



Citizenship and
Immigration Canada

Citoyenneté et
Immigration Canada

ENF 19

Appeals before the Immigration Appeal
Division (IAD) of the Immigration and
Refugee Board (IRB)

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | |
|--|----|
| Updates to chapter | 3 |
| 1. What this chapter is about | 4 |
| 2. Program objectives | 4 |
| 3. The Act and Regulations | 4 |
| 3.1. Forms | 7 |
| 4. Instruments and delegations | 7 |
| 5. Departmental policy | 7 |
| 5.1. Officer safety and security | 8 |
| 5.2. Incident report writing | 8 |
| 6. Definitions | 8 |
| 7. Procedure: General hearing | 10 |
| 7.1. Calculating time limits | 10 |
| 7.2. Withdrawing an appeal (IAD rule 50) | 10 |
| 7.3. Reinstating an appeal after withdrawal (IAD rule 51) | 11 |
| 7.4. Proof of compliance (IAD rule 30(2)) | 11 |
| 7.5. Applications to reopen an appeal | 11 |
| 7.6. Applications | 11 |
| 7.7. Loss of appeal rights | 12 |
| 7.8. Non-disclosure of information [A86: Prior to an appeal hearing] | 13 |
| 7.9. Non-disclosure of information [A 86]: During an appeal | 13 |
| 7.10. Pre-hearing conferences | 14 |
| 7.11. Liaison with the Department of Justice | 14 |
| 7.12. Applications for judicial review | 14 |
| 8. Procedure: Family class sponsorship appeals | 15 |
| 8.1. Family class sponsorship appeals | 15 |
| 8.2. Notice of appeal | 15 |
| 8.3. Designated representative | 15 |
| 8.4. Grounds for appeal | 15 |
| 8.5. Disputed appeal rights | 16 |
| 8.6. Preparation of the record | 16 |
| 8.7. Requirements to be authorized to sponsor | 17 |
| 8.8. Failure to meet sponsorship criteria | 17 |
| 8.9. Right of permanent residence fee (RPRF) refund | 17 |
| 8.10. Sponsorship exclusions | 17 |
| 8.11. Humanitarian and compassionate grounds related to sponsorship | 17 |
| 8.12. Sponsors residing in provinces under federal-provincial agreements [A8(1) and A9(2)] | 18 |
| 8.13. Members of the family class | 18 |
| 8.14. Medical inadmissibility | 18 |
| 8.15. Filing evidence | 19 |
| 8.16. Consenting to an appeal—Communication with the visa office | 19 |
| 8.17. Post-hearing procedures | 19 |
| 8.18. Transitional provisions | 20 |
| 9. Procedure for appeals involving medical inadmissibility | 20 |
| 9.1. Overview of process for medical inadmissibility | 20 |
| 9.2. Grounds for appeal | 21 |
| 9.3. When to consider a new medical examination during the appeal process | 21 |
| 9.4. Procedures upon receipt of new medical information during the appeal | 22 |
| 9.5. New medical examination | 22 |
| 9.6. Communicating medical results | 23 |
| 9.7. Medical officers' statutory declaration | 23 |
| 9.8. Effective communication | 24 |
| 10. Alternative dispute resolution process (ADR) [IAD rule 20] | 24 |
| 10.1. Purpose of ADR | 24 |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | | |
|----------|--|----|
| 10.2. | Responsibilities of hearings officers for dispute resolution..... | 24 |
| 11. | Procedure for removal order appeals | 25 |
| 11.1. | Persons who may appeal against removal orders | 25 |
| 11.2. | Criminality | 25 |
| 11.3. | All the circumstances of the case | 25 |
| 11.4. | Mandatory conditions to be imposed by the IAD | 26 |
| 11.5. | Discretionary conditions in criminal inadmissibility cases | 27 |
| 11.6. | Discretionary conditions in stays of removal of entrepreneur appellants | 28 |
| 11.7. | Monitoring compliance with the conditions of a stay of removal | 29 |
| 11.8. | Cancellation of stays by operation of law | 29 |
| 11.9. | Transitional provisions | 29 |
| 12. | Procedure: Loss of residency status appeals | 31 |
| 12.1. | In Canada | 31 |
| 12.2. | Outside Canada | 31 |
| 12.3. | Record of refusal (outside Canada)..... | 31 |
| 12.4. | Requests to return to Canada for the hearing | 31 |
| 12.5. | Dismissed appeals—Type of removal order..... | 32 |
| 12.6. | Failure to appear at an appeal..... | 32 |
| 13. | Procedure: The Minister's appeal rights | 32 |
| 14. | Procedure: Roles and responsibilities..... | 33 |
| Appendix | A Procedural fairness letter | 35 |
| Appendix | B Letter to medical officer - New medical information..... | 36 |
| Appendix | C Examples of cases that do not need to be forwarded to Operations Directorate, Medical Services Branch, NHQ, by the officer. | 37 |
| Appendix | D Sample letter from hearings officer to appellant or counsel for the appellant - New medical examinations | 38 |
| Appendix | E Statement of Service..... | 39 |
| Appendix | F Notice of cancellation, by operation of law, of a stay of removal order granted by the IAD [A68(4)] | 40 |
| Appendix | G Application to reconsider an appeal [A197, A64 and IAD rule 26] | 42 |
| Appendix | H Application to reconsider an appeal (A197, A68(4) and IAD Rule 26) | 46 |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

Updates to chapter

Listing by date:

Date: 2005-12-30

Changes have been made throughout this chapter. All previous versions should be discarded in favour of the current one.

Of particular importance are changes and additions as follows:

- Dispositions with respect to guardianship have been deleted in the Regulations amending the *Immigration and Refugee Protection Regulations*, which came into force on March 22, 2005. Changes throughout this chapter have been made accordingly.
- Changes have been made to reflect sharing of policy responsibility between the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness. The latter is also responsible for the service delivery of hearings before the Immigration Appeal Division.
- More comprehensive sections have been added in relation to the conditions, mandatory and discretionary, imposed by the Immigration Appeal Division when a decision to stay a removal order is taken. See new sections 11.4, 11.5, 11.6 and 11.7

Date: 2003-10-01

Important changes have been made to ENF 19. Among the changes to this chapter, the highlights include:

- a new Section 11.7 provides guidelines on the interpretation and the application of A197 of the transitional provisions of the IRPA (appellant who has been granted a stay of the removal order and who breaches a condition of the stay);
- Appendice F has been updated to reflect the Immigration Appeal Division Rules;
- a new Appendice G provides guidance on how to prepare an application to reconsider an appeal pursuant to A197 and A64 of the IRPA and rule 26 of the IAD Rules;
- a new Appendice H provides guidance on how to prepare an application to reconsider an appeal pursuant to A197 and A68(4) of the IRPA and rule 26 of the IAD Rules;

It is recommended that any former version of this chapter be discarded in favour of the one now appearing in CIC Explore.

For more information, please contact: <mailto:nancie.couture@cic.gc.ca>

1. What this chapter is about

This chapter describes the role of a hearings officer while acting as counsel for the Minister of Citizenship and Immigration (C&I) or the Minister of Public Security and Emergency Preparedness (PSEP) at appeals heard before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB). Procedures for the preparation of an appeal, the conduct of appeal proceedings and for post-hearing responsibilities are all covered in this chapter. Further, the program objectives, the role and jurisdiction of the IAD, the different types of IAD hearings and the ways in which they may be resolved are discussed.

2. Program objectives

Canada's *Immigration and Refugee Protection Act* (IRPA) allows specific groups of people to appeal to the IAD in order to:

- ensure that prescribed groups of people ordered to be removed from Canada after an examination or admissibility hearing have had the benefit of a full hearing on the allegations against them. The Act recognizes an additional commitment to permanent residents, protected persons and foreign nationals who hold a permanent resident visa by allowing them to appeal their removal orders to the IAD, not only on the basis of legal and factual questions relating to the allegations at the admissibility hearing, but also on the basis that special consideration may be warranted;
- ensure that the reunion in Canada of Canadians and permanent residents with their close relatives from abroad is facilitated by providing a review, by way of appeal, of refusals of sponsored applications for permanent residence from members of the family class; and
- ensure that the rights of permanent residents are given due consideration by allowing an oral appeal to the IAD for loss of residency status determinations made both within and outside Canada.

The right of appeal to the IAD is consistent with the objectives of IRPA in that it helps to accomplish the following:

- ensure that families are reunited in Canada; and
- protect the health and safety of Canadians and maintain the security of Canadian society.

3. The Act and Regulations

The following statutory and regulatory provisions apply to appeals before the IAD.

| Provision | IRPA and its Regulations |
|--|--------------------------|
| Definition of foreign national | A2(1) |
| Definition of permanent resident | A2(1) |
| Family Class | A12(1) |
| Sponsorship of foreign nationals | A13(1) |
| Undertaking to sponsor | A13(3) |
| Residency obligation – permanent resident residency obligation | A28(1), A28(2) |
| For more details regarding the residency obligation, see ENF 23, Loss of | |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | |
|---|--------|
| Permanent Resident Status,, OP 10, Permanent Residency Status Determination, and ENF 1, Inadmissibility | |
| Security - inadmissibility on security grounds For more details, see ENF 1 | A34(1) |
| Human or international rights violations – inadmissibility for violating human or international rights For more details, see ENF 1 | A35(1) |
| Serious criminality – inadmissibility for serious criminality For more details, see ENF 1 | A36(1) |
| Criminality – inadmissibility for criminality For more details, see ENF 1 | A36(2) |
| Organized criminality – inadmissibility for organized criminality For more details, see ENF 1 | A37(1) |
| Health grounds – inadmissibility for health grounds For more details, see ENF 1 | A38(1) |
| Financial reasons – inadmissibility for financial reasons For more details, see ENF 2, /OP 18, Evaluating Inadmissibility, section 8 | A39 |
| Misrepresentation – inadmissibility for misrepresentation For more details, see ENF 1, ENF 2, Evaluating inadmissibility, section 9 | A40 |
| Non-compliance with the Act – inadmissibility for non-compliance with the Act For more details, see ENF 1, Inadmissibility, ENF 2, Evaluating inadmissibility | A41 |
| Inadmissible family member , See, ENF 2, Evaluating inadmissibility, for more details | A42 |
| Loss of status – loss of permanent resident status For more details regarding the residency obligation, see ENF 23, Loss of Permanent Resident Status,, OP 10, Permanent Residency Status Determination and ENF 1, Inadmissibility | A46 |
| Right to appeal - visa refusal of family class | A63(1) |
| Right to appeal - visa and removal order | A63(2) |
| Right to appeal - removal order | A63(3) |
| Right of appeal - residency obligation | A63(4) |
| Right of appeal - PSEP Minister | A63(5) |
| No appeal rights – inadmissibility | A64(1) |
| No appeal rights – serious criminality | A64(2) |
| No appeal rights – misrepresentation | A64(3) |
| Humanitarian and compassionate considerations | A65 |
| Disposition of an appeal | A66 |
| Allowing an appeal | A67 |
| Effect of allowing an appeal | A67(2) |
| Staying a removal order | A68 |
| Effect of staying a removal order | A68(2) |
| Reconsideration of a stay of a removal order | A68(3) |
| Termination of a stay of a removal order | A68(4) |
| Dismissal of an appeal | A69(1) |
| Minister's appeal | A69(2) |
| Making a removal order | A69(3) |
| IAD decision binding | A70(1) |
| Examination suspended | A70(2) |
| Re-opening appeal | A71 |
| Judicial review | A72 |
| Judicial consideration | A78 |
| Application for non-disclosure of information | A86 |
| Composition of the IRB | A151 |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | |
|--|---------|
| Sole and exclusive jurisdiction | A162(1) |
| Proceedings before all Divisions | A166 |
| Abandonment of proceeding | A168(1) |
| Abuse of process | A168(2) |
| Decisions and reasons | A169 |
| IAD - Court of record | A174(1) |
| Powers of the IAD | A174(2) |
| IAD proceedings | A175(1) |
| Presence of a permanent resident at a hearing | A175(2) |
| Transition — Application of the Act | A190 |
| Transition – Immigration Appeal Division | A192 |
| Transition – Loss of appeal rights | A196 |
| Transition – Stays – Breach of conditions – Application of the Act | A197 |

| | |
|---|----------|
| Definition of common-law partner | R1(1) |
| Definition of family member | R1(3) |
| Definition of conjugal partner | R2 |
| Definition of dependent child | R2 |
| Definition of Hague Convention on Adoption | R2 |
| Definition of relative | R2 |
| Definition of minimum necessary income | R2 |
| Definition of social assistance | R2 |
| Family relationships – Bad faith | R4 |
| Excluded relationships | R5 |
| Medical examination required | R30(1) |
| Danger to public health | R31 |
| Danger to public safety | R33 |
| Definition of excessive demand | R1 |
| Definition of health services | R1 |
| Definition of social services | R1 |
| Excessive demand on health services or social services | R34 |
| Definition of Canadian business (residency obligation) | R61 |
| Member of the family class | R117(1) |
| Adoption under 18 | R117(2) |
| Best interests of the child | R117(3) |
| Adoption over 18 | R117(4) |
| Excluded relationships | R117(9) |
| Member of the spouse or common-law partner in Canada class | R123 |
| Sponsorship eligibility | R130 |
| Sponsorship undertaking | R131 |
| Requirements for sponsor | R133 |
| Income calculation rules | R134 |
| Rehabilitation | R18 |
| Inadmissibility on health grounds | R20 |
| Types of removal order | R223 |
| Specified removal order – Permanent resident loss of residency status | R228 (2) |
| Country of removal | R241 |
| IAD – Mandatory conditions for stayed removal orders | R251 |

| | |
|--------------------------------------|------------------|
| Provision | IAD Rules |
| Definitions | Rule 1 |
| Appeal by sponsor – Notice of appeal | Rule 3(1) |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | |
|---|-----------|
| Time limit | Rule 3(2) |
| Appeal record | Rule 4(1) |
| Time limit | Rule 4(4) |
| Late appeal record | Rule 4(5) |
| Removal order appeals made at an admissibility hearing | Rule 5 |
| Appeal record | Rule 6 |
| Removal order appeals made at an examination | Rule 7 |
| Appeal record | Rule 8 |
| Appeals of decisions made outside Canada on residency obligations | Rule 9 |
| Appeal record | Rule 10 |
| Appeals by the Minister | Rule 11 |
| Counsel of record | Rule 14 |
| Designated representative | Rule 19 |
| Alternative dispute resolution process | Rule 20 |
| Subject of an appeal in custody | Rule 24 |
| Stay of removal order | Rule 26 |
| Disclosure of documents | Rule 30 |
| Witnesses | Rule 37 |
| Applications | Rule 42 |
| Return to Canada for a hearing | Rule 46 |

3.1. Forms

| Title | Number |
|--|------------|
| Application to Sponsor and Undertaking | IMM 1344AE |
| Medical Notification | IMM 5365B |

4. Instruments and delegations

Refer to IL3, Designation of Officers and Delegation of Authority, for CIC and the CBSA..

5. Departmental policy

The Minister of C&I is responsible for the administration of IRPA, with the following exceptions:

The Minister of PSEP is responsible for the administration of IRPA as it relates to:

- a) examination at ports of entry;
- b) the enforcement of IRPA, including arrest, detention and removal;
- c) the establishment of policies respecting the enforcement of IRPA and inadmissibility on grounds of security, organized criminality or violating human or international rights; or
- d) determinations under any of A34(2), A35(2) and A37(2).

For the purposes of an appeal, hearings officers may represent either the Minister of PSEP or the Minister of C&I as IRPA is the legislation for both the Department and the agency. The CBSA's hearings officers represent the Minister of C&I during sponsorship refusal appeals as well as residency obligation appeals with respect to decisions made abroad. They represent the Minister of PSEP in all other matters before the IAD, i.e., removal order appeals.

5.1. Officer safety and security

If an officer perceives a threat to their safety **prior to a hearing**, they should immediately inform their manager. Managers should contact the IRB and, in consultation with regional security managers, make arrangements for a risk assessment and the initiation of appropriate security measures.

Situations may arise **during a hearing** in which an officer feels their personal safety or the safety of others is being compromised. When an officer feels their safety has been threatened, such as in situations of intimidation by witnesses, the uttering of threats or other safety concerns, they should immediately bring the matter to the attention of their manager.

IRB procedures for safety and security should help prevent such situations and provide guidance for managing them if they do arise.:

5.2. Incident report writing

Where an incident occurs before, or during, a hearing where an officer feels their safety has been threatened, they should complete an incident report. Reporting procedures enable the Canada Border Services Agency (CBSA) to make important decisions regarding the safety and security of staff, ongoing training needs, and the recognition of exemplary performance in difficult situations. See ENF 7, Investigations and arrests, section 5.12.

6. Definitions

| The hearing process | |
|---|---|
| Immigration Appeal Division (IAD) | <p>The IAD is an administrative tribunal that provides an independent review of decisions made under the immigration program. The IAD examines cases before it for possible errors in law, in fact, and mixed law and fact, or for failure to observe a principle of natural justice. It also has the authority to reverse valid decisions on equitable grounds. This Division is part of the IRB and is completely independent of CIC, PSEPC and their respective Ministers.</p> <p>The principal matters that may be brought before the IAD are:</p> <ul style="list-style-type: none"> • refusal of a sponsorship application for members of the family class; • removal orders made against foreign nationals who hold permanent resident visas; • removal orders made against permanent residents and protected persons at an examination or admissibility hearing; • Minister's appeal of a decision made by a member of the Immigration Division; and • appeals of overseas decisions on loss of permanent resident status. |
| Humanitarian and compassionate considerations | <p>The IAD has an equitable jurisdiction, which allows it to consider factors that may warrant an appeal being allowed despite the fact the decision is valid in law. IRPA sets out the test to be applied by the IAD in order to allow a case for reasons of equity. Under IRPA, the test of equity, which the IAD is to apply, has been consolidated into one test for all types of appeals to the IAD by a party other than the Minister. A67(1)(c) states that the IAD must be satisfied that, at the time the appeal is disposed of "... 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."</p> <p>The IAD will balance factors such as those set out below against the grounds for the removal order or refusal under appeal. If it finds in favour of the appellant, it will set aside the decision. In the case of an appeal respecting an application</p> |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | |
|----------|---|
| | <p>based on membership in the family class, the IAD must first be satisfied that the foreign national is a member of the family class and the sponsor is a sponsor within the meaning of the Regulations before it can consider humanitarian and compassionate considerations [A65].</p> <p>Factors to be considered by the IAD in appeals of removal orders include:</p> <ul style="list-style-type: none"> • the seriousness of the offence leading to the removal order, where applicable; • the possibility of rehabilitation, where applicable; • the length of time spent in Canada and the degree to which the appellant is established here; • the family in Canada and the dislocation to the family that the deportation would cause; • the support available to the appellant, not only within the family but also within the community; • the degree of hardship that would be caused to the appellant by their return to their country of nationality, provided that the likely country of removal has been established by the appellant on a balance of probabilities. <p>These factors have been established by the Immigration Appeal Commission in <i>Ribic v. Canada (Minister of Employment and Immigration)</i>, [1985] I.A.B.D. No. 4 (QL). The Supreme Court of Canada in <i>Chieu v. Canada (Minister of Citizenship and Immigration)</i>, [2002] 1 S.C.R. 84 at paragraph 90, reaffirmed that “The factors set out in <i>Ribic</i>, [supra], remain the proper ones for the IAD to consider during an appeal...”</p> <p>[When considering an appeal of a family class sponsorship, some of the factors that may be considered by the IAD include:</p> <ul style="list-style-type: none"> • whether authorizing the applicant to enter would result in the reunion in Canada of the appellant with close family; • the strength of the relationship between the applicant and the appellant; • the degree to which the applicant is established abroad; • whether an applicant has demonstrated the potential to adapt to Canadian society; • whether the parties to the application have obligations to one another based on their cultural background; • whether the applicant is alone in their country; • the availability of health services to the applicant in Canada and abroad (for refusals based on medical grounds); • whether there is evidence of rehabilitation or the risk of the applicant re-offending (for refusals based on criminal grounds). |
| Hearings | <p>The IAD is a court of record. It conducts public hearings on the basis of the adversary system and established judicial principles, rules and precedents. The IAD has all the powers, rights and privileges vested in a superior court of record with respect to any matter necessary for the exercise of its jurisdiction, including the swearing and examination of witnesses, the production and inspection of documents, and the enforcement of its orders.</p> <p>IAD hearings are <i>de novo</i> and therefore not limited strictly to reviewing the evidence that led up to the refusal or removal order. In <i>Kahlon v. Canada</i></p> |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | |
|-----------|--|
| | (<i>Minister of Employment and Immigration</i>), 7 Imm. L.R. (2d) 91; 97 N.R. 349 (F.C.A.), the Federal Court of Appeal established that the IAD must hear the whole case and consider any additional facts brought to its attention. |
| Evidence | The IAD has broader powers regarding the admission of evidence than regular courts since it is not bound by any legal or technical rules of evidence. During a hearing, the IAD may receive, and base a decision, on evidence it considers credible or trustworthy in the circumstances, even if the strict rules of evidence have not been met. |
| Decisions | The IAD may dispose of an appeal by allowing it or dismissing it. In the case of an appeal against a removal order, the IAD may also direct that the execution of the order be stayed for a set period of time, with conditions attached [A68]. IRPA requires the IAD to impose mandatory conditions specified in R251.. The IAD can reconsider a decision to stay a removal order at any time. A review of a stay may be initiated either by application by the appellant or the Minister’s counsel or on the IAD’s own initiative. [IAD rule 26] Where the Minister is successful in appealing a favourable decision made by the Immigration Division, the IAD may make or stay the removal order that the member of the Immigration Division did not make. A decision that is delivered orally at a hearing takes effect when the member states the decision. A decision made in writing takes effect when the member signs and dates the decision [IAD rule 55]. |
| Reasons | The IAD is required to provide written reasons for all decisions regarding an appeal by a sponsor and for decisions that stay a removal order. For all other decisions, the person concerned or the C&I Minister or the PSEP Minister may request written reasons within 10 days after the day they receive the decision [IAD rule 54(1)]. |

7. Procedure: General hearing

7.1. Calculating time limits

The *Interpretation Act* governs the calculation of time limits in federal statutes, regulations and rules:

Pursuant to subsection 27(2) of the *Interpretation Act*, when a statute refers to a number of days (not *clear days*) between two events, officers will exclude the day on which the first event happened and include the day on which the second event is to occur.. When the time limit for the performance of a required action expires or falls on a holiday, the action may be performed on the next workday after the holiday. Pursuant to sections 26 and 35 of the *Interpretation Act*, Sundays are holidays, Saturdays are not.

For example, if there is a 15-day limit to appeal a decision made on June 2, the count begins on June 3 and ends on June 17. Holidays are not left out in counting up to the 15th day. June 17 would therefore be the last day to file, unless it were a Sunday, in which case, June 18 would be the last day. If June 17 is a Saturday and the office is closed, then the appeal must be filed on June 16.

7.2. Withdrawing an appeal (IAD rule 50)

An appellant may apply in writing to the IAD to withdraw their appeal. Should the IAD determine that withdrawing the appeal would have a negative effect on the integrity of the IAD appeal process, it may determine that the withdrawal is an abuse of process and refuse to allow the appellant to do so.

If an appeal is withdrawn before the record is prepared or distributed, it is not necessary to distribute the record.

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

When a decision is received from the IAD indicating that an appeal has been withdrawn, the FOSS “Appeals” screen and National Case Management System (NCMS) should be updated by the hearings officer.

7.3. Reinstating an appeal after withdrawal (IAD rule 51)

An appellant may apply to the IAD to reinstate an appeal that has been withdrawn. The application must conform to the IAD Rules for applications and include the appellant’s address and telephone number. The IAD may reinstate the appeal if it is satisfied that it failed to observe a principle of natural justice or that it is in the interest of justice to do so [IAD rule 51].

If an appeal is reinstated by the IAD, the decision must be entered in FOSS and the NCMS by the hearings officer.

7.4. Proof of compliance (IAD rule 30(2))

A written statement stating how and when the documents were provided to the other party must accompany all applications, documents and records of appeal filed with the IAD. A sample statement of service is attached in Appendix E.

7.5. Applications to reopen an appeal

A foreign national who has not left Canada under a removal order may make an application to the IAD to reopen their appeal. The IAD may grant the application and reopen the appeal only if it is satisfied that it failed to observe a principle of natural justice [A71].

Where the foreign national has been removed prior to their application to reopen their appeal before the IAD has been heard, the IAD maintains its jurisdiction to consider the application. Although the IAD does not have the legal power to authorize the re-entry of an appellant for the purpose of attending a hearing, under A 52(1), an immigration officer can authorize the re-entry of a person who has left under a removal order. Furthermore, telecommunications generally enable the IAD to conduct hearings without ordering the return of appellants to attend in person. The fact that the IAD does not have the legal power to authorize the re-entry of an appellant for the purpose of attending a hearing does not, in fact, compromise its control over its own process. (*Tesoro v. Canada (Minister of Citizenship and Immigration)*, [2005] FCA 148, para. 20, 21, 22)

Hearings officers should strongly oppose any application to reopen unless they are satisfied there was a breach of natural justice that merits the appeal being reopened. Decisions to consent to applications to reopen on any other ground should be referred to Litigation Management (BCL) at NHQ.

BCL will decide whether an application for leave and judicial review should be made.

7.6. Applications

The IAD Rules specify that unless the IAD Rules provide otherwise, requests made to the IAD must be made in an application [IAD rule 42]. Applications may be made either orally at a proceeding or in writing. Procedures for applications made orally at an appeal will be determined by the IAD at the proceeding.

Applications made in writing must:

- state the decision that the applicant wants the IAD to make;
- give reasons why the IAD should make the decision;
- state whether the other party agrees to the application; and

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

- include any evidence that the applicant wants the IAD to consider when it renders its decision.

Evidence included with an application must be in the form of a statutory declaration or affidavit [IAD rule 44(2)]. This rule, however, does not apply to applications to change the location of a hearing or the date or time of a hearing or applications to reconsider the appeal, where a stay of removal has previously been granted.

Written applications must first be provided to the other party and then filed at the IAD registry with a written statement indicating how and when the other party was provided with the application. The sample statement of service (Appendix E) may be used to meet the proof of service requirement.

Some examples of requests that must be made by way of application are:

- requests to change the location of a conference or a hearing;
- requests to change the time or date of a proceeding;
- requests to return to Canada for a hearing;
- requests to change or extend time limits;
- requests to hold a hearing in private; and
- requests to withdraw or reinstate an appeal.

Responses to written applications must be in writing [IAD rule 44(1)]. A written response must include the same information as noted above for the application. The response must be filed with the IAD no later than seven days after the respondent receives the application [IAD rule 44(4)]. An applicant may reply in writing to the response no later than five days after they have received the response. [IAD rule 45(4)].

When an application is received, it should be reviewed to determine whether it has merit and warrants the Minister's consent or should be opposed.

When an application is filed or received, the "Application" screen of FOSS and the NCMS should be completed by the hearings officer showing that an application has been initiated. All events in the application process should be entered into both FOSS and the NCMS.

7.7. Loss of appeal rights

A64 specifies the circumstances under which a foreign national, a sponsor or a permanent resident loses their right of appeal. If a foreign national or permanent resident is determined by an officer or the Immigration Division to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, they do not have a right to appeal to the IAD.

Serious criminality—Term of imprisonment of two years or more for a crime that was punished in Canada [A64(2)].

In order for the loss of appeal rights to apply on grounds of serious criminality, the person must have received a sentence of two years or more. In cases where there has been time served, i.e., pre-sentence custody, the officer must verify the credit given by the criminal court sentencing judge for the pre-sentence custody by reviewing the criminal court transcript. If there is no indication in the transcript of how the sentencing judge has credited the time served, each day of time served is credited as two days of a prison sentence. For example, if a person were sentenced to one year of imprisonment plus 183 days of time served, the 183 days of time served would count as a 366-day sentence (2 x 183=366) plus the one-year sentence imposed for a total

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

sentence of two years and one day. There is no appeal right because the total sentence exceeds two years. When calculating the total sentence imposed, it is imperative that the sentence be calculated to the day and not rounded off to the month as the repercussion of meeting the two-year threshold is the loss of a right of appeal. (*R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18, para. 44 and 45)

A64(2) is not meant to include multiple, consecutive sentences. It refers to only a single sentence.

Misrepresentation

If a sponsored application for permanent residence is rejected based on a finding of inadmissibility on grounds of misrepresentation, there is no right of appeal. However, this provision does not apply if the foreign national is the sponsor's spouse, common-law partner or child [A64(3)].

7.8. Non-disclosure of information [A86: Prior to an appeal hearing

The following steps must be taken prior to an appeal hearing before the IAD:

- information is provided to CIC/CBSA (Case Management Branch, NHQ) that a person is suspected of being inadmissible;
- after reviewing the file, and in consultation with the agency providing the information, a decision will be made as to whether the Minister will go forward with an application for the non-disclosure of information;
- if the decision is made to go forward with the application, the Minister's counsel notifies the IAD, the appellant and their counsel in writing that there is an application for the non-disclosure of information concerning their appeal hearing [A86]. This should occur as soon as possible to ensure minimal delay in the hearing;
- The IAD registrar will schedule a date for the *ex parte*, in private hearing as soon as possible. The scheduling will be done in consultation with the Minister's counsel to ensure that all participants have the required security clearances;
- the Minister's counsel and the agency providing the information shall meet with the IAD member, *ex parte*, in private, to present the non-disclosure evidence for the member's examination;
- should the IAD member decide that the information is relevant and requires non-disclosure status, the member shall provide a summary document to the Minister's counsel. The Minister's counsel and the agency providing the information must agree with the contents of the summary prior to its release to the person concerned;
- if no agreement can be reached on some or all of the summary contents, the Minister's counsel can withdraw the information under dispute, or the application altogether, and a decision on the appeal will be rendered without taking into account the information withdrawn and
- if the summary is released, all the non-disclosure information may be considered by the IAD member in their decision on the appeal.

7.9. Non-disclosure of information [A 86]: During an appeal

The following steps must be taken during an appeal before the IAD:

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

- should the Minister's counsel present a written application for the non-disclosure of information, the IAD member adjourns the hearing;
- the IAD member determines whether to grant the Minister's application for an *ex parte*, in private hearing for the non-disclosure of information;
- should the IAD member decide that the information is relevant and requires non-disclosure status, the member provides a summary document to the Minister's counsel. The Minister and the agency providing the information must agree with the contents of the summary prior to its release to the person concerned;
- if no agreement can be reached on some, or all of, the summary contents, the Minister's counsel can withdraw the information under dispute, or the application altogether, and a decision on the appeal will be rendered without consideration of the information withdrawn ; and
- if the summary is released, all the non-disclosure information may be considered by the IAD member in their decision on the appeal.

7.10. Pre-hearing conferences

When officers enter into an undertaking with counsel and the IAD at a pre-hearing conference, it *must be noted in writing on the file*. For example, if the Minister's counsel agrees to an appeal based on the results of DNA testing, it must be noted on file.

Where one officer has entered into an undertaking, any officer who subsequently has responsibility for that appeal is bound by the undertaking made by the previous officer.

7.11. Liaison with the Department of Justice

CIC's and the CBSA's Legal Services must be the primary source of legal advice to the Department and agency to ensure uniform advice and to keep departmental senior officials informed of new or unexpected issues. Sometimes, the need for incidental legal advice arises in the field, when regional officials may seek advice from the local office of the Department of Justice. However, if significant or sensitive legal or policy issues are involved, officials should seek legal opinions from Legal Services by channelling requests for opinions through the Director, Legislative and Regulatory Policy, Admissibility Branch, CIC, NHQ. or e-mail to NHQ-Legislative-Policy@cic.gc.ca or CBSA Inland Enforcement, NHQ, as appropriate.

The office concerned should advise NHQ as early as possible of appeals involving important Charter questions or issues that could have a potentially serious impact on the immigration program and the interpretation of the legislation. CIC or the CBSA will consult Legal Services to decide if assigning a Department of Justice lawyer to the case is warranted.

7.12. Applications for judicial review

Where the officer who represents the C&I Minister or PSEP Minister before a Division of the IRB, depending on who has the policy responsibility, believes that there are or may be grounds to seek judicial review, the officer will consult with their supervising officer and, *within five business days of the decision, order, act or omission being made or taking place*, send a report to the Director, Litigation Management, (BCL) NHQ. The report is to be transmitted by facsimile to (613) 954-4285 or by electronic means to: Nat-Litigation-Management@cic.gc.ca

It is imperative that a copy of the written reasons be forwarded as soon as possible to BCL. This will allow sufficient time for review and any needed consultations. This will also allow BCL to give appropriate instructions, and time, to the Department of Justice to prepare applications for leave and judicial review.

Note: See ENF 9, Judicial Review, for further information .

8. Procedure: Family class sponsorship appeals

CIC has the policy responsibility for family class sponsorship and the Minister of C&I is the respondent.

8.1. Family class sponsorship appeals

When a sponsored application for permanent residence is refused, the sponsor must be informed of the reasons for the refusal and of the right of appeal to the IAD. If a Canadian citizen or permanent resident files an application to sponsor a foreign national as a member of the family class, and the application is refused, the sponsor may appeal the refusal of the application to the IAD [A63(1)].

There is no right of appeal to the IAD if the foreign national (applicant) is inadmissible on the following grounds [A64(1), (2) and (3)]:

- security, violating human or international rights;
- serious criminality with respect to a crime that was punished in Canada by a term of imprisonment of at least two years;
- organized crime; or
- misrepresentation (an exception applies to spouses, common-law partners and children).

Details regarding loss of appeal rights and exceptions can be found in section 7.7 above.

8.2. Notice of appeal

To file an appeal to the IAD under IRPA, the sponsor must submit a notice of appeal and the officer's written reasons for refusal to the IRB registry no later than 30 days after the appellant received the reasons for the refusal of the application [IAD rule 3(2)].

The IAD will provide the notice of appeal and written reasons for refusal to the C&I Minister immediately upon receipt of the documents.

8.3. Designated representative

If counsel for the appellant or Minister believes the IAD should designate a representative for the subject of the appeal because they are under 18 years of age or unable to appreciate the nature of the proceedings, they must notify the IAD in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, they must provide the person's contact information in the notice of appeal [IAD rule 19(1)].

8.4. Grounds for appeal

An appeal to the IAD may be based on questions of law, fact, or mixed law and fact, or on the grounds that there are humanitarian and compassionate considerations that warrant granting special relief under its equitable jurisdiction. The definition of "humanitarian and compassionate considerations" in section 6 above elaborates on the IAD's equitable jurisdiction.

If the IAD determines that the applicant is not a member of the family class or that their sponsor is not a sponsor within the meaning of the Regulations, it cannot exercise its equitable jurisdiction to consider humanitarian and compassionate factors [A65].

8.5. Disputed appeal rights

When a refusal is based on a determination that the sponsor or applicant for permanent resident status has not filed their application in the prescribed manner as set out in R10, then an application to dismiss the appeal should be made to the IAD. Hearings officers should argue that the IAD does not have jurisdiction to hear the appeal because the sponsor or applicant has not made an application under the Act pursuant to R10. The issue of whether or not the sponsor is entitled to appeal to the IAD will be decided by the IAD.

8.6. Preparation of the record

The IAD will notify the applicable visa office that an appeal has been filed and will copy the hearings office. Once the visa office has received the notice of an appeal, it will send the visa office file to the applicable hearings office within four weeks.

Upon receiving the notice of appeal and the file, the hearings office should:

- ensure that the FOSS and NCMS “Appeals” screens are completed promptly;
- enter any motions or applications associated with the appeal in the FOSS “Motions” screen;
- prepare the record, ensuring the documentation is complete and that it is legible and suitable for presentation to the IAD. IAD rule 4(1) states that a record shall contain a table of contents and the following documents:
 - ◆ the application for a permanent resident visa that has been refused;
 - ◆ the application for sponsorship and the sponsor’s undertaking;
 - ◆ any document that the Minister has that is relevant to the application, to the reasons for the refusal or to any other issue in the appeal; and
 - ◆ the written reasons for the refusal.

Note: Under IRPA, the officer is no longer required to prepare a statutory declaration. However, officers are required to record the rationale for their decision and this must be included in the record.

The Minister’s counsel must provide the appeal record to the appellant and a copy to the IAD. The copy of the appeal record provided to the IAD must be accompanied by a written statement saying how and when the Minister provided the appeal record to the appellant [IAD rule 4(3)].

Records must be received by the IAD no later than 120 days after the Minister receives the notice of the appeal [IAD rule 4(4)].

If the IAD has not received the record within 120 days, it may take one of the following measures:

- ask the Minister to explain orally or in writing why the appeal record has not been provided within the time limit and give reasons why the appeal record should nevertheless be accepted; or
 - ◆ schedule and start the hearing without the appeal record or with only part of the appeal record.

Note: It is important that a hearings officer review the visa office file as soon after receipt as possible. This review will allow officers to identify problems and opportunities to resolve the case without a hearing.

8.7. Requirements to be authorized to sponsor

R133 and R134, concerning the sponsorship of members of the family class, provide the requirements that a person must meet to be authorized to sponsor a relative. .

8.8. Failure to meet sponsorship criteria

R134 provides procedures for calculating a sponsor's ability to meet the minimum necessary income requirement. Assessment of ability to meet this requirement is based on the last notice of assessment or equivalent document. Where the sponsor does not produce the document or their income is less than the required amount, their income will be calculated based on the income during the 12 months preceding the application. The date of the application is the date on which the Application to Sponsor and Undertaking [IMM 1344AE] and the processing fees have been received at the CPC-Mississauga.

Sponsorship criteria are set out in R130 to R134.

Appellants may submit new evidence of income relating to the period preceding the date of giving the undertaking. In such cases, officers are required to take into account the new evidence of income in determining CIC's position at the appeal hearing.

However, officers should argue that evidence of income relating to the period that follows the giving of the undertaking is not a valid indication of a sponsor's ability to meet the requirements in R134 for authorization to sponsor. The IAD should not take such evidence into account in deciding on the basis of a question of fact or law. Where the sponsor's financial situation has improved, the option to submit a new undertaking is available.

In the past, some sponsorship kits have contained incorrect charts for the Low Income Cut-Off (LICO) requirements. Where a refusal is based on insufficient settlement arrangements, hearings officers should ensure the refusal was based on the relevant minimum necessary income requirement for the case.

8.9. Right of permanent residence fee (RPRF) refund

R295(3)(b) and R301(2)(b) allow a sponsor to have their right of permanent residence fee (RPRF) refunded if they choose to discontinue their sponsorship application. These provisions may reduce the number of appeals from sponsors who do not meet the sponsorship criteria figures as they can receive a refund and reapply when they do meet the criteria.

8.10. Sponsorship exclusions

Sponsorship criteria have been expanded to exclude persons convicted of sexual offences, and offences against the person under the *Criminal Code* in relation to the sponsor's relatives. [R133(1)(e)].

In addition, the sponsorship application shall only be approved if there is evidence that the sponsor is not in receipt of social assistance for a reason other than disability [R133(1)(k)].

See IP 2, Processing Applications to Sponsor Members of the Family Class, for further information concerning the processing of applications made within Canada.

8.11. Humanitarian and compassionate grounds related to sponsorship

The IAD may consider the existence of compassionate and humanitarian considerations that would warrant the granting of special relief.

However, when a refusal is based on the fact that the sponsor has not met the minimum necessary income requirement set out in R134 or is in default of a previous sponsorship as of the date that the undertaking was given, officers should argue that the fact that the sponsor would

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

meet the requirements if the current situation were taken into consideration does not constitute, in itself, sufficient humanitarian and compassionate grounds.

Hearings officers should argue that, for an appeal to be allowed in equity, the decision must be based on factors other than an improvement in the sponsor's financial situation or the fact that the sponsor is no longer in default. Officers should ask the IAD to note that the sponsor had the option of taking a refund of the processing fee or proceeding with their application, knowing it would be refused because they did not meet the requirements at the time. Otherwise, allowing persons who did not meet the regulatory requirements during the specific time frame to sponsor a member of the family class negates the effect of the Regulations.

See IP 2, Processing Applications to Sponsor Members of the Family Class, for more information.

8.12. Sponsors residing in provinces under federal-provincial agreements [A8(1) and A9(2)]

If a sponsor resides in a province that has sole responsibility for establishing and applying financial criteria for sponsors under a federal-provincial agreement [A8(1)], the sponsor has no right of appeal to the IAD on any ground of law, fact or mixed law and fact when both of the following circumstances exist:

- the application is refused based on the rejection of the person's application for sponsorship by an official of that province on the grounds that the person failed to meet the financial criteria or to comply with any prior undertaking concerning the sponsorship of any application for permanent residence and
- the laws of that province provide the person with a right to appeal the rejection of their application for sponsorship.

Note: The sponsor can still appeal on humanitarian and compassionate grounds [A9(2)].

At present, Quebec is the only province with such an agreement.

8.13. Members of the family class

The definition of member of the family class has been changed to better reflect the social realities of modern society. The principal changes include common-law and conjugal partners being added as members of the family class, adoption provisions being altered, and the age for dependent children being changed from 19 to 22. It is to be noted that spouses can be of the same sex under the *Civil Marriage Act*. A12(1), R116 and R117 specify who is a member of the family class.

See OP 2, Processing Members of the Family Class, for more information on determining if an applicant is a member of the family class, .

8.14. Medical inadmissibility

IRPA has introduced some changes regarding refusals of applications for permanent residents on health grounds. The principal changes are as follows:

- IAD Rules have been modified to require that where an appeal is based on inadmissibility for health grounds, any medical documents must be disclosed at least 60 days before the hearing [IAD rule 30(4)];
- excessive demand has been defined in R1(1);
- health services and social services have been defined in R1(1);
- spouses, common-law partners and dependent children who are determined to be members of the family class are exempt from the excessive demand criteria [A38(2)(a)].

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

For information about the appeal process before the IAD, please see section 9 below.

8.15. Filing evidence

Information and documents must be submitted in a form suitable for presentation to the IAD, such as a statutory declaration or the interviewing officer's reasons or CAIPS notes recording the information or identifying the documents received. Officers' declarations should contain facts, not opinions or conclusions, and should clearly indicate that the person making the declaration is an officer.

Documents must be filed with the IAD no later than 20 days before the hearing with a written statement saying how and when the documents were provided to the other party. Medical documents related to a refusal based on inadmissibility for health grounds must be filed no later than 60 days before the hearing. The earlier filing of medical documents is intended to provide sufficient time for parties to evaluate any new medical evidence in advance of the hearing and, consequently, to help prevent adjournments.

New information may be received in the form of a report, with appropriate documentation, from an officer in Canada or abroad who has become aware of new information concerning an appellant, such as marriage, the birth of a child, hospitalization, a criminal conviction or becoming a public charge.

The visa office may forward information to the officer that it has used in assessing a sponsored application for permanent residence. If such evidence was obtained in confidence from the government or an institution of a foreign state, or an international organization of states and cannot be released publicly, the Minister may make an application for non-disclosure of information to the IAD. The grounds for the application will be that disclosure of such information would be injurious to national security or the safety of persons. Procedures for applications for non-disclosure of information are found in section 7.8 above.

8.16. Consenting to an appeal—Communication with the visa office

When a decision is made to consent to a sponsorship appeal, it is imperative that the hearings officer inform the visa office of the reasons. In order to assist visa officers in identifying ways to strengthen decisions and avoid potential trends from developing, lines of communication with visa offices must be kept open.

Should the officer notice a trend forming with particular types of refusals or refusals from a particular office, copies of the refusals in question should be forwarded to the Legislative and Regulatory Policy Division, Admissibility Branch, CIC NHQ , e-mail to NHQ-Legislative-Policy@cic.gc.ca with an overview of the scenario. Should a trend develop without being brought to the attention of the visa office and NHQ, the number of similar refusals may increase. It is imperative that hearings officers and CIC-NHQ work in collaboration with visa offices and the International Region, NHQ, to ensure well-reasoned, consistent decisions that can be defended before the IAD.

8.17. Post-hearing procedures

When the hearings office concerned receives notice of the IAD's decision, the FOSS and NCMS "Appeals" screens are to be completed promptly.

If the IAD allows the appeal and the officer, in consultation with their supervisor, believes that an application for leave and judicial review of the decision is warranted, the IAD's decision should immediately be brought to the attention of the Director, Litigation Management, NHQ (BCL). See ENF 9 for detailed procedures on applying for judicial review.

If the C&I Minister applies for leave to begin an application for judicial review of the IAD decision allowing a sponsorship appeal, further processing of the visa application by the officer is stayed until the leave and judicial review application are disposed of by the Federal Court and the Federal Court of Appeal . If leave is granted, further processing of the visa application is stayed

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

until the courts have finally disposed of the matter, or until the time limits for filing the application for judicial review or appeal have elapsed.

If the IAD allows the appeal, refers the matter back for reconsideration and the Minister does not file an application for leave to apply for judicial review of the decision, the case is returned to the appropriate visa office for reconsideration in accordance with the IAD's decision [A70(1)].

The officer should send a copy of the IAD's reasons to the visa office, including any new evidence that was established at the hearing. If the Minister consented to the appeal, the visa office is given a full explanation of the reasons for the Minister's consent.

Where an officer determines that the sponsor and the applicant meet the requirements of IRPA and its Regulations, other than those on which the IAD ruled the application will be approved. It is possible that additional grounds warranting a second refusal of the application will come to light, although in the first refusal, the decision should have included every ground applicable to the case.

Note: To ensure that visa offices do not process applications where an application for judicial review has been made, hearings officers must inform the visa office that an application for judicial review of the IAD decision is pending.

8.18. Transitional provisions

A192 provides that if a notice of appeal was filed immediately before IRPA came into force, the appeal shall be continued under the former *Immigration Act, 1976*.

A196 stipulates that A192 does not apply if an appellant has no right of appeal pursuant to A64 and they have not been granted a stay under the former Act. Therefore, if an appellant has been found inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality and would not have a right of appeal under IRPA, their appeal shall be discontinued unless they were granted a stay under the former Act. A196 applies to both removal order appeals and family class sponsorship appeals.

If an appellant has been granted a stay under the former Act and they then breach a condition of the stay, A197 causes the application of A64 and A68(4). This provision applies if either the breach of condition or the conviction for the breach of condition or both occur after IRPA came into force.

9. Procedure for appeals involving medical inadmissibility

9.1. Overview of process for medical inadmissibility

CIC has the policy responsibility with respect to medical inadmissibility [A38]

- The medical officer will send a copy of the medical record (not including x-rays) and the Medical Notification [IMM 5365B] to the officer when, in the opinion of the medical officer concurred in by at least one other medical officer, the applicant's authorization to enter Canada is likely to pose a threat to public health or safety and/or create excessive demand on health or social services.
- The officer will then send a letter to the applicant informing them of the medical officer's diagnosis and narrative using the new procedural fairness letter (see example provided in Appendix A).
- The applicant then has 60 days in which to provide any additional medical information to the officer.
- Depending on whether the applicant responds or not, the following actions should be taken:

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

- ◆ upon receiving a response from the applicant, the officer will forward a copy of the information and all submitted x-rays to the medical officer (see example of letter provided in Appendix B); and
- ◆ if the applicant does not respond within the 60-day period, then the applicant's application to enter Canada will be denied based on the initial medical assessment.
- If the applicant does respond within the 60-day period, the medical officer will review the new information and either:
 - ◆ confirm the initial medical opinion; or
 - ◆ withdraw the existing medical opinion and reopen the assessment process leading to a new medical opinion.
- If a medical refusal is later appealed by the sponsor, the officer then forwards the medical information along with the other documents, except for photographs and x-rays, to the hearings office. When transferring medical refusal files to the hearings office, visa offices should keep the inadmissible applicant's photographs on file wherever possible. This will help speed up the issuance of new medical instructions, should this become necessary.
- Within six weeks, the officer must forward the required documentation to the hearings office to allow for the preparation of the case. This six-week period begins on the day the visa office receives an e-mail from the IAD registry advising that an appeal has been filed. The documentation may include the statutory declaration by the medical officer, the documents from the visa office and a copy of the medical record. No photographs or x-rays need to be forwarded.

9.2. Grounds for appeal

The IAD will normally deal with the issue of additional medical information with the appellant at the assignment court. This includes clarifying the grounds for appeal for which the information is intended to be used and setting time frames for providing the information.

To accelerate the processing of these appeal cases, the hearings officer should try to ascertain as soon as possible the grounds for appeal to be used before the IAD, namely, whether there is a challenge in law or whether it will be argued that there are compassionate or humanitarian considerations that warrant the granting of special relief, or both.

9.3. When to consider a new medical examination during the appeal process

Where only compassionate or humanitarian considerations form the basis for the appeal, a new medical examination should not be issued during the appeal process. In these cases, the hearings officer will simply need to consider requesting sufficient time between receipt of the medical information from the appellant and the hearing. During this time, the hearings officer will seek the advice of Operations Directorate, Medical Services Branch, CIC, NHQ, about the medical information submitted, and to consider whether to introduce an opinion of a medical officer as rebuttal evidence.

Where newly-submitted medical information is intended to challenge the decision in law, the appellant or counsel should be advised that the examining health-care professional consulted by the applicant must refer to the medical notification of medical inadmissibility. Any health care professional's report aimed at challenging the decision in law should expressly and clearly address the issues raised in the medical notification, that is, diagnosis, prognosis and the issue of excessive demand on health and social services, and the issue of whether the health condition is likely to be a danger to public health and safety. Prior to agreeing to a postponement for

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

obtaining this new medical information, the hearings officer will confirm that the applicant is willing to undergo further medical examinations if a medical officer so recommends.

In considering the appropriate time frame for obtaining the medical information, the hearings officer must be fair to the appellant and consider facilitating resolution without litigation, but without compromising CIC's interest in the finality of litigation.

Generally, CIC will not support the consideration of more than one submission of new medical information from counsel once an appeal has been filed unless there is a genuine need to clarify the evidence previously gathered by obtaining supplementary evidence.

9.4. Procedures upon receipt of new medical information during the appeal

When hearings officers receive new medical information about an applicant, they will reconfirm with the appellant or counsel the purpose for which the information is being submitted, review the new information and decide whether it should be forwarded to the Operations Directorate, Medical Services Branch, CIC, at NHQ. Hearings officers must assess whether the information is relevant and related to the applicant's medical condition, as described in the CIC medical officer's medical assessment, namely, in terms of the diagnosis, the prognosis and the issue of excessive demand on health and social services, and the issue of whether the health condition is likely to be a danger to public health or safety. In most cases, the information will be forwarded to the Operations Directorate, Medical Services Branch, CIC, at NHQ. However, the new information should not be forwarded to the Medical Services Branch if it clearly has no link with the reason for refusing the applicant on medical grounds or if the medical information is so vague or of such a general nature that it has little or no probative value. Instead, a date for hearing at the IAD should be requested. (Examples are provided in Appendix C.)

On receipt of the new medical information, the Medical Services Branch, NHQ will transfer a copy to the medical officer abroad and inform both the relevant visa office and the hearings officer. The hearings officer will inform the IAD and appellant or counsel in writing of the timing of this transfer. The Medical Services Branch at NHQ and the medical officer abroad will review this new medical information and jointly decide if the original medical assessment should be upheld or if a new medical examination should take place because it appears that there is a change in the person's medical status. The medical officer abroad will then forward this decision directly to the hearings officer, with a copy to both the visa office in charge of the case and the Medical Services Branch at NHQ. The findings will read as follows:

Medical officer X has reviewed the applicant's entire medical file including the newly-submitted medical information that consists of *[list what was reviewed about the applicant]*. After completing this review, the medical officer upholds the original medical assessment. In this case, the hearings officer will proceed with the appeal before the IAD.

or

After completing this review, it is recommended that the applicant undergo a new medical examination. The hearings officer will provide any direction required as to the requested medical examination

9.5. New medical examination

When medical officers recommend a new medical examination, the officer will contact the applicant within 30 days, request photographs within that time frame (where necessary) and issue new medical instructions.

Upon receipt of a notice that a new medical examination is required, the applicant should either undergo the medical examination within 30 days or, alternatively, provide the officer with the date of an appointment for the medical examination within 30 days.

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

The medical examination will be at the applicant's own risk and expense. The applicant should be advised that failure to comply within 30 days will lead CIC to terminate the medical reassessment process. (Example letter provided in Appendix D.)

At the same time, the hearings officer will immediately inform the appellant or counsel in writing, with a copy to the IAD, that the applicant will be allowed to undergo a new medical examination. The hearings officer will also advise the appellant or their counsel that it is their responsibility to ensure the applicant complies with the officer's instructions to forward passport-size photographs within 30 days and, if required, to undergo a medical examination or make an appointment for the medical examination within 30 days of receipt of the new medical instructions. The hearings officer should notify the appellant or counsel that the applicant's failure to comply within 30 days may result in CIC terminating the medical reassessment process. (Example letter provided in Appendix D.)

It is important for the visa office to indicate, in CAIPS, the date on which the new medical instructions were sent out. If the applicant does not comply with the instructions, the officer will notify the hearings officer, who will in turn inform the IAD and ask for a hearing date to be set, with a copy of the request for a hearing date to the appellant or counsel.

Each visa office should appoint a coordinator to ensure the follow-up of these cases by means of a bring-forward (BF) system. The results of the new medical examination must be forwarded to the hearings office as soon as they have been received.

Hearings offices should also use a BF system to follow up on these cases with the visa offices, at a minimum every three months, with appropriate follow-up to visa offices where no action seems to have been taken. CAIPS could be used for follow-up by those hearings offices that have access.

CIC's target time frame for the medical reassessment process is a maximum of nine months from the time the visa office is informed that a new medical examination is required.

9.6. Communicating medical results

When the visa office receives the results of the medical officer's updated medical assessment, it shall immediately forward them to the hearings officer, with a copy to the IAD. The visa officer must pass on the results as soon as possible to permit the Department to meet the nine-month processing targets.

Where the re-examination reveals that the applicant is no longer medically inadmissible, there will be no need to pursue the appeal, barring other non-medical grounds for inadmissibility. The appellant or counsel should be advised in writing that processing will continue once the appeal has been formally withdrawn. Upon notification from the hearings office that the IAD has acknowledged receipt of the withdrawal of the appeal, visa officers can continue processing the application for permanent residence.

9.7. Medical officers' statutory declaration

The specialized knowledge of a medical officer is important to hearings officers in properly defending medical refusals before the IAD. Although it was the practice for medical officers to prepare statutory declarations when they were informed that a sponsor had appealed a refusal on health grounds, medical officers can no longer systematically prepare statutory declarations for all medical refusals.

Medical officers may still be called upon in some cases to provide hearings officers with statutory declarations to establish the connection between the diagnosis and the conclusion that the person's coming to Canada might cause an excessive demand on health or social services, or is likely to be a danger to public health or safety. To assist medical officers, hearings officers will have to indicate clearly those points in the medical documents that require explanation. A medical record contains technical terms and specialized vocabulary that are not always easy to

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

understand and interpret. To help and support hearings officers in this task, the Operations Directorate, Medical Services Branch at CIC, NHQ (Tel.(613) 952-9648) are available to answer questions from hearings officers and provide clarifications that could prevent additional delays.

A statutory declaration can be requested in situations where the threshold of the proof can be very demanding, for example, when a person suffering from intellectual disability is refused because their entry into Canada might cause excessive demands on social services.

In cases where the person's state of health is very serious and it is recognized by the medical community that a person suffering from this type of illness will require repeated access to health services, hospitalization or major surgery, and the medical record as well as the medical notification contain sufficient details, it is not necessary to request a statutory declaration. An example would be a person suffering from metastatic malignancy, renal failure or AIDS.

The IAD has upheld inadmissibility based on health reasons in cases where clear evidence was provided without a statutory declaration from a medical officer.

9.8. Effective communication

Communication is the key to ensuring that the set procedures are dealt with effectively. This means updating CAIPS notes, bringing files forward on a regular basis and communicating with everyone involved in given cases, including visa officers, medical services and hearings officers. If established procedures are followed, the number of requests for updates received at offices and unnecessary litigation before the IAD will be reduced. More importantly, client service in the form of more timely decisions on complex medical appeals will result.

10. Alternative dispute resolution process (ADR) [IAD rule 20]

The CBSA has the responsibility for operational policies, including ADR.

The IAD may require the parties to participate in an ADR process in order to encourage the parties to resolve an appeal without having recourse to a full hearing.

10.1. Purpose of ADR

ADR aims to empower parties to an immigration appeal to participate in the resolution of their case through the use of a negotiation process. This program is premised on the notion that litigation is often not in the best interests of the parties and that some types of appeals could be prevented from proceeding to a hearing by applying ADR techniques.

The principal ADR method of attempting to resolve appeals is through mediation sessions. An IAD-employed dispute resolution officer (DRO) acts as mediator and attempts to resolve the appeal. ADR cases are generally resolved by the sponsor withdrawing their appeal or by Minister's counsel consenting to it. Alternatively, in unsuccessful mediations, the evidence and legal issues required at the hearing are often reduced as a result of the earlier mediation session.

It is important to note that, as Minister's counsel, hearings officers possess the authority to make decisions on behalf of the Minister of C&I or the Minister of PSEP when appearing at ADR sessions.

10.2. Responsibilities of hearings officers for dispute resolution

| When | Responsibility |
|-------------------------------|--|
| Before and during the hearing | The role of Minister's counsel is to represent the public interest and attempt to ensure that justice is done. A crucial difference between the role of Minister's counsel in the hearings process versus the ADR process is that an ADR approach requires parties to |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | |
|----------|---|
| | <p>operate in a proactive manner by searching for a resolution that will avoid a hearing. This does not mean that compromise is reached for the sake of compromise. However, Minister's counsel must balance the need for program integrity with efficiency.</p> <p>This means ensuring that a resolution reached through ADR is consistent with the principles of IRPA , and CIC or the CBSA policy. An approach that acknowledges statutory obligations and ADR values is one in which the Minister's counsel decides to consent to an appeal because it is recognized that it is not in the public interest to litigate cases that have a poor chance of success at a hearing.</p> |
| Post-ADR | <p>In appeal cases that are resolved at ADR, an IAD-issued Summary of Agreement of the Parties form is completed by the DRO. The Minister's counsel must ensure that this form and any additional and relevant information relating to the reasons for the ADR settlement of the case are forwarded to the appropriate visa office and officer. It is acceptable to do this by e-mail.</p> <p>Questions regarding the outcomes of individual appeals should be directed to the hearings officer who acted as the Minister's counsel on the case. General questions regarding the use of ADR in the appeals process may be forwarded to the Director, Inland Enforcement, the CBSA, Enforcement Branch, NHQ.</p> |

11. Procedure for removal order appeals

The CBSA has the policy responsibility with respect to the issuance of removal orders and the Minister of PSEP is the respondent in removal order appeals.

11.1. Persons who may appeal against removal orders

Pursuant to A 63(2) and A63(3), permanent residents, foreign nationals who hold a permanent resident visa and protected persons, may appeal against a decision at an examination or an admissibility hearing, their removal order to the IAD . They may appeal not only on the basis of legal and factual questions, but also on the basis that there are humanitarian and compassionate considerations that warrant granting special relief.

An appeal may be based on the grounds that the decision appealed is wrong in law, fact or mixed law and fact or that a principle of natural justice has not been observed or that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case. [A 67]

11.2. Criminality

Inadmissibility provisions have been consolidated under IRPA such that provisions apply both inland and at the port of entry. For details on inadmissibility provisions, see ENF 1, Inadmissibility, and ENF 2, Evaluating inadmissibility.

Situations may arise where the appellant had convictions as a young offender, and evidence related to those convictions is important in establishing the Minister's case. Under A 36(3)(e), inadmissibility on the grounds of A36(1) or A36(2) may not be based on an offence under the *Young Offenders Act (YOA)*. *The YOA was replaced by the Youth Criminal Justice Act (YCJA)* which came into effect on April 1, 2003.,

For additional information, see ENF 14, Criminal Rehabilitation, OP 19, Criminal Rehabilitation and ENF 28, Ministerial Opinions on Danger to the Public and to the Security of Canada.

11.3. All the circumstances of the case

The definition of "humanitarian and compassionate considerations" in section 6 above provides details of the test to be applied by the IAD when exercising its equitable jurisdiction. It also sets

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

out the general factors the IAD considers when hearing removal order appeals. Removal order appeals differ from sponsorship appeals in that the IAD's equitable jurisdiction includes the potential risk the appellant may face in their country of destination.

The Supreme Court ruled in *Chieu v. M.C.I.*, [2002] 1 S.C.R. 84 and *Al-Sagban v M.C.I.*, [2002] 1 S.C.R. 133 that "all the circumstances of the case" may include foreign hardship, including the risk that the individual may face, provided that the likely country of destination has been established. Based on the Supreme Court's reasoning, it is highly likely that appellants will submit documentation regarding the human rights situation in the country of destination and other documentation related to risk at the appeal against their removal order. The Court has acknowledged that the Minister is entitled to have documents verified prior to the hearing or to challenge their validity.

Without a passport or travel document for a particular country, it is the CBSA's position that there is insufficient evidence to assume which will be the likely country of destination and foreign hardship should be considered only where the likely country of destination has been established.

If such documentation is necessary to determine the likely country of destination, the circumstances in the country of destination at the time of removal cannot be certain. Where the appellant is serving a sentence or it can be established that the removal process is particularly lengthy, it will become even more difficult to anticipate country conditions at an uncertain point in the future.

Hearings officers should evaluate the circumstances of each case and, where appropriate, argue that, in the absence of sufficient evidence to establish the likely country of destination or time of removal, anticipated risk or hardship cannot be properly evaluated.

Further, appellants will have an opportunity to apply for a pre-removal risk assessment (PRRA) when they become ready for removal. Foreign hardship will be more accurately assessed at the right time through the PRRA process. Therefore, in some cases it will be appropriate for hearings officers to submit that foreign hardship should be given little weight for these reasons.

11.4. Mandatory conditions to be imposed by the IAD

A68(2)(a) states that where the IAD stays a removal order:

"it shall impose any condition that is prescribed and may impose any condition that it considers necessary."

Mandatory conditions are found in R251 and are as follows:

251. ...

- (a) to inform the Department and the IAD in writing in advance of any change in the person's address;
- (b) 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;
- (c) 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;
- (d) to not commit any criminal offences;
- (e) if they are charged with a criminal offence, to immediately report that fact in writing to the Department; and
- (f) if they are convicted of a criminal offence, to immediately report that fact in writing to the Department and the Division.

Note: Effective December 12, 2003, the portions of the Department of Citizenship and Immigration that deal with enforcement (removals, detention, investigations, hearings, appeals, interventions) and war crimes were transferred to the Canada Border Services Agency. Therefore, the words “the Agency” should be read where the words “the Department” currently appear in the above-referenced section of the Regulations (R251).

The mandatory conditions shall be imposed in all stays of removal imposed by the IAD, whether the removal order was based on criminal inadmissibility or on entrepreneurial appellant not having fulfilled their conditions of permanent residence.

11.5. Discretionary conditions in criminal inadmissibility cases

The IAD has discretionary power to impose non-prescribed conditions when it stays a removal.. Generally, these conditions are imposed in cases involving criminal inadmissibility and entrepreneur appellants.

In criminal inadmissibility appeals, conditions of a stay that are frequently imposed by the IAD include the following:

- provide all information, the notice and documents required by the conditions of the stay by hand, by regular or registered mail, by courier or priority post to the CBSA, at (address of the CBSA's office) and to the IAD (address of the IAD and fax number) It is the responsibility of the appellant to ensure that the documents are received by the Agency within any time period required by a condition of the stay.
- report to the CBSA on the dates set by the IAD, or the first of the month in a sequence chosen by the IAD. The appellant shall report in person, in writing or by telephone. The reports are to contain the following details:
 - ◆ employment or efforts to obtain employment, if unemployed;
 - ◆ current living arrangements;
 - ◆ marital status, including common-law relationships;
 - ◆ attendance at meetings of Alcoholics Anonymous, or any other drug or alcohol rehabilitation program;
 - ◆ other relevant changes of personal circumstances.
- make reasonable efforts to seek and maintain full-time employment and immediately report any change in employment to the Agency.
- not knowingly associate with individuals who have a criminal record or who are engaged in criminal activity, except contact that might result while attending meetings of Alcoholics Anonymous, or any other drug or alcohol rehabilitation program.
- not own or possess offensive weapons or imitations of offensive weapons.
- respect all parole conditions and any court orders.
- refrain from the use of alcohol.
- keep the peace and be of good behaviour.

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

- take immediate steps to repay any and all debts owed to creditors. Provide proof of repayment schedule and compliance at each time of reporting to the Agency.
- follow or continue to follow a psychotherapy program if the probation officer sees the need. (If appellant withdraws consent to this condition, they must forthwith make an application to the IAD to have this condition removed.)
- engage in or continue anger management counselling with (name of therapist or group).
- refrain from the illegal use or sale of drugs, including marijuana.
- maintain the payment schedule as foreseen in the agreement with the Municipal Court.

Discretionary conditions depend on the nature of the appellant's situation, which will have been established during the hearing before the IAD. They can be suggested by the Minister's counsel and the appellant, but the IAD decides which conditions will be imposed.

The burden rests on the appellant to demonstrate that the conditions have been met; however, the CBSA's hearings office will monitor whether the appellant complies with the mandatory and discretionary conditions imposed with the stay in order to report, when required, to the IAD. See section 11.7 below.

11.6. Discretionary conditions in stays of removal of entrepreneur appellants

Along with the six mandatory conditions found in R251, the IAD may impose conditions that will see the profitable finalization of the enterprise created by the entrepreneur appellant. The conditions may include the following:

- establish, or make a substantial investment in, a business or a commercial venture in Canada;
- create, or continue, employment opportunities for one or more Canadian citizens or permanent residents, other than themselves and their family members;
- participate actively and on an ongoing basis in the management of the business or commercial venture;
- make a significant contribution to the economy of Canada;
- provide a fully completed monitoring progress report within (set period of time) of the stay to (provide address of CIC's local business office) and then every (sequence) for the duration of the stay. This report shall contain evidence of his efforts to achieve the four objectives as listed above;
- provide current financial statements at the end of the stay, along with final submissions;
- appear in person at the (CIC's local business office) as directed in writing by an officer throughout the period of the stay.

The burden rests on the appellant to demonstrate that the conditions imposed by the IAD have been met; however, the CIC Business Unit will monitor the compliance of the mandatory and discretionary conditions in order to report, when required, to the IAD.

11.7. Monitoring compliance with the conditions of a stay of removal

Where the IAD has stayed a removal order, it may, at any time, on application or on its own initiative, reconsider the appeal. [A 68(3)].

The Minister or the appellant can apply to the IAD to reconsider the appeal [IAD rule 26(1)]. The applicant must follow IAD rule 43 for applications generally, but evidence is not required in an affidavit or a statutory declaration and a written statement of whether the subject of the appeal has complied with the conditions of the stay must be provided with the application.

When the IAD provides notice that it may reconsider an appeal in which it stayed a removal order, both parties must immediately provide the IAD with a written statement concerning compliance with the conditions of the stay of removal [IAD rule 26(3)].

The statement of the Minister's counsel must indicate the information the Minister has concerning compliance with the conditions of the stay and should indicate what decision the IAD should make when reconsidering the appeal [IAD rule 26(3)].

Criminal inadmissibility cases:

Where a removal order on the grounds of criminal inadmissibility has been stayed, verification of compliance with the conditions imposed by the IAD is the CBSA's responsibility. When a date is scheduled by the IAD for a review, a report indicating compliance, or default, with the conditions shall be prepared with a recommendation to the IAD. Such a recommendation may be to :

- allow the appeal, cancel the stay and quash the removal order; or
- maintain the stay for an extended period of time with additional conditions, or removal of conditions which have been met; or
- dismiss the appeal and order removal of the appellant as soon as it is practicable.

Entrepreneur cases:

Where a removal order for an entrepreneur appellant has been stayed, the verification of compliance of the conditions imposed by the IAD is CIC's responsibility. Once the decision to impose a stay with conditions has been received by the CBSA's hearings office, a copy of the decision is sent to the CIC Business Unit for subsequent verification and monitoring of the conditions. At the time indicated in the decision, or upon request by the IAD, the CIC Business Unit will prepare a report indicating compliance, or default, with the conditions and the appropriate recommendation. The report shall be sent to the CBSA's hearings office, which will in turn send a copy to all parties involved.

11.8. Cancellation of stays by operation of law

A68(4) provides that a stay is automatically cancelled by operation of law and the appeal terminated where a person who was found inadmissible on grounds of serious criminality or criminality is granted a stay of removal and is then convicted of another offence described in the serious criminality provisions of A36(1).

Where a stay is cancelled by operation of law, hearings officers must send the appellant a notice in writing regarding cancellation of their stay (see Appendix F). A copy of the notice must also be sent to the IRB with a statement of service [IAD rule 27(3)].

11.9. Transitional provisions

A197 provides:

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

197. Despite section 192 [of the IRPA], 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 [IRPA].

A197 applies if the breach of conditions occurred after IRPA came into force. However, the date when the breach is deemed to have occurred is the date of conviction and not the date that the offence was committed. Thus, even if an offence had been committed before IRPA came into force, but the person was convicted after IRPA came into force, A197 applies.

Where the hearings officer believes that the appellant has breached one or more conditions of the stay, the officer must send the IAD—with a copy to the appellant—an application to reconsider the appeal under IAD rule 26. In the application, the officer must describe the offence in detail and ask the IAD to examine the breach of condition(s) and reconsider the appeal since A197 is, in the Minister's opinion, applicable (See Appendices G and H).

When seized with an A197 application, the IAD must first determine whether a breach of conditions has in fact occurred, notwithstanding the nature of the breach. If this is the case, the IAD must then determine whether the appellant loses their right of appeal pursuant to A64. A finding by the IAD that there has been a breach of conditions also allows the Minister to examine the applicability of A68(4) to the appellant's case.

No appeal for inadmissibility under A64 (Appendix G)

A64 provides that no appeal may be made to the IAD by a foreign national, their sponsor or a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality. Inadmissibility for serious criminality here refers to an offence punished in Canada by a term of imprisonment of at least two years.

In A197 cases, once the IAD finds that a breach of conditions has, in fact, occurred, it must determine whether the inadmissibility for which the appellant was originally granted a stay was one of the grounds of inadmissibility listed in A64. This includes examining whether the appellant's inadmissibility for serious criminality falls within the definition under A64 (2), i.e., punished in Canada by a term of imprisonment of at least two years. Where A64 is found to apply, the IAD must find, pursuant to A197, that the appellant loses their right of appeal and that the stay the appellant enjoyed is cancelled. Should the IAD decide that there is a breach of conditions and a loss of the right of appeal, the removal order becomes enforceable.

Cancellation, by operation of law, of a stay of removal order under A68(4) (Appendix H)

A68(4) stipulates that if the IAD 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 A36(1), the stay is cancelled by operation of law and the appeal is terminated.

Where the IAD finds that a breach of conditions has in fact occurred, the IAD may decide to rule on the applicability of A68(4) on its own initiative. However, the Minister does not have to wait for the IAD's ruling on the applicability of A68(4). In A197 cases where the appellant's original inadmissibility was on grounds of serious criminality or criminality, and the IAD determines that a breach of conditions has in fact occurred, the Minister may examine the applicability of A68(4) to the appellant's case. Where the breach of conditions is an offence of serious criminality as described in A36(1), the stay that the appellant enjoyed is therefore cancelled by operation of law and the appeal is terminated pursuant to A197 and A68(4). The IAD's decision that a breach of conditions has occurred and the existence of the facts necessary for the application of A68(4) make the removal order enforceable.

12. Procedure: Loss of residency status appeals

CIC has the policy responsibility with respect to loss of residency status and the Minister of C&I is the respondent in these appeals.

12.1. In Canada

Permanent residents who are determined by the Minister's delegate to have lost their permanent resident status have the right to appeal their removal order against the Minister of C&I pursuant to A63(3). Persons in this category are subject to the same appeal provisions as permanent residents who are ordered removed on other grounds of inadmissibility.

For more information, see section 11.

12.2. Outside Canada

Pursuant to A63(4), permanent residents may appeal to the IAD, against the Minister of C&I, with respect to a decision made outside Canada on the residency obligation under A28. IAD rule 9 requires that:

- the notice of appeal be filed with the IAD of the region in Canada where the appellant last resided;
- the written reasons for the loss of status decision be filed with the notice of appeal;
- if the appellant wants to return to Canada for the hearing of the appeal, they must indicate it on the notice of appeal; and
- after they receive the written reasons for the decision, appellants have 60 days to file with the IAD a notice of appeal and the written reasons for the decision.

When the notice of appeal is received, the hearings office should:

- ensure that the FOSS and NCMS "Appeals" screens are completed promptly; and
 - enter any motions or applications associated with the appeal in the FOSS "Motions" screen.
-

12.3. Record of refusal (outside Canada)

IAD rule 10(1) requires that the Minister prepare an appeal record that includes a table of contents and the following documents:

- any documents the Minister of C&I has in their possession relevant to the decision on the residency obligation and the issues raised in the appeal; and
- the officer's written decision and written reasons.

All parties must receive the appeal record and proof of compliance no later than 120 days after the Minister has received the notice of appeal.

12.4. Requests to return to Canada for the hearing

A31(3)(c) provides that a permanent resident shall be issued a travel document if:

- they were physically present in Canada at least once in the last 365 days; and
- they have made an appeal under A63(4); or

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

- the period for making an appeal has not expired.

The situation will arise where permanent residents who do not meet the residency requirement request a travel document during the 60-day appeal period although they have not filed an appeal. Persons in this situation would be allowed to enter Canada during the 60-day appeal period even if they have not yet filed an appeal. In cases such as this, the port of entry will notify the hearings office. Hearings offices should monitor the file to determine if an appeal is filed. When an appeal is not filed within the 60-day period, the file should be referred to the CBSA for investigation.

When an appellant is not eligible for a travel document under A31(3)(c), they must make an application to the IAD requesting to return to Canada for their hearing [IAD rule 46(1)].

Applications must be filed with the IAD and the Minister no later than 60 days after the notice of appeal is filed. If the IAD is satisfied the presence of the permanent resident at the hearing is necessary, it will order that the permanent resident physically appear at the hearing. Where the IAD has ordered that the appellant be physically present, an officer shall issue a travel document for that purpose [A175(2)].

12.5. Dismissed appeals—Type of removal order

A69(3) requires that where the IAD dismisses an appeal under A63(4) and the permanent resident is in Canada, it shall make the removal order. Neither the Act nor the Regulations specify what type of removal order should be issued by the IAD. To ensure consistency with procedures in cases involving the in-Canada determination of residency obligation, hearings officers should request that the IAD issue a departure order for failure to comply with the residency obligation [R228(2)].

12.6. Failure to appear at an appeal

If an appellant fails to appear for their appeal, hearings officers should ask the IAD to dismiss the appeal. Where an appellant was determined to have lost their residency status outside Canada, officers should ask that the IAD issue the appropriate removal order *in absentia*. Appeals should not be declared abandoned in cases where persons have returned to Canada for their appeal. This would result in an abuse of process as there are no other means for the Minister of C&I to obtain a removal order.

13. Procedure: The Minister's appeal rights

If a member of the Immigration Division decides at an admissibility hearing that the person concerned is not a person against whom a removal order should be made or, that the person may be granted authorization to enter Canada, the Minister of PSEP may appeal that decision to the IAD on questions of law or fact, mixed law and fact, or on question of a breach of a principle of natural justice. [A63(5) and A67(1)].

The decision to appeal an Immigration Division decision to the IAD is made at Litigation Management (BCL), NHQ, by persons with delegated authority from the Minister. When the Minister decides to appeal, Litigation Management will:

- serve a notice of appeal on the respondent and the IAD within 30 days of the Immigration Division's decision [IAD rule 11];
- send a copy of the material to the appropriate hearings office and advise the hearings officer supervisor where the decision was made; and
- provide a copy of the notice of appeal to the Director, Inland Enforcement, CBSA,, NHQ. or the Director, Legislative and Regulatory Policy, Admissibility Branch, CIC, NHQ.

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

The Immigration Division must provide the Minister of PSEP and the IAD with a certified true copy of the record no later than 45 days after the IAD receives the notice of appeal [IAD rule 12(3)].

When the Minister of PSEP begins an appeal, Litigation Management (BCL) NHQ, will complete the FOSS "Appeals" screen. If the Minister or the respondent begins a motion or application, hearings officers are responsible for completing the "Motions" screen.

The IAD may make, and stay, the applicable removal order, or it may dismiss the appeal [A69(1) and (2)]. When the IAD makes a removal order, if the subject of the removal order has a right of appeal to the IAD under A63(2) or A63(3), they are deemed to have made an appeal to the IAD on the basis that all the circumstances of the case warrant special consideration.

After the IAD renders its decision, the hearings office promptly updates the FOSS "Appeals" or "Motions" screens and the NCMS screens, as the case may be. This is particularly important when the IAD issues a removal order. In those cases, the officer completes the appropriate removal order by hand and forwards the CBSA's copy of the order to the appropriate office.

If the IAD dismisses the Minister's appeal and the officer, in consultation with their supervisor, believes that an application for judicial review of the decision is warranted, the officer should immediately bring the decision to the attention of Litigation Management(BCL) NHQ .The documents may be faxed at (613)954-4285 and e-mailed to Nat-Litigation_Management@cic.gc.ca (See ENF 9, Judicial Review).

In addition, in dismissed appeals, the officer should make a written request for the written reasons.

14. Procedure: Roles and responsibilities

| Role | Responsibilities |
|--------------------------------------|---|
| CIC and CBSA's Litigation Management | The Litigation Management Division (BCL), situated in the Case Management Branch, NHQ, has responsibility for the management of all CIC and CBSA cases involving litigation in the Federal Courts and for ministerial appeals before the Immigration Appeal Division pursuant to A63(5). See ENF 9, Judicial Review, for more information.. |
| Hearings officer | <p>Hearings officers present cases in accordance with policies and functional direction from either CIC, Legislative and Regulatory Policy, Admissibility Branch, or the CBSA, Inland Enforcement , NHQ.</p> <p>The role of a hearings officer as the Minister's counsel is to ensure that the integrity of the system is upheld and that justice is served. In most circumstances, this requires the hearings officer to defend the decision of an officer not to issue a visa, or the decision of a Minister's delegate or the Immigration Division to issue a removal order.</p> <p>Exceptions may arise where the original decision is not defensible due to an error in law or fact or due to a breach of natural justice. Officers should consent to an appeal being allowed only when the circumstances of the case merit the original decision being overturned. Due to the <i>de novo</i> nature of IAD hearings, hearings officers will often have different evidence to consider and present to the IAD than that considered by the original decision-maker. New evidence is often introduced through documentation at the hearing.</p> <p>It is essential that hearings officers be familiar with the IAD Rules as they govern procedures such as disclosure, preparation of the record and procedures at IAD hearings.</p> |

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

| | |
|---|--|
| | Hearings officers represent the Minister of C&I or the Minister of PSEP in proceedings before all Divisions of the IRB. Hearings officers have direct contact with counsel and clients. They should always be professional in both decorum and appearance. Hearings officers should maintain their professionalism in their telephone manner, written correspondence, conduct at hearings and all other interactions with the public. Professionalism should be exhibited by properly preparing for cases and treating all participants at a hearing with dignity and respect. The participants include members, counsel, witnesses, interpreters and observers, if any. |
| Legislative and Regulatory Policy Division, Admissibility Branch, CIC, NHQ. | The Director, Legislative and Regulatory Policy Division, CIC, at NHQ is responsible for all admissibility policies except security, war crimes and organized crime. The Director is also responsible for policies related to appeal rights and grounds for appeals. |
| Inland Enforcement, CBSA, NHQ. | The Director, Inland Enforcement, CBSA, at NHQ is responsible for admissibility hearings as well as appeals of a removal order by a permanent resident, a protected person or a holder of a permanent resident visa. |

Appendix A Procedural fairness letter

Date:

File:

Dear:

This letter is in reference to your application for permanent residence in Canada.

I have received a medical notification stating that you/your family member (*insert name of family member*) have/has the following medical condition or diagnosis: (*insert name of disease or condition and diagnosis from IMM 5365B*) which, in the opinion of a medical officer:

(insert narrative from IMM 5365B).

This information raises concerns that you/your family member is likely to be a danger to public health/public safety in Canada/might reasonably be expected to cause excessive demands on health or social services in Canada. For this reason, you may be a member of the inadmissible class under section 38(1) of the *Immigration and Refugee Protection Act* (the Act) and your application for permanent residence could be refused.

Section 38(1) of the Act states that:

A foreign national is inadmissible on health grounds if their health condition

(a) is likely to be a danger to public health;

(b) is likely to be a danger to public safety; or

(c) might reasonably be expected to cause excessive demands on health or social services.

Before I make my final decision, you may submit additional information or documents relating to the above medical condition, diagnosis or opinion. You may also submit any information addressing the issue of excessive demand if it applies to your case.

You have until (*insert date which is 60 days after date of letter*) to submit additional information to our office at the address shown below.

Please ensure that you quote the file number indicated at the top of this letter on any information you submit. We will then forward the information to the appropriate medical officers, who will review the material and advise us of their conclusions.

You are responsible for any fees charged by doctors or other professionals you consult as a result of this opportunity to submit new information.

If you choose not to respond with additional information, a decision will be rendered on your application based on the information before us.

Yours truly,

(Appropriate Signature Block)

Appendix B Letter to medical officer - New medical information

Office File:

Medical file:

Director, Operations Directorate
Medical Services Branch
Citizenship and Immigration Canada
219 Laurier Avenue West, 3rd Floor
Ottawa Ontario
K1A 0L5 Canada
or MOF address for other offices

Dear Doctor:

Re: *(Enter applicant's complete name and DOB)*

Enclosed is additional medical material submitted under procedural fairness on behalf of the above-named applicant, who was previously assessed at your office under the above-referenced medical file number.

Kindly review the material and advise us of your conclusions at your earliest opportunity.

Sincerely,

Appropriate signature block

Encl.

Appendix C Examples of cases that do not need to be forwarded to Operations Directorate, Medical Services Branch, NHQ, by the officer.

The officer should not forward the new medical information about the applicant to Operations Directorate, Medical Services Branch at NHQ when it either has no link with the applicant's reason for refusal on medical grounds or the medical information is so vague or of such a general nature that it has little or no probative value. Instead, the officer should request that a date be set for a hearing at the IAD. The following are examples of cases where the officer should not forward the new medical information to the Medical Services Branch at NHQ:

1. when the person concerned was initially found inadmissible because they were diagnosed with emphysema, and the new medical information received about the applicant states that they are being treated for an unrelated condition (e.g., a broken leg);
2. when the applicant was initially found inadmissible because of hypertension and the new medical information received deals with the applicant's prognosis with diabetes; or
3. the applicant was found inadmissible because of cancer, and the new medical information submitted states that the applicant's hypertension is being treated and there is a good prognosis.

Note: If the officer is uncertain whether the submitted information refers to the reason for medical inadmissibility, they should request clarification from their regional medical officer.

Appendix D Sample letter from hearings officer to appellant or counsel for the appellant - New medical examinations

Appellant/counsel's address

Subject: New medical examination required for *(insert name of applicant)*

Dear Sir/Madam:

Further to the new medical information submitted by *(insert name of applicant)* on *(insert date)*, with respect to *(describe in detail the newly submitted medical information)*, please be advised that a new medical examination will be required in order for us to make a determination about the applicant's case.

Please note that it is your responsibility to ensure that the applicant complies with the officer's instructions to:

- forward passport-size photographs within 30 days (if required by the officer); and the applicant may either:
- undergo the new medical examination within 30 days of receipt of this notification letter *(medical submitted to applicant by office)*; or alternatively,
- provide the officer, within 30 days of receipt of this notification letter, with a date for the medical examination.

We wish to advise you that should the applicant fail to comply with the above-mentioned 30-day time frame, we will have no other choice but to discontinue the medical reassessment process concerning the applicant's file.

Signed at _____, on _____

Hearings officer

c.c.: IAD Registry

Appendix E Statement of Service

The Registrar
Immigration and Refugee Board
Division
Address

Re: *(Insert name of person concerned)*

FOSS ID:

Address

IRB File:

TAKE NOTICE that the attached documents were provided to *(insert name of person concerned)* at the above-noted address on *(insert date)*. The documents were provided to the person concerned by the method of service noted below:

- by hand;
- regular mail;
- registered mail;
- certified mail;
- courier;
- priority post;
- facsimile; or
- other.

Name and position
Hearings Office
Address

Appendix F Notice of cancellation, by operation of law, of a stay of removal order granted by the IAD [A68(4)]

Date

Name of appellant

FOSS ID/IRB file

Address

Re: Notice of cancellation, by operation of law, of a stay of removal order granted by the IAD

Dear Mr./Ms. (name of appellant):

As provided for in subsection 68(4) of the *Immigration and Refugee Protection Act* (hereinafter “the Act”), you are hereby notified, in accordance with Immigration Appeal Division rule 27, that the stay of the removal order that was granted to you on (*insert date*) by the Immigration Appeal Division is cancelled by operation of law because of your conviction for (*enter nature of conviction*), contrary to (*insert relevant provision of an Act of Parliament*) on (*insert date*) at (*insert place*), this being a conviction for which you have been sentenced to a term of imprisonment of (*insert prison sentence imposed*). The maximum term of imprisonment for such an offence is (*insert maximum term of imprisonment*). The relevant provisions of the Act stipulate that:

68.(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.

36.(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

As a result of this conviction, the stay of the removal order that you enjoy is cancelled by operation of law, and your appeal is now terminated. The removal order that was issued against you on (*insert date*) is now enforceable.

Sincerely,

Name of officer

Hearings Officer

TAKE NOTICE that, pursuant to subsection 72(1) of the Act you may file an application seeking leave from the Federal Court to commence an application for judicial review of any matter—a decision, determination or order made, a measure taken or a question

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

raised—under the Act. Pursuant to paragraph 72(2)(b) of the Act, notice of such an application must be served on the other party and filed in the Registry of the Federal Court within 15 days.

c.c.: Registry of the IAD
Counsel for the appellant

Encl. Certificate of conviction
Declaration of service

Appendix G Application to reconsider an appeal [A197, A64 and IAD rule 26]

IRB file number

Appellant's ID

IMMIGRATION AND REFUGEE BOARD

IMMIGRATION APPEAL DIVISION

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION or

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

- and -

NAME OF APPELLANT

Respondent

APPLICATION TO RECONSIDER AN APPEAL

Sections 197 and 64, *Immigration and Refugee Protection Act*

Rule 26, *Immigration Appeal Division Rules*

TO ONE OF THE MEMBERS OF THE IMMIGRATION APPEAL DIVISION OF THE IMMIGRATION AND REFUGEE BOARD:

TAKE NOTICE that the Minister of Citizenship and Immigration or the Minister of Public Safety and Emergency Preparedness is respectfully asking the Immigration Appeal Division (hereinafter "the IAD") to find that the Respondent has not complied with the conditions of the stay of the removal order that was granted to them on (*insert date of the decision granting the stay*), to cancel that stay and to dismiss the appeal in accordance with sections 197 and 64 of the *Immigration and Refugee Protection Act* (hereinafter "IRPA").

IN SUPPORT OF ITS APPLICATION, THE APPLICANT STATES:

The facts

Note: In the statement of facts, the hearings officer shall mention, in particular, the following items of information (the following list is not exhaustive):

- The Respondent obtained permanent residence, and the date on which the permanent residence was obtained.
- The Respondent's criminal record since arriving in Canada (in detail).
- A brief history of the Respondent's immigration record .
- Date of hearing of the appeal before the IAD.
- Decision rendered by the IAD, and date of the decision.

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

- A list of the conditions accompanying the stay of the removal order.
- A list of the conditions that have been breached.

Law

The relevant provisions of IRPA provide as follows:

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.

64.(1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

(2) For the purposes of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

36.(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

The relevant provisions of the *Immigration and Refugee Protection Regulations* provide as follows:

320.(5) A person who on the coming into force of this section had been determined to be inadmissible on the basis of paragraph 27(1)(d) of the former Act is

(a) inadmissible under the Immigration and Refugee Protection Act on grounds of serious criminality if the person was convicted of an offence and a term of imprisonment of more than six months has been imposed or a term of imprisonment of 10 years or more could have been imposed; or

(b) inadmissible under the Immigration and Refugee Protection Act on grounds of criminality if the offence was punishable by a maximum term of imprisonment of five years or more but less than 10 years.

Submissions

Note: At the beginning of the submissions section, the hearings officer must describe in detail what the Respondent did to breach the conditions of the stay that had been granted to them, and/or what the Respondent failed to do to comply with these conditions.

The Minister maintains that the Respondent has in fact breached the conditions of the stay that was granted to them on (*insert date of the decision granting the stay*). Since the Respondent was granted a stay under the former *Immigration Act, 1976*, and has not complied with the conditions of the stay, the Minister is of the opinion that section 197 of IRPA is applicable to the Respondent.

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

If the IAD finds that there has in fact been a breach of conditions by the Respondent, it must then determine whether the original inadmissibility for which the Respondent was granted a stay falls within section 64 of IRPA.

Note: The hearings officer must demonstrate in detail that the original inadmissibility for which the Respondent was granted a stay falls within section 64 of IRPA.

For example:

It is clear from the certificate of conviction and the court documents filed in support of this Application that the Respondent was in fact convicted of (*insert nature of conviction*), contrary to (*insert relevant provision of an Act of Parliament*) on (*insert date*) at (*insert place*), this being a conviction for which a term of imprisonment of (*insert term of imprisonment imposed*) has been imposed on the Respondent. The maximum term of imprisonment for such an offence is (*insert maximum term of imprisonment*).

The offence for which the Respondent was convicted is one of serious criminality within the meaning of subsection 36(1) of IRPA. Consequently, the Minister respectfully submits that the IAD must find that the appellant has lost their right of appeal.

The Minister believes that this interpretation of sections 197 and 64 of IRPA reflects Parliament's intention when it enacted IRPA, namely, to protect the health and safety of Canadians and to maintain the security of Canadian society [paragraph 3(1)(h) of IRPA], and to promote international justice and security by denying access to Canadian territory to persons who are security risks or serious criminals [paragraph 3(2)(i) of IRPA]. Where the appellant has been granted a stay, sections 197 and 64 of IRPA provide that the person will no longer enjoy a right of appeal if they do not comply with the conditions of the stay that have been imposed on them. The Minister is of the opinion that Parliament's intention in framing this transitional provision was to restrict the right of appeal of such persons.

The Minister also wishes to emphasize that the restriction on the right of appeal contained in section 64 of IRPA also appeared in subsection 70(5) of the former *Immigration Act, 1976*. The case law developed by the Federal Court regarding the interpretation of this latter provision recognized that the IAD lost jurisdiction where the tests of subsection 70(5) of the former *Immigration Act* were met:

Williams v. Canada (M.C.I.) (C.A.), 147 D.L.R. (4th) 93, 212 N.R. 63, [1997] 2 F.C. 646, 4 Admin L.R. (3rd) 200 (Fed. C.A.)

The Federal Court had ruled that subsection 70(5) of the former *Immigration Act* had the effect of restricting, or even eliminating, the right of appeal to the IAD where the tests of that subsection were met:

Casiano v. Canada (M.C.I.), (September 20, 1996) IMM-746-96 [1996] F.C.J. No. 1199

Pratt v. Canada (M.C.I.), (April 30, 1997) IMM-3160-95 (T.D.) [1997] F.C.J. No. 522

Luksicek v. Canada (M.C.I.), (April 30, 1997) IMM-3528-95 (T.D.) [1997] F.C.J. No. 523

In the Minister's view, then, it is no coincidence that the wording of IRPA and of the former *Immigration Act* is the same. Parliament has clearly replaced the restriction on the right of appeal of persons covered by the danger opinion of subsection 70(5) of the former *Immigration Act* by the restriction on the right of appeal of persons to whom section 64 of IRPA applies.

Therefore, in light of the above, the Minister is of the opinion that the Respondent has in fact breached the conditions of the stay that was granted to them by the IAD and, pursuant to section 197 of IRPA, has lost their right of appeal within the meaning of section 64 of IRPA.

CONSEQUENTLY, MAY IT PLEASE THE IMMIGRATION APPEAL DIVISION TO

FIND that the Respondent has not complied with the conditions of the stay of the removal order that was granted to them on (*insert date of the decision granting the stay*).

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

CANCEL the aforementioned stay.

DISMISS the appeal.

City, date

Hearings Officer

c.c.: Appellant/Counsel for the Appellant

Enclosures:

All the documents that support the Minister's claim that there has been a breach of conditions

Declaration of service

Appendix H Application to reconsider an appeal (A197, A68(4) and IAD Rule 26)

IRB file number

Appellant's ID

IMMIGRATION AND REFUGEE BOARD

IMMIGRATION APPEAL DIVISION

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION or

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

- and -

NAME OF APPELLANT

Respondent

APPLICATION TO RECONSIDER AN APPEAL

Sections 197 and 68(4), *Immigration and Refugee Protection Act*

Rule 26, Immigration Appeal Division Rules

TO ONE OF THE MEMBERS OF THE IMMIGRATION APPEAL DIVISION OF THE IMMIGRATION AND REFUGEE BOARD:

TAKE NOTICE that the Minister of Citizenship and Immigration or the Minister of Public Safety and Emergency Preparedness respectfully asks the Immigration Appeal Division (hereinafter "the IAD") to find that the Respondent has not complied with the conditions of the stay of the removal order that was granted to them on (*insert date of the decision granting the stay*), to cancel that stay and to dismiss the appeal pursuant to section 197 and subsection 68(4) of the *Immigration and Refugee Protection Act* (hereinafter "IRPA").

IN SUPPORT OF ITS APPLICATION, THE APPLICANT STATES:

The facts

In the statement of facts section, the hearings officer shall mention, in particular, the following items of information (the following list is not exhaustive):

- The Respondent obtained permanent residence, and the date on which the permanent residence was obtained.
- The Respondent's criminal record since arriving in Canada (in detail).
- A brief history of the Respondent's immigration record (e.g., Report 20, 27, 44, removal order, etc.).
- The date of hearing of an appeal before the IAD.
- The decision rendered by the IAD, and the date of the decision.

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

- A list of the conditions accompanying the stay of the removal order.
- A list of the conditions that have been breached.

Law

The relevant provisions of IRPA provide as follows:

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.

68.(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.

36.(1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

- (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
- (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
- (c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

The relevant provisions of the *Immigration and Refugee Protection Regulations* provide as follows:

320.(5) A person who on the coming into force of this section had been determined to be inadmissible on the basis of paragraph 27(1)(d) of the former Act is

- (a) inadmissible under the *Immigration and Refugee Protection Act* on grounds of serious criminality if the person was convicted of an offence and a term of imprisonment of more than six months has been imposed or a term of imprisonment of 10 years or more could have been imposed; or
- (b) inadmissible under the *Immigration and Refugee Protection Act* on grounds of criminality if the offence was punishable by a maximum term of imprisonment of five years or more but less than 10 years.

Submissions

Note: At the beginning of the submissions section, the hearings officer must describe in detail what the Respondent did to breach the conditions of the stay that had been granted to them, and/or what the Respondent failed to do to comply with these conditions.

The Minister maintains that the Respondent has in fact breached the conditions of the stay that was granted to them on (*insert date of the decision granting the stay*). Since the Respondent was granted a stay under the former *Immigration Act, 1976*, and has not complied with the conditions of the stay, the Minister is of the opinion that section 197 of IRPA is applicable to the Respondent.

It is clear, from the certificate of conviction and the court documents filed in support of this Application, that the Respondent was in fact convicted of (*insert nature of conviction*), contrary to (*insert relevant provision of an Act of Parliament*), on (*insert date*) at (*insert place*), this being a conviction for which a term of imprisonment of (*insert term of imprisonment imposed*) has been

ENF 19 Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB)

imposed on the Respondent. The maximum term of imprisonment for such an offence is (*insert maximum term of imprisonment*). The offence for which the Respondent was convicted is one of serious criminality within the meaning of subsection 36(1) of IRPA.

If the IAD comes to the conclusion that there was in fact a breach of conditions by the Respondent because of a conviction for an offence described in subsection 36(1) of IRPA, the Minister is of the opinion that subsection 68(4) applies. The Minister submits that the wording of subsection 68(4) of IRPA is unambiguous and that the IAD must confirm that the stay of the removal order granted to the Respondent is cancelled by the operation of law and the Respondent's appeal is now terminated.

The Minister respectfully submits that he does not have to wait for the IAD to rule on subsection 68(4) of IRPA, since the IAD's finding that a breach of conditions has occurred is sufficient to enable the Minister to consider the applicability of subsection 68(4). The IAD's final decision, finding that a breach of conditions has occurred, and the existence of the facts necessary for the application of section 68(4) make the removal order enforceable.

The Minister believes that this interpretation of sections 197 and 68(4) reflects Parliament's intention when it enacted IRPA, namely, to protect the health and safety of Canadians and to maintain the security of Canadian society [paragraph 3(1)(h) of IRPA], and to promote international justice and security by denying access to Canadian territory to persons who are security risks or serious criminals [paragraph 3(2)(i) of IRPA]. Where the person has been granted a stay, sections 197 and 68(4) of IRPA provide that the stay will be cancelled by operation of law and the appeal terminated if the person is convicted of another offence described in subsection 36(1).

The Minister is of the opinion that Parliament's intention in framing this transitional provision was to cancel, by operation of law, the stay of a removal order made against any person convicted of another offence described in subsection 36(1), in order to expedite the removal of dangerous criminals who continue to commit offences involving serious criminality after being given a second chance.

Therefore, in light of the above, the Minister is of the opinion that the Respondent has in fact breached the conditions of the stay that was granted to them by the IAD, that the stay is cancelled by operation of law, and that the appeal is now terminated, as provided by subsection 68(4) of IRPA.

CONSEQUENTLY, MAY IT PLEASE THE IMMIGRATION APPEAL DIVISION TO

FIND that the Respondent has not complied with the conditions of the stay of the removal order that was granted to them on (*insert date of the decision granting the stay*).

CONFIRM that the stay is cancelled by operation of law pursuant to subsection 68(4) of IRPA, and that the Respondent's appeal is now terminated.

City, date

Hearings Officer

c.c.: Appellant/Counsel for the Appellant

Enclosures:

All the documents that support the Minister's claim that there has been a breach of conditions.

Declaration of service.