Citizenship and Immigration Canada
Citoyenneté et Immigration Canada

OP 21

Appeals

Canada

OP 21 Appeals

Updates to chapter

Listing by date:

Date: 2005-10-25

Changes were made to OP 21 in order to reflect the CIC and CBSA policy responsibility and service delivery roles.

1. What this chapter is about

This chapter provides an understanding of the process of appeals of decisions made under the *Immigration and Refugee Protection Act* (IRPA). This chapter deals specifically with overseas cases that are subject to an appeal before the Immigration Appeal Division (IAD).

2. Program objectives

IRPA allows specific groups of people to appeal to the IAD in order to:

- ensure that persons ordered removed from Canada after an admissibility hearing have had the benefit of a full hearing on the allegations against them. The Act recognizes an additional commitment to permanent residents and protected persons by allowing them to appeal 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 in and outside of Canada.

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

- ensure that families are reunited in Canada;

- protect the health and safety of Canadians and maintain the security of Canadian society.

3. The Act and Regulations

For legislation regarding appeals see:

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 – Minister of Public Safety and Emergency Preparedness (PSEP)	A63(5)
No appeal - inadmissibility	A64(1)
No appeal - serious criminality	A64(2)
No appeal - misrepresentation	A64(3)
Humanitarian and compassionate considerations - Jurisdiction of the IAD	A65
Disposition of an appeal	A66
Allowing an appeal	A67
Effect of allowing an appeal	A67(2)
Dismissal of an appeal	A69(1)
Removal order - permanent resident	A69(3)

IAD decision binding	A70(1)
Reopening appeal	A71
Immigration and Refugee Board	A151
Sole and exclusive jurisdiction	A162(1)
Presence of parties	A164
Proceedings - all Divisions	A166
Right to counsel	A167(1)
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)
Proceedings - IAD	A175(1)
Presence of a permanent resident at a hearing	A175(2)
Specified removal order - loss of permanent resident status	R228(2)

3.1. Forms

Nil.

4. Instruments and delegations

Pursuant to A6(1) and A6(2), the Minister of Citizenship and Immigration (C&I) and the Minister of Public Safety and Emergency Preparedness (PSEP) have designated persons or class of persons as officers to carry out any purpose of any provision, legislative or regulatory, and have specified the powers and duties of the officers so designated. These delegations may be found in chapter IL 3, Designation of Officers and Delegation of Authority.

5. Departmental policy

The Minister of C&I has the policy responsibility with respect to family class sponsorship refusal appeals and residency determination appeals.

The Minister of PSEP has the policy responsibility with respect to removal order appeals.

It is the Canada Border Services Agency (CBSA) that has the responsibility for the service delivery of all appeals before the IAD on behalf of either Minister, depending on who has the policy lead.

For more information, please refer to ENF 19, Appeals before the Immigration Appeal Division (IAD) of the Immigration and Refugee Board (IRB).

5.1. Humanitarian and compassionate considerations

The IAD has an equitable jurisdiction, which allows it to consider factors that may warrant an appeal being allowed despite the fact that the decision being appealed 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)]. When considering an appeal of a family class sponsorship, the IAD may consider some of the following factors:

- whether the admission of the applicant 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 reoffending (for refusals based on criminal grounds).

The IAD will balance these factors against the grounds for the refusal under appeal, and if it finds in favour of the appellant, will set aside the decision. Where an appeal is based on an application as a member of the family class, the IAD must first be satisfied that the foreign national is a member of the family class, and that the sponsor is a sponsor within the meaning of the Regulations before it can consider humanitarian and compassionate considerations [A65].

5.2. Hearings

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.

The IAD hearings are *de novo*, and therefore not limited strictly to reviewing the evidence that led to the refusal or removal order. In *Kahlon v. Minister of Employment and Immigration* (1989), 7 IMM LR (2d) 91, the Federal Court of Appeal established that the IAD must hear the whole case, taking into consideration any additional facts brought to its attention.

5.3. Evidence

The IAD has broader powers regarding the admission of evidence than regular courts, as it is not bound by any legal or technical rules of evidence. During a hearing, the IAD may base a decision on evidence it considers credible or trustworthy in the circumstances, even if the strict rules of evidence have not been met.

5.4. 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 might instead direct that the execution of the order be stayed for a set period of time, with terms and conditions attached. A66 requires the IAD to impose mandatory conditions specified in the Regulations for every stay. Additional conditions may be imposed at the IAD's discretion [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 or on the IAD's own initiative.

5.5. 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 responsible Minister may request written reasons within 10 days after the day they receive the decision. [IAD Rule 54(2)]

5.6. The role of the Minister

The Minister is party to all appeals filed with the IAD. In most cases the Minister's representative is the respondent, taking a position supporting the decision under appeal. The Minister may also file appeals with the IAD, as the appellant, to challenge favourable decisions of members of the Immigration Division.

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 departments. 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.

Hearings officers represent the Minister of C&I and the Minister of PSEP. On occasion, lawyers of the Department of Justice (DOJ) are assigned to provide this representation.

Hearings officers and DOJ lawyers present cases and take positions in accordance with instructions channelled through Admissibility Branch, Legislative and Regulatory Policy Division, CIC, and Inland Enforcement, the CBSA at NHQ. These instructions may be specific to an individual case, or be in the form of general policy instructions applicable to the various categories of cases.

5.7. Applications

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

.

5.8. Loss of appeal rights

A64 specifies the circumstances under which a foreign national, a sponsor or a permanent resident loses their right of appeal. No appeal may be made to the IAD by a foreign national or their sponsor or by a permanent resident in respect of a decision that was based on a determination that 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. Serious criminality is further defined in A64(2).

A64(3) also provides for the loss of appeal rights in respect of a decision that was based on a finding of inadmissibility on the ground of misrepresentation, unless the foreign national in question is the sponsor’s spouse, common-law partner or child.

.

5.9. Consenting to an appeal

The role of the hearings officer as the Minister’s counsel (Minister of C&I or Minister of PSEP) is to ensure the correct decision is made by the IAD. In most circumstances, this requires the hearings officer to defend the decision of the officer or the Minister’s delegate or Immigration Division to issue a removal order. However, exceptions may arise where the original decision is not tenable.

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

6. Definitions

Nil.

7. Procedure: Roles and responsibilities

This role/office:	Is responsible for:
The Immigration Appeal Division	The Immigration Appeal Division 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 in 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. The principal matters that may be brought before the IAD are: • refusal of a sponsorship application for members of the family class; • refusal of an immigration application by a member of the family class; • 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.
Legislative and Regulatory Policy Division, Admissibility Branch, CIC, NHQ	The Director,Legislative and Regulatory Policy Division, CIC, 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 to appeal.
Litigation Management	Litigation Management (BCL) is situated in the Case Management Branch, NHQ, and is responsible for the management of CIC and the CBSA's cases involving litigation in the federal courts of decisions made under IRPA and for Ministerial Appeals before the IAD pursuant to A63(5). BCL provides instructions to DOJ lawyers with respect to pending litigation. (For more information on BCL and judicial reviews, see OP 22, Judicial Review.)
Inland Enforcement, CBSA, NHQ	The Director of Inland Enforcement, the CBSA, 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.

8. Procedure: Family class sponsorship appeals

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

8.1. Family class sponsorship appeals

If a Canadian citizen or permanent resident makes 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)]. The sponsor must be given the reasons for the refusal and also told of their right to appeal the decision to the IAD.

Details regarding loss of appeal rights and exceptions can be found in section 5.8 above.

8.2. Notice of appeal

When an appeal has been filed with the IAD, CIC has 120 days to produce the official record. Where the record is not produced in 120 days, the IAD may schedule the hearing and proceed without the record. Production of the record for the IAD is a joint process between the visa office and the hearings office. It is crucial for all parties with a stake in production of the record to cooperate. The following measures would ensure that records are handled more efficiently:

- in the case of family class sponsorship refusals, the notice of appeal will be sent by the IAD to the visa office, with a copy to the appropriate hearings office. In the case of residency determination appeals, the IAD will advise the appropriate hearings office which will in turn advise the visa office;

- the visa office will acknowledge receipt of the notice by e-mail to the hearings office and record receipt of notice in CAIPS. The CAIPS notes will indicate receipt of the notice of appeal, the IAD file number and the hearings office concerned;

- the hearings office will correlate acknowledgments of receipt with notices in order to identify undelivered mail.

8.3. Production of the record

When a notice of appeal has been received, the visa office should complete the following:

- make a copy of the paper file to keep in the office;

- send the original file and a copy of the CAIPS notes to the hearings office. The visa office will use a diplomatic bag where possible or a courier where operationally feasible. The file and CAIPS notes should be sent within four weeks of the visa office receiving the IAD notice;

  In cases of family class medical refusals, send the medical file with the visa office file when the medical and visa officers are at the same visa office. However, photographs and x-rays should be kept at the visa office. Keeping the photographs on file will help speed up the issuance of new medical instructions, should this become necessary later on. For complete instructions for medical officers regarding the appeal process, see OP 15, Medical Procedures.

Note: For cases where the medical officer is at another visa office, the medical officer should send the medical file directly to the hearings office. In such cases, the visa office is responsible for informing the medical officer of the name of the sponsor, the file number and the address. The medical officer must include the sponsor's name and the hearings office file number in a covering memorandum.

- enter sending details into CAIPS when the record leaves the office, i.e., dip bag or waybill number and shipping date;

Note: Under IRPA, visa officers are no longer required to prepare a statutory declaration. Therefore, it is vital that the CAIPS notes and the refusal letter provide a complete account of the decision made in the case.

- designate addresses of appropriate contacts for reminders, i.e., Manager of Registry, Program Manager.

The hearings office will check CAIPS if the record has not been received within four weeks after the visa office acknowledged receipt of the notice. If there is no indication that the record has been sent, the hearings office will send a reminder e-mail to the visa office. The visa office should respond immediately with a case status update.

8.4. Procedures upon receipt of new medical information during an appeal

If new medical information is provided during the appeal process, and the medical officer determines that a new examination is warranted, the visa office must:

- contact the applicant to request photographs;
- issue new medical instructions within 30 days;
- advise the applicant that a new medical examination must be conducted within 30 days or, if that is not possible, that the visa office must be informed before the end of the 30-day period of a date of a medical appointment. Failure to comply will result in the termination of the medical re-assessment process;
- indicate in CAIPS the date on which the new medical instructions were issued;
- forward the new assessment by the medical officer to the hearings officer with a copy to the IAD;
- advise the hearings officer if the applicant does not comply with the instructions to undergo a new medical examination.

8.5. Appeal allowed

After the 15-day period has elapsed to apply for an application for leave and judicial review, the IAD will provide hearings offices with copies of final decisions and reasons in each appeal of a refusal of family class applicants.

The IAD forwards its decision to the appropriate hearings office and a copy is then put in the original client file. The client file is then returned to the visa office, who may then resume processing as per the IAD's decision.

A70(1) obliges an officer to respect the decision of the IAD in re-examining an application. However, the officer must review the application to determine whether the application meets all other requirements of eligibility and admissibility. Sponsors and applicants are exempt from any requirements that the IAD has set aside in its decision. In rare cases, if there are new grounds of ineligibility or inadmissibility, or grounds that were not assessed in the first decision, the application may be refused again.

Applicants may be re-examined as part of a determination. However, re-examination is not always necessary. An officer may not have reason to believe they are now inadmissible for new causes (see OP 15, section 17, Procedure: Allowing appeals).

If an officer is satisfied that re-examination will not uncover new inadmissibility, the reasons are to be recorded in the case notes.

A Permanent Resident Visa is issued unless there are new reasons not to do so. A Temporary Resident Permit is not issued to overcome the inadmissibility set aside by the IAD.

8.6. Appeal withdrawn

Appeals are *de novo* hearings. If the facts no longer support the refusal, the IAD must allow the appeal.

Hearings officers may resolve cases before the hearing stage; in which case, sponsors withdraw their appeals, and hearings officers instruct the visa office to resume processing.

Examples of such instances include the improvement of an applicant's medical condition, a positive result from a DNA test of a relationship, or the death of an inadmissible family member.

When a hearings officer instructs the visa office to resume processing because there are no longer any grounds for refusal, the application is treated as if the appeal was allowed (see section 8.5 above). The hearings office sends the original file with a copy of the withdrawal or consent to the visa office.

9. 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.

9.1. Outside Canada

A63(4) stipulates that permanent residents may appeal to the IAD against a decision made outside Canada on the residency obligation under A28. Pursuant to IAD Rule 9:

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

For information on how to produce the record, see section 8.3 above.

9.2. Requests to return to Canada for the hearing

A31(3) provides that a permanent resident shall be issued a travel document if an officer is satisfied that:

- they were physically present in Canada at least once in the last 365 days;
- they have made an appeal under A63(4); or
- 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 though they have not filed an appeal. Persons in this situation are 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 investigations.

When an appellant is not eligible for a travel document under A31(3), they may 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 of C&I no later than 60 days after the notice of appeal is filed. If the IAD is satisfied that the presence of the permanent resident at the hearing is necessary, they 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 facilitation visa for that purpose [A175(2)].

For more detailed information on loss of residency status appeals, see ENF 19, section 12, Procedure: Loss of residency status appeals, and see ENF 23, Loss of Permanent Resident Status.

For more detailed information on processing residency determination cases, see OP 10, Permanent Residency Status Determination.