Chapter Three

Permanent Residence

Introduction

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

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

Removal orders against permanent residents

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

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

2 *IRPA*, subsection 63(3).

3 *IRPA*, subsection 63(4).

4 *IRPA*, subsection 27(1).

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

6 *IRPA*, section 34.

7 *IRPA*, section 35.

8 *IRPA*, subsection 36(1).

9 *IRPA*, section 37.

10 *IRPA*, section 40.

11 *IRPA*, paragraph 41(b).

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

Jurisdictional issues

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

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

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

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

Acquisition and loss of permanent resident status

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

Acquiring permanent resident status

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

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12 *IRPA*, subsection 63(3).

13 *IRPA*, section 64.

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

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

16 *IRPA*, subsection 2(1).

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

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

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

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

Permanent resident cards

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

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

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

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

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

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

21 *IRP Regulations*, sections 123 – 129.

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

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

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

25 *IRP Regulations*, section 55.

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

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

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

Loss of Permanent Resident Status

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

- if they become Canadian citizens[32]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The residency obligation

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

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

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

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

41 *Immigration Act*, section 24.

42 See footnote 5.

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

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

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

Section 28 of the IRPA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) a position outside Canada;

(b) an affiliated enterprise outside Canada; or

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

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

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

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

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

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

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

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

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

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

Challenges to Retrospective Legislation

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

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

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

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

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

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

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

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

Discretionary Relief in Residency Obligation Appeals

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Return to Canada for appeal

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

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

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

Travel documents

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

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

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

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

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

80 *IRPA*, subsection 69(3).

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

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

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

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

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

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

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

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

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

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

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84 *IRPA*, subsection 31(3).

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

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

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

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

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

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

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

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

CASES