# Chapter Twelve

# Appeals by the Minister

## Introduction

Pursuant to section 63(5) of the *Immigration and Refugee Protection Act* (the "IRPA "), the Minister may appeal to the Immigration Appeal Division (IAD) from a decision made by an Immigration Division (ID) member made at an admissibility hearing.

## Relevant Legislative Provisions

> 63(5) The Minister may appeal to the Immigration Appeal Division against a decision of the Immigration Division in an admissibility hearing.
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> 67(1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time the appeal is disposed of,
>
> - the decision appealed is wrong in law or fact or mixed law and fact;
> - a principle of natural justice has not been observed; or
> - 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.
>
> (2) If the Immigration Appeal Division allows the 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.
>
> 69(1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.
>
> (2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, 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, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).

> (3) If the Immigration Appeal Division dismisses an appeal made under subsection 63(4) and the permanent resident is in Canada, it shall make a removal order.

## Admissibility Hearings

When the Minister refers a case to the ID under subsection 44(2) of the IRPA, the ID must hold a hearing to determine whether the permanent resident or foreign national who is the subject of the subsection 44(1) report is inadmissible. Depending on the panel's finding with respect to inadmissibility, it must, under section 45 of the IRPA, authorize the person to enter or remain in Canada or make the applicable removal order under the Immigration and Refugee Protection Regulations (IRPR). According to section 44(2), the Minister may, in certain cases, declare the person inadmissible and make a removal order without referring the case to the ID.

Subsection 44(2) and paragraph 45(d) of the IRPA provide that the Minister or the ID, as the case may be, may make a removal order against a permanent resident or a foreign national who is inadmissible on one or more of the grounds set out in sections 34 to 42 of the IRPA. The jurisdiction of the Minister or the ID over inadmissibility and removals is determined by subsection 44(2) and section 45 of the IRPA, as well as by sections 227, 228 and 229 of the IRPR, which also specify the appropriate removal order in each case. Subsections 44(2) of the IRPA and 228(1) of the IRPR list the cases that fall within the Minister's jurisdiction, while subsections 227(1) and 229(1) of the IRPR list those within the ID's jurisdiction. Section 45 of the IRPA sets out the decisions that the ID may make at the conclusion of a hearing.

Those who are the subject of a report under subsection 44(1) of the IRPA may try to enter Canada at a port of entry or may already be in Canada. The former Immigration Act provided for classes of inadmissible persons at the port of entry and grounds justifying the removal of persons who were already in Canada, as well as a separate hearing and removal process. The IRPA does not distinguish between grounds of inadmissibility and the hearing and removal process applicable to those seeking to enter Canada (port of entry cases) and those who are already in Canada (inland cases). Parliament grouped together and reproduced in section 45 of the IRPA the decisions that could be made under the former Immigration Act in port of entry and inland cases.

## Removal Orders

Section 223 of the IRPR provides that there are three types of removal orders: departure orders, exclusion orders, and deportation orders.

Subsections 228(1), 228(2) and 229(1) of the IRPR specify the applicable removal order depending on the ground of inadmissibility and determine the cases in which the Minister and the ID have jurisdiction to make the removal order. It should be noted that the panel has no discretion concerning the order to be made; if, for example, the person concerned is inadmissible on two grounds, under paragraphs 34(1)(c) and 40(1)(a) of

IRPA (security grounds and misrepresentation respectively) two removal orders must be made- a deportation order and an exclusion order. A removal order against a refugee protection claimant is conditional under subsection 49(2) of IRPA.

### Issues Pertaining to Admissibility

Various issues arise before the Immigration Appeal Division when the Minister appeals the decision by an ID member that a person who was the subject of an admissibility hearing is not inadmissible. Some of the issues that have arisen in appeals by the Minister pursuant to section 63(5) of IRPA include:

- whether the respondent is inadmissible for misrepresentation pursuant to paragraph 40(1)(a) of IRPA,[1]
- whether the respondent is described in s.34(1)(f) of IRPA (member of an organization that engaged in terrorism),[2]
- whether the respondent is inadmissible on grounds of serious criminality,[3]
- whether the respondent is inadmissible on grounds of organized criminality.[4]

### Nature of a Section 63(5) Hearing

The burden of proof on a balance of probabilities rests with the Minister; in order to succeed on appeal the Minister must demonstrate that the ID decision is wrong in law or fact or mixed law and fact.[5] The panel is to base its decision on "evidence …that it considers credible or trustworthy in the circumstances"[6]. A hearing before the IAD is a hearing *de novo* and additional evidence that was not before the ID may be taken into

[1] See *M.P.S.E.P.* v. *Zhai, Ning* (IAD VA6-02206), Ostrowski, March 6, 2007; *M.P.S.E.P.. v. Amin, Imran Chaudhary* (IAD VA6-00292), Lamont , March 14, 2007.

[2] See *M.P.S.E.P.* v. *Abramishvili, Givi,* (IAD VA5-01125), Nest, January 16, 2007; *M.P.S.E.P.* v. *Singh, Jasvir* (IAD VA5-00776), Workun, June 22, 2005; *M.P.S.E.P.* v. *Seyed, Zia Mushtaq* (IAD VA6-00066), Ostrowski, March 12, 2007. See the following Federal Court cases: *M.C.I.* v. *Qureshi, Mohammad* (F.C., no. IMM-1565-07), Phelan, October 15, 2007; 2007 FC 1049; *Memon, Javed* v. *M.C.I.* (F.C. no. IMM-4674-07), Zinn, May 14, 2008; 2008 FC 610.

[3] See *Amin, supra,* footnote 1.

[4] See *M.P.S.E.P.* v. *Chung, Jae Kwon* (IAD VA6-02680), Shahriari, July 23, 2007. See the decision of the Federal Court in *Contreras Mendoza, Roberto Ernesto* v. *M.P.S.E.P.* (F.C. no. IMM-1160-07), de Montigny, September 19, 2007; 2007 FC 934.

[5] Subsection 67(1) IRPA.

[6] Paragraph 175(1)(c) IRPA.

account.[7] In practice, however, often no new evidence is adduced and the matter proceeds on the basis of the record and written submissions from both parties.

## The Remedies Available

The IAD can do one of three things with the appeal- it can allow the appeal, it can stay any removal order made or it can dismiss the appeal.[8]

## Allowing an appeal

Section 67 sets out the circumstances for allowing the appeal of the Minister. There are two applicable grounds of appeal:

- the decision of the ID was wrong in law or fact or mixed law and fact;[9]
- A principle of natural justice had not been observed by the ID.[10]

If the IAD allows the appeal then there are two available remedies as provided in s.67(2). First, the IAD shall set aside the original decision of the ID and substitute its own decision which includes the making of a removal order. As an example: if the ID had decided that the person was not inadmissible to Canada and did not issue a removal order against the person, then the IAD in allowing the appeal of the Minister would set aside the decision of the ID and make a removal order. Second, the IAD could refer the matter back to the ID for reconsideration. This second remedy may be used when there is insufficient evidence from the admissibility hearing for a determination.

## Dismissing the appeal

Where the IAD finds that the member of the ID was correct in his or her decision, the appeal by the Minister can be dismissed pursuant to section 69 of *IRPA*.

> s.69(1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.
>
> (2) In the case of an appeal by the Minister respecting a permanent resident or a protected person, other than a person referred to in subsection 64(1), if the Immigration Appeal Division is satisfied that, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and

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[7] See *Contraras Mendoza, supra,* footnote 4, where the Court confirms the *de novo* jurisdiction of the IAD.

[8] Section 66 IRPA.

[9] S. 67(1)(a).

[10] S. 67(1)(b).

> compassionate considerations warrant special relief in light of all the circumstances of the case, it may make and may stay the applicable removal order, or dismiss the appeal, despite being satisfied of a matter set out in paragraph 67(1)(a) or (b).

Subsection 69(2) incorporates the concept of deemed appeal found in subsection 3(3) of the *Immigration Act*. The situation is as follows: in a usual removal order appeal, a permanent resident or protected person could appeal a removal order to the IAD on legal grounds or on the grounds that there are sufficient humanitarian and compassionate considerations that warrant the granting of special relief. The legislation, therefore, needs to set up provisions that allow a streamlined process whereby when the IAD allows a Minister's appeal and issues a removal order against a permanent resident or protected person then the IAD can take into account humanitarian and compassionate considerations in the same proceeding. If this were not done then the person would have to file a separate appeal to have those matters heard and there would be two proceedings consecutively heard as opposed to dealing with both matters in the same proceedings. In the *Immigration Act*, this was done through a deemed appeal. Under *IRPA*, it is not a deemed appeal as much as a consideration of humanitarian and compassionate considerations in a Minister's appeal. Although different in approach the result is essentially the same.

First, under s.69(2) the ability to consider humanitarian and compassionate considerations only applies to Minister's appeals that affect permanent residents or protected persons. Second, if the IAD is satisfied that sufficient reasons exist, then despite the fact that there were errors with the ID decision, the IAD can do one of two things. The IAD can make the removal order that should have been made and then stay the order pursuant to s.68 or it can dismiss the appeal outright which means that there is no removal order against the person.

**CASES**

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