Maintaining and Demonstrating Permanent Residency at the Immigration Appeal Division

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[1] Any opinions expressed or positions taken in this paper are solely those of the author and do not necessarily represent positions of Legal Services, Immigration and Refugee Board of Canada or, of the Immigration Appeal Division.

I Introduction

Your client has contacted you and given you either 1) a removal order made against her based on contravention of the residency obligation, or 2) a refusal of a Travel Document based on a determination made outside of Canada that she has contravened her residency obligation. What do you do to prepare to defend your client's rights?

The purpose of this paper is to provide an overview of the process that you will have to follow at the Immigration Appeal Division (IAD) of the Immigration and Refugee Board of Canada (the "Board") as well as providing a review of the relevant provisions of the *Immigration and Refugee Protection Act* (IRPA),[2] the *Immigration and Refugee Protection Regulations* (IRP Regulations)[3] and the IAD Rules.[4] In addition, the paper will highlight a number of issues that the IAD[5] and the Federal Court have dealt with in relation to residency obligation appeals.

The Board is Canada's largest independent administrative tribunal. Its mission is to make well-reasoned decisions on immigration and refugee matters, efficiently, fairly, and in accordance with the law.

The IAD, one of the Board's Divisions, is a court of record. It hears appeals of family class applications for permanent resident visas refused by officials of Citizenship and Immigration Canada (CIC),[6] appeals from certain removal orders made against permanent residents, refugees and other protected persons, and holders of permanent resident visas; and appeals by permanent residents who have been found outside of Canada not to have fulfilled their residency obligation. The IAD also hears appeals by CIC from decisions of the Immigration Division of the Board at admissibility hearings.

The IAD operates under the authority of IRPA, which came into effect on June 28, 2002; prior to that date the provisions of the former *Immigration Act* (the "former Act") and the former *Immigration Regulations, 1978* (the "former Regulations") applied to the IAD.

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2 S.C. 2001, c. 27

3 SOR/2002-227 as amended

4 SOR/2002-230

5 Digests for most of the IAD decisions referred to in this paper can be found in *RefLex*, which is a Legal Services' publication of digests of recent immigration and refugee protection decisions of the Board. *RefLex* is available on the Board's website: www.irb-cisr.gc.ca. In addition, reasons for decision for digests contained in *RefLex* can be obtained via the Board's website within a short period after the issue of a *RefLex* edition and they are also available in the Board's documentation centres.

6 For ease of reference, I have not differentiated between CIC and the Canada Border Services Agency (CBSA).

II Right of Appeal and Possible Dispositions

Under subsection 63(3) of IRPA, a permanent resident may appeal to the IAD against a decision at an examination to make a removal order against her. This includes a permanent resident who has received a departure order[7] for contravening the residency obligation. The IAD may dispose of a subsection 63(3) residency obligation appeal by allowing or dismissing the appeal. As this is a removal order appeal, the IAD can stay the removal order in accordance with section 68 of IRPA. However, while stays are common in removal order appeals based on criminality, this is not a likely disposition due to the nature of these appeals.[8]

Under subsection 63(4) of IRPA, a permanent resident may appeal to the IAD against a decision made outside of Canada on the residency obligation. The appeal is against the residency obligation decision and it is not against the refusal to issue a Travel Document. The IAD may dispose of a subsection 63(4) residency obligation appeal, by allowing or dismissing the appeal.

The majority of appeals to the IAD with respect to the contravention of the residency obligation are made under subsection 63(4) of IRPA.[9]

The IAD has held that there is no appeal to the IAD against an appellant's decision to revoke a voluntary relinquishment of permanent resident status. In *Tosic,* the appellant applied for a visitor's visa. As part of the application, he executed a voluntary relinquishment of permanent resident status. A visitor's visa was granted and he returned to Canada and filed a notice of appeal with the IAD. The panel held that as there was no determination made outside of Canada on the residency obligation or a removal order having been made against him, there was no right of appeal to the IAD under subsections 63(3) or 63(4). The appeal was dismissed for lack of jurisdiction.[10]

III First Steps – Commencing an appeal at the IAD

A. Filing deadlines – Notice of Appeal

It is important to remember that there are different filing deadlines for appeals under subsections 63(3) and 63(4) of IRPA.

30 days: In an appeal under subsection 63(3), where a permanent resident has been ordered removed for contravention of the residency obligation, the IAD must receive the

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7 IRPA subsection 44(2) and IRP Regulations subsection 228(2).

8 For an example where a stay was granted see *Chiu, Choi Leung Paul et al. v. M.C.I.* (IAD TA3-09151), Stein, February 25, 2004.

9 While not often encountered, it is possible for an appellant to have simultaneous residency obligation appeals under subsections 63(3) and 63(4).

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

notice of appeal and the removal order no later that 30 days after the appellant received the removal order – IAD Rule 7(2).

60 days: However, in an appeal under subsection 63(4) where a permanent resident wants to appeal a decision made outside of Canada on the residency obligation, the permanent resident must provide to the IAD a notice of appeal and the officer's written decision to the registry office for the region in Canada where the appellant last resided no later than 60 days after the appellant received the written decision. If the appellant wants to return to Canada for the hearing of the appeal, the appellant must state this in the notice of appeal – IAD Rules 9(1) & 9(2).

B. You missed a filing deadline, what do you do?

Where an appellant has not filed the notice of appeal within the required time frame, an application can be made to extend the time to file the notice of appeal under IAD Rules 58(d) and 43. The Court and the IAD have considered requests to extend in a number of cases including the following:

The Federal Court held in *Rumpler*[11] that the IAD erred when it determined that it had no jurisdiction to extend time for the filing of a notice of appeal in a subsection 63(3) appeal based on the applicant no longer being a permanent resident once the removal order came into force.

In *Kasba,* the IAD dismissed an application for an extension to file a notice of appeal in a subsection 63(4) appeal where the delay was not adequately explained, and it was not established that there was a continuing intention to appeal since the decision was issued. The IAD also concluded that it had not been established that it was in the interests of natural justice to permit late filing of the notice of appeal.[12]

In *Ikhuiwu*, the IAD in a subsection 63(4) appeal extended the time to file the notice of appeal where the reason for the late filing of the notice of appeal was that the appellant had been issued in error a permanent resident card which led him to believe that he did not need to appeal the residency obligation decision.[13]

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[11] *Rumpler, Eluzur v. M.C.I.* (F.C., no. IMM-1552-06), Blanchard, December 13, 2006; 2006 FC 1485.

[12] *Kasba, Baljit Singh v. M.C.I.* (IAD VA7-00162), Workun, October 3, 2007.

[13] *Ikhuiwu, Emmanuel Ese v. M.C.I.* (F.C., no. IMM-276-07), de Montigny, January 10, 2008; 2008 FC 35.

IV Pre-hearing Steps and Issues

A. Provision of Information – contact information – IAD Rule 13

It is important to provide the IAD and CIC update-to-date contact information for the appellant and counsel (if any) as required by IAD Rule 13.

B. Providing of the Appeal Record by CIC - IAD Rules 7, 8, 9 and 10

The IAD Rules require the Minister to provide the appeal record within the time periods noted below. If the Minister is late in providing the appeal record, the IAD may (a) ask the Minister to explain orally or in writing, why the appeal record was not provided on time and to give reasons why the appeal record should be accepted late; or (b) schedule and start the hearing without the appeal record or with only part of the appeal record.[14]

45 days: In a residency obligation removal order appeal, the Minister has 45 days after receipt of the notice of appeal to provide the appeal record.

120 days: In an outside of Canada residency obligation determination appeal, the Minister has 120 days after receipt of the notice of appeal to provide the appeal record.

C. Documents and disclosure - IAD Rules 28 and 29

The form and language of documents submitted must comply with the applicable IAD Rules. In particular, documents not in French or English must have a translator's declaration in compliance with IAD Rule 29(3). If a document has not been properly translated or does not have a proper translator's declaration, there is a strong possibility that a member will not accept that document into evidence.

D. Disclosure – IAD Rules 30 and 31

The IAD expects all parties will provide documents no later than 20 days before the hearing in compliance with the disclosure rule. If your disclosure is late, be prepared to seek the IAD's permission to allow you to submit the late disclosure. Your submissions should include explaining why the documents were disclosed late and dealing with possible prejudice to the other party by reason of the late disclosure. In *Bourdiert*, the Federal Court concluded that the panel did not err when it refused to consider the additional documents that the appellant had asked to file on the day of the hearing.[15]

E. Witnesses – IAD Rule 37

If a party wants to call a witness, the party must provide the information set out in IAD Rule 37 no later than 20 days before the hearing. If a party does not comply with the

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14 IAD Rules 8(5) and 10(5).

15 *Bourdiert, Enilda v. M.C.I.* (F.C. No., IMM-5681-06), Lagacé, May 3, 2007; 2007 FC 475.

requirements of IAD Rule 37, the witness (including an expert witness) may not testify unless the IAD allows the witness to testify. As noted above in relation to the disclosure Rule, you should be prepared to explain your non-compliance with the Rule, otherwise you may find that your witnesses may not be allowed to testify at the hearing.

F. Teleconferencing

In many subsection 64(3) appeals the appellant will be testifying by teleconference as she has not been able to return to Canada for their hearing. You should make sure arrangements have been made to contact the appellant by telephone in accordance with the practice of the IAD Regional office where the hearing is being held.

V Return to Canada

While permanent residents who have received a determination that they have contravened the residency obligation remain permanent residents until final determination of their appeal,[16] under IRPA, permanent residents are required to have a permanent resident card or a travel document in order to travel to Canada with a transportation company.[17]

A. Where the appellant has a right to return to Canada

Under paragraph 31(3)(c) of IRPA, if an Immigration officer is satisfied that the permanent resident was physically present in Canada at least once within the 365 days before the examination and they have made an appeal under subsection 63(4) of IRPA that has not yet been finally determined or the period for making such an appeal has not yet expired, the officer shall issue to the permanent resident a travel document.

B. Application to Return to Canada to be present at the IAD Hearing

In the event that an appellant cannot otherwise return to Canada, a permanent resident who appeals a decision made outside Canada on the residency obligation may pursuant to subsection 175(2) of IRPA make an application under IAD Rules 43 and 46 for an order that they physically appear at the hearing. The IAD may, after considering submissions, and if satisfied that the presence of the permanent resident at the hearing is necessary, order the permanent resident to physically appear at the hearing, in which case an officer shall issue a travel document for that purpose. The travel document will generally be issued by CIC after the IAD has set a date for the hearing of the appeal.

The IAD has dealt with applications to return in a number of appeals and has made the following rulings:

The fact that the appellant wished to appear in person was not in itself a sufficient ground for granting the order sought. Pursuant to subsection 175(2) of IRPA, such a

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16 IRPA paragraph 46(1)(b).

17 IRPA subsection 148(1) and IRP Regulations section 259.

request must be supported by reasons; for example, problems with telecommunication from the home country.[18]

The appellant had established that there was an impediment to attending his hearing by way of teleconferencing where the appellant was hearing impaired and required the assistance of a sign language interpreter at his hearing. His counsel would also require either a captionist and or an ASL interpreter. The application was granted.[19]

The application was denied where the only ground the appellant gave for the order sought, was a desire to "be assured of being able to properly discuss the case and present his arguments...without any limitations or dependencies on technologies that might or might not be available".[20]

The application was denied where the request was made after one year had elapsed from the filing of the notice of appeal and no reason given why the appellant had to be present in person.[21]

An application based on counsel's submission that it was essential that he and the appellant be physically together to review documents and otherwise prepare for the hearing was denied.[22]

VI Legal Issue: Retrospective Legislation

There have been numerous legal challenges at the IAD to the residency obligation provisions applying to time periods prior to the June 28, 2002 implementation date of IRPA.[23] This issue was settled by the Federal Court in *Chu*[24] where the Court found that the legislative scheme in IRPA is retrospective. The Court held that the legislation rebuts the presumption against retrospective or retroactive application, since its terms unambiguously say that it applies to immigration matters, as of June 28, 2002. The Court also found that the appellant had not suffered a loss of life, liberty or security under section 7 of the *Charter*. The Federal Court of Appeal in dismissing an appeal of the Federal Court's decision in *Chu*, confirmed that the five-year period in section 28 of IRPA applies to periods prior to June 28, 2002 and that the retroactive application of

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

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

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

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

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

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

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

section 28 did not breach section 7 of the *Charter*.[25] It should not be overlooked that subsection 328(1) of the IRP Regulations provides that a person who was a permanent resident immediately before the coming into force of section 328 (June 28, 2002) is a permanent resident under IRPA.[26]

VII Challenges to the Legal Validity of the Residency Obligation Decision

While most appellants concede the legal validity of the residency obligation decision, under paragraphs 67(1)(a) and (b) of IRPA, an appellant can challenge the legal validity of a residency obligation decision by proving that either a) the decision appealed is wrong in law or mixed law and fact; or b) a principle of natural justice has not been observed.

The first issue to consider is whether or not the appellant was physically present in Canada for at least 730 days of the five-year period prior to the determination date of the residency obligation.[27] If not physically present for at least 730 days, do the days of physical presence (if any) together with the other ways of obtaining credit under paragraph 28(2)(a) of IRPA equal at least 730 days? If the appellant is short by even one day the residency obligation will not have been met and the decision will be valid in law. In *Ul Hasan*[28] the appellant was found by the visa officer to be in contravention of the residency obligation when the officer calculated 727 days as being credited towards the residency obligation. The IAD upheld the visa officer's decision, allowing the appeal on humanitarian and compassionate considerations.

If the appellant's residency obligation determination took place within five years of becoming a permanent resident, under subparagraph 28(2)(b)(i) of IRPA, the appellant should have received credit for the number of days left from the date of determination to the end of the five-year period. While less of an issue today, if the appellant had obtained returning resident permits under the former Act, consideration must be given to whether this will result in a credit towards the residency obligation under subsections 328(2) and 328(3) of the IRP Regulations.

If you will be challenging legal validity, it is important that you provide the IAD with an evidentiary basis for demonstrating that the appellant was physically present in Canada on the days claimed. In *Vong*, the Federal Court held that the IAD must consider relevant evidence (bank statements and animal clinic reports) that might establish that the

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

[26] *See Kwan, Chih Lao James v. M.C.I.* (IAD VA2-02440), Workun, September 24, 2003 where the IAD discussed the impact of this transitional provision where an abandonment had taken place under the former Act.

[27] Time spent in Canada after the issuance of a subsection 44(1) report or after an outside of Canada decision has been made cannot be included in the section 28 calculation further to section 62 of the IRP Regulations. See *Angeles, Antonio Ramirez v. M.C.I.* (F.C., no. IMM-8460-03), Noël, September 16, 2004; 2004 FC 1257.

[28] *Ul Hasan, Syed Fareed v.M.C.I.* (IAD TA5-11148), Collison, February 21, 2008.

appellant was physically present in Canada and must not consider irrelevant factors such as the appellant being a loan shark.[29]

Under subparagraph 28(2)(a)(ii) of IRPA, credit is given where the permanent resident is "outside Canada accompanying a Canadian citizen who is their spouse or common-law partner or, in the case of a child, their parent." In *Abraham*[30] the meaning of the term "accompanying" was considered and the IAD held that it does not matter that the Canadian citizen spouse followed the permanent resident in order for the permanent resident to receive credit for accompanying the Canadian citizen spouse.

Just because the appellant has obtained a permanent resident card prior to the appeal hearing does not mean that the residency obligation decision will be found not valid in law. The Federal Court has held that mere possession of a permanent resident card is not conclusive proof of status in Canada. The Court went on to hold that the permanent resident card could not restore that status if previously lost where the card was issued after a determination made outside of Canada that the person had contravened his residency obligation.[31]

As my co-panellist Carter Hoppe is dealing with the issue of maintaining permanent residency by reason of working for a Canadian business (subparagraphs 28(2)(a)((iii) and (iv)), I will not comment on this issue except to note that there are a number of IAD decisions available in *RefLex* that deal with the issue:

> *Kroupa, Robert James, et al. v. M.C.I.* (IAD VA2-02797 et al.), Workun, July 16, 2003.
> *Ardavani, Farnam v. M.C.I.* (IAD VA4-01907), Workun, May 30, 2005 (reasons signed June 2, 2005).
> *Yuan, Chang-Jing v. M.C.I.* (IAD VA4-00822), Workun, April 12, 2005.
> *Faeli, Morteza et al. v. M.C.I.* (IAD TA4-05739 et al.), Hoare, November 9, 2005.
> *Ai, Xie Yang v. M.C.I.* (IAD VA5-02589), Mattu, February 12, 2007.
> *Wong, Tsz Cheung v. M.C.I.* (IAD VA5-02649), Shahriari, April 18, 2007.
> *Li, Guo Ping v. M.C.I.* (IAD VA6-01174), Ostrowski, August 9, 2007.
> *Franklin, Usha; et al. v. M.C.I.* (IAD TA6-03650 *et al*.), Whist, February 22, 2008.

VIII Requesting the Exercise of Humanitarian and Compassionate Relief

A. Humanitarian and Compassionate Decisions made by the Minister

Where a permanent resident does not meet the residency obligation, a determination may be made by an officer on whether or not humanitarian and compassionate considerations exist, taking into account the best interests of a child directly affected by the

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29 *Vong, Boon Lim v. M.C.I.* (F.C., no. IMM-1327-06), Beaudry, December 15, 2006; 2006 FC 1480.
30 *Abraham, Bobby Mathew v. M.C.I.* (IAD TA4-06963), Bousfield, July 29, 2005.
31 *Ikhuiwu, Emmanuel Ese v. M.C.I.* (F.C., no. IMM-276-07), de Montigny, January 10, 2008; 2008 FC 35.

determination which justify retaining permanent residence.[32] At an appeal to the IAD, it is not the role of the IAD to review the correctness of that decision; the IAD is to make its own decision on the evidence presented at the IAD hearing.

B. The Statutory Test for Humanitarian and Compassionate Relief

Unlike under the loss of permanent residence status provisions in section 24 of the former Act, the IAD is able to exercise humanitarian and compassionate relief in residency obligation appeals made pursuant to subsections 63(3) and 63(4) of IRPA.

The statutory test for humanitarian and compassionate relief for all IAD appeals (other than in the case of an appeal by the Minister) is set out in paragraph 67(1)(c) of IRPA. If the IAD is to allow an appeal under its humanitarian and compassionate jurisdiction, it must be satisfied that at the time the appeal is disposed of, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

At issue is how the IAD has applied the test in paragraph 67(1)(c) of IRPA to residency obligation appeals under subsections 63(3) and 63(4).

C. Subsection 63(4) Appeals - Humanitarian and Compassionate Considerations

In *Bufete Arce*,[33] the panel noted that the residency obligation appeal under subsection 63(4) was a new type of appeal, and that "while general principles governing the IAD's exercise of discretionary relief, relied upon and applied for many years, continue to be useful and relevant, the specific appropriate considerations within this new area must be identified and tailored so as to be relevant to the fundamental nature of the appeal. Appropriate considerations must recognize the needs of the parties and provide for a degree of objectivity and consistency in the area while recognizing that unique facts present themselves in every appeal." In addition to the best interests of a child directly affected by the decision, the panel went on to identify the following non-exhaustive considerations:

> - an appellant's initial and continuing degree of establishment in Canada,
> - his or her reasons for departure from Canada,
> - reasons for continued, or lengthy, stay abroad,
> - ties to Canada in terms of family,
> - whether reasonable attempts to return to Canada were made at the first opportunity and,
> - generally, whether or not there are unique or special circumstances present in the case such as meet the *Chirwa*[34] standard for discretionary relief.

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32 IRPA paragraph 28(2)(c).

33 *Bufete Arce, Dorothy Chicay v. M.C.I.* (IAD VA2-02515), Workun, June 16, 2003.

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

These considerations, as well as the additional considerations noted below, are often cited by IAD members in their reasons for decision in subsection 63(4) residency obligation appeals.[35]

D. Subsection 63(3) Appeals - Humanitarian and Compassionate Considerations

In *Kuan*,[36] the panel dealt with a subsection 63(3) removal order appeal based on contravention of the residency obligation. The panel noted that it was a removal appeal grounded in a new type of inadmissibility, one not previously considered by the IAD. The panel noted that the *Ribic*[37] factors continue to be a useful, general guideline in the exercise of discretion. Including the best interests of a child directly affected by the decision, the panel in *Kuan* identified the following other relevant considerations:

- an appellant's initial and continuing degree of establishment in Canada
- his or her reasons for departure from Canada,
- reasons for continued, or lengthy, stay abroad
- ties to Canada in terms of family, and
- whether reasonable attempts to return to Canada were made at the first opportunity.

These considerations, as well as the additional considerations noted below, are often cited by IAD members in their reasons for decision in subsection 63(3) residency obligation appeals

E. Subsections 63(4) and 63(3) Appeals – Humanitarian and Compassionate Decisions by the IAD

While one must keep in mind the differences in subsection 63(4) and 63(3) appeals, there is still considerable overlap in the considerations that the IAD must take into account in deciding either type of appeal. Set out below are a number of issues that come up in residency obligation appeals together with the considerations noted above, as well as an overview of how the IAD has dealt with them in the disposition of residency obligation appeals. It is important to note that none of the factors set out in *Bufete Arce* and *Kuan*, or factors noted below are determinative and an assessment of "all the circumstances" in a given case may involve giving lesser or more weight to one consideration than another, depending on the compelling nature of the consideration within the context of the individual case before the panel.[38]

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[35] See for example the recent decision by Member Workun: *Chen, Xiao Qiang et al v. M.C.I.* (IAD VA6-03307, VA6-03315/6), Workun, December 10, 2007.

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

[37] *Ribic, Marida v. M.E.I.* (I.A.B. 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985 and confirmed in *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; 2002 SCC 3.

[38] *Chen*, *supra*, footnote 35, at paragraph 8.

i) Reasons for departure from Canada

Members have examined the circumstances that led to the permanent residents leaving Canada and whether, despite their stated intentions of returning, there were reasons beyond their control, such as taking care of an ill family member that delayed their return and prevented them from fulfilling their residency obligation.[39] Accordingly, it is important to have the appellant explain what caused her to leave Canada and to submit credible documentation to support the appellant's explanation.

ii) Reasons for continued, or lengthy, stay abroad

As noted above, it is important to adduce evidence with respect to why the appellant left Canada. It is equally important to explain why an appellant continued to be outside of Canada, particularly where there is a lengthy stay abroad.[40]

iii) Appellant's initial and continuing degree of establishment in Canada including length of time in Canada,

In *Al-Gumer*, establishment was through the connection of the appellant to deaf community in Canada.[41] In *Thompson*, the fact that an appellant was well-established in Canada by her residency for 13 years prior to leaving Canada and before her residency obligation was breached, was a positive factor considered by the IAD in allowing the appeal.[42] Where an appellant, after becoming a permanent, resided in Canada for only a short time period before departing, the IAD may find this to be a negative factor on the basis that the appellant never intended to become established in Canada, unless the short stay is adequately explained.[43]

iv) Whether or not reasonable attempts to return to Canada were made at the first opportunity

An important consideration for many IAD members is whether or not the appellant has made reasonable attempts to return to Canada at the first opportunity available to the appellant.[44] It is important to show what efforts were made by the appellant to return to Canada and when they were first made. A delay in attempting to return may be viewed as a lack of interest in regaining the appellant's permanent residence status.

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39 Appeal allowed in *Nunez, Elia Francisca v. M.C.I.* (IAD TA4-13922), Stein, August 5, 2005.

40 In a case where considerable time passed after the illness was no longer a reason for not returning to Canada, the appeal was dismissed: *Humphries, Michael George et al. v. M.C.I.* (IAD TA4-02745), Hoare, July 26, 2005.

41 *Al-Gumer, Nazer Jassim v. M.C.I.* (IAD TA4-11257, Stein, August 22, 2005.

42 *Thompson, Gillian Alicia v. M.C.I.* (IAD TA3-00640), MacPherson, November 12, 2003.

43 See for example *Nohra, Alain Antoine v. M.C.I.* (IAD MA3-08026), Manglaviti, January 4, 2005.

44 See for example *Ai, Xie Yang v. M.C.I.* (IAD VA5-02589), Mattu, February 12, 2007.

v) An appellant's ongoing intention vis-à-vis long-term residency in Canada even during a period of absence

It is very interesting to note that the intentions of permanent residents who have been found not to have met their residency obligation are still considered relevant.[45] They have been taken into account as a significant factor by the IAD in the exercise of discretionary relief.[46] In *Angeles,* the Court citing *Kuan,* found that an individual's intention to return to Canada throughout the periods of extended residency outside of Canada was a relevant factor in a humanitarian and compassionate assessment.[47] The period of time outside of Canada can be very lengthy; in *Price-Fisher,* the IAD dismissed an appeal where the appellant was outside of Canada for 45 years.[48]

Intention becomes a problematic issue where the appellant became a permanent resident and left Canada when a still a child. In *Lai* the Court noted on the difficulty in identifying a truly independent intention on the part of a relatively young and dependent child. The Court went on to note that in the case of a dependent child of relatively young age there is little, if any, opportunity to independently fulfill the residency obligation required to preserve landed status or to create the genuine ties to Canada that are typically necessary for humanitarian and compassionate relief. The Court commented that in most cases, the child can only accomplish that which the parents are prepared to allow and support. The Court concluded by finding that a child's status may have been jeopardized by the decisions of the child's parents, but the child's claim to relief should not be enhanced by those parental decisions.[49]

The IAD has approached the situation of children in a number of ways. In *Uriarte,* the panel was of the view that the appellant could not be blamed or penalized for her parents' actions in taking her as a young child from Canada.[50] Other panels have considered that a young child leaving Canada under parental influence is not a misfortune for which discretionary relief should be given; a panel may approach the case differently where a child who had become accustomed to a Canadian lifestyle had then been uprooted by his

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45 An individual's intention to abandon Canada continues to be relevant when considering humanitarian and compassionate factors, although a finding of "abandonment" is no longer necessary to the disposition of the case: *Kroupa, Robert James, et al. v. M.C.I.* (IAD VA2-02797 et al.), Workun, July 16, 2003.

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

47 *Angeles, Antonio Ramirez v. M.C.I.* (F.C., no. IMM-8460-03), Noël, September 16, 2004; 2004 FC 1257.

48 *Price-Fisher, Elizabeth v. M.C.I.* (IAD TA5-11925), Collison, February 15, 2008.

49 *Lai, Chih-Yin v. M.C.I.* (F.C., no. IMM-325-06), Barnes, November 9, 2006; 2006 FC 1359.

50 *Uriarte, Obando, Rebeca Patricia v. M.C.I.*. (IAD MA4-02972), Néron, March 17, 2006. See also *Hallak, Hadeell v. M.C.I.* (IAD TA3-13986), Hoare, September 29, 2004.

parents without being able to make an independent decision to leave and stay outside of Canada.[51]

vi) On going and continuing ties to Canada in terms of family ties and other ties

IAD panels are interested in receiving evidence with respect to family and other ties to Canada including visits to Canada.

vii) Generally, whether or not there are unique or special circumstances present in the case such as meet the Chirwa[52] standard for discretionary relief

This a consideration that panels have applied to subsection 63(4) appeals. It includes the degree of hardship that would be caused to the appellant by loss of status in Canada including country conditions in the appellant's home country. Another consideration would be the impact of the loss of status on the appellant's family in Canada.

viii) Ribic factors

This a consideration that panels have applied to subsection 63(3) appeals. The *Ribic* factors (other than possibility of rehabilitation) can have relevance to the removal order appeal and counsel should consider adducing evidence where appropriate.

ix) Best Interests of the Child

In *Lai*, the Court found that the IAD's finding that it was in the applicant's best interests as a child to return to live with her parents in Taiwan is an evidence based conclusion that cannot be characterized as unreasonable.[53] In *Konig,* the IAD held that the best interests of developmentally handicapped children living in a community care facility where the appellant assisted would be served by allowing him to remain in Canada.[54] In *Thompson*, substantial weight was given to this factor where the appellant had a daughter in Canada with whom she had a close relationship.[55] IAD panels in assessing best interests consider children living in Canada and in the home country. Accordingly, a panel may find best interests as a neutral factor where the appellant has grandchildren in Canada and in the home country.

F. Assessment of Evidence; Decisions of the Federal Court

In *M.C.I. v. Gharanejad-Dashkesen,* the Minister challenged the IAD's assessment of humanitarian and compassionate considerations. The Court held that the IAD must not make a selective assessment of the evidence favourable to the applicant while

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51 For example see *Leung, Po Fan v. M.C.I.* (IAD TA4-15811), Collison, July 18, 2006 and *Chang, Han-Lun v. M.C.I.* (IAD VA4-00735), Workun, December 16, 2004.

52 *Chirwa, supra, footnote 34*.

53 *Lai, supra,* footnote 49.

54 *Konig, Andrew Daniel v. M.C.I.* (IAD VA2-03202), Kang, November 17, 2003.

55 *Thompson, supra,* footnote 42.

disregarding, without proper reasons, other relevant evidence not favourable to the applicant.[56]

In *El Idrissi*, the Court found that the IAD had not erred in determining that the applicant had very little to do with his wife. It was obvious from the applicant's testimony that he had not kept in close contact with his wife, who had been in a relationship with another man for two years, and that he knew nothing more. Having a wife in Canada is not sufficient as a humanitarian and compassionate ground for the granting of special relief in this case.[57]

In *Lello***,** the Court held that the question which should have been considered by the IAD was whether the applicant's Canadian citizen daughter who testified that she and her child needed the appellant to move to Canada was able to sponsor her mother right now, and, if not, whether the failure to maintain the required number of days in Canada should have been waived.[58]

G. Impact of a Positive Humanitarian and Compassionate Determination

Your client has obtained a positive humanitarian and compassionate determination from CIC or the IAD on the residency obligation. What advice should you give her regarding leaving Canada prior to having accrued 730 days of physical presence in Canada in the prior five-year period? If she leaves Canada and tries to return, will she be subject to another residency obligation determination? To what extent does subsection 70(1) of IRPA[59] assist your client if an officer reconsiders residency obligation compliance where the IAD has previously allowed a residency obligation appeal? Counsel may wish to caution successful permanent residents to remain in Canada until they have built up sufficient number of days of physical presence to avoid a possible future negative determination and the need to appeal that decision to the IAD.

IX Where the IAD must make a Removal Order

Subsection 69(3) of IRPA provides that were an appeal under subsection 63(4) is dismissed and the permanent resident is in Canada at the time the appeal is disposed of, the IAD shall make a removal order. The IAD has interpreted this to mean the making of a departure order, as that is the order made by an officer where a permanent resident is ordered removed at an examination (IRPA subsection 44(2) and IRP Regulations subsection 228(2)). The IAD has taken subsection 69(3) to provide authority for it to

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[56] *M.C.I. v. Gharanejad-Dashkesen*, Hassan (F.C., no. IMM-1853-07), Pinard, January 30, 2008; 2008 FC 92.

[57] *El Idrissi, Moulay Youssef v. M.C.I.* (F.C. no. IMM-9308-04), Blais, August 15, 2005; 2005 FC 1105.

[58] *Lello, Janice Eileen v. M.C.I.* (F.C., no. IMM-5324-04), Harrington, January 25, 2005; 2005 FC 109.

[59] Subsection 70(1) of IRPA reads as follows: "An officer, in examining a permanent resident or a foreign national, is bound by the decision of the Immigration Appeal Division to allow an appeal in respect of the foreign national."

make a departure order where it has abandoned a subsection 63(4) appeal where the permanent resident is in Canada at that time. A departure order may also be made where the appeal is withdrawn where the appellant is still in Canada at that time.

Accordingly, if an appellant is going to leave Canada after the hearing of the appeal, satisfactory evidence of the appellant having left Canada should be provided to the IAD and CIC, otherwise the IAD may make a departure order in the event that the appeal is dismissed, abandoned or withdrawn.

X When the Residency Determination Becomes Final

In *Ikhuiwu* the Federal Court, in a removal order appeal, based on criminality was required to consider the question of when a determination of non-compliance with the residency obligation under section 28 of the IRPA becomes "final" so as to deprive a permanent resident of that status. The applicant had been found by a visa officer to have failed to comply with the residency obligation. Despite that finding, the applicant returned to Canada. He had been ordered removed for criminal offences on the basis that he was a foreign national. Subsequently he was successful in having the IAD extend time for filing a subsection 63(4) appeal, which appeal was dismissed with an application for judicial review of the IAD decision being dismissed.

The Court in *Ikhuiwu* held that: 1) The correct interpretation of paragraph 46 (1)(b) is that a section 28 determination is final when the time prescribed by the rules for bringing an appeal from the decision has expired. 2) The effect of the statutory scheme at that time is the loss of permanent resident status. That and the operation of other provisions of IRPA may lead, as in this case, to the issuance of a removal order. 3) A harmonious interpretation of those provisions with the IAD's jurisdiction to grant an extension of time to appeal the section 28 determination, requires that any removal order deriving from the loss of permanent resident status be suspended upon the filing of a motion for an extension and, if granted, until the appeal is decided. 4) In the present case, there was no impediment to the issuance of the removal order at the time it was made. The removal order was not vitiated by the filing of the application for an extension nor its grant but was suspended pending the outcome of the appeal. It was open to the applicant at that time to seek leave for judicial review of the IAD decision and a stay of execution of the removal order pending the outcome of the process, as he did in this instance. But the removal order remained valid and executable upon completion of the appeal and review processes.[60]

[60] *Ikhuiwu, Emmanuel Ese v. M.C.I.* (F.C., no. IMM-3520-05), Mosley, March 13, 2008; 2008 FC 344.