivalent is at the time of the assessment with respect to admissibility, and, in the case of an appeal to the Appeal Division, at the time of the appeal.

For example, *a person may have been convicted of, or committed, acts which at that time would have been indictable offences in* Canada*; however, as a result of changes to the Criminal Code the offences may no longer be indictable at the time of the assessment of equivalency*.

In *Robertson*[35] the applicant was ordered deported pursuant to paragraph 19(1)(c) based on a 1971 conviction of possession of stolen property valued at more than $50, an offence which carried a maximum of 10 years' imprisonment. However, the *Criminal Code* was subsequently amended such that that penalty applied to stolen goods exceeding $200, which amendment was in force at the time of the inquiry in 1978. (According to the evidence, the retail value of the stolen property in question did not exceed $150, and the wholesale value was approximately $45 to $60; thus the maximum punishment at the time would have been imprisonment for two years.) In setting aside the deportation order, the Federal Court of Appeal stated:

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

In *Weso,*[36] the applicant was convicted of "theft over" when that offence was defined as being in possession of stolen goods in excess of $1,000. By the time of the inquiry, the *Criminal Code* had been amended to change the amount to $5,000. Possession of stolen property worth less than $5,000 carried a penalty of no more than two years' imprisonment. The Federal Court—Trial Division held that the adjudicator had erred in attempting to distinguish *Roberston* because of a change in wording of paragraph 19(1)(c); although it no longer contained the word "constitutes", the remaining words still spoke in the present tense. Moreover, the adjudicator's finding that the automobile of which the applicant was in possession, in 1991, was worth more than $5,000 was unsupported by evidence.

On the other hand, *a person may not have been inadmissible criminally at the time of his or her conviction, but has become so as a result of subsequent amendments to the Criminal Code.*

In *Ward*,[37] at the time of the applicant's conviction in Ireland of the offence of false imprisonment, the Canadian equivalent offence, namely forcible confinement, carried a term of

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[35] *Robertson* v. *Canada (Minister of Employment and Immigration),* [1979] 1 F.C. 197 (C.A.), at 198.

[36] *Weso, Mohamed Omar* v. *M.C.I.* (F.C.T.D., no. IMM-516-97), Cullen, April 21, 1998.

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

imprisonment of five years, whereas at the date of the deportation order, the offence provided for a term of imprisonment not exceeding 10 years. The Federal Court—Trial Division held that there was no reason to distinguish the principle enunciated in *Robertson*, and that the adjudicator had not erred in considering the (more severe) punishment for the offence as of the date of the deportation order.

8.4.4. Report and direction or visa refusal letter as limiting factors

In *Anderson*,[38] the Federal Court of Appeal held that there can be no switching between the criminality provisions of section 19, where the report alleges that the person is described in paragraph 27(2)(a) in conjunction with that section. A person can only be found described on the basis of a ground contained in the report. In a similar decision relating to a predecessor provision, the Court pointed out, however, that this does not mean that "the specific facts must be precisely as alleged in the report providing the requirements of natural justice are complied with."[39] This principle, however, does not apply to inquiries held pursuant to a subsection 20(1) report at the port of entry, provided the person concerned (who is seeking admission) is given notice of the fact that the removal order is going to be made on a basis other than the basis set out in the report.[40]

The Federal Court of Appeal has held that an adjudicator is not bound to consider only the putative Canadian equivalent(s) set out in the report. The adjudicator may consider other Canadian equivalents if the appropriate equivalent leads to the person concerned being described in the paragraph of the *Immigration Act* cited in the report.[41] The Immigration Appeal Board has held that a reference in the refusal letter to specific sections of the *Criminal Code* does not restrict the Board in making a determination of equivalency to a Canadian offence. The Board, in making that determination, may, if necessary, explore various other provisions of the Canadian law.[42]

In *Drake,*[43] the applicant had been convicted *in absentia*, in 1992, in the State of Washington of child molestation. In 1993, an adjudicator made a deportation order for subparagraph 27(1)(a.1)(i) of the *Immigration Act*, and did not rule on the subparagraph 27(1)(a.1)(ii) allegation. In 1994, a U.S. judge vacated the *in absentia* conviction and the applicant pleaded guilty to the charges on which the earlier conviction had been based. The appeal before the Appeal Division was postponed from 1994 until 1998. The Appeal Division quashed the deportation order based on subparagraph 27(1)(a.1)(i), but made a new deportation

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bring the applicant within the ambit of section 19 and that the visa officer could not apply amendments to the *Criminal Code* enacted after the filing of the application to the detriment of the applicant.

38 *Anderson* v. *Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 30 (C.A.), at 32.

39 *Eggen* v. *Canada (Minister of Manpower and Immigration)*, [1976] 1 F.C. 643 (C.A.), at 645. See also *Canada (Minister of Manpower and Immigration)* v. *Brooks*, [1974] S.C.R. 850, at 854-55.

40 *Singh, Ajit* v. *M.E.I.* (F.C.A., no. A-258-84), Heald, Hyde, Lalande, September 21, 1984.

41 *Clarke, supra*, footnote 16.

42 *Lavi, Diane* v. *M.E.I.* (I.A.B. T-83-9929), Falardeau-Ramsay, Teitelbaum, Tisshaw, April 24, 1985, at 2.

43 *Drake, supra,* footnote 33.

order based on subparagraph 27(1)(a.1)(ii), which allegations had never been abandoned. The Federal Court—Trial Division did not accept the applicant's main submission that he had not been properly informed of the nature of the proceedings before the Appeal Division.

In *Chan,*[44] the Federal Court—Trial Division held that the visa officer was not *functus officio* and had jurisdiction to revoke the applicant's visa after receiving new information indicating that the applicant (a triad member) was a member of an inadmissible class. Although nothing in the *Immigration Act* deals with whether a visa officer may review decisions already made, this silence should not be construed as a prohibition against reconsideration of decisions. A visa officer has jurisdiction to reconsider his or her decision, particularly when new information comes to light.

In another case, after being advised by the visa officer that a visa would be issued (but before the visa was actually given to the applicant), it came to light that the applicant had been convicted of an offence equivalent to section 253 of the *Criminal Code* (impaired driving). The visa officer issued a further letter denying the visa. In *Park,*[45] the Federal Court—Trial Division held that the visa officer was not *functus officio* and was entitled to reconsider his initial decision. Furthermore, while the refusal letter referred to the wrong sections of the *Immigration Act,* the error was inadvertent: "An improper statement of the appropriate sections can be overcome by the application of the proper sections."

8.4.5. "Hybrid offences"

(a) *Canadian convictions*

Under Canadian criminal law, "hybrid offences" are those which may be prosecuted (at the election of the Crown) either by way of indictment or by way of summary conviction. By virtue of paragraph 34(1)(a) of the *Interpretation Act*, hybrid offences are "indictable" until the prosecution elects to proceed by summary conviction. Where a person is charged with an indictable offence but pleads guilty to a lesser and included "hybrid offence", the plea constitutes a plea of guilty to the indictable portion of the included offence.[46] (The Crown is not required to elect whether it is proceeding by way of indictment or summarily in such cases.)

Where an offence is prosecuted by way of summary conviction, the maximum possible sentence, unless otherwise specified, is six months (see section 787 of the *Criminal Code*). The maximum possible sentence for an indictable offence, unless otherwise specified, is five years (see section 743 of the *Criminal Code*).

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[44] *Chan* v. *Canada (Minister of Citizenship and Immigration),* [1996] 3 F.C. 349 (T.D.).

[45] *Park, Jong In* v. *M.C.I.* (F.C.T.D., no. IMM-3327-97), Campbell, March 5, 1998. Reported: *Park* v. *Canada (Minister of Citizenship and Immigration)* (1998), 42 Imm. L.R. (2d) 123 (F.C.T.D.).

[46] *R.* v. *Wardley* (1978), 43 C.C.C. (2d) 345 (Ont. C.A.); *Canada (Minister of Employment and Immigration)* v. *Smalling*, [1992] 2 F.C. 237 (C.A.).

In *(Kai) Lee*,[47] the Federal Court of Appeal held, in relation to the former paragraph 19(2)(a) of the *Immigration Act*, that a person prosecuted and convicted in Canada by way of summary conviction is, for the purposes of the *Immigration Act*, convicted of a summary offence despite the fact that the offence could have proceeded by indictment. However, paragraph 19(2)(a) has since been amended by virtue of Bill C-86 to render inadmissible those persons who were charged (in Canada) with a hybrid offence, and convicted of a summary offence because the Crown elected to proceed summarily.[48]

The principle enunciated in *(Kai) Lee*, appears to be still applicable in relation to paragraph 19(1)(c) of the *Immigration* Act notwithstanding amendments to the wording of that provision by virtue of Bill C-86. In other words, paragraph 19(1)(c) does not appear to capture within its purview hybrid offences that provide for a (maximum) punishment of 10 years if they were proceeded with by summary conviction. [49]

(b) *Foreign convictions or commissions*

In *Potter*,[50] the Federal Court of Appeal held that, having regard to the language of subparagraph 19(2)(a)(i) of the *Immigration Act*, (the equivalent of the present paragraph

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47 *Lee* v. *Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 374 (C.A.).

48 Prior to February 1, 1993, a person convicted of a hybrid offence which had been prosecuted summarily was not criminally inadmissible to Canada. After that date, paragraph 19(2)(a) of the *Immigration Act* was amended so as to include persons convicted of a hybrid offence, even where the matter had proceeded by way of summary conviction. See *Kanes, Chellapah* v. *M.E.I.* (F.C.T.D., no. IMM-1918-93), Cullen, December 14, 1993. Reported: *Kanes* v. *Canada (Minister of Employment and Immigration)* (1993), 22 Imm. L.R. (2d) 223 (F.C.T.D.), at 230; and *Ladbon, Kamran Modaressi* v. *M.C.I.* (F.C.T.D., no. IMM-1540-96), McKeown, May 24, 1996. In *Ngalla, Binta Mamboh* v. *M.C.I.* (F.C.T.D., no. IMM-4785-96), Nadon, March 13, 1998. Reported: *Ngalla* v. *Canada (Minister of Citizenship and Immigration)* (1998), 44 Imm. L.R. (2d) 79 (F.C.T.D.), the Court rejected the argument that paragraph 19(2)(a) was contrary to paragraph 34(1)(c) of the *Interpretation Act* or subsection 11(h) of the Charter; the offence is not a summary conviction offence, but a hybrid offence which could have been proceeded with by way of indictment.

The wording of paragraph 19(2)(a) has been further amended effective August 1, 1996 by removing the words "by way of indictment". Arguably, since the French version was not altered at that time and retains the words "par mise en accusation", the scope of that provision still extends only to those hybrid offences that may be punishable by way of indictment by a maximum term of imprisonment of less than 10 years.

49 It is recognized that this interpretation gives rise to the following incongruity: A hybrid offence that carries a possible term of imprisonment of less than 10 years and is dealt with summarily would attract the application of paragraph 19(2)(a), whereas a *more* serious hybrid offence which carries a possible term of 10 years or more and is dealt with summarily would *not* attract the application of paragraph 19(1)(c). Instead, it might attract the application of paragraph 19(2)(b) provided that the person has been convicted of at least two summary conviction offences not arising out of a single occurrence.

50 *Potter* v. *Canada (Minister of Employment and Immigration)*, [1980] 1 F.C. 609 (C.A.). The Court stated, at 614-615:

> In my view it is at any rate irrelevant whether the applicant was convicted on indictment in England. The relevant question for the Adjudicator was whether the applicant, had the offence been committed in Canada, could have been convicted of an offence in respect of which he might have been proceeded against by way of indictment in Canada, and whether, if convicted in Canada, he might have been imprisoned for a maximum term of less than ten years.

19(2)(a.1)), *(Kai) Lee* was not applicable in the case of a person prosecuted and convicted *abroad* of a hybrid offence. The determining factor in that case is whether or not the offence could be punishable in Canada by indictment and the person thus deemed to have been convicted by indictment.[51] This same rationale would appear to apply in relation to paragraph 19(1)(c.1).

8.4.6. Two convictions "not arising out of a single occurrence"

Subparagraph 19(2)(b)(ii) of the *Immigration Act* renders inadmissible those persons who have been convicted of the equivalent of two summary conviction offences "not arising out of a single occurrence", until five years have elapsed since the time of the expiry of any sentence period.

In *Libby*,[52] in relation to the predecessor of the similarly worded subparagraph 19(2)(b)(i), the adjudicator found that the appellant had been convicted of two offences not arising out of a single occurrence. The appellant had originally been charged with theft. Pursuant to that charge, she was required to present herself for fingerprinting and had failed to do so. She was then charged and convicted of a second summary conviction offence for failing to appear for fingerprinting. The Federal Court of Appeal found that these two convictions had arisen out of the same occurrence and could not in themselves be grounds for removal.

In *Alouache*,[53] the Federal Court—Trial Division came to a different conclusion based on the facts before it. The applicant had been convicted in Canada of three summary conviction offences, namely, failure to comply with a condition of a recognizance, theft under $1,000 and threatening to use a weapon in the commission of an assault. All the offences occurred within the context of a marital dispute, but on different dates. The Court held that the three summary convictions arose out of different occurrences. "Occurrence", within subparagraph 19(2)(b)(i), is synonymous with "event" and "incident", and not with "a course of events" such as the breakdown of a marriage.

8.4.7. Meaning of the term "convicted"

The word "conviction" means a conviction which has not been expunged. In *Burgon,*[54] Linden J.A. stated:

> It is clear that the word "convicted" does not have a universal, immutable meaning; this word, like so many other words, may have "equivocal" and "different meanings depending upon the context in which it is used".

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[51] The analysis enunciated in *Potter, supra*, footnote 50, was followed in *Wong, Lung Suen* v. *M.E.I.* (F.C.A., no. A-645-88), Heald, Mahoney, Stone, April 25, 1989. Reported: *Wong* v. *Canada (Minister of Employment and Immigration)* (1989), 8 Imm. L.R. (2d) 16 (F.C.A); and *Ruparel* v. *Canada (Minister of Employment and Immigration),* [1990] 3 F.C. 615 (T.D.).

[52] *Libby, Tena Dianna* v. *M.E.I.* (F.C.A., no. A-1013-87), Urie, Rouleau, McQuaid, March 18, 1988. Reported: *Libby* v. *Canada (Minister of Employment and Immigration)* (1988), 50 D.L.R. (4th) 573 (F.C.A.).

[53] *Alouache, Samir* v. *M.C.I.* (F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995. Reported: *Alouache* v. *Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 68 (F.C.T.D.).

[54] *Burgon*, *supra,* footnote 2, at 57-58.

Where a person has been undoubtedly convicted, the validity of the conviction on the merits cannot be put in issue at the inquiry.[55] As stated in *Ward,*[56] the issue is not whether the applicant would have been convicted if the entire facts had been revealed at the trial abroad, or whether he would have been convicted in Canada on those facts; rather the issue is whether there are reasonable grounds to believe, based on the facts at trial and the admissions of the applicant, that the foreign conviction is equivalent to one in Canadian law. Moreover, the Federal Court—Trial Division in that case also rejected the applicant's argument that his offence was political in nature and should not, therefore, be considered for the purposes of subparagraph 19(1)(c.1)(i).[57]

The Federal Court of Appeal has held that a conviction *in absentia* is a conviction.[58] There can be no equivalency where the equivalent offence in Canada is found to be invalid as contrary to the *Canadian Charter of Rights and Freedoms*[59]; however, the fact that a foreign conviction is subsidiary to one whose Canadian equivalent has been declared unconstitutional does not extinguish the foreign conviction nor the subsidiary offence (jumping bail) in either country.[60] Where a Convention refugee uses a false passport to come to Canada, such activity would not give rise to equivalency under Canadian law.[61]

8.4.7.1. Effect of a discharge

If a person pleads guilty to, or is found guilty of, an offence in Canada and is granted a conditional or absolute discharge, then this will not constitute a conviction for the purposes of

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55 *Brannson, supra,* footnote 10, at 145; *Li, supra,* footnote 4, at 256.

56 *Ward, supra,* footnote 37, at 7. Thus the Court rejected the applicant's argument that he had been coerced into pleading guilty in order to protect his wife and children.

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

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

59 In *Halm* v. *Canada (Minister of Employment and Immigration),* [1995] 2 F.C. 331 (T.D.), the applicant had been convicted in New York State of sodomy. The court held that the Canadian equivalent—section 159 of the *Criminal Code* (prohibiting anal intercourse with persons under 18)—violated sections 7 and 15 of the *Charter*.

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

61 In *Vijayakumar, Nagaluxmy* v. *M.C.I.* (F.C.T.D., no. IMM-4071-94), Jerome, April 16, 1996. Reported: *Vijayakumar* v. *Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 176 (F.C.T.D.), the Court held that the applicant's (sponsored) husband used a false passport to get out of Sri Lanka unharmed, not to defraud immigration officials; moreover, paragraph 95.1(1)(d) of the *Immigration Act* prohibits the prosecution (pending the disposition of the claims) of Convention refugee claimants who present false documents upon arrival in Canada. Therefore, the husband had not committed an offence as contemplated by subparagraph 19.1(c.1)(ii). See also *Jeganathan, Vathsala* v. *M.C.I.* (IAD T95-06869), D'Ignazio, December 5, 1997.

the *Immigration Act.*[62] Subsection 730(3) of the *Criminal Code*, which establishes the effect of conditional and absolute discharges, provides, in such cases as are specified, that "the offender shall be deemed not to have been convicted of the offence ...", subject to certain exceptions.

In *Saini,*[63] discussed in the section below, the Federal Court of Appeal clarified the effect of a foreign discharge.

In *Fenner*,[64] the respondent was given a deferred sentence after a conviction in the State of Washington of the offence of "negligent homicide by means of a motor vehicle". This meant that at the end of a period of probation he could request the opportunity to withdraw his guilty plea and have the charge dismissed, which is, in fact, what occurred. The Immigration Appeal Board decided that this procedure, unknown to Canadian law, was not equivalent to an absolute or conditional discharge and that the conviction in the first instance remained part of the applicant's record.

8.4.7.2. Effect of a pardon

The granting of a pardon in another country does not necessarily render the person concerned admissible to Canada. The Federal Court of Appeal considered the effect of a pardon in a foreign jurisdiction in *Burgon*.[65] The Court concluded that in using the word "convicted" in section 19, Parliament meant a conviction that has not been expunged pursuant to any other legislation it had enacted. The Court further held that when the laws and legal system of the foreign country are substantially similar to those of Canada in purpose, content and result, effect should be given to a foreign pardon unless there is good reason not to do so.

> The further question to consider is whether the U.K. legislation, which is similar in purpose, but not identical to the Canadian law, should be treated in the same way. In both countries, certain offenders are granted the advantage of avoiding the stigma of a criminal record so as to facilitate their rehabilitation. There is no good reason for Canadian immigration law to thwart the goal of this British legislation, which is consistent with the Canadian law. Our two legal systems are based on similar foundations and share similar values.…

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[62] See *Lew* v. *Canada (Minister of Manpower and Immigration),* [1974] 2 F.C. 700 (C.A.), where the appellant successfully appealed the conviction, and was granted an absolute discharge after he had been ordered deported, but before the matter was determined on appeal to the Immigration Appeal Board. The Court held that the Board ought to have considered the appeal in light of the circumstances existing at the time of the appeal (i.e., the absolute discharge). In *Kalicharan* v. *Canada (Minister of Manpower and Immigration),* [1976] 2 F.C. 123 (T.D.), the Court held, at 125, that a person convicted at trial is a convicted person notwithstanding that he may have an unexhausted right of appeal, but when a court of appeal substitutes a conditional discharge for a sentence imposed by a trial court, that means that the conviction is deemed never to have been passed and the basis for making the removal order not only no longer exists in fact; it is deemed, in law, not to have existed at all.

[63] *M.C.I.* v. *Saini, Parminder Singh* (F.C.A., no. A-121-00), Linden, Sharlow, Malone, October 19, 2001

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

[65] *Burgon*, *supra,* footnote 2, at 61-62, 63.

> Unless there is some valid basis for deciding otherwise, therefore, the legislation of countries similar to ours, especially when their aims are identical, ought to be accorded respect. While I certainly agree with Justice Bora Laskin that the law of another country cannot be "controlling in relation to an inquiry about criminal convictions to determine whether immigration to Canada should be permitted" (see *Minister of Manpower and Immigration v. Brooks*, [1974] S.C.R. 850, at page 863), we should recognize the laws of other countries which are based on similar foundations to ours, unless there is a solid rationale for departing therefrom. …
>
> There being no "conviction" in the U.K., and there being no reason to refuse to grant recognition to the law of the U.K., which is similar to ours, Ms. Burgon was not "convicted" as that term is used in paragraph 19(1)(c) of the *Immigration Act*....

The rationale in *Burgon*, in relation to the United Kingdom *Powers of Criminal Courts Act, 1973,*[66] was applied in *Barnett*[67] where the applicant, who had been convicted of burglary in the United Kingdom, benefited from the *Rehabilitation and Offenders Act, 1974.* As he was no longer deemed to have been convicted of the offence, his U.K. conviction was spent for the purposes of subparagraph 19(1)(c.1)(i) of the *Immigration Act*.

In the case of *Lui,*[68] the Federal Court—Trial Division interpreted *Burgon* as setting out two conditions for recognizing the law of a foreign jurisdiction:

(1) That the laws and legal system of the foreign jurisdiction are similar to those of Canada; and

(2) that the foreign law is similar in (a) aim or purpose, (b) content and (c) effect, but not necessarily identical to the Canadian law.

In *Lui,* the Federal Court—Trial Division found that the apparent scope of Hong Kong's *Rehabilitation of Offenders Ordinance* is much narrower than that of the *Criminal Records Act* of Canada. The effect of the latter, subject to very few exceptions pertaining to certain provisions of the *Criminal Code,* is to vacate a conviction if the National Parole Board grants a pardon and to remove any disqualification to which the person so convicted is, by reason of the conviction, subject by virtue of the provision of any Act of Parliament. While, in a general sense, the purpose of the Hong Kong Ordinance is similar in nature, the Court found that its effect and

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[66] Subsection 13(1) of the U.K. *Powers of Criminal Courts Act, 1973* stipulates:

> ... a conviction of an offence for which an order is made under this Part of this Act placing the offender on probation discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the preceding provisions of this Act.

[67] *Barnett, John* v. *M.C.I.* (F.C.T.D., no. IMM-4280-94), Jerome, March 22, 1996. Reported: *Barnett* v. *Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 1 (F.C.T.D.).

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

operation were subject to numerous restrictions and exceptions. In particular, the conviction is not to be treated as spent with respect to the operation of a law providing for a disqualification as a result of the conviction. Alternatively, the Court found that if the Hong Kong Ordinance should be recognized, all of its provisions should be recognized, and therefore, by its terms, the Hong Kong conviction would not be spent for the purposes of the disqualification in subparagraph 19(1)(c.1)(i) of the *Immigration Act.*

In overturning the decision of the Trial Division, the Federal Court of Appeal in *Saini*[69] clarified the law with respect to the effect that is to be given to a foreign discharge or pardon:

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

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

> [29] … The systems must be "similar" not "somewhat similar". There is a substantial difference between the two tests; it is not a trivial distinction. Of course, that does not mean that the two systems must be identical, for no two legal systems are. It does require, however, that there be a strong resemblance in the structure, history, philosophy and operation of the two systems before its law will be given recognition in this context.[30] Moreover, the similarity of the systems must normally be proved by evidence to that effect, except perhaps in the rare situation where it is obvious. … it is not enough to assume, without evidence, as the Motions Judge has done, that another country's system is "somewhat similar" to ours. …
>
> [31] … we must further examine the aim, content and effect of the specific legislation in question to determine if it is consistent with Canadian law and, more precisely, Canadian immigration law … We must first explore the similarity of the aim and rationale of Canadian law to the foreign law respecting pardons. It seems clear that the aims of the Canadian laws are to eliminate the potential future effects of convictions … Although it may be that the goals and rationale for pardoning provisions around the world are similar, there must be evidence of that adduced. …
>
> [32] Second, we must address the content of Canadian laws as compared to the foreign law regarding pardons, which includes the process as well as the factual basis upon which it may be granted. Canadian pardons, when granted, are almost invariably administered under the *Criminal Records Act*, … a legislative scheme formulated by Parliament, which outlines provisions regarding the guidelines, procedures and effects of pardons. The *Criminal Code* contains provisions authorizing the Governor in Council to grant free or conditional pardons … Even in the extremely rare circumstances where the royal prerogative is invoked, established formal

[69] *Saini, supra,* footnote 63.

procedures are used to assess applicants and make recommendations to the Crown, which may grant or deny the pardon.

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

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

[35] Third, we must explore the effect of a pardon in Canada as compared to the effect of the foreign pardon. The Supreme Court of Canada discussed the meaning and effect of a Canadian pardon in *Therrien (Re)*,[70] … The Court … focussed on the effect of pardons under the *Criminal Records Act*. It explained that a pardon under the *Criminal Records Act* "removes any disqualification to which the person is subject by virtue of any federal Act or regulation made thereunder" (at paragraph 116). Importantly, however, the Court held that a convicted person cannot deny having been convicted and that such a pardon does not wipe out the conviction itself; it only limits its negative effects. …

[40] It was clearly decided in *Smith*[71] and *Therrien* that a Canadian pardon only removes the disqualifications resulting from a conviction, and does not erase the conviction itself. We would note that free pardons may also be granted in Canada, which are expressly deemed by the *Criminal Code* to erase the conviction as if it had never existed (see s. 748(2)). Importantly, however, a free pardon can only be granted by the Governor in Council where a person has been wrongly convicted, and even then, there are established procedures that must be followed. …

[41] Even if a foreign jurisdiction has a legal system similar to ours, the enquiry is not complete. … Canadian immigration law cannot be bound by the laws of another country, even where that foreign law's mirror our own. There will still be situations where Canadian immigration law must refuse to recognize the laws of close counterparts.

[42] Thus, we must assess the third requirement of *Burgon,* that there was, "no good reason for Canadian immigration law to thwart the goal of [the] British legislation". This Court expressly stated in that case that we ought to respect the legislation of countries similar to ours, "unless there is some valid basis for deciding otherwise" or there is a "solid rationale" for not doing so. …

[43] In our view, the seriousness of the offence can be considered under this third requirement. … The gravity of the crime of highjacking is obvious; it is universally condemned and punished severely. Although there is no evidence of the particular circumstances of this offence, highjacking is an offence that is always very serious. …It is clear that highjacking is considered to be among the most serious of criminal offences. …

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

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

> [44] In our view, the gravity of the offence can and should be considered when deciding whether or not to give effect to a foreign pardon. Even if the Pakistani legal system were similar, and even if the pardon were given under a law similar to Canadian law, the conviction in this case was for an offence so abhorrent to Canadians, and arguably so terrifying to the rest of the civilized world, that our Court is not required to respect a foreign pardon of such an offence.

8.4.8. Rehabilitation to overcome a prohibition against admission

Persons who have incurred criminal convictions in Canada can no longer apply for rehabilitation. Rather, to overcome inadmissibility, they are to apply to the National Parole Board for a pardon. Section 3 of the *Criminal Records Act* provides that a person who has been convicted of an offence under an Act of Parliament or a regulation made under an Act of Parliament can apply to the National Parole Board for a pardon of that offence.

In relation to foreign convictions, under the present legislation, after the expiry of the relevant statutory time period, it is the Minister or his delegate (see section 121 of the *Immigration Act*) who must be satisfied that rehabilitation has taken place in relation to paragraphs 19(1)(c.1), 19(2)(a.1), 27(1)(a.1) and 27(1)(a.3).

The Federal Court of Appeal has held in *Gill*,[72] that a person is inadmissible until such time as the Governor in Council (at the time it was the Governor in Council who had to be satisfied on this account and this power could not be delegated) has made a positive determination with respect to rehabilitation, and that a visa officer does not err by refusing an application of a person who is inadmissible without putting the issue of rehabilitation before the Governor in Council. The Court held that there was no obligation for the Governor in Council to make a negative determination before the determination was made concerning admissibility.[73] The same result was reached in relation to a port-of-entry inquiry in *Dance*.[74]

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[72] *M.E.I.* v. *Gill, Hardeep Kaur* (F.C.A., no. A219-90), Heald, Hugessen, Stone, December 31, 1991. Reported: *Canada (Minister of Employment and Immigration)* v. *Gill* (1991), 137 N.R. 373 (F.C.A.).

[73] In this regard, the court followed a previous decision in *Mohammad* v. *Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363 (C.A.), which held, at 371, that it is not a precondition to the operation of paragraph 19(1)(c) that the Governor in Council shall have considered the question of rehabilitation and be not satisfied that the applicant has brought himself within that exception; the visa officer need only be satisfied that no decision of satisfaction by the Governor in Council has been made. Thus an immigration officer in issuing a subsection 27(1) report and a direction for inquiry under subsection 27(3) of the *Act* was not required to possess information as to whether the appellant had satisfied the Governor in Council as to his rehabilitation.

[74] See *Dance, Neal John* v. *M.C.I.* (F.C.T.D., no. IMM-366-95), MacKay, September 21, 1995, at 6, 8:

> In my opinion, under s-s.8(1) the onus rests on the applicant at all times to establish that he has a right to be admitted to Canada, even, as in this case, where he has done all that could be expected of him to obtain the necessary approval of his rehabilitation, without any success because of apparent delays on the part of the respondent's department and its processes.
>
> ... there was no evidence before him [the adjudicator] that the Minister had in fact positively approved, that is, that the Minister had been satisfied, that the applicant had rehabilitated himself.

The Immigration Appeal Board has ruled that, as a matter of procedural fairness, there is a duty on the visa officer processing an application for an immigrant visa to advise the applicant of the possibility of applying for rehabilitation.[75] However, the Federal Court—Trial Division in *Wong*[76] considered a case where material showing rehabilitation had been submitted by the applicant to the visa officer, rather than to the Governor in Council as was then required. The Court stated that, although it was "unfortunate" the visa officer had not assisted in routing the material, this did not constitute a reviewable error.

In *Lakhani,*[77] the Federal Court—Trial Division held that the visa officer was not obligated to advise the applicant of the process for obtaining a decision of the Governor in Council that the applicant had been rehabilitated; neither was the visa officer obligated to initiate that process on behalf of the applicant. The onus was on the applicant to provide evidence of rehabilitation. Because the applicant gave no evidence of rehabilitation to the visa officer and failed to disclose his conviction on his written application form, the visa officer was not satisfied that the applicant was, in fact, rehabilitated.

The issue which has not been resolved is whether this applies to the situation where the Minister makes the decision as to rehabilitation, given the proximity of the visa officer to the Minister. Does this impose an obligation of fairness on the visa officer to advise the applicant about the exception in these sections?

In *Leung*,[78] the Federal Court—Trial Division held that there was no duty on the visa officer to question the reasonableness of the Minister's decision on an application for approval of rehabilitation where, on the face of the record, the decision may be unreasonable. The responsibility for rehabilitation decisions has been clearly vested in the Minister, not in officials such as visa officers. This decision was upheld by the Federal Court of Appeal.[79]

In *Kan,*[80] the Federal Court—Trial Division held that if a visa officer finds that an applicant falls into a criminally inadmissible class, then it is the Minister's task to determine whether or not that applicant has been rehabilitated. At most, a pardon obtained could perhaps be one of the Minister's considerations for that purpose. The visa officer, therefore, did not err by not considering the applicant's pardon under Hong Kong law.

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

75 *Crawford* v. *Canada (Minister of Employment and Immigration)* (1987), 3 Imm. L.R. (2d) 12 (I.A.B.).

76 *Wong, Lung Suen* v. *M.E.I.* (F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995. Reported: *Wong* v. *Canada (Minister of Citizenship and Immigration)* (1995), 36 Imm. L.R. (2d) 168 (F.C.T.D.).

77 *Lakhani, Salim D.* v. *M.C.I.* (F.C.T.D., no. IMM-1047-96), Heald, October 7, 1996. Reported: *Lakhani* v. *Canada (Minister of Citizenship and Immigration)* (1996), 36 Imm. L.R. (2d) 47 (F.C.T.D.).

78 *Leung, Chi Wah Anthony* v. *M.C.I.* (F.C.T.D., no. IMM-1061-97), Gibson, April 20, 1998. Reported: *Leung* v. *Canada (Minister of Citizenship and Immigration)* (1998), 45 Imm. L.R. (2d) 242 (F.C.T.D.).

79 *Leung, Chi Wah Anthony* v. *M.C.I.* (F.C.A., no. A-283-98), Stone, Evans, Malone, May 3, 2000.

80 *Kan, Chow Cheung* v. *M.C.I.* (F.C.T.D., no. IMM-728-00), Rouleau, November 21, 2000.

8.4.9. Transitional provisions and the effect of amendments to the *Immigration Act*

The Federal Court has held that section 109 of the Transitional Provisions to Bill C-86 (as enacted by S.C. 1992, c. 49) expressly overrides any common law presumption against the retrospective application of a change in legislation. In the circumstances of that case, the amended paragraph 19(2)(a) (since amended again) would apply, such that the applicant's earlier summary conviction for the hybrid offence (of failing to remain at the scene of an accident) would render him inadmissible, even though he would not have been inadmissible under the previous provision of the *Immigration Act*.[81]

In *Cortez*,[82] at a pre-February 1, 1993 inquiry, the applicant had been found not to be described in paragraph 27(2)(a) and subparagraph 19(2)(b)(i) of the *Immigration Act* , as it then read. Pursuant to a further report of March 2, 1993, a second inquiry was held to determine whether the applicant contravened the amended paragraph 19(2)(a) (it was amended by virtue of Bill C-86, effective February 1, 1993). At the second inquiry the applicant was found to be in contravention of the Act based on the same Canadian convictions as alleged at the first inquiry. The Federal Court—Trial Division held:

> ... the real issue that must be determined is the admissibility of the applicant at the time of the inquiry, namely in May of 1993. This is not a question of retrospectivity. ...
>
> ... at the time of the inquiry, the applicants admissibility had to be determined based on these facts and the applicable provisions of the Act, namely paras. 27(2)(a) and 19(2)(a) as they read after the 1993 amendments.

In *Bubla*,[83] the Federal Court of Appeal considered the effect of an amendment to paragraph 19(1)(c) of the *Immigration Act,* which, prior to February 1, 1993, dealt with foreign convictions as well as Canadian ones. By virtue of Bill C-86, this provision was split in two, creating paragraph 19(1)(c.1) for foreign convictions. The appellant was ordered deported by an adjudicator on March 3, 1992 as a person described in paragraph 27(1)(a) based on his inadmissibility under paragraph 19(1)(c). The Appeal Division, which heard the appeal after February 1, 1993, concluded that the substantive law as amended should apply to determine the validity of the deportation order and that such amendment invalidated the order. In upholding the adjudicator's decision, the Federal Court of Appeal held that section 109 of the Transitional Provisions to Bill C-86 properly applied, and rejected the Appeal Division's conclusion that "the deportation order had to be treated as invalid because ... the section numbers had changed." In support of its decision, the Court applied the *Interpretation Act* and general principles of statutory interpretation. Unless Parliament has clearly indicated otherwise, the correctness of the adjudicator's decision must be measured by the law in force at the time of the decision.

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[81] *Kanes, supra,* footnote 48, at 229. See also, generally, footnote 48.

[82] *Cortez, Rigoberto Corea* v. *S.S.C.* (F.C.T.D., no. IMM-2548-93), Rouleau, January 26, 1994. Reported: *Cortez* v. *Canada (Secretary of State)* (1994), 23 Imm. L.R. (2d) 270 (F.C.T.D.), at 276.

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

A similar conclusion was arrived at in *Engel*,[84] where the applicant's inquiry had commenced on April 30, 1992, before the coming into force of the amendments found in Bill C-86. The adjudicator properly determined the applicant's admissibility pursuant to paragraph 19(1)(c), as it read prior to the amendments, and issued the deportation order on May 18, 1994, on the basis of the provisions as they existed on the date of issuance, namely subparagraph 19(1)(c.1)(i).

8.5. ORGANIZED CRIME

8.5.1. Paragraph 19(1)(c.2)

In *Chan,*[85] the Federal Court—Trial Division stated in relation to an allegation under paragraph 19(1)(c.2):

> It must be shown that the visa officer had reasonable grounds to believe that the applicant is or was a member of an organization that there are reasonable grounds to believe is or was engaged in crime. This does not mean that there must be proof that the organization is criminal or that the applicant is or was an actual member of such an organization, but only that there are reasonable grounds to believe she is or was a member of such an organization.[86]

The Court held, in that case, that the visa officer had more than adequate grounds upon which to base his decision that the applicant, a member of a triad (a Chinese society existing for criminal purposes), should not be admitted to Canada.

In *Chiau,*[87] the applicant had been denied a visa because of suspected association with triad organizations. Following *Jolly*[88] and *Chan,*[89] the Federal Court—Trial Division held that there is no need to prove that the organization is criminal or that the applicant is an actual member. After a discussion of the intent of paragraph 19(1)(c.2) of the *Immigration Act*, the Court in *Chiau* concluded that "it cannot be said that the term 'member' should be interpreted as meaning actual or formal membership coupled with active participation in unlawful acts. Being a 'member' of a criminal organization means simply belonging to a criminal organization." Moreover, since the visa officer had extensive experience and specialized knowledge with

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[84] *Engel, Hans Gunther* v. *S.S.C.* (F.C.T.D., no. IMM-2634-94), Richard, April 19, 1995. Reported: *Engel* v. *Canada (Secretary of State)* (1995), 29 Imm. L.R. (2d) 234 (F.C.T.D.), at 236, n. 1.

[85] *Chan, supra,* footnote 44.

[86] *Chan, ibid*., at 370-371.

[87] *Chiau* (T.D.)*, supra,* footnote 23.

[88] *Jolly, supra,* footnote 18.

[89] *Chan, supra,* footnote 44.

reference to triad activities in Hong Kong and elsewhere, it was well within his competence to define the meaning of membership in a triad, and the Court must view with considerable deference his definition of "reasonable grounds" and "member".

In upholding this decision, Justice Evans of the Federal Court of Appeal stated:

> by equating being a "member" with "belonging to" a criminal organization, the Trial Division Judge correctly concluded that, in this context, the term should be broadly understood. …
>
> First, in my view, paragraph 19(1)(c.2) of the Act is broad enough to enable Canada to protect its national security by excluding, not only those intending to commit crimes here, but also those whose presence in Canada may be used to strengthen a criminal organization or to advance its purposes.

Second, it will not always be possible to draw a bright line between the legitimate business activities of a criminal organization and its criminal activities. The former may be used to launder the proceeds of the latter, while the organization's criminal activities may in turn be financed by profits made from a successful legitimate business that it controls. Hence, a person's participation in a legitimate business, knowing that it is controlled by a criminal organization, in some circumstances may support a reasonable belief that the person is a member of the criminal organization itself.[90]

In *Yuen,*[91] the applicant had joined the 14K Triad gang in Hong Kong as a teenager. He was convicted of theft in Hong Kong in 1979. The Federal Court—Trial Division held that the adjudicator did not err in determining that paragraph 19(1)(c.2) of the *Immigration Act* did not violate subsection 2(d) of the *Canadian Charte*r *of Rights and Freedoms*—the right to freedom of association. Paragraph 19(1)(c.2) does not make membership in an organization unlawful in Canada; it precludes from admission to Canada those who are unable to satisfy the Minister that their admission would not be detrimental to the national interest. Moreover, it applies in the case of foreign nationals, who have no right to enter or remain in Canada except as the *Immigration Act* permits. Subsection 2(d) of the Charter is not engaged because the right conferred by that provision does not extend beyond the boundaries of Canada to protect the right of a foreign national to be a member of a foreign criminal organization. Even if subsection 2(d) of the Charter were engaged, the restriction on the right to freedom of association contained in paragraph 19(1)(c.2) is a reasonable limit prescribed by law which can be demonstrably justified in a free and democratic society (section 1 of the Charter). This decision was upheld by the Federal Court of Appeal which stated:

> It is clear from the language of the Charter that subsection 2(d) only protects the exercise of association for lawful pursuits or objectives. …

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[90] *Chiau* (C.A.), *supra,* footnote 23, at 319-20. Leave to appeal to the Supreme Court of Canada was refused August 16, 2001 (S.C.C. no. 28418). For additional cases dealing with the term "membership" in the context of terrorist organizations see Re *Suresh, Manickavasagam* v. *M.C.I.* (F.C.T.D., no. DES-3-95), Teitelbaum, November 14, 1997. Reported: *Re Suresh* (1997), 40 Imm. L.R. (2d) 247 (T.D.); *M.C.I. and S.G.C.* v. *Singh, Iqbal* (F.C.T.D., no. DES-1-98), Rothstein, August 11, 1998. Reported: *Canada (Minister of Citizenship and Immigration)* v. *Singh* (1998), 44 Imm. L.R. (2d) 309 (F.C.T.D.); *M.C.I.* v. *Owens, Kathleen* (F.C.T.D., no. IMM-5668-99), Dawson, October 11, 2000. Reported: *Owens* v. *Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 101 (F.C.T.D.).

[91] *Yuen, Kwong Yau v. M.C.I.* (F.C.T.D., no. IMM-5272-97), Cullen, February 2, 1999. Reported: *Yuen* v. *Canada (Minister of Citizenship and Immigration)* (1999), 48 Imm. L.R. (2d) 24 (F.C.T.D.).

> Where, as here, the organization has but one single brutal purpose, mere membership is sufficient to bring the Appellant within the provisions of paragraph 19(1)(c.2) of the Act.[92]

8.5.2. Paragraph 19(1)(d)

In *Ali,*[93] the applicant had two wives in Kuwait. He filed an application for permanent residence with wife number one, their three children and two children of the second marriage. Wife number two filed a separate application on the same day. The applications were refused on the grounds that the visa officer was of the opinion that there were reasonable grounds to believe that the applicants intended to practice polygamy contrary to section 293 of the *Criminal Code,* and thus were inadmissible under subparagraph 19(1)(d)(i) of the *Immigration Act.* The Federal Court—Trial Division dismissed the application for judicial review. The issue of whether the second marriage would be recognized in Canada was irrelevant: the only question was whether the applicant would have more than one wife in Canada. Contrary to counsel's arguments, it did not matter whether the applicants were taking any active steps to practice polygamy in Canada. The practice of polygamy is having more than one spouse at the same time. The Court certified a question.

8.6. WAR CRIMES AND CRIMES AGAINST HUMANITY

Paragraph 19(1)(j) of the *Immigration Act* applies to removal order appeals for those ordered removed under section 19. It also applies, in more limited circumstances, to permanent residents ordered removed as being described in paragraph 27(1)(g) or (h). The latter provisions encompass only those permanent residents described in paragraph 19(1)(j) who were landed subsequent to the coming into force of paragraph 19(1)(j), or who became a member of that inadmissible class subsequent to the coming into force of that provision. (Paragraph 19(1)(j) came into force on October 30, 1987.)

As a result of the enactment of the *Crimes Against Humanity and War Crimes Act,* paragraph 19(1)(j) was amended effective October 23, 2000, and now refers to "persons who there are reasonable grounds to believe have committed an offence referred to in any of sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act.*" The latter legislation sets out definitions of "war crimes", "crimes against humanity" and "genocide", both within and outside of Canada. In *Varela,*[94] the Federal Court—Trial Division held that the two provisions are "in substance" the same, though not identical.

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[92] *Yuen, Kwong Yau* v. *M.C.I.* (F.C.A., no. A-152-99), Létourneau, Sexton, Malone, December 21, 2000. In *Chong, Chor Shan* v. *M.C.I.* (F.C.T.D., no. IMM-4038-00), McKeown, December 4, 2001, the Court held that triad organizations have a single brutal purpose: the commission of crime for financial gain. "There is no requirement that the applicant be linked to specific crimes as the actual perpetrator."

[93] *Ali, Bahig Mohamed Skaik* v. *M.C.I.* (F.C.T.D., no. IMM-613-97), Rothstein, November 2, 1998.

[94] *Varela, supra,* footnote 1.

In order for a person to fall within the ambit of paragraph 19(1)(j), as it read before its amendment on October 23, 2000:

(1) The person need not have been convicted of an offence: it is sufficient if there are "reasonable grounds" to believe that the person committed the offence;

(2) the offence must be one that would now be considered a war crime or crime against humanity as those terms are defined in subsection 7(3.76) of the *Criminal Code* of Canada; and

(3) the offence in question would have constituted an offence under Canadian law at the time it was committed.

The leading case on this issue is *Rudolph.,*[95] In that case, the Federal Court of Appeal rejected the argument that paragraph 19(1)(j) was offensive because it resulted in the retrospective application of legislation:

> It is not retrospective legislation to adopt today a rule which henceforward excludes persons from Canada on the basis of their conduct in the past.

Paragraph 19(1)(j) makes specific reference to subsection 7(3.76) of the *Criminal Code.* That subsection incorporates, by reference, into Canadian law both customary and conventional international law. Therefore, in determining whether the conduct in question was prohibited by custom or conventional international law, one first looks at international conventions in effect at the time that the conduct occurred. In this particular case, the Court considered the *Convention on the Laws and Customs of War on Land* concluded at the Hague on October 18, 1907. Secondly, the Court looked to customary international law. Such a body of law existed in the period 1943-1945 with regard to war crimes and crimes against humanity. Further, the Charter of the International Military Tribunal which, following the end of the war in Europe in 1945, created a tribunal to try war crimes was, in Article 6, declaratory of existing customary international law with respect to crimes against peace, war crimes, and crimes against humanity. The Charter of the International Military Tribunal was expressly recognized and affirmed by Resolution 95(1) of the General Assembly of the United Nations, adopted on December 11, 1946. These instruments are very strong evidence of the content of existing customary international law during the relevant period.

The Court went on to hold that

> the second, or "Canadian" branch of the "double criminality" requirement of paragraph 19(1)(j) mandates the notional transfer to Canadian soil of the *actus reus* only ("an act or omission … that, if it had been committed in Canada") and not the entire surrounding circumstances so as to permit a plea of obedience to a *de facto* foreign state authority. … in deciding if the applicant's conduct would have constituted an offence against the laws of Canada, his acts and omissions, but not the entire state apparatus of the

[95] *Rudolph*, *supra,* footnote 24, at 657-58. The applicant employed foreign prisoners in a Nazi concentration camp in the production of munitions during 1943-45; these munitions were intended for use against the civilian populations of the Allied countries.

> Third Reich, were notionally transferred to this country. The fact that the German government ordered or condoned the applicant's conduct during World War II is no defence to a charge of doing the same thing in Canada.

The adjudicator's findings of fact constituted reasonable grounds to believe that the applicant aided and abetted the crimes of kidnapping under subparagraph 297(a)(ii) of the *Criminal Code,* in force in Canada in 1943-1945, and forcible confinement under paragraph 297(b).

In the decision of *Caballero*,[96] the Federal Court—Trial Division considered as appropriate the approach taken by the adjudicator in applying paragraph 19(1)(j), as it read before it was amended on October 23, 2000, to the facts of that case:

> The Adjudicator first addressed the question as to whether the activities described by the applicant fell within the meaning of "crimes against humanity". In defining this phrase, the Adjudicator relied on a passage from *R. v. Finta*, [1994] 1 S.C.R. 701 at 814 where Mr. Justice Cory stated:
>
> > What distinguishes a crime against humanity from any other criminal offence under the Canadian Criminal Code is that the cruel and terrible actions which are essential elements of the offence were undertaken in pursuance of a policy of discrimination or persecution of an identifiable group....
>
> The Adjudicator concluded that the applicant's actions constituted crimes against humanity.…
>
> The Adjudicator next considered the defence of duress or coercion, specifically that the applicant was following orders and that to refuse meant putting his own life at risk. Relying on the Federal Court of Appeal's decision in *Ramirez v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 306, the Adjudicator concluded that such a defence required the applicant to demonstrate that he was himself in danger of imminent harm, the evil threatened him was, on balance, greater than the evil inflicted on his victims and that he was not responsible for his own predicament. The Adjudicator also relied on *Finta, supra*, wherein the Court clarified the defence of obedience to superior orders, finding that such a defence was not available when the orders in question were manifestly unlawful. The Adjudicator then proceeded to consider whether the applicant had satisfied the conditions precedent to relying on the defences of duress, coercion or obedience to superior orders.

The Court went on to hold that:

(1) The adjudicator did not err in finding the "identifiable group" to be comprised of any person or persons who were suspected by the applicant's superiors of being subversive or who were perceived to be of some threat to the established authorities.

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[96] *Caballero, Florencio* v. *M.C.I.* (F.C.T.D., no. IMM-272-96), Heald, November 13, 1996, at 4-5, 9-13. This case dealt with a member of a military unit in Honduras which kidnapped, tortured and murdered people.

(2) While the assessment of the applicant's moral choice (*vis-à-vis* the defence of obedience to superior orders) is not as clear as it might ideally be, the adjudicator did turn his mind to the issue of superior orders and determined that the applicant could have disobeyed.

(3) Whether a person is or is not in "imminent harm" is a question of fact, based upon the circumstances surrounding his or her particular case.

(4) The question before the adjudicator was not whether the applicant should be "pardoned" for those crimes because he later helped to shed light on the crimes of his superiors.

In *Mugesera,*[97] the Federal Court—Trial Division considered the validity of a deportation order issued under paragraph 19(1)(j), as that provision read before it was amended on October 23, 2000. The applicant had delivered a speech in Rwanda in November 1992 inciting the persons present to violence and the murder of Tutsi and political opponents. The Court held that the question of whether the applicant committed or participated in the commission of war crimes or crimes against humanity was a determination of law and not of fact. The Court held that, while a different interpretation could have been given to the speech, the Appeal Division's interpretation and conclusion that parts of it constituted an incitement to murder and genocide were not unreasonable. However, the Appeal Division erred in law in finding that the speech constituted a crime against humanity. Absent proof of a direct or indirect link between the speech and some murders in a systematic and widespread manner, the speech is not by itself cloaked in the requisite inhumaneness for it to constitute a crime against humanity. The Court certified a question on this issue.

In *Varela,*[98] the Federal Court—Trial Division held that an adjudicator is not bound by an earlier determination of the Convention Refugee Determination Division excluding the applicant from refuge status under Article 1F(a) of the Convention relating to the Status of Refugees. However, it would be open to the adjudicator to take into account an earlier decision of the Refugee Division. Moreover, the Court held that, having regard to section 44 of the *Interpretation Act,* an inquiry commenced under the repealed paragraph 19(1)(j) can be continued under the "new" paragraph 19(1)(j) that came into force on October 23, 2000 as a result of the enactment of the *Crimes Against Humanity and War Crimes Act,* since the two provisions are "in substance" the same, though not identical in scope.

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97 *Mugesera* v. *Canada (Minister of Citizenship and Immigration),* [2001] 4 F.C. 421 (T.D.).

98 *Varela, supra,* footnote 1. A different approach was taken in *Figueroa, Rony Danilo* v. *M.C.I.* (F.C.T.D., no. IMM-1264-99), Pinard, February 25, 2000, a case involving a determination by an *immigration officer* to refuse to grant landing under subsection 46.04(3) of the Act because one of the persons was described in paragraph 19(1)(j). According to the Court, paragraph 19(1)(j) provides for a test with two conditions: a person belongs to an inadmissible class if there are reasonable grounds to believe that he or she has committed acts that constitute a crime against humanity within the meaning of subsection 7(3.76) of the *Criminal Code*, and if these acts would constitute an offence in Canada. The Court found that the exclusion of a refugee under Article 1F(a) shows that the first condition of the test in paragraph 19(1)(j) of the Act has been met. In upholding the decision of the Trial Division, the Court of Appeal did not comment directly on this part of the Trial Division's reasons. See *Figueroa, Rony Danilo* v. *M.C.I.* (F.C.A., no. A-138-00), Desjardins, Décary, Noël, April 6, 2001. The Trial Division's decision in *Figueroa* was distinguished in *Varela.*

8.7. OFFENCES COMMITTED OUTSIDE CANADA BY YOUNG OFFENDERS

There is a dearth of jurisprudence on this topic. The guiding principle for equivalency was enunciated in *Potter*,[99] namely:

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

In *Hall*,[100] a decision involving a permanent resident who had been convicted in Canada in 1981 for crimes that he committed at the age of 17, the Federal Court of Appeal held:

> There is no merit in the appellant's submission that the *Young Offenders Act*, which came into force in April 1984, applied to the case at bar and therefore prevented the board from considering the criminal record of the appellant for crimes that he committed at the age of 17 when he was a young person and for which he had been convicted under the *Juvenile Delinquents Act*. …
>
> [Section 36(1)(b) of the *Young Offenders Act*] does not apply retroactively to proceedings that originated and were fully completed under the repealed *Juvenile Delinquents Act* and to dispositions made under this Act which contained no similar provision.

The following situations, with tentative outcomes, might arise for consideration in this context:

(a) When a person has been treated as a young offender under foreign law, and no conviction has been recorded—such a person would likely not be criminally inadmissible to Canada.

(b) When a young person has been convicted in an adult court in a country which has a special procedure for young offenders—the conviction would likely be treated in the regular manner.

(c) Subject to (d) or (e) below, where a foreign conviction has been registered in an adult court, the foreign jurisdiction having no system for young offenders, or in a foreign court for young offenders, where the disposition registered has not yet ceased to have effect—the young offender would likely be considered to have been convicted.

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[99] *Potter*, *supra,* footnote 50, at 615.

[100] *Hall, Othniel Anthony v. M.E.I.* (F.C.A., no. A-1005-91), Stone, Létourneau, Robertson, July 6, 1994. Reported: *Hall* v. *Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d) 1 (F.C.A.), at 3-4.

(d) When a person has committed an offence for which, in Canada, he could not be transferred to adult court (see section 553 of the *Criminal Code* and subsection 16(1) of the *Young Offenders Act*)—such a young offender would likely be considered not to have been convicted for immigration purposes.

(e) When the young offender has committed an offence for which, in Canada, he would not have been dealt with in adult court (see factors for transfer to be considered set out in subsection 16(2) of the *Young Offenders Act*)—such a young offender would likely be considered not to have been convicted.

However, in *Wong,*[101] the Minister conceded that the visa officer made an error in law in denying a visa to an applicant who was 17 years old at the time of his conviction, in Hong Kong, for possession of an offensive weapon and had not rehabilitated himself. (The visa officer found him inadmissible under subparagraph 19(2)(a.1)(i) of the Act.) In overturning the visa officer's decision, the Court held:

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

8.8. DISCRETIONARY JURISDICTION

On the appeal of a removal order for a person, generally a permanent resident, who was ordered removed by virtue of being described in one of the criminal equivalency provisions, the Appeal Division can exercise its discretionary jurisdiction in the appellant's favour. For a detailed discussion of the Appeal Division's discretionary jurisdiction, see Chapter 9.

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

CHAPTER 8

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CHAPTER 9

9. DISCRETIONARY JURISDICTION

9.1. INTRODUCTION

Generally, 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]

Where a removal order is made against a permanent resident or person in lawful possession of a valid returning resident permit, the appeal may be brought under paragraph 70(1)(b) of the *Immigration Act* (the Act). In that case, the Appeal Division is required to examine **all the circumstances of the case** in the exercise of its discretionary jurisdiction and to decide whether or not the person (the "appellant") should be removed from Canada.

Where a removal order is made against a person who has been determined to be a Convention refugee under the Act or the *Immigration Regulations, 1978, (*the "Regulations"*)* but who is not a permanent resident or a person who seeks landing or entry and is in possession, at the relevant time, of a valid immigrant visa or valid visitor's visa, as the case may be, the appeal may be brought under paragraph 70(3)(b) of the Act. In such a case, the Appeal Division is required to examine the **compassionate or humanitarian considerations** in the exercise of its discretionary jurisdiction and to decide whether or not the appellant should be removed from Canada.[4] In general, the rights of appeal of a permanent resident are different from, and broader than, those of a person in possession of a valid visa.[5]

The cases that are decided under the Appeal Division's discretionary jurisdiction typically involve criminality, misrepresentation, or failure to comply with terms and conditions of landing. In any of these cases, where the Appeal Division exercises its discretionary jurisdiction in favour

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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*, *infra*, footnote 3.

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

3 *Boulis* v. *M.M.I.*, [1974] S.C.R. 875, at 877.

4 *Nagularajah, Sathiyaseelan* v. *M.C.I.* (F.C.T.D., no..IMM-3732-98), Sharlow, July 7, 1999.

5 *Tran, Thi Minh Nguyet* v. *M.C.I.* (F.C.T.D., no. IMM-3111-95), McKeown, December 18, 1996. In *Nagularajah, supra* footnote 4, Justice Sharlow concluded "whatever the difference is between the phrase "all the circumstances of the case" and the phrase "humanitarian and compassionate considerations," they both are broad enough to include evidence of criminal history, rehabilitation and future prospects, including risk of future danger to the public."

of the appellant, it may, pursuant to subsection 70(3) of the Act, either allow the appeal and quash the removal order or it may direct that the execution of the removal order be stayed. Conversely, where the Appeal Division exercises its discretionary jurisdiction against the appellant, it may, pursuant to the same statutory authority, 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. 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.[6]

9.2. ALL THE CIRCUMSTANCES OF THE CASE: PARAGRAPH 70(1)(b)

The Appeal Division has held that the phrase "all the circumstances of the case" 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 under paragraph 70(1)(b) of the Act 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."[7] The leading case under paragraph 70(1)(b) is *Ribic.*[8] Recently, the Supreme Court of Canada issued its decisions in *Chieu*[9] and *Al Sagban.*[10] In overturning the decisions of the

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[6] *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.

[7] *Machado, Joao Carneiro John* v. *M.C.I.* (IAD W89-00143), Aterman, Wiebe, March 4, 1996, at 91 .

[8] *Ribic, Marida* v. *M.E.I.* (IAB 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985.

[9] *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.

[10] *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,

Federal Court of Appeal[11] in those cases, the Supreme Court of Canada held that the Appeal Division is entitled to consider the factor of potential foreign hardship when the Appeal Division exercises its discretionary jurisdiction under paragraph 70(1)(b) of the Act, 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*[12] remain the proper ones for the IAD to consider during an appeal under paragraph 70(1)(b) In that 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;
>
> (b) the possibility of rehabilitation or, alternatively, the circumstances surrounding the failure to meet the conditions of admission;
>
> (c) the length of time spent, and the degree to which the appellant is established in, Canada;
>
> (d) the family in Canada and the dislocation to the family that removal would cause;
>
> (e) the family and community support available to the appellant; and
>
> (f) the degree of hardship that would be caused to the appellant by the appellant's return to his or her country of nationality.

These factors are not exhaustive and the way they are applied and the weight they are given may vary according to the particular circumstances of the case.[13] In the words of the Appeal Division:

> The combination of factors and the extent to which some factors may overshadow others in a given case increase the possible permutations of relevant circumstances further. What the Appeal Division looks at in any given case is a function of what the appellant has done, is doing and will likely do with his life, and what effect that has had, is having and will likely have on Canadian society at large. While it is fair to say that there are typical cases and typical patterns of behaviour the Appeal

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Clark, Dossa, N. Singh, November 13, 1996, [1996] I.A.D.D. No. 859 (QL), dismissing the appellant's appeal from a removal order.

[11] In these decisions, the Federal Court of Appeal in place of the "Ribic factors" had set out eight non-exhaustive factors to be considered by the Appeal Division in exercising discretionary relief. These factors were as follows: the seriousness of the offence leading to deportation; b. the possibility of rehabilitation (if a crime is involved); the impact of the crime on the victim (if crime is involved); the remorsefulness of the applicant (if crime is involved); the length of time spent in Canada and the degree to which the appellant is established here; the presence of family in Canada and the impact on it that deportation would cause; the efforts of the applicant to establish himself or herself in Canada, including employment and education; and the support available to the applicant, not only within the family but also within the community.

[12] *Ribic*, *supra*, footnote 8.

[13] 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."

> Division encounters, the process of analyzing and weighing of relevant factors in any individual case is as particular as the personal history and future prospects of the appellant who is seeking a favourable exercise of jurisdiction.[14]

The language of paragraph 70(1)(b), "all the circumstances of the case," contemplates 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. Paragraph 70(1)(b) requires that social considerations be taken into account, together with every extenuating circumstance that can be presented in favour of the appellant.[15] 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."[16]

9.2.1. Nature, Gravity and Pattern 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 9.2.2.

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] 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*.[18]

9.2.1.1. Health, Safety and Good Order of Canadian Society

In exercising its discretionary jurisdiction, the Appeal Division has regard to the objective in section 3(i) of the Act which is "to maintain and protect the health, safety and good order 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 9.2.2.). In *Furtado*,[19] the Appeal Division concluded

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[14] *Machado*, s*upra*, footnote 7, at 88.

[15] *Canepa* v. *M.E.I.*, [1992] 3 F.C. 270 (C.A.), at 286.

[16] *Krishnapillai, Thampiyah* v. *M.C.I.* (IAD T96-03882), Aterman, Boire, D' Ignazio, April 24, 1997, at 6.

[17] *Moody, Mark Stephen* v. *M.E.I.* (IAD V93-01012), Clark, June 10, 1994.

[18] *Pushpanathan, Velupillai v. M.C.I.* (F.C.T.D., no. IMM-1573-98), Sharlow, March 19, 1998.

[19] *Furtado, Valentina Cordeiro* v. *M.C.I.* (IAD T99-00276), Sangmuah, December 23, 1999.

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 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."

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.[20]

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.[21]

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 there were no other convictions indicating that the appellant had a basically criminal disposition.[22]

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.[23]

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

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[20] *Labrada-Machado, Ernesto Florencia* v. *M.E.I.* (IAB 87-6194), Mawani, Wright, Gillanders, November 13, 1987 (reasons signed January 29, 1988).

[21] *Franklin, Cheryl* v. *M.E.I.* (IAD M91-04378), Durand, Angé, Brown, June 9, 1991.

[22] *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.

[23] *Hassan, John Omar* v. *M.C.I.* (IAD V95-00606), McIsaac, November 1, 1996.

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.[24]

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.[25]

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.[26]

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 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.[27]

The Appeal Division does not exceed its jurisdiction when it considers the question of public safety where the Minister has not issued a danger opinion under subsection 70(5) of the Act.[28] However, it may be a reviewable error for the Appeal Division to ignore the fact that a danger opinion was not issued.[29]

9.2.1.2. 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[30]. In deciding the case, the Appeal

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[24] *McJannet, George Brian* v. *M.E.I.* (IAB 84-9139), D. Davey, Suppa, Teitelbaum (dissenting), February 25, 1986 (reasons signed July 17, 1986).

[17] *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.

[26] *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.

[27] *Graeili-Ghanizadeh, Farshid* v. *M.C.I.* (IAD W93-00029), Wiebe, June 3, 1994.

[28] *Nagularajah, supra,* footnote 4. This case involved an appeal under paragraph 70(3)(b) of the Act.

[29] *McCormack, Richard v.M.C.I.* (F.C.T.D., no. IMM-396-98), McKeown, September 3, 1998.

[30] 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 jurisdicition 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".

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.[31] 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 sentennces imposed in other cases involving similar offences.[32] Further, the length of the sentence that is imposed is not the only criterion relevant to assessing the serious of an offence.[33]

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.[34]

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.[35]

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.[36]

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[31] *Setshedi, Raymond Lolo* v. *M.E.I.* (IAD 90-00156), Rayburn, Goodspeed, Arpin, April 16, 1991 (reasons signed August 13, 1991).

[32] *Puspanathan, supra* footnote 18.

[33] *Murray, Nathan v.M.C.I.* (F.C.T.D., no. IMM-4086-99), Reed, September 15, 2000.

[34] *Kabongo, Mukendi Luaba* v. *M.C.I.* (IAD T95-02361), Aterman, April 30, 1996.

[35] *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.

[36] *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.

9.2.1.3. 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.[37] In *Bertold,*[38] 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.

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.[39]

9.2.1.4. Victim-Impact Evidence

Under paragraph 69.4(3)(c) of the Act, the Appeal Division has discretion to determine the admissibility and relevance of evidence. This discretion extends to the 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.[40]

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

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[37] *Kumar, James Rakesh* v. *M.E.I.* (F.C.A., no. A-1533-83), Heald, Urie, Stone, November 29, 1984.

[38] *Bertold, Eberhard v.M.C.I.* (F.C.T.D., no. IMM-5228-98), Muldoon, September 29, 1999.

[39] *Waites, Julian Martyn* v. *M.E.I.* (IAD V92-01527), Ho, Clark, Singh, April 28, 1994 (reasons signed June 28, 1994).

[40] *M.C.I. v. Jhatu, Satpal Singh* (F.C.T.D., no. IMM-2734-95), Jerome, August 2, 1996.

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.[41]

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.[42] 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.[43]

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 focussed 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.[44]

9.2.2. Rehabilitation

9.2.2.1 Burden of Proof

The onus in on the appellant to prove his or her rehabilitation on a balance of probabilities. Moreover, where the offences of which the appellant has been convicted are serious, the appellant is required to present compelling evidence of rehabilitation.[45] 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.[46]

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[41] *Pepin, Laura Ann* v. *M.E.I.* (IAD W89-00119), Rayburn, Goodspeed, Arpin (dissenting), May 29, 1991.

[42] *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.

[43] *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.

[44] *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.

[45] *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.

[46] *Mothersill, Charlene Fawn* v. *M.E.I.* (IAD W89-00184), Wlodyka, Arpin, Wright, November 23, 1989.

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.[47] The Appeal Division has held that where an appellant whose removal order was once stayed commits serious offences during the stay, compelling evidence of rehabilitation or of a strong potential for rehabilitation must be presented to justify an extension of the stay.[48]

9.2.2.2. 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.[49] In making the assessment, the Appeal Division has regard to the societal interests set out in section 9.2.1.1.

The assessment of risk raises three important issues: the seriousness of the criminal conduct (canvassed in section 9.2.1.); the degree to which the appellant has demonstrated rehabilitation; and the support system available to the appellant (addressed in section 9.2.5.). The last two issues are related to the likelihood of the appellant's reoffending.[50] Thus, for example, in one case, citing its responsibility for protecting the 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.[51]

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.[52]

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[47] *Liedtke, Bernd* v. *M.E.I* (IAD V89-00429), Verma, Wlodyka, Gillanders, November 26, 1992.

[48] *Almonte, Antonio* v. *M.C.I.* (IAD T89-00826), Aterman, Bartley, Ramnarine, September 29, 1995. Since the appellant had failed to satisfy the Appeal Division on a balance of probabilities that he was not likely to reoffend, that factor outweighed the factors in his favour, which included the hardship removal would cause to his Canadian-born wife and son.

[49] See, for example, *Muehlfellner,* s*upra*, footnote 42.

[50] *Ramirez Martinez, Jose Mauricio (a.k.a. Jose Mauricio Ramirez)*, (IAD T95-06569), Bartley, January 31, 1997, at 3.

[51] *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.

[52] *Vetter, Dorothy Ann* v. *M.E.I.* (F.C.T.D., no. IMM-760-94), Gibson, December 19, 1994.

9.2.2.3. 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".[53]

9.2.2.3.1. 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.[54]

Generally, where an appellant expresses remorse for criminal conduct and the Appeal Division finds the expression of remorse credible, that factor will be considered 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.[55]

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.[56]

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.[57]

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[53] *Ramirez*, s*upra*, footnote 50.

[54] *Balikissoon, Khemrajh Barsati* v. *M.C.I.* (IAD T99-03736), D'Ignazio, March 12, 2001.

[55] *Ramirez*, *supra*, footnote 50.

[56] *Duong, Thanh Phuong* v. *M.C.I.* (IAD T94-07928), Band, June 13, 1996.

[57] *Chand, Naresh* v. *M.C.I.* (IAD V93-03239), Clark, Ho, Lam, July 24, 1995.

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 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 counselling.[58]

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.[59]

9.2.2.3.2. 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.[60]

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, supported a

[58] *Nguy, Chi Thanh* v. *M.C.I.* (IAD T95-01523), Band, March 8, 1996.

[59] *Galati, Salvatore* v. *M.C.I.* (F.C.T.D., no. IMM-2776-95), Noël, September 25, 1996.

[60] *Nic, Vladimir* v. *M.E.I.* (IAD V89-00631), Gillanders, Chambers, MacLeod, March 7, 1990.

conclusion of serious risk of serious harm to the community in the event of the appellant's reoffending.[61]

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.[62]

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.[63]

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.[64]

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 the appellant, who suffered from manic depression, had committed the offence while off medication because of side effects, but subsequently changed medication.[65]

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[61] *Sandhu, Kaura Singh* v. *M.C.I.* (IAD T93-02412), Leousis, February 22, 1996 (reasons signed June 21, 1996).

[62] *Manno, Marco* v. *M.C.I.* (IAD V94-00681), Clark, March 9, 1995 (reasons signed May 23, 1995).

[63] *Barnes, Desmond Adalber* v. *M.C.I.* (IAD T95-02198), Band, November 3, 1995 (reasons signed November 9, 1995).

[64] *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.

[65] *Habimana, Alexandre* v. *M.C.I.* (IAD T95-07234), Townshend, September 27, 1996 (reasons signed October 31, 1996).

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.[66]

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.[67]

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.[68]

9.2.3. 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." [69]

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.[70]

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[66] *Salmon, Kirk Gladstone* v. *M.E.I.* (IAD T93-04850), Bell, September 20, 1993.

[67] *Agnew, David John* v. *M.C.I.* (IAD V94-02409), Singh, Verma, McIsaac, June 6, 1995.

[68] *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.

[69] *Archibald, Russell* v. *M.C.I.* (F.C.T.D., no. IMM-4486-94), Reed, May 12, 1995, at 10.

[70] *Birza, Jacob* v. *M.E.I.* (IAB 80-6214), Howard, Chambers, Anderson, April 4, 1985 (reasons signed October 15, 1985).

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.[71]

Being imprisoned nearly the entire time[72] or failing to achieve anything despite having lived in Canada for a significant period of time may weigh against the appellant, [73] as may failure to find employment, develop close family relationships, and accept responsibility for the care and support of a child.[74] Having no family in Canada and not becoming established in the country despite working at various jobs will not assist the appellant either.[75]

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.[76]

9.2.4. 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.

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.[77]

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.[78] The Supreme Court of Canada in *Baker*[79] considered the situation of a woman with Canadian-born, dependent children ordered

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[71] *Archibald*, s*upra*, footnote 69.

[72] *Baky, Osama Abdel* v. *M.E.I.* (IAB 74-7046), Scott, Hlady, Howard, December 15, 1980.

[73] *Hall, Gladstone Percival* v. *M.E.I.* (IAB 80-9092), Glogowski, Benedetti, Tisshaw, January 29, 1981 (reasons signed March 30, 1981).

[74] *Frangipane, Giovanni* v. *M.M.I.* (IAB 75-10227), D. Davey, Benedetti, Tisshaw, March 19, 1981.

[75] *Larocque, Llewellyn* v. *M.E.I.* (IAB 81-9078), Davey, Teitelbaum, Suppa, June 22, 1981.

[76] *Maxwell, Lenford Barrington* v. *M.C.I.* (IAD T98-09613), Kelley, March 29, 2000.

[77] *Mercier, Rachelle* v. *M.E.I.* (IAB 79-1243), Houle, Tremblay, Loiselle, November 17, 1980.

[78] *Sutherland, Troylene Marineta* v. *M.E.I.* (IAB 86-9063), Warrington, Bell, Eglington (dissenting), December 2, 1986.

[79] *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.

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 residence be made from outside Canada. In considering the certified question,[80] 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".

Based on the Supreme Court's decision in *Baker*, it appears that the Appeal Division in exercising discretionary relief under both paragraphs 70(1)(b) and 70(3)(b) of the Act, should give serious consideration to the best interests of the appellant's children.[81]

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.[82]

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.[83]

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[84] or parents in need of the financial support provided by the appellant.[85]

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[80] The following question was cerified 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?"

[81] In *Mengaptche, Calvin Fankem* v. *M.C.I.* (IAD M97-00882), Lamarche, April 15, 1999, a decision released prior to *Baker*, the Appeal Division considered the best interests of the appellant's children as one of the factors in an appeal based on paragraph 70(1)(b) of the Act.

[82] *M.C.I.* v. *Vasquez, Jose Abel* (IAD T95-02470), Michnick, October 23, 2000 (reasons signed December 19, 2000).

[83] *Krusarouski, Mihailo* v. *M.C.I.* (IAD T99-04248), Sangmuah, November 30, 2001.

[84] *Dean, Daniel Shama v. M.E.I.* (IAB 86-6318), Anderson, Goodspeed, Ahara, February 18, 1987 (reasons signed May 15, 1987).

[85] *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.

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.[86]

9.2.5. Family and Community Support

In addressing the issue of rehabilitation discussed in section 9.2.2., 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 explanation given, the Appeal Division may draw an inference adverse to the appellant's case.[87]

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.[88]

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.[89]

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[86] *Olarte, Josephine* v. *M.C.I.* (IAD V93-02910), Clark, Verma, Lam, February 14, 1995.

[87] *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.

[88] *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.

[89] *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.

9.2.6. 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 9.2., the Supreme Court of Canada in *Chieu*[90] and *Al Sagban*[91] overturned decisions of the Federal Court of Appeal in those cases. The Supreme Court 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 under section 70(1)(b) of the Act. Decisions of the Federal Court, the Immigration Appeal Board (the predecessor of the Appeal Division) and the Appeal Divison 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. 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.

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*.[92]

In *Chandran,*[93] 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 the appellant had

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[90] *Chieu*, *supra* footnote 9.

[91] *Al Sagban*, *supra* footnote 10.

[92] *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.

[93] *Chandran, Rengam v.M.C.I.* (F.C.T.D., no. IMM-126-98), Rothstein, November 26, 1998.

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.

9.2.7. 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.[94] 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.[95]

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 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.[96]

The Appeal Division allowed an appeal brought under paragraph 70(1)(b) of the 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

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

[95] *Ng, Wai Man (Raymond)* v. *M.C.I.* (IAD V95-01846), Bartley, November 8, 1996.

[96] *Espiritu, Flordelina* v. *M.C.I.* (IAD W94-00060), Wiebe, February 20, 1995.

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.[97]

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.[98]

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 his son. It also took into consideration that the appellant expressed regret at not having told the truth.[99]

Where a removal order is made against the appellant on the basis of misrepresentation, the fact that the appellant signed the application for permanent 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.[100]

9.2.8. Circumstances of Failure to Comply with Terms and Conditions of Landing

As with the circumstances surrounding misrepresentation, the Appeal Division examines the circumstances surrounding an appellant's failure to comply with the terms and conditions of landing. In this context, the inadvertent nature of the failure to comply with terms and conditions

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[97] *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.

[98] *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.

[99] *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.

[100] *Nguyen, Truc Thanh* v. *M.C.I.* (IAD T96-01817), Townshend, October 4, 1996 (reasons signed November 4, 1996).

is a relevant factor for the Appeal Division to consider. For example, where the evidence demonstrates that an appellant, sponsored as a fiancée, is unable to comply with the condition to marry within a specified time period because her sponsor refuses to go through with the marriage, her inability to comply with the condition through no fault of her own would tend to weigh in her favour.

In one such case where the appellant had failed to fulfil the condition of landing to marry, the Federal Court of Appeal held that a relevant factor that should have been taken into consideration in the exercise of the Appeal Division's discretionary jurisdiction was the social stigma the appellant faced upon return to the country of origin.[101]

9.3. CONTINUING NATURE OF DISCRETIONARY JURISDICTION

The discretionary jurisdiction of the Appeal Division is of a continuing nature in removal cases. Accordingly, the Appeal Division has jurisdiction to reopen an appeal from a removal order on discretionary grounds only, to receive more evidence.[102] It may also reinstate an appeal that was withdrawn.[103] The Appeal Division may, at its discretion, consider *ex post facto* evidence to justify a reopening. The only limit on reopening is the Appeal Division's good judgment.[104] To justify a reopening, the tendered evidence need only be such as to support a conclusion that there is a reasonable possibility, as opposed to probability, that the evidence could lead the Appeal Division to change its original decision. In cases where the application to reopen is not *bona fide*, however, in that it is merely a delaying tactic, the Appeal Division may rightly refuse to grant the application to reopen on the basis of a lack of *bona fides*.[105]

The Appeal Division has jurisdiction to reopen an appeal on discretionary grounds where the motion to reopen has been filed before the appellant is removed from Canada and the motion has not been adjudicated on the merits.[106] Moreover, the appellant's removal from Canada does not extinguish the Appeal Division's continuing discretionary jurisdiction to hear the motion to reopen filed before removal.[107]

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[101] *Aujla, Kulwant Kaur* v. *M.E.I* (F.C.A., no. A-520-89), Mahoney, MacGuigan, Décary, March 4, 1991.

[102] *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.

[103] *Clancy*, *supra*, footnote 102.

[104] *Sandhu, Surinder Singh* v. *M.E.I.* (F.C.A., no. A-300-86), MacGuigan, Urie, Stone, March 17, 1987.

[105] *Castro, Wilson Reinerio* v. *M.E.I.* (F.C.A., no. A-149-87), Reed, Heald, McQuaid, June 3, 1988.

[106] *Harrison, Christopher* v. *M.E.I.* (IAD V92-01424), Singh, July 14, 1993, rev'g *S.G.C. v. Harrison, Christopher Michael* (F.C.T.D., no. IMM-4578-93), Jerome, September 16, 1994 and sent back to the Appeal Division for rehearing and redetermination by a freshly constituted panel. This position was confirmed in *Jackson, Darrel Wayne* v. *M.C.I.* (F.C.T.D., no. IMM-5340-99), Rouleau, August 3, 2000. In *Nguyen, Minh Trang v. M.C.I.* (IAD V95-02770), Boscariol, March 19, 2001, the Appeal Division found that it did not have jurisdiction to reopen where the appeal was filed after the appellant has been removed from Canada but not yet arrived in the intended country of removal.

[107] *Harrison, Michael Christopher* v. *M.E.I* (IAD V92-01424), Clark, January 31, 1997, aff'd *Canada* (*Minister of Citizenship and Immigration)* v. *Harrison,* [1998] 4 F.C. 557 (T.D.). See also *M.C.I.* v. *Toledo, Walter*

The Appeal Division may reopen an abandoned appeal from a removal order for the purpose of hearing evidence relevant to the appeal based on all the circumstances of the case.[108] In *A.B.Z.* the Federal Court-Trial Division agreed with a panel of the Appeal Division, that the Appeal Division's power on motions to reopen does not extend to applying the law retroactively and that the change in the Supreme Court of Canada's decision in *Baker*[109] is not a new circumstance or fact which justifies reopening.[110] The Appeal Division subsequently took that approach in *Grant*,[111] which held that the change in the law brought about by *Chieu*[112] and *Al Sagban*[113] does not constitute "new evidence" and that, in the interest of finality of decisions, the Appeal Division should not reopen. Also, in *Wang*,[114] the Trial Division commented favourably on *A.B.Z.* [115]in a judicial review of an Appeal Division removal order appeal regarding the holder of an immigrant visa.

Gonzales (F.C.T.D., no. IMM-3415-98), Sharlow, July 8, 1999. See also *M.C.I. v. Binns, Robert Lawrence* (F.C.T.D., no. IMM-2823-95), Rouleau, November 13, 1996 where the Court determined that the Appeal Division has no jurisdiction to reopen an abandoned appeal where the application to reopen was made after the appellant's removal and return to Canada.

[108] *Jones, Wayne Harry* v. *M.E.I.* (IAD V90-01153), Wlodyka, July 12, 1991.

[109] *Baker, supra* footnote 79.

[110] *A.B.Z* v. *M.C.I.* (F.C.T.D., no. IMM-334-00), McKeown, May 25, 2001.

[111] *Grant, O'Neil Rohan v. M.C.I.*, IAD T93-00071, Aterman, February 6, 2002.

[112] *Chieu, supra* footnote9.

[113] *Al Sagban, supra* footnote 10.

[114] *Wang, Ke Yu v. M.C.I.* (F.C.T.D., no. IMM-2143-01), Tremblay-Lamer, February 1, 2002.

[115] *A.B.Z, supra* footnote 110.

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CHAPTER 10

10. REMEDIES AND TERMS AND CONDITIONS OF A STAY

10.1. SECTION 70 APPEAL REMEDIES

There are prescribed remedies available to appellants who have appealed to the Appeal Division pursuant to section 70 of the *Immigration Act* (the "Act") from the issuance of a removal order or conditional removal order. Removal orders are defined and include a departure order, an exclusion order or a deportation order and include as well their respective conditional forms where a refugee claim is made by the person concerned.

These remedies take the form of ways the Appeal Division may dispose of an appeal and the *Act* prescribes the following:

> 73. (1) The Appeal Division may dispose of an appeal made pursuant to section 70
>
> (a) by allowing it;
>
> (b) by dismissing it;[1]
>
> (c) in the case of an appeal pursuant to paragraph 70(1)(b) or 70(3)(b), respecting a removal order, by directing that execution of the order be stayed; or
>
> (d) in the case of an appeal pursuant to paragraph 70(1)(b) or 70(3)(b) respecting a conditional removal order, by directing that execution of the order on its becoming effective be stayed.

Where the Appeal Division **allows the appeal** under paragraph 73(1)(a) it has certain options which are set out in subsection 74 (1) below:

> 74. (1) Where the Appeal Division allows an appeal made pursuant to section 70, it shall quash the removal order or conditional removal order that was made against the appellant and may
>
> (a) make any other removal order or conditional removal order that should have been made; or
>
> (b) in the case of an appellant other than a permanent resident, direct that the appellant be examined as a person seeking admission at a port of entry.

If a **stay** is requested and the facts suggest that there is reason to consider a stay, then, if reasons for decision are given by the panel, the appellant is entitled to know why a stay was not

[1] Although not expressly mentioned in the Act, the Appeal Division can dismiss an appeal for lack of jurisdiction, that is, if the appellant is not a permanent resident or in possession of a valid returning resident permit, a Convention refugee who is not a permanent resident, or a person in possession of a valid immigrant or visitor's visa.

granted where the appeal is dismissed.[2] Where there is a joint recommendation that a stay be granted, the Appeal Division should not reject that submission and dismiss the appeal unless there are good reasons to do so.[3]

10.2. TERMS AND CONDITIONS GENERALLY

Where a stay is granted by the Appeal Division pursuant to paragraphs 73(1)(c) or (d), the Act allows for the imposition of terms and conditions on the appellant. It is noteworthy that the nature and content of these terms and conditions are not prescribed by law but rather are those which "the Appeal Division may determine". Subsection 74(2) of the Act states:

> 74 (2) Where the Appeal Division disposes of an appeal by directing that execution of a removal order or conditional removal order is stayed, the person concerned shall be allowed to come into or remain in Canada *under such terms and conditions as the Appeal Division may determine* and the Appeal Division shall review the case from time to time as it considers necessary or advisable. (emphasis added)

In imposing a particular length of stay or review period, some members of the Appeal Division address the gravity of the criminal record or particular offence for which a deportation order was issued while other members address the need for the appellant to continue his or her course of rehabilitation over a specified period. Stays are often from one year up to five years. The stay continues in full force and effect until the Appeal Division disposes of the case by order under section 73 of the Act; that is, it does not automatically lapse at the end of the stay period.[4]

Subsection 74(2) mandates a review of the order which granted the stay "from time to time as it considers necessary or advisable". This review of the order may result in the quashing of the removal order, the cancellation of terms and conditions and/or the imposition of new terms and conditions. The Appeal Division initially sets the schedule for this review as part of the decision on the appeal. The Appeal Division must give the parties 30 days notice of a review of the order pursuant to rule 33(3) of the *Immigration Appeal Division Rules*.

As well, the Appeal Division, on its own motion, may re-open the hearing at any time to review its stay order whether there has been a breach of terms and conditions or not.[5]

As well as this review of the order as scheduled by the Appeal Division under the *Immigration Appeal Division Rules*, **any party** may make an application to the Appeal Division to amend or cancel the terms and conditions which had been previously imposed.

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[2] *Lewis, Lynda v. M.C.I.* (F.C.T.D., no. IMM-5272-98), Simpson, August 5, 1999.

[3] *Nguyen, Thi Ngoc Huyen v. M.C.I.* (F.C.T.D., no. IMM-567-99), Lemieux, November 3, 2000.

[4] *Theobalds, Eugene v. M.C.I.* (F.C.T.D., no. IMM-588-97), Richard, January 29, 1998.

[5] *M.E.I. v. Lewis, John Michael* (F.C.A., no. A-768-86, A-769-86, A-430-87, A-431-87), Mahoney, Hugessen, Desjardins, February 10, 1988. Reported: *Canada (Minister of Employment and Immigration) v. Lewis.*(1988) 4 Imm. L.R. (2d) 31 (F.C.A.). See also *Lyn, Floyd St. Nicholas v. M.C.I.* (F.C.T.D., no. IMM-1322-96), Wetston, December 9, 1996.

Subsection 74(3) of the Act states:

> 74. (3) Where the Appeal Division has disposed of an appeal by directing that execution of a removal order or conditional removal order be stayed, the Appeal Division may, at any time,
>
> (a) amend any terms and conditions imposed under subsection (2) or impose new terms and conditions; or
>
> (b) cancel its direction staying the execution of the order and
>
> (i) dismiss the appeal and direct that the order be executed as soon as reasonably practicable, or
>
> (ii) allow the appeal and take any other action that it might have taken pursuant to subsection (1).

Rule 33 (1) of the *Immigration Appeal Division Rules* states:

> 33. (1) Where the Appeal Division disposes of an appeal in accordance with paragraph 73(1)(*c*) or (*d*) of the Act, a party may apply in writing to the Appeal Division to take one of the measures referred to in paragraphs 74(3)(*a*) and (*b*) of the Act.

This is a two-step procedure: the onus is on the Minister[6] to satisfy the panel that there is a *prima facie* case to justify an oral review of the matter. If the Minister makes out such a case, the Appeal Division usually orders the oral review to take place at that time.[7] However, the review may take place at some time subsequently.[8]

The rule goes on to state the manner in which the application shall be brought. The application shall state the grounds and must be accompanied by an affidavit setting out the facts on which the application is based and a concise statement of the law and arguments that are relied on by the applicant. The application and accompanying material shall be served on the other party and be filed at the registry within prescribed time limits.[9]

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[6] *Willis, Michael Anthony v. M.E.I.* (F.C.A., no. A-793-87), Reed, Heald, McQuaid, July 5, 1988. See also *M.E.I. v. Seymour, Andre* (I.A.B. T82-9698), Eglington, Teitelbaum, Bell, April 7, 1987 (see CLIC, no. 104.16, November 1987).

[7] The notice to appear given to the appellant must specify the purpose of the hearing. It must be clear whether the Appeal Division will review only whether the appellant has been complying with the terms and conditions of the stay, or whether, as it has jurisdiction to do, it intends to review the original stay. See *Stocking, Laurence v. M.C.I.* (F.C.T.D., no. IMM-5331-97), Nadon, July 6, 1998.

[8] *Willis, ibid.*

[9] The importance of proper notice cannot be underestimated. See *Ashour, Ahmed Khalid v. M.C.I.* (F.C.T.D. no. IMM-3201-97), McKeown, May 11, 1998 and *Ponnusamy, Thuraisrasa v. M.C.I.* (F.C.T.D., no. IMM-1084-99), MacKay, June 16, 2000.

While it may be preferable for the panel who granted a stay order to review it, another panel may do so.[10]

The stay order and any terms and conditions imposed in that order remain in effect until the Appeal Division allows the appeal and quashes the removal order or dismisses the appeal and cancels the stay order and directs that the removal order be carried out as soon as practicable.

In *Grant*[11], the Appeal Division held that, in order to establish a person has breached a term and condition that he keep the peace and be of good behaviour, conviction for a crime is not required. A person breaches the term and condition when he acts or causes others to act in a manner that disrupts and/or disturbs the peace or good order of Canadian society. This term and condition may be breached while a person is incarcerated.

10.2.1. Specific Terms and Conditions

Because appellants tend not to seek judicial review of specific terms and conditions imposed as part of a stay order there is no judicial authority on terms and conditions within the immigration field. The purposes served by imposing terms and conditions are many, but the terms must be complied with for the appellant to have the removal order quashed and the appeal allowed. In this sense, they are imposed to ensure the safety of the Canadian public.

There should be a nexus between the terms and conditions imposed and the reasons for the granting of the stay. Any term and condition should be relevant to the particular appellant and case being decided. It is also important that any term and condition being imposed be precise as there are consequences for failing to comply with a term and condition. If an appellant does not comply with a term and condition, the appellant may be brought before the Appeal Division for a review of the stay. Also, the Minister, pursuant to subsection 70(6),[12] may file a "danger to the public opinion" which may remove the jurisdiction of the Appeal Division to review the appeal. (For a further discussion of "danger to the public opinions", see Chapter 2.)

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[10] *Eltassi v. Canada (Minister of Employment and Immigration)*, [1989] 3 F.C. 444 (T.D.). *M.E.I. v. Tang, Chi Kong (Rick)* (I.A.B. V85-6042), Howard, Chambers, Vidal, July 8, 1986. This is implied as well in *Kumar, James Rakesh v. M.E.I.* (F.C.A., no. A-1533-83), Heald, Urie, Stone, November 29, 1984.

[11] *Grant, O'Neil Rohan v. M.C.I.* (IAD T93-00071), D'Ignazio, June 21, 2001.

[12] Subsection 70(6) reads:

> Where the Appeal Division directs that the execution of a deportation order or conditional deportation order be stayed, the direction is of no effect and, notwithstanding subsection 74(2), the Appeal Division may not review the case, where the Minister is of the opinion that the person has breached the terms and conditions set by the Appeal Division and that the person constitutes a danger to the public in Canada and the person has been determined by an adjudicator to be
>
> (a) a member of an inadmissible class described in paragraph 19(1)(c), (c.1), (c.2) or (d);
>
> (b) a person described in paragraph 27(1)(a.1); or
>
> (c) a person described in paragraph 27(1)(d) who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of ten years or more may be imposed.

Terms and conditions often imposed include, but are not limited to, the following:

- Report to the Canada Immigration Centre at _____ on _____ and every __ month(s) thereafter on the following dates.

The Appellant shall report (in person) (by telephone) (in writing). The reports are to contain details of the Appellant's:

- employment or efforts to obtain employment if unemployed
- current living arrangements
- marital status or common-law relationships
- attendance at any educational institution and any change in that attendance
- attendance at meetings of Alcoholics Anonymous, or any other drug or alcohol rehabilitation program
- participation in psychotherapy or counselling (please specify type):
- meetings with parole officer, including details of any violations of the conditions of parole
- other relevant changes of personal circumstances
- other (specify):_____.
- Report any change of address to the Canada Immigration Centre and the Immigration and Refugee Board, Appeal Division within 72 hours of making such a change.
- Report any criminal convictions FORTHWITH to the Canada Immigration Centre.
- Make reasonable efforts to seek and maintain full time employment and FORTHWITH report any change in employment.
- Engage in or continue psychotherapy or counselling. **NOTE**: *IF YOU WITHDRAW YOUR CONSENT TO THE FOREGOING CONDITION, YOU MUST BRING AN APPLICATION TO THE IAD FORTHWITH TO HAVE THIS CONDITION REMOVED. (NOTE: THIS CONDITION SHOULD ONLY BE IMPOSED WITH THE APPELLANT'S PRIOR CONSENT)*
- Attend a drug or alcohol rehabilitation program. **NOTE**: *IF YOU WITHDRAW YOUR CONSENT TO THE FOREGOING CONDITION, YOU MUST BRING AN APPLICATION TO THE IAD FORTHWITH TO HAVE THIS CONDITION REMOVED. (NOTE: THIS CONDITION SHOULD ONLY BE IMPOSED WITH THE APPELLANT'S PRIOR CONSENT)*
- Make reasonable efforts to maintain yourself in such condition that:

  (a) your (name condition, eg. chronic schizophrenia or alcoholism) will not cause you to conduct yourself in a manner dangerous to yourself or anyone else; and

  (b) it is not likely you will commit further offences.

- Not knowingly associate with individuals who have a criminal record or who are engaged in criminal activity.

- Not own or possess offensive weapons or imitations thereof.
- Respect all parole conditions and any court orders.
- Refrain from the illegal use or sale of drugs.
- Keep the peace and be of good behaviour.
- Other (specify):_____.

10.2.2. Consent to Terms and Conditions

There are certain terms and conditions for which the consent of the appellant is required before the term and condition can be imposed. Usually, the terms and conditions for which consent are required are those which deal with the *Charter* rights of the appellant. So, for example, in the list of terms and conditions above, the condition for the appellant to "attend a drug or alcohol rehabilitation program" requires the consent of the appellant. The Appeal Division, when considering appeals of persons who have been engaged in criminal activity caused by an abuse of narcotics, has considered whether it could impose random drug testing as a term and condition of a stay.

The *Rogers*[13] case which dealt with medical treatment as a term of a probation order raised serious *Charter of Rights and Freedoms* concerns with respect to non-consensual orders. It appears reasonable to conclude from this case that the Appeal Division may impose random drug testing as a term and condition of a stay provided the appellant gives a free and informed consent to this measure. The Appeal Division has held that it has the jurisdiction to order the appellant to undergo psychological and psychiatric treatment.[14]

10.3. OTHER REMEDIES

10.3.1. Return to Canada

Pursuant to section 75 of the Act, the Appeal Division can order a person returned to Canada for his or her appeal. Section 75 reads:

> 75. Where a person against whom a removal order or conditional removal order has been made is removed from or otherwise leaves Canada and informs the Appeal Division in writing of his desire to appear in person before the Appeal Division on the hearing of the appeal against the order, the Appeal Division may, if an appeal has been made, allow the person to return to Canada for that purpose under such terms and conditions as it may determine.

Rule 34 of the *Immigration Appeal Division Rules* governs the procedure for this application which includes notice be given to the Minister who may file submissions and the applicant shall have the right to file a response to the submissions of the Minister.

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[13] *R. v. Rogers* (1990), 61 C.C.C. (3d) 481 (B.C.S.C.).

[14] *Johnson, Bryan Warren v. M.E.I.* (IAD T89-01143), Sherman, Townshend, Ariemma, November 22, 1989.

In *Harrison,*[15] the Appeal Division indicated that section 75 confers a discretionary power on the Appeal Division to allow a person who has filed an appeal to return to Canada for the purpose of attending the hearing of his or her appeal. It is implicit in this section that removal from Canada does not terminate an appeal which has been filed prior to removal and that the Appeal Division retains jurisdiction to hear an appeal despite the fact that the appellant has been removed from Canada pursuant to the removal order.[16]

10.3.2. Confidentiality Application

Appeal Division proceedings are usually in public. There is a provision of the Act, however, which allows the proceedings, on application, to be held *in camera*. Section 80 of the *Act* reads

> 80. (1) Subject to subsections (2) and (3), an appeal to the Appeal Division shall be conducted in public.
>
> (2) Where the Appeal Division is satisfied that there is a serious possibility that the life, liberty or security of any person would be endangered by reason of the appeal being conducted in public, the Appeal Division may, on application therefor, take such measures and make such order as it considers necessary to ensure the confidentiality of the appeal.
>
> (3) Where the Appeal Division considers it appropriate to do so, the Appeal Division may take such measures and make such order as it considers necessary to ensure the confidentiality of any hearing held in respect of any application referred to in subsection (2).

These applications are to be made, pursuant to rule 20, by motion in accordance with subrules 27(2) to (7).

In *Walker*,[17] the Appeal Division refused an application under these provisions, stating that the risk of stress being caused to the appellant did not justify limiting the right of the press to report the names of adult participants in a public hearing and further, the right to security of the person does not encompass the right not to be threatened with suffering occasioned by the stress of public humiliation.

10.3.3. Abandonment

Pursuant to section 76 of the Act, the Appeal Division may declare an appeal from a removal order or conditional removal order to be abandoned where the appellant:

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[15] *Harrison, Michael Christopher v. M.C.I.* (IAD V92-01424), Clark, January 31, 1997; aff'd by *Canada* (*Minister of Citizenship and Immigration) v. Harrison,* [1998] 4 F.C. 557 (T.D.).

[16] *Harrison*, *supra*, footnote 10. See also, *M.C.I. v. Toledo, Walter Gonzales* (F.C.T.D., no. IMM-3415-98), Sharlow, July 8, 1999.

[17] *Walker, Patricia Ann v. M.C.I.* (IAD V95-02640), Clark, July 15, 1996.

> s. 76 [...]fails to communicate with the Appeal Division upon being requested to do so or fails to inform the Appeal Division of the [appellant's] most recent address[...]

Often this provision is used in situations where the appellant has been notified to appear before the Appeal Division for a hearing and yet fails to show on the date requested. In these circumstances, the member would review the Appeal Division's file and ascertain whether the appellant has met the criteria in section 76 of the Act, that is, have they failed to communicate with the Appeal Division. If the member is satisfied that the appellant comes within this section, then the matter would be declared abandoned. In future, the appellant could apply under rule 32 to have the case reopened.

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CHAPTER 11

11. SECTION 70 OF THE *IMMIGRATION ACT* AND THE CHARTER

11.1. INTRODUCTION

Constitutional arguments based on the Charter[1] can take a variety of forms. However, administrative tribunals have limited jurisdiction in constitutional matters; therefore, the most commonly used argument is inconsistency between one or more provisions of the enabling legislation and the Charter.

This chapter focuses first on the scope of the constitutional jurisdiction of the Appeal Division. It then examines the law as it pertains to the right of appeal of permanent residents and holders of returning resident permits under subsection 70(1) of the *Immigration Act* and of refugees and visa holders under subsection 70(2) of the Act. Finally, it addresses the constitutional argument of "unreasonable delay" and comments on procedural issues.

11.2. JURISDICTION OF THE APPEAL DIVISION

The Charter contains three provisions that can be used as grounds for claiming an infringement of Charter rights.

11.2.1. Subsection 24(1)

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

This subsection provides a remedy for any damages that may be sustained.

In *Borowski,*[2] an adjudicator found that the legislative provision that permits the court to appoint a lawyer in certain types of investigation and not in others was discriminatory and inconsistent with the right to equality set out in section 15 of the Charter. He therefore appointed a lawyer to represent the person concerned. The Federal Court Trial Division ruled that an adjudicator could choose not to take into consideration a provision of the *Immigration Act* inconsistent with the Charter but could not provide a remedy within the meaning of subsection 24(1) of the Charter.

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[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* [Schedule B of the *Canada Act, 1982* (1982, U.K., c. 11)].

[2] *Canada (Minister of Employment and Immigration) v. Borowski,* [1990] 2 F.C. 728 (T.D.).

In *Howard,*[3] the remedy sought was to have the deportation order quashed. The applicant had challenged the constitutionality of certain provisions of the *Young Offenders Act,*[4] a conviction under which had led to the deportation of a permanent resident; a stay of the deportation had been granted but had been subsequently cancelled by the Appeal Division. The Federal Court upheld the Appeal Division's decision that it did not have jurisdiction to rule on the constitutional arguments and stated that neither the adjudicator nor the Appeal Division was, in the matter at hand, a court of competent jurisdiction within the meaning of subsection 24(1) of the Charter because the *Immigration Act* did not grant authority to rule on the constitutionality of the *Young Offenders Act.*

The fact remains that these are matters in which the remedy sought was clearly beyond the tribunal's jurisdiction. The Supreme Court of Canada has not yet decided the issue of whether an administrative tribunal is a "court of competent jurisdiction" within the meaning of subsection 24(1) of the Charter, and it is not certain that it will do so. Every case is reviewed on its own merits, and the courts do not seem inclined to rule out the possibility that administrative tribunals are, in some circumstances, a "court of competent jurisdiction" within the meaning of section 24 of the Charter.

The entire body of case-law indicates that this section does not confer new jurisdiction on any tribunal. A tribunal is competent under subsection 24(1) if it has jurisdiction over the person, the subject-matter and the remedy sought, pursuant to a legal source separate from the Charter.[5] This raises the prospect of the Appeal Division's being recognized, in specific circumstances, as a "court of competent jurisdiction," provided it is authorized under the *Immigration Act* to grant the remedy sought.

The Appeal Division does not have to take a position in this regard if no Charter rights have been violated.[6]

11.2.2. Subsection 24(2)

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

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[3] *Howard, Kenrick Kirk v. M.C.I.* (F.C.T.D., no. IMM-5252-94), Dubé, January 4, 1996; see also *Halm v. M.E.I.* (1991), 172 N.R. 315 (F.C.A.).

[4] R.S.C. 1985, c. Y-1.

[5] *Singh v. Canada (Minister of Employment and Immigration),* [1985] 1 S.C.R. 177; *Mills v. The Queen,* [1986] 1 S.C.R. 863; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board),* [1991] 2 S.C.R. 5.

[6] *Chan, Ngorn Hong v. M.E.I.* (IAD V90-00287), Wlodyka, Guillanders, Verma, July 31, 1992; *Maharaj, Davechand v. M.E.I.* (IAD T90-07339), Sherman, Ariemma, Weisdorf, October 21, 1991.

This subsection provides for a remedy by means of the inadmissibility of evidence. It is intrinsically linked to subsection 24(1). Consequently, all of the comments made above apply here as well.

The task then would be to determine first, whether the evidence the tribunal has been asked to set aside was obtained in a manner that infringed Charter rights and second, whether the use of that evidence would likely bring the administration of justice into disrepute. Three factors bear on whether the administration of justice has been brought into disrepute: (1) the impact that use of the evidence might have on the fairness of the proceeding; (2) the seriousness of the infringement of rights; and (3) the consequences of not admitting the evidence. These factors were developed in criminal proceedings,[7] but it is likely that they would apply to administrative matters as well if properly adapted.

The doctrine and the case-law are all but silent as to the use of this remedy before administrative tribunals. Still, according to academic J. M. Evans,[8] the authority conferred on the Appeal Division under paragraph 69.4(3)(*c*) of the *Immigration Act* to receive evidence it finds credible, trustworthy and necessary would permit the remedy provided for in subsection 24(2).

Furthermore, in *Bertold*,[9] the Federal Court Trial Division referred the case back to the Appeal Division, among other things, because the Division had admitted evidence from criminal and investigations files from Germany, obtained through the illegal, fraudulent and deceptive schemes of a third party in violation of sections 7 and 8 of the Charter. The Court stated that this evidence should have been excluded pursuant to subsection 24(2) of the Charter, thus confirming that the Appeal Division had jurisdiction to do so.

11.2.3. Subsection 52(1)

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[7] *R. v. Collins*, [1987] 1 S.C.R. 265, at 280-1; *R. v. Ross,* [1989] 1 S.C.R. 3, at 15; *R. v. Genest*, [1989] 1 S.C.R. 59, at 83.

[8] Professor of law, Osgoode Hall Law School, York University. Speaker at a training session for Appeal Division members in Toronto, April 22, 1994.

[9] *Bertold, Eberhard v. M.C.I.* (F.C.T.D., no. IMM-5228-98), Muldoon, September 29, 1999. In this case, the documents had been obtained from the Germany authorities. The Appeal Division did not accept the appellant's argument that the documents had been obtained in a manner that infringed his rights guaranteed by the Charter. The argument was based on the decision in *Schreiber v. Canada (Attorney General)*, [1998] S.C.R. 841, in which the Supreme Court of Canada held that it is the law of the country where the information is found that governs the issue whether and how it may be obtained. The judgment of the Federal Court was not the clearest of judgments. The Court appears to have found that the German authorities had, upon request of Canadian immigration authorities, only confirmed information they had received from a certain Langreuther, a creditor of the appellant who had harassed and threatened the appellant. The judgment does not shed any light with respect to determining how the evidence was obtained in a manner that infringes sections 7 and 8 of the Charter. The Court did not make any pronouncement on the issue whether the evidence was likely to bring the administration of justice into disrepute.

> The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

This subsection deals with application of the Constitution, of which the Charter is a part, by rendering of no force or effect any law that is inconsistent with the Charter. This is the argument most commonly used before administrative tribunals. The competence of administrative tribunals, including the Appeal Division, to rule on the inconsistency of the provisions of their own enabling legislation with the Charter has been well established[10] for a number of years. It should be noted that such competence is limited to declaring to be of no force or effect one or more provisions of the *Immigration Act* in the specific matter before the Appeal Division and that such a finding can in no way be construed as a formal declaration of invalidity valid *erga omnes.*[11]

11.3. APPEAL BY PERMANENT RESIDENTS AND HOLDERS OF RETURNING RESIDENT PERMITS [SUBSECTION 70(1)]

Higher courts have ruled in a number of cases involving permanent residents who have invoked constitutional grounds to challenge removal orders made against them. It appears that no cases involving holders of returning resident permits have yet been referred to the courts. Consequently, this section will deal only with appeals filed by permanent residents; however, in all probability, the case-law regarding permanent residents would apply in the same way to holders of returning resident permits in respect of whom a removal order had been issued.

11.3.1. Permanent residents

The removal of permanent residents has been challenged on constitutional grounds, primarily as an infringement of the rights guaranteed by sections 7, 12 and 15 of the Charter. The limitations on the right of appeal of permanent residents, which are set out in subsections 70(4) and (5) of the *Immigration Act*, have been challenged on the same grounds. Paragraph 70(1)(*b*) has also been debated as regards its consistency with the rights guaranteed by sections 7 and 12 of the Charter.

11.3.1.1. Applicable sections of the Charter

To begin, the sections of the Charter that have been invoked most frequently to challenge the constitutionality of certain provisions of the *Immigration Act* will be examined and commented upon briefly, as appropriate. Section 7 of the Charter merits comment:

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[10] The S.C.C. trilogy: *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570; *Cuddy Chicks, supra,* footnote 5; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission),* [1991] 2 S.C.R. 22.

[11] *Cuddy Chicks, ibid.*

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This is the section most often used to support constitutional arguments. The section has two components. First is the phrase "right to life, liberty and security of the person." These three elements are often argued together, but they can be separated, and an infringement of one of the three alone constitutes an infringement of the first component of section 7.[12] As to the second component, the principles of fundamental justice include as a minimum the principles of natural justice, but are not synonymous with those principles because they also include substantial guarantees. Whether a principle is a principle of fundamental justice depends on the nature, sources, rationale and essential role of the principle in the judicial process and our legal system. "Principles of fundamental justice" can be interpreted as including a great many things. They will take on concrete meaning as the courts consider allegations of section 7 infringements.[13]

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Punishment is cruel and unusual if it is so excessive as to outrage standards of decency.[14]

15.(1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Equality entails more than treating in a similar manner persons in similar situations. Consideration has also to be given to the content of the Act, its purpose and its effect on those to whom it applies and those to whom it does not.[15]

Equality within the meaning of section 15 has a more specific objective than simply eliminating distinctions; its objective is to eliminate discrimination. To determine whether there has been discrimination on grounds related to personal characteristics of an individual or group,

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[12] *Singh, supra*, footnote 5, at 205.

[13] *Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.

[14] *R. v. Smith*, [1987] 1 S.C.R. 1045, at 1072.

[15] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 167; see also *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where the Supreme Court of Canada held that a legislative omission can infringe the right guaranteed under section 15 of the Charter. In this case, the employment of the appellant had been terminated because of his homosexuality. He turned to the Human Rights Commission of Alberta, created by the *Individual's Rights Protection Act* (IRPA), and the Commission informed him that he could not bring a complaint as sexual orientation was not one of the grounds enumerated in the IRPA. In a liberal interpretation, the Supreme Court of Canada read sexual orientation into the enumerated grounds of discrimination prohibited by the IRPA and concluded that this omission by the Legislator constituted a negation of the right of homosexuals to the equal benefit and protection of the law.

it is necessary to examine not only the legislative provision, but also the larger social, political and legal context.[16]

> **1.** The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 does not come into play unless the person invoking the Charter (that is, the appellant) establishes that there has been an infringement of a right he or she is guaranteed by the Charter. It is then up to the government to show that, based on a balance of probabilities, the limitation of rights is reasonable.[17] The test for determining the "reasonableness" of the limitation is based on a proportionality test between the objective in question, which must be sufficiently important to justify the limitation of a right, and the means chosen, which must be such that the right is impaired as little as possible.[18]

11.3.1.2. Deportation of permanent residents

The Supreme Court of Canada recently determined in *Chieu*[19] that it was permissible for the Appeal Division in exercising its discretionary jurisdiction to take into consideration potential hardship abroad (including the situation in the country regarding factors that were not taken into account by the Refugee Division), for purposes of determining whether to quash or stay a removal order against a permanent resident.

No constitutional question was raised in this case; however, the decision modifies somewhat the approach taken in the jurisprudence of the Federal Court of Appeal as a whole, that is, that removal is a decision by the Minister that can only be made once the Appeal Division has decided the case. The consequence of this approach has been that constitutional challenges of a decision by the Minister to carry out removal were presented, in particular, before the Federal Court rather than before the Appeal Division. Following the decision in *Chieu*, the appellant will be more likely to make constitutional arguments before the Appeal Division.[20] It is therefore important to comment briefly on this decision.

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[16] *R. v. Turpin*, [1989] 1 S.C.R. 1296, at 1329.

[17] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[18] *Oakes, ibid*.

[19] *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3. Registry no.: 27107.

[20] *Ibid.* In this case, the Minister attempted unsuccessfully to argue that the scheme of the Act militates in favour of considering foreign hardship either by way of an application for judicial review of the decision made by the Minister under section 52 of the Act in relation to the country of removal or by seeking a Minister's permit under subsection 114(2) in order to exempt the individual from removal by reason of potential foreign hardship. In this respect, the Supreme Court stated as follows in paragraph 50 of its decision: "In my opinion, these alternative avenues of redress are not the ideal way for foreign hardship concerns to be taken into account. They need be resorted to only in cases where the I.A.D. cannot consider potential foreign hardship – either because a likely country of removal has not been established, because the I.A.D. has lost jurisdiction (i.e., pursuant to ss. 70(5) or 81of the Act), or because the country of removal changed after the s. 70(1)(b) appeal hearing."

While recognizing that the decision to effect removal is that of the Minister, the Court pointed out that it usually difficult for a person facing deportation from Canada to be admitted to a country other than the person's country of nationality. The result is that the country of removal is generally known at the time of the hearing of the appeal. Traditionally, the Minister has decided the country of removal after the dismissal of the appeal, but this is not a requirement under the Act. The Minister is free to make a decision regarding the country of removal before the hearing before the Appeal Division, and the Minister may make arguments before the Appeal Division regarding the likely country of removal during the appeal. The Appeal Division must therefore take into account the situation in the likely country of removal, even though it is not known with certainty what country that will be.[21]

A permanent resident who has not been determined to be a refugee may argue before the Appeal Division that removal to his or her country of nationality constitutes an infringement of a Charter-protected right. In *Thamotharampillai*,[22] the applicant, a permanent resident, had a very substantial criminal record and a deportation order was made against him under paragraph 27(1)(*d*) and subsection 32(2) of the Act. He did not exercise his right of appeal before the Appeal Division and did not claim refugee status. He did not apply for a pre-removal risk assessment or humanitarian or compassionate review until after exercising his rights of recourse in the Federal Court with respect to the Minister's decision to execute the removal order.

He claimed that as a young Tamil, convicted in Canada, he would be suspected by the Sri Lankan Government of belonging to the Tiger Tamils and would consequently be at risk, among other things, of being tortured, which would be an infringement of his right to life, liberty and security of the person guaranteed under section 7 of the Charter. The Federal Court dismissed the application because the applicant had not demonstrated that he would be tortured or killed if he were deported. However, the Court did certify the following question: "Whether the removal order issued against the applicant requiring his deportation to Sri Lanka, a country engaged in an armed conflict, infringe or deny the rights guaranteed by ss. 7 or 12 of the Canadian Charter of Rights and Freedoms."

It is likely that in a similar situation where a permanent resident had moreover exercised his or her right of appeal, the Minister would issue an opinion under subsection 70(5) of the Act, to deprive the permanent resident of that right. However, absent such an opinion, the Appeal Division would be called upon to determine the issue, taking into account the ruling of the Supreme Court of Canada in *Chieu*, that is, that the Appeal Division, in exercising its discretionary jurisdiction, must consider all the potential hardship a permanent resident who is not a refugee will face after removal to the country of removal.

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[21] The Supreme Court does not expressly rule out the possibility that it is permissible for the Appeal Division to do the same in refugee cases. However, the Court notes that the likely country of removal in refugee cases will not be ascertainable given section 53 of the Act that prohibits removal to a country where the person faces a risk of persecution. In practice, the Minister does not seek to deport a refugee unless the Minister is of the opinion that the refugee constitutes a danger to the public. In that case, the person's right of appeal is usually limited under subsection 70(3.1), (4), or (5) of the Act and the Appeal Division is not entitled to exercise its discretionary jurisdiction. See also *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1. Registry number: 27790.

[22] *Thamotharampillai, Shanmugavadivel v. M.C.I.* (F.C.T.D., no. IMM-1549-96), Muldoon, April 20, 2001.

With respect to constitutional challenges, the Supreme Court of Canada ruled on a number of issues in *Chiarelli.*[23] In that case, the respondent had been the subject of a deportation order under subsection 32(2) of the *Immigration Act* since he was found to be described in subparagraph 27(1)(*d*)(ii). The hearing of the appeal based on paragraph 70(1)(*b*) was adjourned in accordance with subsection 81(6) of the Act, and the Minister issued a security certificate under subsection 83(1) [now subsection 82(1) of the Act], which forced the Appeal Division to dismiss the appeal. It was argued that the deportation infringed the rights guaranteed by sections 7, 12 and 15 of the Charter.

Section 7

As to the consistency of the legislative provisions allowing the deportation of permanent residents because of criminal activity (subsection 32(2) and paragraph 27(1)(*d*)) with section 7 of the Charter, the predominant position[24] of the Federal Court of Appeal has been that deportation does not infringe liberty.

In *Chiarelli,*[25] the Federal of Court of Appeal determined that deportation for serious offences cannot be considered a deprivation of liberty. In *Hoang,*[26] the Court reiterated its position: "[. . .] deportation [. . .] is not to be conceptualized as a deprivation of liberty." While it concluded in *Chiarelli*[27] that the deportation of permanent residents did not infringe the right

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[23] *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711.

[24] See *Nguyen v. M.E.I.* (1993), 18 Imm. L.R. (2d) 165 (F.C.A.), where Marceau J. implied in contrast that deportation could constitute a deprivation of liberty. See also *Farhadi, Jamshid v. M.C.I.* (F.C.T.D., no. IMM-3846-96), Gibson, March 20, 1998, at 9, where the Federal Court concluded that the necessary factual foundation to support a Charter argument was absent, but nevertheless referred to the words of Mr. Justice Marceau in *Nguyen.* It is interesting to note Mr. Justice Gibson's conclusion in this case, namely that, to respect the principles of natural justice and fairness, the applicant had the right to a pre-removal risk assessment, in addition to the procedure already followed leading to the issuance of the opinion as to danger under subsection 70(5) of the *Immigration Act.* In *Barre, Mohamed Bulle v. M.C.I.* (F.C.T.D., no. Imm-3467-98), Teitelbaum, July 29, 1998, Mr. Justice Teitelbaum refused to follow this approach and he reached the contrary conclusion that the *Immigration Act* did not impose such a requirement. In *Jeyarajah, Nishan Gageetan v. M.C.I.* (F.C.T.D., no. IMM-6057-98) Denault, December 15, 1998, Mr. Justice Denault followed the decision in *Barre* in the context of an application for an interim stay of removal. At the same time, the applicant had brought an action for a declaration that, in the absence of a risk assessment of return independent from the procedure leading to the issuance of an opinion under subsection 70(5) infringed the rights guaranteed under sections 7 and 12 of the Charter. The Federal Court Trial Division dismissed the action and the appeal against this decision was likewise dismissed by the Federal Court of Appeal. The words of Mr. Justice Gibson in *Farhadi* have given rise to constitutional challenges in several cases regarding the opinion as to danger to the public issued by the Minister pursuant to section 53. In this regard, see *infra*, note 58.

[25] *Chiarelli v. Canada (Minister of Employment and Immigration.),* [1990] 2 F.C. 299 (C.A.). See also *Canepa v. Canada (Minister of Employment and Immigration*), [1992] 3 F.C. 270 (C.A.); *Hurd v. Canada (Minister of Employment and Immigration.),* [1989] 2 F.C. 594 (C.A.).

[26] *Hoang v. M.E.I.* (1990), 13 Imm. L.R. (2d) 35; (F.C.A., no. A-220-89), Urie, MacGuigan, Linden, November 30, 1990, at 6.

[27] *Chiarelli*, *supra*, footnote 23.

guaranteed by section 7 of the Charter, the Supreme Court of Canada did not uphold the ruling of the Federal Court of Canada, namely that deportation was not a deprivation of liberty. Sopinka J. instead based his conclusions on the second component of section 7:

> [. . .] The Federal Court of Appeal [. . .] held that deportation for serious offences is not to be conceptualized as a deprivation of liberty. I do not find it necessary to answer this question, however, since I am of the view that there is no breach of fundamental justice.[28]

He added at page 733:

> Thus in determining the scope of the principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.

The Appeal Division has since made determinations in a number of cases[29] that are along the same lines as the ruling of the Supreme Court of Canada in *Chiarelli*. The jurisprudence of the Federal Court Trial Division continues to be divided on the issue of whether deportation infringes the right to life, liberty and security of the person,[30] an issue on which the Supreme Court of Canada did not rule in *Chiarelli.* Following *Chieu*, it is possible to anticipate all kinds of grounds permanent residents could argue before the Appeal Division in attempting to demonstrate that removal to their country of nationality would infringe their rights under section 7 of the Charter.

With respect to deportation for reasons other than serious offences, the Federal Court of Appeal in *Canepa* seems to have interpreted the Supreme Court's rulings in this regard as applying in all cases of deportation of permanent residents, regardless of the reasons for deportation:

> The Supreme Court has therefore squarely decided that the qualifications on the right of permanent residents to remain in Canada which Parliament has imposed in the classes of subsection 27(1) of the Act do not contravene the fundamental principles of justice in section 7.[31]

However, now that the Appeal Division is required to consider potential foreign hardship, this statement must be modified. If, in taking this hardship into consideration, the Appeal Division finds that the nature of the removal is such that it infringes a Charter-protected right, the Division will have to take that into account. In its judgment

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[28] *Chiarelli*, *supra*., footnote 23, at 732.

[29] *Kelly, Rolston Washington v. M.E.I.* (IAD T93-04542), Bell, December 1, 1993; *Fernandes, Jose Paulo Arruda v. M.C.I.* (IAD T89-584), Teitelbaum, Wiebe, Ramnarine, May 4, 1994. Application for judicial review dismissed: *Fernandes, Jose Paulo Arruda v. M.C.I. (*F.C.T.D., no. IMM-4385-94), Joyal, November 22, 1995; *Machado, Joao Carneiro John v. M.E.I.* (IAD W89-00143), Aterman, Wiebe, March 4, 1996.

[30] *Canepa, supra*, footnote 25; *Romans, Steven v. M.C.I.* (F.C.T.D., no. IMM-6130-99), Dawson, May 11, 2001.

[31] *Canepa*, *supra*, footnote 25, at 274.

in *Suresh*,[32] the Supreme Court of Canada rejected the position of the Federal Court of Appeal,[33] namely, that even if Mr. Suresh were at risk of torture upon his return to Sri Lanka, there was no infringement of section 7 of the Charter because Canada is merely an "involuntary intermediary" when it deports a person to a country where his or her life, liberty and security of the person are threatened.

According to the Supreme Court of Canada:

> […] where Canada's participation is a necessary precondition for the deprivation and the deprivation is an entirely foreseeable consequence of Canada's participation, the Government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.
>
> […]
>
> There is always the question […] of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.

Based on the case-law as a whole, it can be stated that the deportation of a permanent resident in and of itself does not infringe the right guaranteed under section 7 of the Charter. However, each case must be decided on its own special facts, and depending on the consequences that deportation might have for the permanent resident, there could be a deprivation of this right.

Children who are Canadian citizens do not have standing[34] to challenge the deportation of their parents on constitutional grounds. They are not subject to a removal order, and their departure from Canada with their parents results from a personal decision, with no government intervention.[35]

Section 12

In *Chiarelli,*[36] the Supreme Court of Canada upheld the Federal Court of Appeal's ruling that the deportation of permanent residents for serious offences does not infringe the right to protection from cruel and unusual treatment or punishment guaranteed by section 12 of the Charter. It supported the position taken by the Federal Court of Appeal that deportation is not imposed as a punishment.[37] Deportation could, however, be considered cruel and usual "treatment":

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[32] *Suresh, supra*, footnote 21.

[33] *Suresh v. Canada (Minister of Citizenship and Immigration*, [2000] 2 F.C. 592 (C.A.).

[34] *Skapinker: Law Society of Upper Canada v. Skapinker,* [1984] 1 S.C.R. 357.

[35] *Langner, Ewa Pawlk J. v. M.E.I.* (F.C.T.D., no. T-3027-91), Denault, July 12, 1994. See also *Fernandes, Jose Paulo Arruda v. M.C.I. (*F.C.T.D., no. IMM-4385-94), Joyal, November 22, 1995 and *Dwyer, Courtney v. M.C.I.* (IAD T92-09658), Aterman, Wright, March 21, 1996.

[36] *Chiarelli*, s*upra*, footnote 23.

[37] *Hurd, supra,* footnote 25; *Hoang, supra*, footnote 26.

> Deportation may, however, come within the scope of a "treatment" in s. 12. The *Concise Oxford Dictionary* (1990) defines treatment as "a process or manner of behaving towards or dealing with a person or thing [...]." It is unnecessary, for the purposes of this appeal, to decide this point since I am of the view that the deportation authorized by ss. 27(1)(*d*)(ii) and 32(2) is not cruel and unusual.[38]

Sopinka J. added at page 736:

> The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency. (see 11.3.1.1, section 12)

In a subsequent case, *Canepa,*[39] the Federal Court of Appeal considered the issue of whether the deportation of a permanent resident subject to subparagraphs 27(1)(*d*)(i) and (ii) constitutes cruel and unusual "treatment" within the meaning of section 12 of the Charter and concluded that it does not. The Court noted that an appeal on equitable grounds renders the order reversible, depending upon an assessment of the appellant's personal qualities and faults. After analyzing the reasons given by the Appeal Division, the Court found:

> The foregoing indicates a careful and balanced examination of the appellant's claim to remain in Canada from an equitable rather than a legal point of view. It seems to me that it is the very kind of inquiry mandated by Gonthier J. in *Goltz* [*R. c. Goltz*, [1991] 3 S.C.R. 485] [at page 505], involving an "assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence in itself with the particular circumstances of the offence and the personal characteristics of the offender." I find nothing "grossly disproportionate as to outrage decency in those real and particular circumstances."[40]

Based on the case-law, it is therefore possible to envisage that the deportation of a permanent resident for reasons other than the commission of serious offences could, in some circumstances, constitute cruel and unusual "treatment." Even when deportation is for the perpetration of serious crimes, removal to the country of origin could, in certain circumstances, constitute an infringement of section 12 of the Charter. The comments regarding the implications of *Chieu* and *Suresh* under the Section 7 subheading also apply to section 12 of the Charter.

Section 15

The deportation of permanent residents has also been challenged on the basis of the right to equality guaranteed by section 15 of the Charter, in that subparagraph 27(1)(*d*)(ii) and subsection 32(2) provide for the deportation of persons convicted of an offence punishable by imprisonment for five years or more, regardless of the circumstances of the offence or the

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[38] *Chiarelli*, s*upra*, footnote 23, at 735.

[39] *Canepa*, s*upra*, footnote 25.

[40] *Canepa*, *supra*, footnote 25, at 284. Note that this reasoning would obviously not apply in situations where the right of appeal is limited by subsections 70(4) or (5) of the *Immigration Act*. See also *Gagliardi*, *Giovanni v. M.E.I.* (F.C.A., no. A-1142-87), Heald, Mahoney, Desjardins, January 9, 1990.

offender. The Supreme Court of Canada made a definitive ruling on this issue in *Chiarelli,*[41] namely that the Charter itself provides for different treatment of citizens and permanent residents:

> As I have already observed, s. 6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.[42]

11.3.1.3. Partial limitation of right of appeal of permanent residents [subsection 70(4)]

Under paragraph 70(4)(*a*) of the *Immigration Act*, the right of appeal of permanent residents in respect of whom a certificate is issued under subsection 40(1) of the Act is limited to questions of law or fact, or mixed law and fact (in other words, an appeal on equitable grounds based on paragraph 70(1)(*b*) of the Act is not permitted). Pursuant to paragraph 70(4)(*b*), an appeal is also limited if the person has been determined by an adjudicator to be a member of an inadmissible class. In practice, however, in cases involving permanent residents other than permanent residents in the inadmissible class referred to in paragraph 19(1)(*j*), the Minister issues a certificate under subsection 40(1) or subsection 82(1) in order to take away the discretion of the adjudicator or the Appeal Division.

Moreover, in view of sections 39, 40, 81 and 82 of the Act, it is clear that Parliament allowed for the possibility of a security certificate's being issued at any stage prior to a decision by the Appeal Division. As a result, challenges based on the Charter have focussed primarily on the procedures used to issue a security certificate and the impact of a security certificate on the right of appeal of permanent residents.

In *Chiarelli,* it was argued that where there was a right of appeal based on paragraph 70(1)(*b*), the process leading to the issuance of a security certificate [section 81 and subsection 82(1)] and the Appeal Division's dismissal of an appeal based on such a certificate [subsection 82(2)] infringed the rights guaranteed by sections 7, 12 and 15 of the Charter. The Federal Court of Appeal concluded in that case[43] that there was no infringement of the rights guaranteed by sections 12 and 15 of the Charter. However, in relying on the certificate issued under subsection 82(1) of the Act, the Appeal Division had infringed Mr. Chiarelli's rights guaranteed by section 7 of the Charter.[44]

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[41] *Chiarelli*, *supra*, footnote 23.

[42] *Chiarelli*, *supra*, footnote 23, at 736.

[43] *Chiarelli*, *supra*, footnote 25.

[44] The Federal Court of Appeal had determined that the certificate removes the Appeal Division's authority to allow the appeal on compassionate or humanitarian grounds. Fundamental justice requires that no decision on a person's rights be made unless the person is given a valid opportunity to be heard; therefore, the requirements

The Supreme Court of Canada did not have to rule on the Federal Court of Appeal's decision regarding sections 12 and 15 of the Charter. However, with respect to the violation of section 7, it overturned the Federal Court of Appeal's decision and held that there was no infringement of the right guaranteed by section 7 of the Charter because the principles of fundamental justice were respected. After reviewing the history of the *Immigration Act*, Sopinka J. concluded that a universally available right of appeal from a deportation order on "all the circumstances of the case" had never existed. He added that if any right of appeal from a deportation order was necessary in order to comply with the principles of fundamental justice, an appeal based on paragraph 70(1)(*a*) clearly satisfied such a requirement.[45]

As sections 81 and 82 of the *Immigration Act* are very similar to sections 39 and 40, MacKay J. of the Federal Court Trial Division, ruling in *Al Yamani,*[46] relied on the Supreme Court of Canada's decision in *Chiarelli* in finding that the process provided for in sections 39 and 40 of the Act did not infringe section 7 of the Charter in that the principles of fundamental justice were not breached.

To all intents and purposes, the comments made by Sopinka J. in *Chiarelli* settled that the provisions of the *Immigration Act* imposing partial limitations on the right of appeal of permanent residents do not infringe the right guaranteed by section 7 of the Charter. However, *Chiarelli* did not settle definitively the question of the consistency of subsection 70(5) of the *Immigration Act*, which removes the right of appeal, with section 7 of the Charter.

11.3.1.4. Full limitation of the right of appeal of permanent residents [subsection 70(5)]

Subsection 70(5) of the *Immigration Act* has the effect of removing the right of appeal provided for in subsections 70(1) and (2) of the Act. Under subsection 69.4(2) of the Act, the Appeal Division has the authority to rule on its own jurisdiction regarding appeals contemplated, *inter alia*, by section 70 of the Act. The result is that since subsection 70(5) of the Act came into force on July 10, 1995, when the Minister invokes that subsection, the Appeal Division usually dismisses the appeal on the basis of lack of jurisdiction. Insofar as subsection 70(5) of the Act removes the right of appeal before the Appeal Division, the issue of whether the Appeal Division has the authority to rule on the constitutionality of that provision has been raised.

In *Reynolds,*[47] the Appeal Division, relying on the decision in *Nguyen,*[48] found that it had jurisdiction to rule on the substantive aspect , namely the content or substance of the legislative

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of fundamental justice were not met. This violation of section 7 could not be justified under section 1 of the Charter (Pratte J. held a dissenting view on the issue of justification under section 1).

[45] *Chiarelli*, s*upra*, footnote 23, at 741-742.

[46] *Al Yamani v. Canada (Solicitor General),* [1996] 1 F.C. 174 (T.D.). The security certificate was nevertheless set aside on other grounds, notably the unconstitutionality of part of paragraph 19(1)(*g*), i.e. "that [they were members of an organization] likely to engage in acts of violence that would or might endanger the lives or safety of persons in Canada" because it is inconsistent with the freedom of association guaranteed by paragraph 2(*d*) of the Charter. This limit was not justified under section 1.

[47] *Reynolds, Lloyd Baldwin v. M.C.I.* (IAD T94-06607), Aterman, Bartley, D'Ignazio, March 18, 1997.

provision, but not the procedural aspect, namely the manner in which the law is actually enforced. The Appeal Division noted that under sections 70, 71 and 77 of the *Immigration Act*, its jurisdiction was limited to hearing appeals from decisions by adjudicators, senior officers and visa officers and that the Act did not give the Appeal Division authority to review decisions by the Minister, whatever those decisions might be. Consequently, the Appeal Division does not have jurisdiction to rule on a constitutional challenge based on a procedure used by the Minister to issue a certificate indicating that the appellant is a danger to the public. Such a challenge can be made before the Federal Court on judicial review.

The substantive aspect lies primarily in the issue of whether the removal of the right of appeal provided for in subsection 70(5) of the *Immigration Act* violates the Charter. The Federal Court of Appeal ruled on that issue in *Williams*.[49] In that case, after Williams, a permanent resident, had filed his appeal under paragraphs 70(1)(*a*) and (*b*) of the Act, but before the appeal was heard,[50] the Minister issued a danger-to-the-public certificate under subsection 70(5) of the Act. Strayer J., writing for the Court, began by pointing out the effects of such a certificate, one of which is to deprive the permanent resident of his or her right of appeal before the Appeal Division. He then distinguished a limitation of the right of appeal from deportation *per se*. Finally, while recognizing that the Court had itself made different rulings on the matter,[51] he concluded that even though he had to agree that the Minister's opinion resulted in the deportation

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[48] *Nguyen*, *supra*, footnote 24, where the Federal Court of Appeal considered whether the issuance of a certificate of danger to the public making a claim ineligible under subparagraph 46.01(1)(*e*)(ii) of the *Immigration Act* was consistent with the principles of fundamental justice. The Court made a distinction between substantive and procedural aspects, and while it recognized the authority of the tribunal in the matter at hand to rule on the substantive aspect of the issue, it had the following to say on the procedural aspect: "We are sitting in judicial review of the decision of a tribunal which, in my view, did not have the jurisdiction to examine whether the public danger certificate placed before it had been issued in accordance with the rules of natural justice. The mandate of this tribunal did not entitle it to look behind a certificate fully valid on its face. While expressing an opinion, the issuance of a certificate is nevertheless, it seems to me, a decision which is subject to judicial review by this Court only, not by immigration officers."

[49] *Williams v. Canada (Minister of Citizenship and Immigration),* [1997] 2 F.C. 646 (C.A.).

[50] See also *Ibraham v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J 1559 (T.D.), in which the Federal Court Trial Division ruled that where the Minister issues a certificate of danger to the public after the hearing but before the Appeal Division has made its decision, there is no violation of section 7 of the Charter because that approach is not inconsistent with the principles of fundamental justice. In *Meikle, Maurice v. M.C.I.* (F.C.T.D., no. IMM-1031-96), Heald, October 1, 1997, the Federal Court allowed the applicant to be heard by the Appeal Division despite the issuance by the Minister of an opinion as to danger to the public pursuant to subsection 70(5) of the *Immigration Act.* The notice of appeal served on the adjudicator within the prescribed time limits was only forwarded to the registry of the Appeal Division 20 months later. Meanwhile, the Minister had issued an opinion under subsection 70(5). The Appeal Division therefore dismissed the appeal for lack of jurisdiction. The Federal Court granted a remedy in accordance with section 18.1 of the *Federal Court Act*, but rejected the constitutional arguments based on section 7 of the Charter, declaring itself bound by the decision in *Williams.*

[51] The Court cited decisions in which it had ruled that deportation did not constitute a deprivation of liberty: *Hoang, supra,* footnote 26*,* at 41; *Canepa, supra,* footnote 25, at 277; and *Barrera v. Canada (Minister of Employment and Immigration),* [1993] 2 F.C. 3 (C.A.), at 16. Regarding decisions to the effect that deportation does or might in some circumstances constitute a deprivation of liberty, the Court cited: *Chiarelli*, *supra*, footnote 25; *Nguyen, supra,* footnote 24.

of a permanent resident, the right to liberty and security of the permanent resident guaranteed by section 7 of the Charter was not affected.

In *Williams*, the Federal Court of Appeal also ruled on the constitutionality of subsection 70(5) of the *Immigration Act*, which had been challenged on the grounds of vagueness, taking into account in particular the fact that the legislation does not require the Minister to give reasons for a finding of danger to the public. Referring to *Nova Scotia Pharmaceutical Society,*[52] in which the Supreme Court of Canada wrote, "a law will be found unconstitutionally vague if it so lacks in precision as not to give sufficient guidance for legal debate," the Federal Court of Appeal, after analysing the concept of "danger to the public," concluded that subsection 70(5) of the Act is not constitutionally vague and that Parliament's failure to include a requirement for the Minister to give reasons for his or her opinion does not breach the principles of fundamental justice. There is therefore no infringement of the right guaranteed by section 7 of the Charter.

More recently, in *Suresh*,[53] the Supreme Court of Canada looked at the terms "danger to the security of Canada". The Court concluded that this phrase is not unconstitutionally vague. In *Rasa*[54] the Federal Court Trial Division interpreted the terms "danger to the public" in subsection 70(5) and paragraph 53(1)(*d*) of the Act. The Court also concluded that this phrase is not unconstitutionally vague.

After *Williams*, it is difficult to imagine what constitutional challenges to the substantive aspects of subsection 70(5) of the *Immigration Act* might be mounted. Certainly, a certificate from the Minister under which the appellant is deemed to be a danger to the public will always be open to challenge based on whether the certificate is appropriate or whether it was issued in the proper manner. However, such a challenge would have to be made through an application for judicial review before the Federal Court because it is outside the Appeal Division's jurisdiction.[55]

11.3.1.5. Appeal on equitable grounds [paragraph 70(1)(*b*)]

In *Ostojic,*[56] it was argued that paragraph 70(1)(*b*) of the *Immigration Act* is inconsistent with the right guaranteed by section 12 of the Charter in that section 12, the purpose of which is to mitigate the severity of a deportation order, is vague and imprecise, primarily because it does not establish any criteria to be considered by the Appeal Division, specifically the criterion of long-term residency.

The Appeal Division relied on the comments made by Gonthier J. in *Nova Scotia Pharmaceutical Society* to reject that argument:

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[52] *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R., at 643.

[53] *Suresh, supra*, footnote 21.

[54] *Rasa, Sriranjan v. M.C.I.* (F.C.T.D., no. IMM-6818), O'Keefe, May 11, 2000.

[55] See for example: *Haghighi v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 F.C. 407; *Bhagwandass, Sunil v. M.C.I.* (F.C.A., no. A-850-99), Rothstein, Sharlow, Malone, March 7, 2001.

[56] *Ostojic, Stevo* v. *M.E.I.* (IAD T93-02051), Goebelle, Weisdorf, Rotman, February 24, 1994.

> [L]aws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights.[57]

Relying on *Canepa,*[58] the Appeal Division also rejected the argument that long-term residency should be a predominant factor in evaluating all the circumstances of the case. In that case, the Federal Court of Appeal had ruled that long-term residency does not grant any legal status that would support a distinction between long-term and other permanent residents.

In *Machado,*[59] it was also argued that the wording of paragraph 70(1)(*b*) of the *Immigration Act* is vague and imprecise in that the lack of criteria related to the phrase "having regard to all the circumstances of the case" leads to the arbitrary application of discretionary power in the case of a decision that can deprive the appellant of the right to liberty and security of the person, which must be considered inconsistent with the principles of fundamental justice. The Federal Court of Appeal, relying on the same case-law, also dismissed that argument.

11.4. APPEAL BY REFUGEES AND VISA HOLDERS [SUBSECTIONS 70(2) AND (3)]

Constitutional arguments have been used against removal orders in respect of refugees. Higher courts have ruled in a number of cases on the right of appeal of visa holders under paragraph 70(2)(*b*) of the *Immigration Act*, but in the absence of arguments based on the Charter, this section will simply include comments on the status of the right of appeal of refugees under paragraph 70(2)(*a*) of the Act.

11.4.1. Refugees

The removal of refugees has been challenged on constitutional grounds primarily as an infringement of the rights guaranteed by sections 7 and 12 of the Charter (see 11.3.1.1). The limitation of the right of appeal provided for in subsection 70(3.1) of the *Immigration Act* has also been challenged on the basis of subsection 40.1(1), for the same reasons.

With regard to the limitation set out in paragraph 70(4)(*b*) of the Act, it should be noted first of all that this is a partial limitation (that is, an appeal on equitable grounds based on paragraph 70(3)(*b*) is not permitted) and second that the inadmissible classes referred to by Parliament are mentioned in subsection 40.1(1) of the Act. What this means is that, in practice,

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[57] *Nova Scotia Pharmaceutical Society, supra*, footnote 52, at 641- 642.

[58] *Canepa*, s*upra*, footnote 25.

[59] *Machado, supra,* footnote 29.

the Minister will issue a security certificate under subsection 40.1(1) or subsection 82(1) of the Act, just as he or she would do in the case of permanent residents (see 11.3.1.3), in order to eliminate the discretionary power of an adjudicator or the Appeal Division. As to the limitation set out in subsection 70(5) of the Act, the case-law referred to in section 11.3.1.4 applies fully.

11.4.2. Deportation of refugees

In *Chieu* and *Suresh*,[60] the Supreme Court of Canada modified somewhat the decisions rendered by the Federal Court of Appeal with respect to the deportation of refugees. In order to understand the developments in this area, it is important to set out a brief history.

In *Hoang,*[61] the appellant had been determined to be a refugee from Vietnam and had subsequently obtained permanent resident status. On appeal from a deportation order that followed convictions for serious crimes, the Appeal Division, in its assessment of the circumstances of the case, refused to take into account the country to which the appellant would be removed, even though the Minister's representative had clearly stated during the hearing that the Department intended to remove the appellant to Vietnam. The appellant argued that his deportation violated the rights he was guaranteed by sections 7 and 12 of the Charter.

The Federal Court of Appeal was called on to distinguish between the removal of permanent residents and the removal of refugees, in that it must be presumed that a person who has obtained refugee status will be persecuted if returned to the country of origin. The Court recognized that the outcome would be different, but maintained the position it had taken in *Chiarelli,*[62] namely that deportation for serious crimes is not an infringement of liberty. As to the claim of infringement of the right guaranteed by section 12 of the Charter, the Court fell back on its decision in *Hurd,**Error! Bookmark not defined.*[63] namely that deportation does not constitute punishment:

> Deportation for committing serious offences does not infringe the rights guaranteed by s. 7 or s. 12, as it is not to be conceptualized as a deprivation of the right to liberty or punishment.[64]

The decision in *Barrera*[65] confirmed the position taken by the Federal Court of Appeal that deportation for serious crimes does not constitute a deprivation of liberty and therefore does not violate section 7 of the Charter, regardless of the status the person might have acquired in

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[60] *Chieu* and *Suresh, supra*, footnotes 19 and 21.

[61] *Hoang*, *supra*, footnote 26.

[62] *Chiarelli*, *supra*, footnote 25. Note that the Supreme Court of Canada, *supra*, footnote 23, did not confirm the position taken by the Federal Court of Appeal in this regard. It found, however, that there was no violation of section 7 because deportation for serious crimes is not inconsistent with the principles of fundamental justice.

[63] *Hurd, supra,* footnote 25. In that case, it was argued that deportation violated paragraph 11(*h*) of the Charter which reads as: "Any person charged with an offence has the right if finally acquitted of the offence, not to be tried […]or punished for it again."

[64] *Hoang*, *supra*, footnote 26, at 41.

[65] *Barrera, supra,* footnote 51.

Canada, that is, permanent resident, refugee, or both. In this particular case, the Court also reiterated its position that deportation does not constitute punishment within the meaning of section 12 of the Charter. However, the issue before the Court was whether the deportation of a Convention refugee constituted cruel and unusual "treatment" within the meaning of section 12 (an issue that the Supreme Court of Canada had raised in *Chiarelli* but did not determine) and, by extension, the constitutionality of section 53 of the *Immigration Act*, which governs the removal of Convention refugees.

The Federal Court of Appeal upheld the Appeal Division's finding that it was premature to rule on these two issues because no ministerial decision had yet been made to deport the refugee to a country in which his life or freedom would be in jeopardy. Execution of a removal order is a decision to be made by the Minister, and removal of a refugee will not proceed unless the Minister determines that the refugee is a person who is a danger to the public. However, the Minister cannot make a decision regarding the country to which the refugee would be removed until the issue of deportation has been resolved by the Appeal Division.[66]

In *Chieu*, the Supreme Court of Canada distinguished the treatment of permanent residents from that of refugees, in particular, on the basis that refugees benefit from express legal protection (section 53 of the Act) against removal to a country where they believe their life or freedom would be threatened. The Court expressed it in these terms: "[…] there is no need for absolute consistency in how the Act deals with Convention refugees and non-refugee permanent residents."[67]

There is no doubt now that the Appeal Division must take into account the likely country of removal of a permanent resident who is not a refugee. With respect to a refugee, the Supreme Court of Canada does not specifically exclude the possibility that the Appeal Division may take into account the likely country of removal, if it is known. However, the Court recognizes that often the likely country of removal in the case of refugees cannot be determined in view of section 53 of the Act that prohibits removal to a country where the person is at risk of persecution. In practice, the Minister does not seek to deport a refugee unless in the Minister's opinion, the refugee constitutes a danger to the public. In that case, the person's right of appeal is usually limited under subsections 70(3.1), (4) or (5), and the Appeal Division is therefore without jurisdiction.

Regarding the deportation of refugees, it is therefore expected that in light of *Chieu*, there will not be a significant change in the Minister's decision to execute a removal order that might infringe the rights guaranteed by the Charter and thus be open to constitutional challenge.[68] This

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[66] *Barrera*, *supra*, footnote 51, at 23.

[67] *Chieu, supra,* footnote 19, paragraph 87 of the decision.

[68] In this regard, the opinion as to "danger to the public" given by the Minister under section 53 (allowing, in certain circumstances, for a refugee to be removed to the country of persecution) was challenged on constitutional grounds on the basis that it infringes the rights guaranteed under subsections 2(*b*) and 2(*d*) as well as sections 7 and 12 of the Charter. It is interesting to point out that the divergent decisions of the Federal Court Trial Division dealing with the Court's jurisdiction to rule on constitutional questions means that there have been constitutional challenges in the context of different remedies (interim injunction against the execution of a removal order, judicial review, declaratory action). See: *Said, Dawod Noori v. M.C.I.* (F.C.T.D.,

was moreover the case in *Suresh*[69] where the Supreme Court of Canada referred the matter back to the Minister for reconsideration.

In *Suresh*, the constitutional validity of paragraph 53(1)(*b*) of the Act was challenged to the extent that the provision did not prohibit the Minister of Citizenship and Immigration from removing a person to a country where the person might be at risk of being tortured. The Supreme Court of Canada ruled that the provision is not unconstitutional as long as the principles of fundamental justice are observed. However, the Minister, in exercising the discretionary power conferred on her under paragraph 53(1)(*b*) of the Act, must act in accordance with the principles of fundamental justice guaranteed under section 7 of the Charter. These principles require a balancing process, the result of which may vary from case to case. In principle, when the evidence reveals the existence of a serious risk of torture, the refugee must not be removed. The balancing process requires that various factors be taken into consideration such as "[…] the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada."

Based on the decision of the Court, it is clear that the refugee must meet a preliminary criterion, which is to establish *prima facie* that he or she could be at risk of torture if deported. To the extent that this criterion is met, certain procedural safeguards apply; in particular, the refugee must be informed of the evidence against him or her; subject to any privilege attaching to certain documents or the existence of other valid grounds for limiting disclosure, all the evidence on which the Minister is basing his decision must be disclosed to the refugee; and the Minister must give written reasons for decision with respect to all the relevant issues.

In *Suresh*, the Court also determined that provisions 19(1)(*e*)(iv)(C), 19(1)(*f*)(ii) and 19(1)(*f*)(iii)(B), which had been challenged on the basis that they infringed freedom of expression and freedom of association guaranteed under subsections 2(*b*) and 2(*d*) of the Charter, were constitutional.

Finally, it is important to note that the case-law as a whole indicates that the legislative provisions according to which a right is limited by the Minister's issuance of a certificate declaring the person to be a danger to the public in Canada have been found to be constitutionally valid.[70]

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no. IMM-169-98 and IMM-170-98), Rothstein, February 11, 1999; *Suresh, Manickavagsagam v. M.C.I.* (F.C.T.D., no. IMM-117-98) McKeown, June 11, 1999, on appeal to the Federal Court of Appeal, *supra,* footnote 33, on appeal to the Supreme Court of Canada, *supra,* footnote 21; *Singh, Iqbal v. M.C.I.* (F.C.T.D., no. IMM-6546-98 and IMM-4825-98), McGillis, June 18 and 23, 1999.

[69] *Suresh, supra*, footnote 21.

[70] See *Nguyen v. Canada (Minister of Employment and Immigration),* [1993] 1 F.C. 696 (C.A.); *Gervasoni, Gerald* v. *M.C.I.* (F.C.T.D., no. IMM-4063-94), Muldoon, April 10, 1996.

11.4.2.1. Limitation of right of appeal provided for in subsection 70(3.1)

In *Ahani,*[71] the applicant had obtained Convention refugee status. The Minister and the Solicitor General of Canada subsequently issued a security certificate under subsection 40.1(1) of the *Immigration Act*. The Federal Court Trial Division considered the constitutionality of section 40.1 of the Act and concluded that the review mechanism provided for in that section met the requirements of the principles of fundamental justice.[72] Given that conclusion, it was not necessary for the Court to rule on the issue of whether the change in the nature of the applicant's right not to be removed from Canada was a denial of his right to life, liberty and security of the person. As to the second component of section 7 of the Charter, the Court, after analyzing immigration principles and policies in context and taking into account the divergent interests of the State and the individual, found that the procedure established by Parliament in section 40.1 of the Act respected the principles of fundamental justice.

Subsection 40.1(6) of the Act, which provides that the Federal Court's determination as to the "reasonableness" of the certificate cannot be appealed or reviewed by any court, has also been challenged on constitutional grounds. In accordance with the entire body of case-law, the Court has held that the principles of fundamental justice do not require that the person named in the certificate be granted another right of appeal. Although subsection 70(3.1) has not been invoked *per se*, the consistency of that subsection with the principles of fundamental justice is by that very fact confirmed.

The Minister subsequently issued an opinion under paragraph 53(1)(*b*) of the Act that Mr. Ahani constituted a danger to public security. This opinion became the subject of judicial review,[73] which involved a series of challenges similar to those invoked in *Suresh*, regarding the Minister's opinion under paragraph 53(1)(*b*) of the Act.

The decisions in relation to the constitutional questions made by the Federal Court Trial Division and by the Federal Court of Appeal in *Suresh*,[74] were applied in *Ahani.* However, the final outcome in this case differed in that the Supreme Court of Canada (contrary to *Suresh*[75]) determined that the Minister had observed the principles of fundamental justice in the procedures that lead to the issuance of the opinion under paragraph 53(1)(*b*) of the Act. There was therefore no deprivation of the rights guaranteed under the Charter.

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[71] *Ahani v. Canada (Minister of Citizenship and Immigration),* [1995] 3 F.C. 669 (T.D.); confirmed (1996) 201 N.R. 233 (F.C.A.), application for leave to appeal to the Supreme Court of Canada dismissed on July 3, 1997.

[72] The Court also found that paragraph 40.1(2)(*b*) of the *Immigration Act*, which provides for detention of the named person until the Federal Court makes its determination under paragraph 40.1(4)(*d*) as to the reasonableness of the certificate, did not infringe the rights guaranteed by section 9 or subsection 10(*c*) of the Charter.

[73] *Ahani v. Canada (Minister of Citizenship and Immigration)* (1999), 1 Imm. L.R. (3d) 124; confirmed (2000), 3 Imm. L.R. 159 (C.A.).

[74] *Suresh, supra*, footnotes 33 and 68.

[75] *Suresh, supra*, footnote 21.

The Federal Court's ruling, confirmed by the Federal Court of Appeal, on the consistency of the procedures used to issue a security certificate under subsection 40.1(1) of the *Immigration Act* with the principles of fundamental justice, coupled with the rulings made by the Supreme Court of Canada in *Chiarelli*[76] (referring to the right of appeal provided for in paragraph 70(1)(*b*)) regarding the constitutionality of sections 8l and 82 of the Act (see 11.1.2.3), suggest that a constitutional challenge to sections 81 and 82 of the Act in connection with a right of appeal under paragraph 70(3)(*b*) would not result in a favourable decision.

It is also interesting to note that the comments made by Sopinka J. in *Chiarelli* were applied by the Federal Court Trial Division and the Federal Court of Appeal to justify their findings of consistency with the principles of fundamental justice and, therefore, the constitutionality of a variety of provisions in the *Immigration Act* limiting the right of appeal, *inter alia*, the appeal before the Federal Court of Appeal under section 83[77] and the Minister's right to issue a certificate of danger to the public under paragraph 77(3.0l)(*b*) after an appeal has been filed with the Appeal Division.[78]

11.5. UNREASONABLE DELAYS

This argument has been used primarily in criminal proceedings to assert the right of an accused to be tried within a reasonable time in accordance with paragraph 11(*b*) of the Charter. If the argument is accepted, the result is a stay of criminal proceedings. In the wake of the Supreme Court of Canada's decision in *Askov,*[79] where Cory J. stated that a delay of six to eight months between the committal for trial and the actual trial is the outer limit of reasonableness, several attempts were made to use the unreasonable delay argument before the various divisions of the IRB.

Two elements are required to sustain such an argument: the person who is the subject of the proceedings must show, first, that he or she has suffered prejudice or an injustice as a result of the delay and, second, that the prejudice constitutes an infringement of a Charter right.

In *Chan,*[80] several years passed after the deportation order was issued without the Minister's acting on it because of the absence of identity papers and a lack of co-operation by the appellant himself and the authorities of the country to which he was to be deported. The appellant argued that the unreasonable delay in executing the deportation order had caused him psychological and emotional stress, since he did not know when, or even if, he would be removed, which infringed his rights guaranteed under sections 7 and 12 of the Charter. The Appeal Division, after reviewing the Department's efforts to execute the removal order and the

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[76] *Chiarelli*, s*upra*, footnote 23.

[77] *Huynh v. Canada (Minister of Citizenship and Immigration),* [1996] 2 F.C. 976 (C.A.).

[78] *Tsang, Lannie Wai Har v. M.C.I.* (F.C.T.D., no. IMM-2585-95), Dubé, January 18, 1996. The Federal Court of Appeal responded in the affirmative to the certified question, but that question did not pertain to the constitutionality of the process of intervention by the Minister.

[79] *Askov v. The Queen*, [1990] 2 S.C.R. 1199.

[80] *Chan, supra,* footnote 6.

appellant's personal situation, rejected the argument because the evidence did not show that there had been an injustice or that the appellant had sustained prejudice because he was not deported.

In *Chiarelli,*[81] in the absence of evidence of prejudice to the appellant, the Appeal Division did not accept the argument that the 14 months it took the Minister to issue the security certificate and order an inquiry into the matter infringed his right guaranteed under section 7 of the Charter.

Higher courts have not been asked to rule on matters where unreasonable delay in the hearing of an appeal before the Appeal Division was used as an argument. However, in *Akthar,*[82] it was argued that the right guaranteed by section 7 of the Charter was infringed because of the two-and-a-half-year delay between the initial refugee claim and the tribunal's decision. The Federal Court of Appeal made a clear distinction between a person claiming refugee status and a person accused of a criminal offence; the former benefits from no presumption, whereas the latter is presumed to be innocent. The Court did not, however, rule out the possibility that an unreasonable delay in being heard might constitute an infringement of the right guaranteed by section 7 of the Charter. The Court stated:

> In the first place, the applicants are not at all in the same legal position as an accused person. This, of course means that they do not enjoy the specific protection afforded by paragraph 11(*b*) of the Charter. That in itself is not conclusive, for it is well accepted that the specific dispositions of section 11 are only particular applications of the principles of fundamental justice enshrined in section 7.[83]

It added, however, that in non-criminal cases any infringement of the Charter based on a delay must be supported by evidence that the person making the claim suffered prejudice or an injustice attributable to the delay.

In *Urbanek,*[84] the Federal Court of Appeal held that the delay in hearing the claim, which resulted in the claimant's not being granted refugee status because of a change in circumstances in his country of origin, did not constitute prejudice.

11.6. PROCEDURES

11.6.1. Notice

Section 57 of the *Federal Court Act*[85] states that where the constitutional validity of a legislative provision is in issue, the Attorney General of Canada and the attorney general of each

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[81] *Chiarelli, Joseph v. M.E.I.* (IAD T89-07380), Weisdorf, Fatsis, Chu, May 19, 1993; the appellant did not make this argument before the Federal Court of Appeal, *supra*, footnote 25 or before the S.C.C., *supra*, footnote 23.

[82] *Akthar v. Canada (Minister of Employment and Immigration),* [1991] 3 F.C. 32 (C.A.).

[83] *Ibid.*, at 38.

[84] *Urbanek, Kristian v. M.E.I.* (F.C.A., no. A-22-90), Hugessen, MacGuigan, Desjardins, June 19, 1992.

[85] R.S.C. 1985, c. F-7, and amendments.

province must be given notice at least 10 days in advance. If the constitutional arguments are not aimed at invalidating a legislative provision, as, for example, in the case of an argument of unreasonable delay, notice to the attorneys general is not required.

If notice to the attorneys general is not given, the Appeal Division may not accept constitutional arguments.[86] It can either adjourn the hearing to allow the parties to meet the requirements of section 57 of the *Federal Court Act*, order that the notice period be changed or refuse to hear the constitutional arguments.

In the absence of reasonable justification, failure to give notice under section 57 of the *Federal Court Act* should not be considered grounds to delay the hearing.

11.6.2. Miscellaneous

In order to be able to assert a right guaranteed by the Charter, a person has to be in Canada because the Charter is of no force or effect outside Canada.[87]

The Appeal Division may hear the appeal on its merits before hearing arguments based on the Charter because, if the decision is favourable, Charter arguments need not be made.[88]

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[86] *Carpenter, Herbert Wayne v. M.C.I.* (IAD V94-02423), Clark, January 3, 1997; *Gonsalves, Gwendolyn Barbara v. M.C.I.* (F.C.T.D., no. IMM-1992-96), Muldoon, May 9, 1997.

[87] *Singh, supra,* footnote 5, at 201-202.

[88] *Singh v. M.E.I.* (1991), 14 Imm. L.R. (2d) 126 (F.C.T.D.); *Bissoondial v. M.E.I.* (1991), 14 Imm. L.R. (2d) 119 (F.C.T.D.); *Gayle, Everton Simon v. M.C.I.* (IAD T94-02248), Hopkins, June 5, 1995.

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CHAPTER 12

12. APPEALS BY THE MINISTER

12.1. INTRODUCTION

Pursuant to section 71 of the *Immigration Act* (the "Act"), the Minister may appeal to the Appeal Division from a decision made by an adjudicator in the course of an inquiry. The grounds of appeal are on questions of law, fact, or mixed law and fact.

12.1.1. Relevant Legislative Provisions

The Act provides as follows:

> 71. The Minister may appeal to the Appeal Division from a decision by an adjudicator in the course of an inquiry on any ground of appeal that involves a question of law or fact or mixed law and fact.
>
> 72. (1) The Appeal Division may order that an inquiry that has given rise to an appeal be reopened before the adjudicator who presided at the inquiry or any other adjudicator for the receiving of any additional evidence or testimony.
>
> (2) The adjudicator who presides at an inquiry reopened under subsection (1) shall file a copy of the minutes of the reopened inquiry, together with the adjudicator's assessment of the additional evidence or testimony, with the Appeal Division for its consideration in disposing of the appeal.
>
> 73. (2) The Appeal Division may dispose of an appeal made pursuant to section 71
>
> (a) by allowing it and making the removal order or conditional removal order that the adjudicator who was presiding at the inquiry should have made; or
>
> (b) by dismissing it.
>
> (3) Where the Appeal Division disposes of an appeal made pursuant to section 71 by allowing it and making a removal order or conditional removal order against the person concerned, that person shall, where the person would have had an appeal pursuant to this Act if the order had been made by an adjudicator after an inquiry, be deemed to have made an appeal to the Appeal Division pursuant to paragraph 70(1)(b) or 70(3)(b), as the case may be.

12.2. IMMIGRATION INQUIRIES

Appeals from decisions of an adjudicator come from two types of inquiries, those arising inland and those arising at the port of entry.

12.2.1. Port-of-Entry Inquiries

The purpose of the port-of-entry inquiry is to determine whether a person, other than a person described in subsection 4(1)[1] or 4(3)[2] of the Act who is seeking to come into Canada is admissible. If an immigration officer at the port of entry is of the opinion that a person seeking to come into Canada is inadmissible,[3] the officer must either allow the person to leave Canada or prepare a written report.[4] The report is then submitted to a senior immigration officer (SIO) who reviews the report. Sections 22 and 23 set out the powers of an SIO upon reviewing the section 20 report: these include allowing a person to come into Canada or granting landing to an immigrant, allowing the person to leave Canada forthwith, making an exclusion order against the person, or causing an inquiry to be held. Except for certain circumstances, where an SIO believes a person is inadmissible, but does not make an exclusion order (or a conditional departure order in the case of persons claiming refugee status), the SIO must cause an inquiry to be held as soon as is reasonably practicable, or allow the person to leave Canada forthwith.[5] If an inquiry is held and the adjudicator does not issue the order sought by the Minister's representative at the inquiry, the Minister may appeal that decision to the Appeal Division under section 71 of the Act.

12.2.2. Inland Inquiries

The purpose of the inland inquiry is to determine whether a person, other than a person described in subsection 4(2)[6], 4(2.1)[7] or 4(3) of the Act and who is already in Canada has

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[1] 4. (1) **Where Right to Come into Canada -** A Canadian citizen and a permanent resident have a right to come into Canada except where, in the case of a permanent resident, it is established that that person is a person described in subsection 27(1).

[2] 4. (3) **Rights of Indians** - A person who is registered as an Indian pursuant to the *Indian Act* has, whether or not that person is a Canadian citizen, the same rights and obligations under this Act as a Canadian citizen.

[3] The inadmissible classes are set out in subsections 19(1) and 19(2) of the Act.

[4] Subsection 20(1) of the Act.

[5] Subsection 23(4.2) of the Act.

[6] 4. (2) **Where Right to Remain in Canada** - Subject to any other Act of Parliament, a Canadian citizen and a permanent resident have a right to remain in Canada except where, in the case of a permanent resident, it is established that that person is a person described in subsection 27(1).

[7] 4. (2.1) **Right of Convention Refugees** - Subject to any other Act of Parliament, a person who is determined under this act or the regulations to be a Convention refugee has, while lawfully in Canada, a right to remain in Canada except where it is established that the person is a person described in paragraph 19(1)(c.1), (c.2) (d), (e), (f), (g), (j), (k), or (l) or a person who has been convicted of an offence under any Act of Parliament for which a term of imprisonment of

(a) more than six months has been imposed; or

(b) five years or more may be imposed.

contravened the Act and should be removed from Canada. The grounds for removing a person who is in Canada are different from those for refusing admission to Canada. The grounds that apply to inland cases are set out in subsections 27(1) and 27(2) of the Act. Subsection 27(1) applies only to permanent residents, and subsection 27(2) applies only to persons in Canada other than Canadian citizens and permanent residents. The process for bringing a person who is in Canada to inquiry is also different from that for a port-of-entry case. An inland inquiry may arise either as a result of a report and a direction for inquiry, or as a result of an arrest without a warrant. If the adjudicator at an inquiry does not issue the order sought by the Minister's representative, the Minister may appeal that decision to the Appeal Division under section 71 of the *Immigration Act.*

12.2.2.1. Inquiries as a Result of Report and Direction

An immigration officer (IO) or a peace officer must forward a written report to the Deputy Minister (DM) where the IO has information that a person is described in subsection 27(1) or 27(2) of the *Immigration Act*. However, an exception is made where a person is arrested and detained without a warrant.[8] In that case a report need not be written. The DM (or the DM's delegate) will review the report and determine whether or not an inquiry is warranted. Where the DM considers that an inquiry is warranted, the DM sends a copy of the report and a direction for inquiry to the SIO.[9] The SIO must then cause an inquiry to be held as soon as is reasonably practicable.[10]

Permanent residents may not be arrested and detained for inquiry without a warrant. Hence, inquiries concerning permanent residents always arise as a result of a report and a direction for inquiry.[11] Consequently, such cases are always assessed by the DM (or the DM's delegate) to determine whether an inquiry is warranted.

12.2.2.2. Inquiries as a Result of Arrest without a Warrant

In certain limited circumstances a person in Canada, other than a Canadian citizen or permanent resident, may be arrested and detained for inquiry, without a warrant.[12] In this case, if neither a departure order pursuant to section 27(4) nor a conditional departure order under section 28(1) is made, or if the person is not allowed to remain in Canada, the SIO must cause an inquiry to be held as soon as reasonably practicable.[13]

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[8] Subsection 103(2) of the Act.

[9] Subsection 27(3) of the Act.

[10] Subsection 27(6) of the Act.

[11] That is, inquiries concerning persons reported as permanent residents. If the IO believes that a person has lost his or her permanent resident status, that person will be reported as a person other than a permanent resident.

[12] Subsection 103(2) of the Act.

[13] Subsection 27(6) of the Act.

12.3. REMOVAL ORDERS

A removal order means a departure order, an exclusion order or a deportation order.[14]

The adjudicator may make different types of orders depending on the nature of the inquiry.[15] If an inquiry arises at a port of entry, the adjudicator may make either a deportation order or an exclusion order may be made by the adjudicator. In the case of a person who claims to be a convention refugee, and whose claim has been referred to an SIO for a determination of whether the person is eligible to make such a claim, or to the Convention Refugee Determination Division of the Immigration and Refugee Board for a determination of the claim, the adjudicator may make either a conditional deportation order or a conditional departure order. The type of order that an adjudicator may make depends on the ground of inadmissibility.

In the case of inland inquiries, the adjudicator may make either a deportation order or a departure order. In some cases, a deportation order is mandatory. In other cases, an adjudicator may, where appropriate, make a departure order. Once again, where a person makes a claim to be a Convention refugee, the deportation order or departure order is conditional.

12.4. ISSUES PERTAINING TO ADMISSIBILITY OR REMOVAL FROM CANADA

Various issues arise before the Appeal Division when the Minister appeals the decision by an adjudicator that a person who was the subject of an inquiry is a person who may be granted admission into Canada or should not be removed from Canada. Some of the more common issues that have arisen in appeals by the Minister pursuant to section 71 of the *Immigration Act* include:

- whether the respondent is medically inadmissible under paragraph 19(1) (a) of the Act and as a result, whether the respondent is described in paragraph 27(2) (a) of the Act;[16]

- whether the respondent has ceased to be a permanent resident under subsection 24(1) of the Act;[17]

- whether the respondent is inadmissible by reason of criminality,[18] or by virtue of having served, as a senior official, in a government that engaged in systemic or gross human rights violations;[19]

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[14] Subsection 2(1) of the Act.

[15] See subsections 32(2), 32(2.1), 32(5), 32(6), 32(7), 32.1(3), and 32.1(5) of the Act.

[16] See *M.E.I. v. Chong Alvarez, Maria del Refugio* (IAD V90-01411), Wlodyka, April 10, 1991; *M.E.I. v. Crouch, James Allen* (IAD V91-01046), Wlodyka, January 21, 1992; *M.E.I. v. Milanich, Joseph* (IAD V91-00949), Wlodyka, April 6, 1992.

[17] See *M.E.I. v. Oliver, Andrew* (IAD V91- 01882), Wlodyka, September 28, 1992; *Labasova v. S.S.C.* (F.C.A., no. A-317-92), Marceau, Décary, Chevalier, July 6, 1994; *M.C.I. v. Colonia, Stefania* (IAD T95-00780), Wiebe, September 13, 1995; *M.C.I.* v. *Cameron* (IAD V99-02528), Clark, January 17, 2000; *M.C.I.* v. *Gough* (IAD TA0-10561), MacAdam, March 26, 2001.

- whether the respondent is a permanent resident described in paragraph 27(1)(b) of the Act in that, having been granted landing in Canada subject to terms and conditions, the respondent subsequently knowingly contravened any such terms and conditions;[20]

- whether the respondent is a person described in paragraph 27(2)(e) of the *Act* in that he or she entered Canada as a visitor and remained in Canada after ceasing to be a visitor;[21]

- whether the respondent should be removed from Canada because the respondent is described in subparagraph 27(1)(a.1)(ii).[22]

12.5. NATURE OF A SECTION 71 HEARING

The onus of proof at an inland inquiry and in a section 71 appeal before the Appeal Division rests with the Minister. The Minister must establish that a respondent is a person who is a member of an inadmissible class under the Act or the Regulations, or is a person described in subsection 27(1) or 27(2) of the Act.

The Appeal Division has approached appeals pursuant to section 71 in much the same manner as it hears and determines appeals under section 70 and subsection 77(3) of the Act. A section 71 appeal is a hearing *de novo*, although in practice new evidence is not always led by counsel for the parties at the hearing. Counsel for the parties often rely solely on the record. The record consists of the adjudicator's decision, a transcript of the proceedings at the inquiry, a certified true copy of all documentary evidence filed at the inquiry, any written reasons given by the adjudicator for the decision, and a table of contents.[23]

Where either of the parties requests written reasons within 10 days after having been notified of the disposition of the appeal, the Appeal Division must give written reasons.[24]

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[18] See *M.E.I.* v. *Chan, Pui Fong* (IAD V90-01084), Wlodyka, January 30, 1991; *M.C.I. v. Izvoztchikov, Fidel* (IAD V97-00467), Boscariol, March 29, 1999.

[19] See *M.C.I.* v. *Duale, Khalif Mohamed* (IAD T95-06875), Wright, Leousis, Townshend (concurring), February 25, 1997 (majority) March 4, 1997 (concurring), and *M.C.I. v. Hussein* (IAD T99-14995), Sangmuah, May 11, 2001, where the ground of inadmissibility was paragraph 19(1) (l) of the Act.

[20] See *M.E.I.* v. *Abu Rabah, Raja Jawad* (IAD V91-01058), Wlodyka, December 30, 1991.

[21] See *M.E.I.* v. *Samaroo, Sumintra* (IAD T92-01615), Bell, Weisdorf, Fatsis, July 28, 1992; *M.E.I. v. Wing, Margaret Joyce Chin* (IAD T91-02344), Weisdorf, Chu, Ahara, March 26, 1992; *M.E.I. v. Ohayon, Joseph* (IAD M92-05731), Blumer, Angé, Durand, January 6, 1993.

[22] *M.C.I.* v. *Macalintal* (IAD W98-00019), D'Ignazio, August 27, 1999.

[23] Rule 9(1) of the Immigration Appeal Division Rules.

[24] Subsection 69.4(5) the Act.

12.6. THE REMEDIES AVAILABLE

Where the Appeal Division finds that the Adjudicator was correct in his or her decision on the issue of admissibility, or in his or her decision that the person who was the subject of the inquiry is not described in subsections 27(1) or 27(2) of the Act, the appeal by the Minister will be dismissed.[25] If the adjudicator is found to have erred, the Appeal Division has the power to allow the appeal and make the type of order that an adjudicator presiding at the inquiry ought to have made.[26]

Where an appeal is allowed, the question of the appropriate type of removal or conditional removal order arises as an issue to be addressed, as the adjudicator will not have considered the question at the original inquiry. Section 71 appeals are almost always appeals from a decision of an adjudicator at an inquiry not to make a removal order.

The Act provides that the Appeal Division may order that an inquiry be reopened before an adjudicator for the receiving of any additional evidence or testimony.[27] However, the Federal Court of Appeal has disapproved of this practice in *Labasova.*[28] In *Labasova,* the majority of the Appeal Division had found that the adjudicator erred in thinking that the subject of the inquiry was a returning resident, since she had left Canada 17 years earlier to get married and settle in Czechoslovakia without any reasonable expectation of being able to return to Canada. However, it considered that it could not dispose of the appeal forthwith since in doing so under subsection 73(2) of the Act, it had to make the removal order which the adjudicator should have made and no evidence had been submitted in this regard. The Appeal Division therefore referred the matter back to the adjudicator to obtain further evidence. The matter came before the Federal Court of Appeal when Ms. Labasova appealed the decision of the Appeal Division. Although the Court acknowledged that the Act gave the Appeal Division the authority, in section 72, for proceeding in the manner in which it had, the Court disapproved of the practice, suggesting that given the *de novo* nature of Appeal Division hearings, the panel should have heard the evidence itself.

12.6.1. Type of Removal Order

In some cases, the Appeal Division has no choice as to the nature of the removal order that must be made. For example, in an appeal by the Minister from a decision by an adjudicator, in a port-of-entry case, if the Appeal Division should find that the respondent is a member of an inadmissible class described in paragraph 19(1)(c), 19(1)(c.1), 19(1)(c.2), 19(1)(d), 19(1)(e), 19(1)(f), 19(1)(g), 19(1)(j), 19(1)(k), 19(1)(l), 19(2)(a), 19(2)(a.1), or 19(2)(b), it must issue a deportation order.[29]

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[25] Paragraph 73(2)(b) of the Act.

[26] Paragraph 73(2) (a) of the Act.

[27] Subsection 72(1) of the Act.

[28] *Labasova, supra*, footnote 17.

[29] Paragraph 32(5)(a) of the Act.

On the other hand, if the Appeal Division finds the respondent to be described in subsection 32(7) of the Act, it has discretion as to the type of removal order it may make. The Appeal Division may issue a departure order if:

(a) it is satisfied that the person should be allowed to return to Canada without the written consent of the Minister; and

(b) it is satisfied that the person will leave Canada within the applicable period specified in the Regulations for the purposes of subsection 32.02 (1).[30]

In *Beeston*,[31] the Federal Court of Appeal upheld the decision of an adjudicator to issue a deportation order rather than a departure notice. The Court held that the adjudicator was justified in viewing as a very important circumstance the fact that the applicant had remained in Canada illegally and without status since September 1976. However, the adjudicator did specifically consider the other circumstances of the case prior to exercising his discretion. In *Lau,*[32] the Court considered whether the adjudicator had erred in issuing a deportation order rather than a departure notice. The adjudicator had found that Mr. Lau's "deliberate and willful actions" in overstaying beyond the term of his visitor's visa and working without an employment authorization were sufficient to outweigh the favourable circumstances in his case. The Court found that the adjudicator had erred in issuing a deportation order. In most cases of this nature, a person's conduct will have been deliberate in that the person has consciously violated the *Immigration Act*. In reaching a decision on the deport/depart issue, the Court stated that the adjudicator was to take all the circumstances into account. In *Bredwood,*[33] the Court found there was no evidence whatsoever to the applicant's credit to be weighed in the balance against her willful and deliberate violation of Canadian immigration laws. Thus, the decision to make a deportation order rather than a departure notice was not subject to attack. In *Stephens*[34] the Court qualified its decision in *Lau.*[35] The latter case was held to stand for the proposition that it was in error for the adjudicator to conclude that by reason of the simple fact of a breach of the *Immigration Act* any possibility of issuing a departure notice was thereby foreclosed.

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[30] Section 27 of the Regulations. Although there are exceptions where departure orders are stayed, where the Minister has declared a moritorium on removals to a particular country, or where the person made an unsuccessful refugee claim, in general a certificate of departure that verifies that a person has left Canada may be issued not later than 30 days after the day on which the departure order becomes effective.

[31] *Beeston* v. *M.E.I.* (1982), 132 D.L.R. (3d) 766 (F.C.A.)

[32] *Lau* v. *M.E.I.*, [1984] 1 F.C. 434 (C.A.). The previous test regarding the deport/depart issue under the Act, was "having regard to all the circumstances of the case, a deportation order ought not be made against the person and the person will leave Canada on or before the date specified in the notice". The test in *Lau* remains good law.

[33] *Bredwood* v. *M.E.I.* (1984), 59 N.R. 316 (F.C.A.) .

[34] *Stephens, Ena May* v. *M.E.I.* (F.C.A., no. A-854-85), Hugessen, Urie, Marceau, September 4, 1986.

[35] *Lau, supra*, footnote 32.

12.7. DEEMED SECTION 70 APPEAL

Where an appeal is allowed and the Appeal Division makes the removal order that the adjudicator should have made, then the respondent, provided he or she would have had a right to appeal pursuant to section 70 of the Act had the adjudicator issued such an order, is deemed to have appealed to the Appeal Division pursuant to paragraph 70(1)(b) or 70(3)(b) of the Act, whichever is applicable.[36] The appeal division may dispose of this appeal at the same time that the section 71 appeal is heard.

[36] Subsection 73(3) of the Act.

CHAPTER 12

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MEMORANDUM NOTE DE SERVICE

To/à

All IAD members / Tous les commissaires de la SAI

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Krista Daley
General Counsel / Director, Legal Services
Avocate générale / Directrice, Services juridiques

Subject / Objet

Removal Order Appeals / Appels relatifs à une mesure de renvoi

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Attached please find the revised Removal Order Appeals paper, dated February 1, 2002, prepared by Legal Services. This work is intended to assist Members of the Appeal Division of the IRB. The electronic version will be available in INTRANET and the IRB web site.

The paper is reviewed on a regular basis to determine whether it requires updating. We want to be sure that it meets your needs. If you have any comments about the format or the content of this work, please forward them to David Schwartz, Legal Services, Vancouver.

Nous joignons à la présente la version révisée du document sur les appels relatifs à une mesure de renvoi, daté du 1er février 2002 et préparé par les Services juridiques. L'objectif de ce document est d'aider les commissaires de la Section d'appel de la CISR. La version électronique sera disponible dans INTRANET et sur le site web de la CISR.

Ce document est examiné régulièrement afin de déterminer si une mise à jour est nécessaire. Nous voulons être certains qu'il répond à vos besoins. Si vous avez des commentaires à faire sur sa présentation ou son contenu, faites-les parvenir à David Schwartz, Services juridiques, Vancouver.

Original signed by / Original signé par

Krista Daley

Canada