Top Ten Cases from 2009, Ten Essential Tips
Removal Order Appeals (Criminality)

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Introduction

The focus of this paper and this session are permanent residents who receive a deportation order based on criminality for a crime punished in Canada for less than two years.[1] The Immigration Appal Division (IAD) is the administrative body appointed to hear appeals relating to sponsorships, removal orders, residency obligations and Minister's appeals. With regard to removal orders, "the nature of the task the Appeal Division performs requires a very broad grant of discretion."[2] Sections 67 and 68 of the *Immigration and Refugee Protection Act* (*IRPA*) read:

> **67 (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,**
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> **(a) the decision appealed is wrong in law or fact or mixed law and fact;**
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> **(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.**
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> To stay a removal order the IAD is guided by section 68 of the *IRPA:*
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> **68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests 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.**
>
> **Effect**
>
> **(2) Where the Immigration Appeal Division stays the removal order**

[1] ibid
[2] Immigration and Refugee Board: "Chapter 9: Discretionary Jurisdiction". January 1, 2009, p.3

(a) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;

(b) all conditions imposed by the Immigration Division are cancelled;

(c) it may vary or cancel any non-prescribed condition imposed under paragraph (a); and

(d) it may cancel the stay, on application or on its own initiative.

Reconsideration

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on its own initiative, reconsider the appeal under this Division.

Termination and cancellation

(4) 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. [3]

Considered as the leading and well known case governing the grant of IAD discretion in removal order appeals, *Ribic*[4] sets out six factors the IAD may consider where appropriate:

· the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation;

· the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order;

· the length of time spent in Canada and the degree to which the applicant is established;

· the existence of family in Canada and the dislocation to that family that deportation of the applicant would cause;

· the support available for the applicant not only within the family but also within the community; and

[3] Immigration and Refugee Protection Act, 2001 C.27, I-2.5, Assented to November 1st, 2001 ss. 67 and 68.
[4] *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL). as used in *Ivanov v. Canada (MCI),* 2007 FCA 315.

· the degree of hardship that would be caused to the applicant by his return to his country of nationality (this factor is sometimes referred to as "foreign hardship").[5]

2009 has been a particularly interesting year in this area as the law has continued to evolve. Ten cases are highlighted and lend themselves to ten practice tips that in this writer's estimation are important to keep in mind when litigating removal order cases involving criminality.

1. Canada v. Khosa, 2009 SCC 12

2009, Supreme Court of Canada, Binnie J. (McLachlin C.J. and LeBel, Abella and Charron JJ. concurring), Rothstein J. and Deschamps J. concurring in reasons and Fish J dissenting.

Fast Facts: Sukhvir Singh Khosa, permanent resident since 1996, at the age of 14. Mr. Khosa along with another was street racing that resulted in a person's death. Khosa was prepared to plead guilty to a charge of dangerous driving, but not to the more serious charge of criminal negligence causing death, of which he was eventually convicted. The respondent continued to deny street racing, although he admitted that he was speeding and that his driving behaviour was exceptionally dangerous. The Crown conceded that there were several factors which mitigate the moral culpability of the respondents in this case. Mr. Khosa and Mr. Bhalru are both young, have no prior criminal record or driving offences, have expressed remorse for the consequences of their conduct, and have favourable prospects for rehabilitation. . . . He received a conditional sentence of two years less a day. The conditions included house arrest, a driving ban, and community service, all of which were complied with prior to the IAD hearing.

Deference Owed to the Immigration Appeal Division

In *Khosa,*[6] the Supreme Court of Canada (SCC) clarified the IAD's discretionary powers, specifically in relation to assessing the *Ribic* factors in removal order appeals. The SCC "confirmed that discretionary relief pursuant to s. 67(1) (c) (of the IRPA), is a power to grant exceptional relief, in recognition of the hardship that may come from removal…"[7] As such, the Federal Court is only to interfere in the IAD's decision where such interference is warranted; for instance, where the IAD's decision is not upheld under the 'reasonableness' standard, as described in *Dunsmuir*[8]:

> **"This deference extended not only to facts and policy, but to a tribunal's interpretation of its constitutive statute and related**

[5] *Ivanov v. Canada (MCI),* 2007 FCA 315, para 3
[6] *Canada (MCI) v. Khosa,* 2009 SCC 12
[7] Immigration and Refugee Board: "Chapter 9: Discretionary Jurisdiction". January 1, 2009, p.5
[8] *Dunsmuir v. New Brunswick*, 2008 SCC 9

> **enactments … courts ought not to interfere where the tribunal's decision is rationally supported"[9]**

The SCC commented on the relevance of factors and not necessarily a cookie cutter approach:[10]

> **These factors have to be considered as a whole, bearing in mind that not all factors will necessarily be relevant for every single case. Factors should not be taken as items on a checklist of criteria that need to be individually analyzed, categorized and balanced in each case to determine whether deference is appropriate or not. What is required is an overall evaluation…** [11]

Thus, in removal order appeals based on criminality, the IAD may (and in some cases, should) differ from the criminal courts in their interpretation and opinions surrounding a case as held in *Khosa:*

> **In assessing Mr. Khosa's expression of remorse, they (the majority) chose to place greater weight on his denial that he participated in a "race" than others might have. The IAD conclusion on the issue of remorse appears to differ from that of the criminal courts. The IAD, however, unlike the criminal courts, had the opportunity to assess Mr. Khosa's testimony.**[12]

PRACTICE TIP 1

Where an appellant has pleaded guilty at the criminal trial his/her testimony at the IAD takes on increased significance. Alternatively, if s/he has testified, criminal court transcripts must be obtained and reviewed. At present, transcripts from criminal court proceedings are rarely before the IAD and sometimes reasoning for sentencing are provided by the Minister.

IAD Mandate

According to the Immigration and Refugee Board's (IRB) guidelines, the function of the IAD in reviewing an appellant's case is summarized as follows:

> **The mandate of the Appeal Division in hearing appeals from a removal order is not to retry the offence of which the appellant has been convicted. In deciding the case, the Appeal Division does not turn in its mind to the sufficiency of the sentence; nor does it exact a greater penalty through removal. It examines the circumstances surrounding the offence- not for the purpose of**

[9] Ibid, para 41 as quoted in *Canada (MCI) v. Khosa,* 2009 SCC 12
[10] *Canada (MCI) v. Khosa,* 2009 SCC 12
[11] ibid
[12] *Canada (MCI) v. Khosa, 2009 SCC 12, para 11*

> **imposing punishment, but rather for the purposes of truly assessing all the circumstances of the case. In considering the gravity of a sentence the panel should consider the evidence in the record to determine whether the sentence in the case was longer or shorter than the sentences imposed in other cases involving similar offences.** [13]

2. Brown v. Canada, 2009 FC 660

Federal Court, Honourable Mr. Justice Phelan

Fast Facts: Mid-30s, PR since he was 8 years old. On September 10, 2002, Brown was convicted of two counts of robbery and one count of using an imitation firearm during the commission of an offence. At Brown's criminal trial, counsel for the Crown and counsel for Brown made a joint submission as to the appropriate sentence given Brown's time (17 months) in pre-trial custody, some of which was during a strike at the jail. The Ontario Court judge accepted the agreed sentence of one day in jail plus 18 months' probation. The formal sentencing by the judge makes no reference to pre-trial custody, much less to any doubling of credit for time served. IAD determined that the issue was whether the pre-trial incarceration was to be considered as straight time (1:1), or whether it was to be considered such that each day served in jail was equivalent to two days of "imprisonment" (2:1). The IAD concluded that, based on 17 months of pre-trial custody, the term of imprisonment for purposes of s. 64(2) was 34 months and therefore Brown had no right of appeal.[14]

The Federal Court determined that the IAD decision was unreasonable in concluding that the sentencing judge "could not be clearer" in accepting a 2:1 credit, since "the sentencing judge was completely silent on that point and even Crown counsel was unsure of what the credit should be" in the case.[15] Of note, the Court appears to open the door to fuller examination of sentencing transcripts as opposed to a mechanical application of a 2:1 ratio:

> **[23] Therefore, the IAD was correct that pre-sentencing custody could be part of the calculation in determining whether the Applicant had been punished by a term of imprisonment of at least two years. The question that remains is whether the IAD properly determined that that was the situation in this instance.**[16]

PRACTICE TIP 2

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[13] Immigration and Refugee Board: "Chapter 9: Discretionary Jurisdiction". January 1, 2009, p.28-30
[14] *Brown v. Canada (PSEP), 2009 FC 660*
[15] *Brown v. Canada (PSEP), 2009 FC 660, para 26*
[16] *Brown v. Canada (PSEP), 2009 FC 660, para 23*

Do not assume an automatic 2:1 ratio when assessing a client's pre-sentence custody and how it factors into the global sentence. Of particular interest Bill C-25 which is not yet in force will credit an accused with 1:1 credit (exception possible for 1.5 to 1) for pre-sentence custody with a requirement that judges set out the calculation in a particular format.

3. Ariri v. Canada, 2009 FC 834

Federal Court, Honourable Mr. Justice Tannenbaum

Fast Facts: Permanent resident since 1993. In addition to earlier convictions for uttering and possession of counterfeit money, in June 2006 he was convicted of a number of charges including fraud over $5000.00, human trafficking and smuggling, and possession of counterfeit money. The conviction on the charge of fraud over $5000.00 was the basis for the deportation order. The applicant's attempt to appeal the deportation order was unsuccessful as the IAD held, on September 7, 2007, that it had no jurisdiction to determine the appeal due to the fact that the applicant had been "punished by a term of imprisonment of at least two years" and therefore had no right to appeal pursuant to subsection 64(2) of IRPA".

In this case post-*Mathieu*, the Federal Court reiterated the IAD's jurisdictional capacity to factor pre-sentence custody into the global sentence. The Court held:

> **[19] Furthermore, the Federal Court decisions cited above apply the purposive approach used by the Supreme Court in *Mathieu* and are consistent with what the Supreme Court referred in the latter decision as the ability on an exceptional basis to treat the time spent in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence. (*Mathieu*, above, para. 7)**[17]

Thus, appellant counsel's attempt to utilize *Mathieu* as a basis to exclude pre-sentence custody was not endorsed. How can a practitioner reconcile *Ariri* with *Brown*? I do not read the decisions as mutually exclusive. Rather, the IAD is to look at the criminal court decision and may factor in pre-sentence custody but must do so on the basis of the evidence of a particular case and not upon a pre-set ratio. Thus, it is this writer's opinion that the sentencing transcript must be put before the IAD as a matter of course before any decision is made on the global sentence.

PRACTICE TIP 3

Pre-sentence custody will continue to be factored into the global sentence despite *Mathieu*. Where possible and when consulted by criminal counsel in advance, the language in the sentencing transcript becomes essential and criminal counsel must be

[17] *Ariri v. Canada (PSEP), 2009 FC 834, para 19*

vigilant that any ratio employed on sentencing be in favour of the accused. Also, there are a number of appeals where post-sec. 44 report, criminal counsel has appealed the sentence to have it reduced to less than 2 years if initially over 2 years to avoid s. 64(2) and obtain an IAD appeal

4. Black v. Canada, 2009 FC 703

Federal Court, Honourable Mr. Justice Russell

Fast Facts: Permanent resident since July 17, 1990 at the age of 15. Living in Canada with an aunt and a few cousins as the Applicant does not know his father and his mother was never married. The rest of the Applicant's family members reside in Jamaica. The Applicant is not married and does not have any relationship or children. His working history in Canada involves several jobs in the restaurant business including assistant chef or chef. At present he is living off social assistance, as he has frequently in the past. At the time of the IAD hearing, the Applicant's criminal record revealed 15 convictions for offences from 1991 to 2007. The crimes for which he has been sentenced include: possession of narcotics; theft; possession of a credit card obtained by crime; failure to attend court; failure to comply with a recognizance; failure to comply with probation orders; obstruction of a peace officer; two convictions for assaulting a peace officer; and assault with a weapon.

The Applicant had a previous deportation order made against him on January 13, 1998 on the basis of two counts of break and enter for which he was convicted on October 17, 1995 and sentenced to 35 days in prison and probation of 24 months. The removal order was stayed by the IAD on March 10, 1999, reviewed on February 2, 2000 and renewed on March 16, 2000 for a period of four years. On June 5, 2002 the case was reviewed by the IAD and the stay maintained with amended conditions. On February 18, 2004, following a final review by the IAD, the stay was cancelled and the appeal was allowed and the removal order quashed.

One of the key conditions of the stay required the Applicant to participate in "psychotherapy or counselling with a registered psychologist" and to "engage in psychotherapy or counselling." The Applicant did not abide by his stay conditions but the IAD disposed of the stay on April 8, 2004 because the Applicant provided a letter indicating that he was "an in-patient at the Scarborough Hospital-General Division from October 15, 2002 to October 30, 2002" and he had a "diagnosis of schizophrenia (Paranoid Type)."[18]

This case raises the issue of mentally ill appellants. Black was diagnosed with schizophrenia which was the reason he received a stay on his initial removal order. In fact, this removal order was quashed when the stay was reviewed due to his mental illness.

[18] Black v. Canada (MCI), 2009 FC 703

At the subsequent hearing the IAD found that the "onus was on the appellant to establish the possibility of rehabilitation."[19] The appellant did not satisfactorily establish the possibility of rehabilitation, had a history of serious criminal convictions and was not well established in Canada. However upon review by the Federal Court, it was found that the appellant's right to procedural fairness was violated when the IAD appointed his mother as his designated representative without any proper instruction regarding her roles and duties. The Federal Court determined that had the appellant retained counsel (as it is the duty of the designated representative to arrange); the outcome of his case could have been affected.

With respect to the effect mental illness has on the IAD's determination of rehabilitation, the IRB guidelines state that…

> **…where an appellant suffers from psychiatric illness that predisposes the appellant to commit criminal offences, it is likely to weigh in the appellant's favour that the appellant is being treated and taking medication to control the symptoms of illness…[20]**

In *Black* the court held:

> **In my view, the ability to act in the Applicant's best interests requires more than a sympathetic and supportive relative, and the IAD and counsel will need to satisfy themselves that anyone who does assume the role is appointed in a timely manner and has the necessary understanding to act in the Applicant's best interests.[21]**

PRACTICE TIP 4

When representing a mentally challenged appellant it is best if the designated representative is also immigration counsel and not a friend or relative. Failure to appoint same may amount to a breach of procedural fairness.

Duty to Consider *Ribic* factors

Although the IAD has a duty to consider the *Ribic* factors in removal order appeals, as has previously noted, clearly the weight attributed to each factor and the specific factors to be considered in each case are discretionary. However, the Federal Court of Appeal in *Ivanov*[22] held that…

> **… the IAD is obliged to consider all relevant factors raised by the evidence, even when the appellant has not presented these**

[19] Ibid, para 19
[20] Immigration and Refugee Board: "Chapter 9: Discretionary Jurisdiction". January 1, 2009, p.17
[21] Black v. Canada (MCI), 2009 FC 703, para. 58
[22] *Ivanov v. Canada (MCI), 2007 FCA 315*

> **factors in his submissions as a basis for staying the deportation order. The IAD is not, however, obliged to elicit the evidence in relation to the Ribic factors.[23]**

It appears this decision survives *Khosa* as the SCC also discussed relevance.

5. Hardware v. Canada, 2009 FC 338

Federal Court, Honourable Mr. Justice Russell

Fast Facts: The Applicant has a biological child and a step-son who is the biological child of the Applicant's current wife, Patricia Gayadat. The Applicant became a permanent resident of Canada on June 14, 1986. The Applicant has amassed 15 criminal convictions during his time in Canada, 12 of which occurred prior to the Applicant being granted a stay of the removal order against him. From February 1992 until October 1999, the Applicant was twice convicted of assault with a weapon, failure to comply with a recognizance four times, assault twice, as well as escaping lawful custody, possession of a weapon, driving with over 80 mg, and failure to stop at the scene of an accident. One of the Applicant's assault convictions involved his former girlfriend as the victim.

From March 1993 until November 2001, the Applicant was convicted of five provincial offences: three offences under the *Highway Traffic Act* and two offences under the *Liquor Licence Act*. Four of these convictions were made against the Applicant in absentia and he made arrangements to pay all the fines levied against him within 60 days. The Applicant received a number of stays. At the June 9, 2008 hearing, the Applicant intended to call his wife and his father as witnesses. However, his father did not attend the hearing, but provided letters of support. The Applicant's former counsel requested an adjournment during the hearing to permit the Applicant's father's testimony. However, that request was objected to and the hearing went ahead.

The Applicant argued that the IAD "didn't provide detailed and cogent explanations which were alive, alert and attentive to the best interests of the children…"[24]With regard to weighing all of the Ribic factors, the applicant "submitted the IAD decided that factors against the applicant outweighed those in his favour, but IAD did not explain why one set of factors outweighs the other."[25] The court concluded:

> **[54] In my view, however, the reasoning process for the IAD's conclusions is easily understood from a reading of the Decision as a whole in the context of the Applicant's history. This was a review of an earlier decision to grant the Applicant a stay of removal upon certain conditions. It had been made clear to the Applicant that the positive factors in his case warranted giving him a chance to stay in Canada, but only if he fulfilled the stated**

[23] Immigration and Refugee Board: "Chapter 9: Discretionary Jurisdiction". January 1, 2009, p.4
[24] *ibid, para 32*
[25] Ibid, para 36

> **conditions and, in particular, avoided further criminality. The Applicant subsequently breached the conditions upon which the stay was based and engaged in serious criminal conduct. The IAD reviewed the stay and all of the *Ribic* factors and decided that the positive factors, including Olivia's interests, could no longer be used by the Applicant to shield him from the consequences of his continued criminality.[26]**

The Court is clear in that the post-stay conduct (further criminality) may justify a different balancing even where positive factors, such as his relationship with his child continue to be a factor in the appellant's favour.

PRACTICE TIP 5

When faced with post stay criminality counsel must seek to address not only the further criminality but update and evidence any and all factors in the appellant's favour.

6. Rehabilitation

The Court has ruled that the *Ribic* factors do not require the appellant to prove that rehabilitation itself has taken place, but that the possibility of rehabilitation exists, or that there exists a likelihood of rehabilitation.[27] In assessing the rehabilitation of the appellant, the IAD may consider the following at the appeal hearing:

> **…credible expressions of remorse, articulation of genuine understanding as to the nature and consequences of criminal behaviour and demonstrable efforts to address the factors that given rise to such behaviour…whether the appellant has personally accepted what he has done is wrong; the appellant's conduct and demeanour at the appeal hearing; and the appellant undertaking to make personal commitments to correct his offending behaviour and to take meaningful steps at making reparations to either victim and/or society…[28]**

Even in certain cases where a long period of time has elapsed since the appellant's last conviction, if the appellant has not managed to address the root cause of the criminality, such as substance abuse issues, the IAD may only stay the removal order and impose certain terms and conditions rather than allowing the appeal.[29]

In *Khosa*, the SCC held:

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[26] Ibid. para. 54
[27] Immigration and Refugee Board: "Chapter 9: Discretionary Jurisdiction", January 1, 2009, p.5
[28] Ibid, p. 14
[29] Ibid, p. 17

> **[66] The weight to be given to the respondent's evidence of remorse and his prospects for rehabilitation depended on an assessment of his evidence in light of all the circumstances of the case. The IAD has a mandate different from that of the criminal courts. Khosa did not testify at his criminal trial, but he did before the IAD. The issue before the IAD was not the potential for rehabilitation for purposes of sentencing, but rather whether the prospects for rehabilitation were such that, alone or in combination with other factors, they warranted special relief from a valid removal order. The IAD was required to reach its own conclusions based on its own appreciation of the evidence. It did so.**[30]

6. Ho v. Canada, 2009 FC 597

Federal Court, Honourable Mr. Justice O'Keefe

Fast Facts: The applicant became a permanent resident of Canada on September 25, 1984. He was born September 18, 1968 in Vietnam. The applicant was married in Canada and has a son, although he does not have an on-going relationship with him beyond financial child support payments. On October 19, 2000 a deportation order was issued because he had been convicted of three counts of trafficking in a narcotic and three counts of proceeds of crime and was sentenced to ten months in jail followed by two years of probation. The IAD stayed the deportation order for four years until a review by the IAD on or about August 20, 2005. On January 2006, the IAD conducted an oral review of the stay of the respondent's removal order. On February 28, 2006 the IAD cancelled the applicant's stay and dismissed his appeal of his deportation order. [31]

The chief reason the IAD found that the stay was no longer warranted was because the appellant had not satisfactorily rehabilitated himself and therefore was still at a risk to reoffend.[32] In reviewing the IAD's decision not to extend the stay, the Federal Court agreed that the proof of rehabilitation (as mandated by the conditions of the stay) provided by the appellant was "sparse," however:

> **The Board instead focused on the applicant's testimony in the oral hearing about whether he was aware of the link between alcohol and crack abuse. I cannot accept that this is reasonable… I am of the review that the judicial review should be granted on this ground. The decision of the Board's finding**

[30] *Canada (MCI) v. Khosa,* 2009 SCC 12, para. 66
[31] Ho v. Canada (PSEP), 2009 FC 597, para. 8
[32] Ibid, para. 9

> **was not reasonable on this point and the Board's decision is based in part on this conclusion"**[33]

This is a case wherein the post stay conduct despite fully documented evidence favoured the appellant, it is still indicative of both the higher threshold that is sometimes applied on stay reviews and perhaps an increasing reluctance to extend stays except in clear cases.

PRACTICE TIP 6

Stay reviews are not to be taken lightly as it is the writer's observation that reviews are becoming increasingly challenging and the absence of any further criminality does not guarantee an extension of a stay or a granting of an appeal outright. It is important for counsel whose client obtains a stay to explain the need to comply with the stay conditions (in particular the mandatory stay conditions including obtaining a passport/travel documents) as remaining crime free might not be enough if stay conditions are breached.

7. Guzman v. Canada, 2009 FC 899

Federal Court, Honourable Mr. Justice O'Keefe

Fast Facts: The applicant was sponsored, along with his wife, by his daughter and her husband in 1997. He has five children and ten grandchildren, with three of the children and seven of the grandchildren being Canadian citizens. All of his children and grandchildren appear to live in Canada. He held various jobs and eventually worked at the Wentworth Manor as a resident assistant. He was convicted of sexually assaulting one of the residents at Wentworth Manor in 2005. She suffered from dementia and was 86 years old. In 2006, he pled guilty and was sentenced to 18 months plus 2 years probation. He served 11 months and was then paroled. The applicant was ordered deported because of the conviction on May 4, 2007. His appeal to the IAD was dismissed.

The issue in this judicial review was whether the IAD "erred in its treatment of the evidence by speculating or misapprehending or ignoring evidence".[34] The appellant claimed that the IAD failed to appropriately weigh and consider the evidence he provided with respect to his rehabilitation:

> **There is considerable evidence that during and after his incarceration the applicant participated in programs to address his problem but the member refused to accept expert findings and ignored all of the evidence which was almost entirely positive concerning his treatment and rehabilitation…**[35]

[33] *Ho v. Canada (PSEP), 2009 FC 597,* para 37

[34] Guzman v. Canada (PSEP), 2009 FC 899, para 16

[35] Ibid, para 20

In reviewing the appellant's evidence regarding his rehabilitation and the IAD's original decision, the Federal Court allowed the judicial review as it found:

> **In relation to treatment, the member seems to have made a significant error in his finding of fact with respect to treatment… as well the member appears to have formed speculative conclusions without significant supporting evidence, and sometimes with reliable evidence to the contrary available…**[36]

PRACTICE TIP 7

Official evidence of rehabilitation is often the most difficult evidence to obtain in a timely manner. It is extremely helpful when numerous and ongoing reports are obtained which clearly outline, time, date, type and frequency of treatment, progression and speaks to likelihood to re-offend.

Weighing of *Ribic* Factors

The IAD generally reaches similar conclusions with respect to the weight of certain *Ribic* factors on each appeal. For example, with respect to the seriousness of the offence, the IAD is entitled consider some of the following factors:

> **Where there are serious offences involved, but they are isolated incidents arising in extenuating circumstances, the Appeal Division may grant discretionary relief… By contrast, where serious offences and a pattern of criminal conduct are involved, the Appeal Division has refused to grant discretionary relief.**[37]

As well, when assessing the degree of establishment of the appellant since his or her arrival to Canada, the IAD considers the following factors:

> **…the length of residence in Canada; the age at which one comes to Canada, length of residence elsewhere; frequency of trips abroad and the quality of contacts with people there; where one is educated, particularly in adolescence and later years; where one's immediate family is; where one's nuclear family lives and the ties that members of the nuclear family have with the local community; where the individual lives; where his friends are; the existence of professional or employment qualifications which tie one to a place, and the existence of employment contracts…**[38]

[36] Ibid, paras 29-31
[37] Immigration and Refugee Board: "Chapter 9: Discretionary Jurisdiction". January 1, 2009, p.7-8
[38] Ibid, p. 19

The degree of hardship faced by an appellant forced to leave Canada must also be measured. The IAD must examine both the impact of the removal from established circumstances in Canada on the appellant as well as the potential hardships the appellant will face in returning to the home country or country of removal.[39]

8. Canada v. Udo, 2009 FC 239

Federal Court, Honourable Mr. Justice Phelan

Fast Facts The Respondent in this judicial review has resided in Canada for 30 years having come here at age 17. He holds Nigerian and U.K. citizenship. Between 1988 and 1995 he acquired nine criminal convictions including: four (4) counts of possession of stolen property, theft, possession of a narcotic, and forcible confinement. He has outstanding warrants in Manitoba for failure to pay fines. For the past four years he has been collecting social assistance continuously. In October 2003, Mr. Udo was found to be inadmissible due to serious criminality in respect of forcible confinement of his girlfriend. In November 2005 the Immigration Appeal Division (IAD) stayed Mr. Udo's removal for two years subject to a number of mandatory terms and conditions. Mr. Udo breached a number of these conditions by: a. failing to pay off existing fines as he was ordered; b. failing to settle an outstanding warrant; c. failing to obtain a passport; and d. failing to report on May 15, 2007. He also failed to report for an immigration oral interview scheduled for November 27, 2007. The IAD stayed the removal again.

Although the weight given to each of the Ribic factors by the IAD varies according to the particular circumstances of the case,[40] on judicial review the Federal Court may determine that the IAD did not weigh the factors correctly or proportionately. *Canada v. Udo*[41] (2009 FC 239) is such an example.

In this case, the IAD was reviewing a stay of removal granted in 2005. In considering a further extension of the stay, the IAD applied the Ribic factors.[42] The IAD weighed the respondent's breaches of mandatory terms and conditions of the stay, the respondents serious convictions, unlikelihood of being rehabilitated, lack of economic establishment in Canada, and the lack of serious effects removal would have on any children/family. In review of the IAD's assessment of these factors, the Federal Court held as follows:[43]

> **[15] The IAD's findings on Mr. Udo's criminal convictions, or lack thereof, since 1995 are inconsistent and contradictory. While the IAD determined that it would give no weight to the post-1995 absence of convictions given his absences of rehabilitation, it went on in its conclusions to give the post-1995 absence of convictions positive weight.**

[39] Ibid, p. 21
[40] *Olaso v. Canada (MCI), FCJ No. 1265* as quoted in *Black v. Canada (MCI), 2009 FC 703*
[41] *Canada v. Udo, 2009 FC 239,*
[42] *Canada v. Udo, 2009 FC 239, para 8*
[43] Ibid, paras 15-17

[16] The IAD further found that Mr. Udo breached the terms of his stay order, showed no rehabilitation nor likelihood of rehabilitation in the future, demonstrated an uncaring attitude, had no significant ties to Canada, and that a further stay would produce meaningless results. To then grant a stay is unreasonable in the extreme. It is impossible to square this conclusion to grant a further stay with a consideration of s. 3(1) (h) of IRPA.

[17] Against this background, to grant a further stay is tantamount to condoning Mr. Udo's past criminal record and his continuing disregard for his obligation to comply with the conditions of immigration orders. To support this IAD decision would be to make a mockery of the legitimate and law abiding behaviour of the rest of Canadian society, including the deserving immigrant community.

PRACTICE TIP 8

Your Retainer Agreement should specifically set out timelines for the receipt and review of evidence well in advance of any hearing date. This avoids last minute lawyering and can lead itself to early resolution in appropriate cases.

9. Totaram v. Canada, 2009 FC 853

Federal Court, Honourable Mr. Justice Zinn

Fast Facts: Permanent resident of Canada since November 15, 1996, when he was 15 years of age. He currently lives with his mentally handicapped sister who depends, in part, on him for assistance and meeting her daily needs. On or about October 26, 2003, Mr. Kawall Totaram was driving a motor vehicle with his brother-in-law as a passenger. He was impaired and involved in an accident with a police cruiser, resulting in severe injury and permanent brain damage to his brother-in-law and minor injury to the police officer. On September 13, 2006, he was sentenced to 10 months imprisonment and 12 months probation for impaired driving causing bodily harm.

Prior to Mr. Kawall Totaram's conviction, he met his spouse, a Guyanese citizen. On April 23, 2006, they were married. On September 7, 2006, a week before his conviction, Mr. Kawall Totaram applied to sponsor his wife, and submitted the necessary application. Section E, Question 16, of that application asks: 'Have you been charged with an offence under an *Act of Parliament* punishable by a maximum term of imprisonment of at least 10 years?' The answer to this question on Mr. Kawall Totaram's form was incorrectly marked 'No'.

On January 23, 2007, two inadmissibility reports were prepared. Consequently, the Immigration Division found that there were reasonable grounds to believe that Mr.

Kawall Totaram was inadmissible on the grounds of serious criminality according to subsection 36(1) of the Act, and a deportation order was issued. The Immigration Division also found that Mr. Kawall Totaram was a person described under subsection 40(1) (a), was thus inadmissible for misrepresentation, and issued an exclusion order. Pursuant to subsection 63(3) of the Act, Mr. Kawall Totaram exercised his statutory right to appeal both orders to the Immigration Appeal Division. A hearing was held before a Panel of the IAD on January 7, 2009. On February 5, 2009, the Panel rendered negative decision rejecting Mr. Kawall Totaram's appeal. [44]

The appellant had someone he believed had a proven track-record of success in filling out such applications to fill out his forms. Interestingly, the Federal Court concluded:

> **In this case the basis for the Panel's determination that it doubts the applicant's testimony with respect to the preparation and signing of the form simply does not follow from the premise the Panel states. Without more, for example, a finding that the applicant generally lacked credibility, based on conflicts between the applicant's testimony and the written documents or other witnesses, or based on his overall demeanour, the manner in which he gave evidence, etc. the credibility finding cannot stand…[45]**

With respect to misrepresentation the IRB guidelines specifically speak towards the difference between intentional and unintentional misrepresentation:

> **The inadvertent or careless nature of the misrepresentation is one factor among many other which the IAD may consider in dealing with a request for discretionary relief … Generally, inadvertent or careless misrepresentation is treated more favourably than is misrepresentation of an intentional nature…In a case, where the appellant had a grade-six education and a limited knowledge of English, a travel agency had prepared his application for permanent residence. The appellant was unaware of the implications of failing to disclose that he had two children. The Appeal Division exercised its discretion in favour of the appellant and allowed the appeal after finding that the appellant had not planned to deceive immigration authorities… In the case of deliberate misrepresentations, the Appeal Division will consider the evidence of remorse by the appellant.[46]**

What is noteworthy about this decision is the finding that the applicant did not *intentionally* misrepresent under these circumstances. This introduces some element of *mens rea* or at the very least subjective and objective unawareness in the decision.

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[44] Totaram v. Canada (MCI), 2009 FC 853, para 15
[45] Ibid, para 28
[46] Imm igration and Refugee Board: "Chapter 9: Discretionary Jurisdiction", January 1, 2009, p.9

Often times, appellants are held accountable for the actions of others filling out forms including unauthorized representatives. Wilful blindness is often the measure employed. This case provides some basis for argument that certain applicants do simply rely upon others in good faith and do not intend to misrepresent.

PRACTICE TIP 9

In most cases, the blame game does not pay. When arguing the negligence of counsel the IAD and Federal Court often and appropriately request proof of an official complaint to governing bodies. What is most difficult for clients who fall prey to unscrupulous individuals is to establish that it was not their intention and to their benefit to misrepresent. This case offers some precedence for this important line of argument as it relates to *mens rea* and objective/subjective unawareness. A key issue for H & C is whether the misrepresentation was intentional or not intentional as generally both support the legal validity of the removal order but the IAD case law supports a comment that panels are more likely to grant H & C with respect to an appellant whose misrepresentation was not intentional as opposed to an intentional misrepresentation.

9. Kang v. Canada, 2009 FC 941

Federal Court, Honourable Mr. Justice Beaudry

Fast Facts: Became a permanent resident of Canada in 1977. The Respondent was convicted of numerous criminal offences including assault (June 2003 and July 2006) and theft (October 2004). On November 30, 2007, the Respondent was convicted of assault with a weapon and of uttering threats, under paragraphs 267(*a*) and 264.1(1) (*a*) of the *Criminal Code*, R.S.C. 1985, c. c-46 respectively. The Immigration Division (the ID) commenced the admissibility hearing on March 14, 2008, but adjourned the hearing for two months in order to allow the Respondent an opportunity to consult legal counsel. On May 14, 2008, the ID once again adjourned to allow the Respondent time to consult legal counsel. On May 29, 2008, the ID resumed the admissibility hearing.

At that hearing, the Respondent admitted the inadmissibility allegations contained in the report and a deportation order was made against him. On the day following the inadmissibility hearing, the Respondent filed a Notice of Appeal to the IAD appealing the deportation order. On September 30, 2008, the IAD held a scheduling hearing. The Respondent received notice but failed to attend or provide an explanation for his absence. On October 21, 2008, the IAD held an abandonment hearing in the Respondent's appeal, of which he was given notice. The Respondent did not attend and the IAD made an order dismissing the appeal as abandoned.[47]

In granting the judicial review the Court looked to the quality and materiality of the evidence:

[47] Canada (MCI) v. Kang, 2009 FC 941

[32] The reasons given by the IAD are based almost entirely on the transcript from the proceedings at the ID. There is no indication in the reasons that it asked the question as to whether or not the IAD committed an error that amounted to a breach of natural justice and its evaluation of the evidence does not allow one to infer such a conclusion.

Did the IAD misconstrue what is meant by a breach of natural justice?

> **[33] In its reasons, the IAD stated:**
>
> **… Appellant's counsel suggests that a designated representative should have been appointed.**
>
> **…..While no request was made for a designated representative in the ID or the IAD, there was some information before the IAD that could imply a lack of understanding of the process, as alleged by the appellant's counsel. In that respect I refer to the comments from the hearing at the ID….. (IAD Reasons, at paragraphs 7 and 8)**

[34] It is difficult to tell from this comment whether or not the IAD did indeed conclude that the onus lies on the IAD to ascertain if a designated representative should be appointed. There is no statutory duty for the IAD to do so. The Immigration Appeal Division Rules do not put an onus on the IAD but rather leaves the door open to counsel of either party to make such a request (section 19).

[35] In past cases, appeals have been ordered reopened when mental illness was proven to be the cause of an inability to understand proceedings and their ramifications. *Mattia* is the case relied upon by both parties. In that case, the appellant suffered from schizophrenia and had received treatment during the appeal period; the evidence presented in that case included diagnoses by immigration medical officers, the appellant's own testimony and documentary evidence of hospitalization.

[36] The IAD did not make any mention as to whether or not the declarations sworn by some of the Respondent's relatives held any weight in the decision or were in any way persuasive. It also noted that a doctor's notes had been provided. The medical evidence before the IAD was clearly not of the same nature of that provided in *Mattia*. Beyond mentioning its existence, the IAD did not refer to the medical evidence in its reasons nor did it evaluate it or seemed to rely on it.

[37] On the whole, the reasons provided by the IAD do not provide much insight into the grounds relied upon it in the granting of the appeal or how exactly the IAD found that natural justice had been breached by the IAD in declaring the appeal as being abandoned. The only thing that is clear is that the IAD felt that, at the ID hearing, the Respondent showed signs of not fully understanding the proceedings. That is not sufficient to support the conclusion that the IAD caused a breach of natural justice in dismissing the appeal as abandoned.

[38] In *Nazifpour*, above, the Federal Court of Appeal at paragraph 74 was clear:

> **If the purpose of enacting section 71 was not to exclude the IAD's right to reopen a decision for any reason other than a breach of a principal of natural justice, it is difficult to see what purpose the provision serves. ...**

[39] The decision in the case at bar does not fall in the acceptable range of possible outcomes in view of the law and the facts of this case.

PRACTICE TIP 10

Where procedural fairness is the issue being judicially reviewed, new evidence may be admitted to the Federal Court, where applicable. For example in *Black*, submissions by the mother ("designated representative") and an immigration lawyer were allowed to be submitted as they were paramount to the appellant's claim that the outcome of his case may have been different if his designated representative was properly appointed and educated on his or her role. The same would have been of great assistance to the court in *Kang*.[48] Counsel should remember his/her obligation under IAD Rules to notify IAD of need for a DR. Also, Guideline 8 on Vulnerable Persons can be used to request a procedural accommodation. Finally, in Kang and other reopening JR's it is clear that the Federal Court is interpreting section 71 strictly so IAD has a limited jurisdiction to reopen

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