Chapter Ten

Remedies & Conditions of a Stay

Section 63 appeal remedies

Regulation 229 of the *Immigration and Refugee Protection Regulations* (the "IRP Regulations")[1] provides that there are three types of removal orders, namely, departure orders, exclusion orders and deportation orders.

There are prescribed remedies available to appellants who have a right of appeal to the Immigration Appeal Division,[2] and who have appealed the issuance of a removal order to the Immigration Appeal Division pursuant to section 63 of the *Immigration Refugee Protection Act* (the "*IRPA*"). These remedies take the form of ways the Immigration Appeal Division may dispose of an appeal. Section 66 of *IRPA* prescribes that after considering the appeal of a decision, the Immigration Appeal Division shall: a) allow the appeal in accordance with section 67, b) stay the removal order in accordance with section 68, or c) dismiss the appeal in accordance with section 69.

To **allow an appeal**, the Immigration Appeal Division must be satisfied in accordance with subsection 67(1) that, at the time the appeal is disposed of,

- (a) the decision appealed is wrong in law or fact or mixed law and fact;
- (b) a principle of natural justice has not been observed: or
- (c) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

Subsection 67(2) provides that where the Immigration Appeal Division allows an appeal,

> it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

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1 *Immigration and Refugee Protection Regulations*, SOR/2002-227, June 11, 2002.

2 Although not expressly mentioned in *IRPA*, the Immigration Appeal Division can dismiss an appeal for lack of jurisdiction if the appellant is not a person with a right of appeal under section 63 of *IRPA*. There is also no right of appeal where the appellant is described in section 64 of *IRPA*. The subject of right of appeal is discussed in Chapter 2.

To **stay a removal order** in accordance with subsection 68(1), the Immigration Appeal Division

> must be satisfied, taking into account the best interest of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

If a **stay** is requested and the facts suggest that there is reason to consider a stay, then, if reasons for decision are given by the panel,[3] the appellant is entitled to know why a stay was not granted where the appeal is dismissed.[4] Where there is a joint recommendation that a stay be granted, the Immigration Appeal Division should not reject that submission and dismiss the appeal unless there are good reasons to do so.[5]

Subsection 69(1) provides that the Immigration Appeal Division shall **dismiss an appeal** if it does not allow the appeal or stay the removal order, if any.

Subsection 69(2) provides for an appeal by the Minister. For a discussion of this type of appeal, see Chapter 12.

Conditions – generally

Where the Immigration Appeal Division stays a removal order,[6] paragraph 68(2)(a) of *IRPA* provides for the imposition of prescribed (mandatory) conditions and non-prescribed (non-mandatory) conditions that the Immigration Appeal Division considers necessary.[7] Non-prescribed conditions may be varied or cancelled by the Immigration Appeal Division; there is no statutory authority for the Immigration Appeal Division to vary or cancel prescribed conditions.[8]

Regulation 251 sets out the following prescribed conditions that must be imposed by the Immigration Appeal Division in all stay orders:

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[3] *Immigration Appeal Division Rule* 54(1) provides that the Immigration Appeal Division must provide to the parties, together with the notice of decision, written reasons for a decision that stays a removal order.

[4] *Lewis, Lynda v. M.C.I.* (F.C.T.D., no. IMM-5272-98), Simpson, August 5, 1999.

[5] *Nguyen, Thi Ngoc Huyen v. M.C.I.* (F.C.T.D., no. IMM-567-99), Lemieux, November 3, 2000.

[6] Pursuant to paragraph 68(2)(b) of *IRPA* all conditions imposed by the Immigration Division are cancelled where the Immigration Appeal Division stays a removal order.

[7] Under the former *Immigration Act*, the nature and content of "terms and conditions" are not prescribed by law but rather are those that "the Appeal Division may determine" pursuant to subsection 74(2) of the former *Immigration Act*. The phrase "terms and conditions" has been replaced in *IRPA* by the simpler term, "conditions".

[8] Paragraph 68(2)(c) of *IRPA*.

- to inform the Department and the Immigration Appeal Division in writing in advance of any change in the person's address;
- to provide a copy of their passport or travel document to the Department or, if they do not hold a passport or travel document, to complete an application for a passport or a travel document and to provide the application to the Department;
- to apply for an extension of the validity period of any passport or travel document before it expires, and to provide a copy of the extended passport or document to the Department;
- to not commit any criminal offences;
- if they are charged with a criminal offence, to immediately report that fact in writing to the Department; and
- if they are convicted of a criminal offence, to immediately report that fact in writing to the Department and the Division.

In imposing a particular length of stay or reconsideration period, some members of the Immigration Appeal Division address the gravity of the criminal record or the particular offence for which a removal order was issued while other members address the need for the appellant to continue his or her course of rehabilitation over a specified period. Stays are often from one year up to five years, although it is becoming more common to see the maximum stay period not exceeding three years.

The stay and the conditions of the stay (including the requirement to keep the Minister and the Immigration Appeal Division aware of the appellant's current contact information) continue in full force and effect until the Immigration Appeal Division disposes of the appeal by order under sections 67 (allow the appeal) or 69 (dismiss the appeal) of *IRPA*; that is, it does not automatically lapse at the "end" of the stay period.[9]

Conditions – specific

Because appellants tend not to seek judicial review of specific conditions imposed as part of a stay order there is little judicial authority on conditions within the immigration field.[10] The purposes served by imposing conditions in a stay are many, but the conditions must be complied with for the appellant to have the removal order

[9] *Theobalds, Eugene v. M.C.I.* (F.C.T.D., no. IMM-588-97), Richard, January 29, 1998. See also *Leite, Jose Carvalho v. M.C.I.* (F.C., no. IMM-6850-04), von Finckenstein, July 14, 2005; 2005 FC 984.

[10] However, there have been a number of decisions on the meaning of the condition; "keep the peace and be of good behaviour". See for example: *Cooper, Stanhope St. Aubyn v. M.C.I.* (F.C., no. IMM-10455-04), MacTavish, September 14, 2005; 2005 FC 1253, *M.C.I. v. Stephenson, Glendon St. Patrick* (F.C., no. IMM-6297-06), Dawson, January 23, 2008; 2008 FC 82 and *Bailey, Samuel Nathaniel v. M.C.I.* (F.C., no. IMM-48-08), Martineau, August 8, 2008; 2008 FC 938. For a different approach see *M.P.S.E.P. v. Ali, Shazam* (F.C., no. IMM-3517-07), Campbell, April 3, 2008; 2008 FC 431.

quashed, and the appeal allowed. One purpose may be to ensure the safety of the Canadian public and to promote the rehabilitation of the appellant.

There should be a nexus between the non-mandatory conditions imposed and the reasons for the granting of the stay. The non-mandatory conditions should be relevant to the particular appellant and case being decided. It is also important that any condition being imposed be precise as there are consequences for failing to comply with a condition.

In *Williams*,[11] the applicant was addicted to crack cocaine and was mentally ill (paranoid schizophrenia). He was ordered deported in July 2002. In April 2003, the Immigration Appeal Division granted a four-year stay, with conditions. In August 2005, the Minister brought an application to cancel the stay because the applicant breached several conditions. Subsequent to the Minister's application, the applicant was convicted of two criminal offences involving assaults against peace officers and was found not criminally responsible on account of a mental disorder for two other identical charges. In March 2005, the Ontario Review Board (ORB) ordered his detention at the Queen Street Mental Health Centre. The Immigration Appeal Division in deciding to cancel the stay, found that the circumstances of the applicant's release were within the jurisdiction of the ORB and that there was no reliable mechanism to bring him back before the Immigration Appeal Division. The Court found that the Immigration Appeal Division misapprehended its broad jurisdiction as there was no reason why the Immigration Appeal Division could not impose a condition under *IRPA,* paragraph 68(2)(a), which requires that, upon the applicant being discharged by the ORB, he report to the Immigration Appeal Division in order to satisfy the Immigration Appeal Division that his rehabilitation and other circumstances are such that he does not pose a danger to the Canadian public.

If an appellant does not comply with a condition, the appellant may be brought before the Immigration Appeal Division for a reconsideration of the stay. Also, the Minister, pursuant to subsection 68(4) of *IRPA* and *Immigration Appeal Division Rule* 27 may as noted below file an application that the appeal be cancelled.

Non-mandatory conditions often imposed include, but are not limited to, the following:

> Report to the Department (in person) (by telephone) (in writing) at Canada Border Services Agency at (insert) on (insert) and every (insert) month(s) thereafter on the following dates:
>
> (insert)
>
> The Appellant shall report (in person) (by telephone) (in writing). The reports are to contain details of the appellant's:

[11] *Williams, Carlton Anthony v. M.C.I.* (F.C., no. IMM-7519-05), Rouleau, November 20, 2006; 2006 FC 1402.

- employment or efforts to obtain employment if unemployed;
- current living arrangements;
- marital status or common-law relationships;
- attendance at any educational institution and any change in that attendance;
- attendance at meetings of Alcoholics Anonymous, or any other drug or alcohol rehabilitation program;
- participation in psychotherapy or counseling (please specify type);
- meetings with parole officer, including details of any violations of the conditions of parole;
- other relevant changes of personal circumstances;
- other (specify);

Make reasonable efforts to seek and maintain full time employment and IMMEDIATELY report any change in employment.

Engage in or continue psychotherapy or counseling. **NOTE**: *IF YOU WITHDRAW YOUR CONSENT TO THE FOREGOING CONDITION, YOU MUST BRING AN APPLICATION TO THE IAD FORTHWITH TO HAVE THIS CONDITION REMOVED. (NOTE: THIS CONDITION SHOULD ONLY BE IMPOSED WITH THE APPELLANT'S PRIOR CONSENT)*

Attend a drug or alcohol rehabilitation program. **NOTE**: *IF YOU WITHDRAW YOUR CONSENT TO THE FOREGOING CONDITION, YOU MUST BRING AN APPLICATION TO THE IAD FORTHWITH TO HAVE THIS CONDITION REMOVED. (NOTE: THIS CONDITION SHOULD ONLY BE IMPOSED WITH THE APPELLANT'S PRIOR CONSENT)*

Make reasonable efforts to maintain yourself in such condition that:

- your (name condition, eg. chronic schizophrenia or alcoholism) will not cause you to conduct yourself in a manner dangerous to yourself or anyone else; and
- (b) it is not likely you will commit further offences.

Not knowingly associate with individuals who have a criminal record or who are engaged in criminal activity.

Not own or possess offensive weapons or imitations thereof.

Respect all parole conditions and any court orders.

Refrain from the illegal use or sale of drugs.

Keep the peace and be of good behaviour.

Consent to Conditions

There are certain conditions for which the consent of the appellant may be required before the condition can be imposed. Usually, the conditions for which consent may be required are those which deal with the *Charter* rights of the appellant.[12] So, for example, in the list of conditions above, the condition for the appellant to "attend a drug or alcohol rehabilitation program" the consent of the appellant should be requested.

The *Rogers*[13] case which dealt with medical treatment as a term of a probation order raised serious *Charter* concerns with respect to non-consensual orders. It appears reasonable to conclude from this case that the Immigration Appeal Division may impose random drug testing as a condition of a stay provided the appellant gives a free and informed consent to this measure. The Immigration Appeal Division, when considering appeals of persons who have been engaged in criminal activity caused by an abuse of narcotics, has in a limited number of appeals imposed random drug testing as a condition of a stay.[14]

Reconsideration of a Stay

Where the Immigration Appeal Division has stayed a removal order appeal, it may vary or cancel any non-prescribed condition, and it may cancel the stay on application or on its own initiative.[15] The Immigration Appeal Division also may at any time, on application or on its own initiative, reconsider the appeal. Rule 26 of the *Immigration Appeal Division Rules* governs the procedure for a reconsideration of an appeal where a removal order is stayed. Proper notice of the reconsideration must be given to the appellant and to the Minister.[16] Where submissions are requested of the

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[12] Under the former *Immigration Act* provisions, the Immigration Appeal Division held that it had the jurisdiction to order an appellant to undergo psychological and psychiatric treatment: *Johnson, Bryan Warren v. M.E.I.* (IAD T89-01143), Sherman, Townshend, Ariemma, November 22, 1989.

[13] *R. v. Rogers* (1990), 61 C.C.C. (3d) 481 (B.C.S.C.).

[14] The IAD imposed on consent random drug testing in *Dwyer, Courtney v. M.C.I.* (IAD T92-09658), Aterman, Wright, March 21, 1996 and *Torres-Hurtado, Jose Lino v. M.C.I.* (IAD V94-00745), Ho, Lam, Clark, December 15, 1994.. See also *Farquharson v. Canada (Public Safety and Emergency Preparedness)*, 2006 CanLII 62209 (I.R.B.).

[15] Paragraph 68(2)(d) of *IRPA*.

[16] See *M.C.I. v. Vincenzo, Palumbo* (F.C., No. IMM-1190-07), Shore, October 16, 2007; 2007 FC 1047 and *M.C.I. v. Charabi, Marwan Mohamad* (F.C., no. IMM-7225-05), Blais, August 17, 2006; 2006 FC 996.

parties, the Immigration Appeal Division must not make a decision on the reconsideration before the time has expired for the parties to provide their submissions.[17]

In *Stephenson,*[18] the Minister challenged a decision of the Immigration Appeal Division to allow a reconsideration without holding an oral hearing. The Court held that the Immigration Appeal Division erred by failing to specifically mention the *Ribic* factors or by failing to consider the seriousness of the offence that lead to the removal order, failing to consider the existence of any exceptional reasons for allowing the appeal flowing from his establishment in Canada, the circumstances of his family in Canada, and the degree of hardship if returned to Jamaica.

In *Newman*,[19] the Minister challenged a decision of the Immigration Appeal Division to allow a reconsideration where the Immigration Appeal Division emphasized the fact that the respondent had not committed any criminal offences in the preceding five years and his rehabilitation continued to weigh in his favour. The Court noted however that the Immigration Appeal Division failed to explain how the evidence relating to the respondent's conduct over the recent years supported a finding of rehabilitation and allowed the application.

Cancellation of a Stay due to a Subsequent Conviction

Subsection 68(4) of *IRPA* deals with the cancellation of a stay where an appellant has been convicted of another offence that is referred to in the subsection 36(1) of *IRPA* "serious criminality" inadmissibility provision. Subsection 68(4) reads as follows:

> If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

Rule 27 of the *Immigration Appeal Division Rules* governs the procedure that the Minister must follow in giving the Notice of Cancellation. This provision has a significant impact on appellants convicted of subsection 36(1) offences while on a stay. This provision replaces the subsection 70(6) former *Immigration Act* "danger opinion" provision.

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[17] *Sivananthan, Sanjeevan v. M.C.I.* (F.C., no. IMM-99-05), MacTavish, September 20, 2005; 2005 FC 1294.

[18] *M.C.I. v. Stephenson, Glendon St. Patrick* (F.C., no. IMM-6297-06), Dawson, January 23, 2008; 2008 FC 82. See also *Ivanov, Leonid v. M.C.I.* (F.C., no. IMM-7131-05), Kelen, September 1, 2006; 2006 FC 1055.

[19] *M.P.S.E.P. v. Newman, Colin Anthony,* (F.C., no. IMM-5642-06), O'Reilly, November 13, 2007; 2007 FC 1150. See also *M.P.S.E.P. v. Philip, Lennox* (F.C., no. IMM-1139-06), Dawson, September 14, 2007; 2007 FC 908.

For subsection 68(4) to apply: 1) the Immigration Appeal Division must have stayed a removal order against the appellant; 2) the appellant must have been found inadmissible on grounds of serious criminality or criminality; and 3) the appellant must have been convicted of another offence referred to in subsection 36(1) of *IRPA* – serious criminality – after the stay was granted by the Immigration Appeal Division.

In *Hardyal,*[20] the Immigration Appeal Division rejected the Minister's position that it had no jurisdiction to consider whether or not to accept the Minister's Notice of Cancellation as according to the Minister the stay was cancelled and the appeal was terminated by operation of law upon the providing of the Notice. The Immigration Appeal Division treated the Notice as an application pursuant to sections 42 to 45 of the *Immigration Appeal Division Rules* and held that once a stay has been granted, it can only be cancelled by the Immigration Appeal Division pursuant to paragraph 68(2)(d) of *IRPA.*

In *Ramnanan,*[21] the Federal Court confirmed that the Immigration Appeal Division has the jurisdiction to consider constitutional questions generally and to grant relief, in light of its general power under *IRPA*, subsection 162(1), to hear and determine "all questions of law and fact, including questions of jurisdiction". However the Immigration Appeal Division did not err in finding that it did not have jurisdiction to decide the constitutionality of *IRPA*, subsection 68(4). Any decision-making power under subsection 68(4) of *IRPA* is strictly factual. If a determination is made by the Immigration Appeal Division that subsection 68(4) applies, based on established facts, the Immigration Appeal Division automatically loses jurisdiction to hear the appeal.

No Right of Appeal to the Immigration Appeal Division

An appellant will not have a right to appeal a removal order to the Immigration Appeal Division where section 64 of *IRPA* applies. For a discussion of the circumstances where an appellant loses the right to appeal a removal order to the Immigration Appeal Division, see Chapter 2.

Confidentiality applications & applications for non-disclosure

Immigration Appeal Division proceedings are usually held in public. There is a provision of *IRPA*, however, which allows the proceedings, on application, to be held in the absence of the public. This provision, which applies to all Divisions of the Board, is more detailed and extensive than section 80 of the former *Immigration Act*.

Section 166 of *IRPA* reads,

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[20] *Minister of Citizenship and Immigration v. Hardyal, Shaneeza* (IAD T97-04344), D'Ignazio, April 15, 2003.

[21] *Ramnanan, Naresh Bhoonahesh v. M.C.I. and M.P.S.E.P.* (F.C., no. IMM-1991-07), Shore, April 1, 2008; 2008 FC 404.

Proceedings before a Division are to be conducted as follows:

(a) subject to the other provisions of this section, proceedings must be held in public;

(b) on application or on its own initiative, the Division may conduct a proceeding in the absence of the public, or take any other measure that it considers necessary to ensure the confidentiality of the proceedings, if, after having considered all available alternate measures, the Division is satisfied that there is

(i) a serious possibility that the life, liberty or security of a person will be endangered if the proceeding is held in public,

(ii) a real and substantial risk to the fairness of the proceeding such that the need to prevent disclosure outweighs the societal interest that the proceeding be conducted in public, or

(iii) a real and substantial risk that matters involving public security will be disclosed;

(c) subject to paragraph (d), proceedings before the Refugee Protection Division and the Immigration Division concerning a claimant of refugee protection, proceedings concerning cessation and vacation applications and proceedings before the Refugee Appeal Division must be held in the absence of the public;

(d) on application or on its own initiative, the Division may conduct a proceeding in public, or take any other measure that it considers necessary to ensure the appropriate access to the proceedings if, after having considered all available alternate measures and the factors set out in paragraph (b), the Division is satisfied that it is appropriate to do so;

(e) despite paragraphs (b) and (c), a representative or agent of the United Nations High Commissioner for Refugees is entitled to observe proceedings concerning a protected person or a person who has made a claim to refugee protection; and

(f) despite paragraph (e), the representative or agent may not observe any part of the proceedings that deals with information or other evidence in respect of which an application has been made under section 86, and not rejected, or with information or other evidence protected under that section.

Rule 49 of the *Immigration Appeal Division Rules* governs the procedure to be followed where a person wants a proceeding held in the absence of the public or wants the Immigration Appeal Division to make an order to ensure the confidentiality of the proceedings.

Section 86 of *IRPA* provides for a request by the Minister for the Immigration Division or the Immigration Appeal Division to make an order for the non-disclosure of information. In response to the decision of the Supreme Court of Canada decision in *Charkaoui*[22] the non-disclosure provisions were replaced on March 5, 2008 to comply with the *Charte*r issues dealt with by the court. Section 86 reads as follows:

> 86 The Minister may, during an admissibility hearing, a detention review or an appeal before the Immigration Appeal Division, apply for the non-disclosure of information or other evidence. Sections 83 and 85.1 to 85.5 apply to the proceeding with any necessary modifications, including that a reference to ``judge'' be read as a reference to the applicable Division of the Board.

As set out in subsection 86, the Immigration Appeal Division is to apply sections 83 and 85.1 to 85.5 of *IRPA* with any modifications that the circumstances require In *Burko*,[23] the Minister brought an application for non-disclosure of information under section 86 of *IRPA*. The Immigration Appeal Division, with the guidance of *Garievi*,[24] concluded that disclosure of some of the material could be made safely while there were other portions of the material that ought not to be disclosed and in respect of which a non-disclosure order could be made. The Minister could respond to that conclusion by withdrawing the material that could be safely disclosed, in which case the material would not be disclosed or considered by the Immigration Appeal Division when the merits of the appeal were heard and considered, or the Minister could leave the material before the panel, and it would be disclosed to the appellant as part of the material provided to the appellant.

Abandonment

Pursuant to subsection 168(1) of *IRPA*, the Immigration Appeal Division may declare an appeal from a removal order to be abandoned. This provision applies to all Divisions of the Board, and with respect to all appeals to the Immigration Appeal Division. Under the former *Immigration Act*, abandonment under section 76 was restricted to removal order appeals. Except for the expansion of the applicability of subsection 168(1), this subsection has not resulted in a significant change from the practice and procedure of the Immigration Appeal Division under the former *Immigration Act*. The Immigration Appeal Division may declare an appeal abandoned at a hearing where an appellant "is in default in the proceedings" as set out in subsection 168(1), or it may hold a show cause hearing to rule on abandonment.

Subsection 168(1) of *IRPA* reads as follows:

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[22] *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 (February 23, 2007).

[23] *Burko, Volodymyr v. M.C.I.* (IAD TA2-22767), Workun, August 27, 2004. *Burko* is the only section 86 application made so far to the Immigration Appeal Division,

[24] *Gariev, Viatcheslav v. M.C.I.* (F.C. no. IMM-5286-02), Dawson, April 6, 2004; 2004 FC 531.

> 168. (1) A Division may determine that a proceeding before it has been abandoned if the Division is of the opinion that the applicant is in default in the proceedings, including by failing to appear for a hearing, to provide information required by the Division or to communicate with the Division on being requested to do so.

In *Ali*,[25] the Court reviewed the decision of the Immigration Appeal Division where it deemed the applicant's appeal abandoned after he failed to appear for a hearing and to provide his address and contact information as required by the conditions of a stay of removal imposed by the Immigration Appeal Division. The Court ruled that nothing in either *IRPA* or the *Immigration Appeal Division Rules* requires that the Immigration Appeal Division hold a show cause hearing to rule on abandonment, unlike the situation that applies before the Refugee Protection Division.

However, in *Nguyen (*also referred to as *Hung)*, based on the facts of that case (counsel was to attend a pre-hearing conference without the applicant, but he was absent for medical reasons), the Court found that the Immigration Appeal Division had committed a fundamental error in declaring the claim abandoned without giving the applicant or his counsel an opportunity to explain why they had not appeared, and that the panel had acted in a manner contrary to the principles of natural justice.[26]

In *Ishmael*,[27] the Court noted that Justice Lemieux in *Nguyen* did not find, as a general principle, that the Immigration Appeal Division must invite an appellant to explain why his case should not be declared abandoned in every situation where the appellant failed to attend a hearing. The Court commented that, Justice Lemieux found that natural justice required that the applicant be given an opportunity because of the unique circumstances of his case: the illness of counsel denied the person concerned his right to attend the hearing; and, thus, have someone represent his interests.

The Immigration Appeal Division's preferred practice is to hold a show cause hearing or conference, in the same way as the Refugee Division is required to hold one.

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[25] *Ali, Abdul Ghani Abdulla v. M.C.I.* (F.C., No. IMM-1633-08), de Montigny, December 5, 2008; 2008 FC 1354.

[26] *Nguyen, Lam Hung* v. *M.C.I.* (F.C. no. IMM-3331-03), Lemieux, July 19, 2004; 2004 FC 966. See also *Dubrézil,Patrick v. M.C.I.* (F.C. no. IMM-4321-05), Noël, February 7, 2006, 2006 FC 142. The Immigration Appeal Division applied these decisions in a reopening application where an appellant missed his hearing and had his appeal abandoned after being hospitalized just before the hearing date: *Siteram, Anthony v. M.P.S.E.P.* (IAD TA2-03542), MacLean, December 31, 2008.

[27] *M.C.I. and M.P.S.E.P. v. Ishmael, Gregory George* (F.C., no. IMM-1984-06), Shore, February 27, 2007; 2007 FC 212. Pursuant to the court order, the Immigration Appeal Division reconsidered the reopening application and denied the reopening in *Ishmael, Gregory v. M.P.S.E.P.* (IAD T99-07831), Band, December 11, 2008.

Reopening a Removal Order Appeal

Section 71 of *IRPA* provides that the Immigration Appeal Division on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice. See Chapter 9 for further on this provision.

Transition provisions

Sections 190, 192, 196 and 197 of *IRPA* provides as follows:

> 190. Every application, proceeding or matter under the former Act that is pending or is in progress immediately before the coming into force of this section shall be governed by this Act on that coming into force.
>
> 192. If a notice of appeal has been filed with the Immigration Appeal Division immediately before the coming into force of this section, the appeal shall be continued under the former Act by the Immigration Appeal Division of the Board.
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> 196. Despite section 192, an appeal made to the Immigration Appeal Division before the coming into force of this section shall be discontinued if the appellant has not been granted a stay under the former Act and the appeal could not have been made because of section 64 of this Act.
>
> 197. Despite section 192, if an appellant who has been granted a stay under the former Act breaches a condition of the stay, the appellant shall be subject to the provisions of section 64 and subsection 68(4) of this Act.

Where subsection 196 and 197 of *IRPA* apply, appeals that would otherwise be governed by the provisions of the former *Immigration Act* will be subject to the provisions of section 64 and subsection 68(4) of *IRPA.* This may result in the appeal being dismissed as a result of the application of section 64 (see also chapters 2, 7 and 8) or the stay being cancelled by operation of law and the appeal being terminated pursuant to subsection 68(4) discussed earlier in this chapter.

Where subsections 197 of *IRPA* applies then subsection 68(4) and/or section 64 of *IRPA* may apply to terminate the appellant's appeal. The operation of subsection 68(4) is not contingent on the applicability of subsection 64 of *IRPA.*[28]

In *Singh*, the Federal Court of Appeal found that the appropriate interpretation of the time of the breach, as regards subsection 197 of *IRPA*, is the time of the offence. Subsection 197 is retrospectively applicable to a case in which an offence occurred prior

[28] *Hyde, Martin R. v. M.C.I.* (F.C.A., no. A-570-05), Evans, Linden, Noël, November 20, 2006; 2006 FCA 379.

to June 28, 2002, but the conviction occurred after the coming into force of *IRPA*. The court concluded that the presumption against retrospectivity does not apply to subsection 197 because that provision is designed to protect the public.[29]

[29] *Singh, Sukhdev v. M.C.I.* (F.C.A., no A-210-05), Linden, Noël, Sexton, December 9, 2005; 2005 FCA 417.

CASES