Chapter Two

Right of Appeal

Introduction

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

Right to Appeal

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

Foreign Nationals

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

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

1 S.C. 2001, c. 27.

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

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

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

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

Foreign nationals who hold a permanent resident visa

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

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

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

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

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

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

---

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

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

6 *Ibid*, at paragraphs 13 and 16.

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

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

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

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

---

7 Also see chapter on visas under IRPA.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

18 *Zhang, supra*, footnote 5.

19 *Geda, supra*, foonote 17.

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

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

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

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

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

Protected Persons

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

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

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

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

Permanent Residents

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

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

Minister's Appeal

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

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

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

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

Limitations on the Right to Appeal

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

IRPA - Section 64

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

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

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

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

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

---

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

---

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

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

32 *Kroon, supra* footnote 25.

33 *Livora, supra* footnote 25.

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

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

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

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

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

---

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

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

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

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

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

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

---

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

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

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

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

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

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

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

IRPA - Section 65

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

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

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

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

---

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

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

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

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

CASES