Date: 20070208

Docket: A-20-06

Citation: 2007 FCA 35

CORAM: **LINDEN J.A.**
NADON J.A.
EVANS J.A.

BETWEEN:

SHAHIN NAZIFPOUR

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Toronto, Ontario, on November 2, 2006.

Judgment delivered at Ottawa, Ontario, on February 8, 2007.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: LINDEN J.A.
NADON J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. INTRODUCTION

[1] For forty years, most non-nationals permanently resident in Canada have had a statutory right to appeal to an independent administrative tribunal against their deportation. The Supreme Court of Canada settled thirty-five years ago that decisions of the appeal tribunal were not "final", principally because the tribunal had a broad discretionary or "equitable" jurisdiction to stay or set aside a deportation order on the basis of the personal circumstances of the appellant. Hence, at any time before being removed from Canada, an appellant could ask the tribunal to reopen its dismissal of the appeal in order to consider new evidence.

[2] Jurisdiction over appeals against deportation orders is now exercised by the Immigration Appeal Division of the Immigration and Refugee Protection Board ("IAD"). Its powers and functions are substantially similar to its predecessors'. Section 71 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*") enables the IAD to reopen a decision for breach of natural justice.

71. The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.	71. L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.

[3] This provision does not expressly state that the IAD may *only* reopen an appeal for a breach of a principle of natural justice. The issue in this appeal is whether the statutory context and purpose supply Parliament's omission, so that section 71 should be interpreted as *implicitly* removing the unusual and long-established jurisdiction of the IAD to reopen a decision to consider new evidence before an appellant is deported.

[4] Shahin Nazifpour, a citizen of Iran, appeals from a decision of Justice Heneghan of the Federal Court dismissing his application for judicial review to set aside a decision of the IAD. The Applications Judge held that the IAD was correct to conclude that section 71 had removed its jurisdiction to entertain Mr Nazifpour's motion to reopen its dismissal of his appeal against a deportation order on the basis of new evidence: *Nazifpour v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1694.

[5] Justice Heneghan certified two questions for appeal pursuant to *IRPA*, paragraph 74(*d*):

> 1. Does section 71 of *IRPA* extinguish the common law continuing "equitable jurisdiction" of the IAD to reopen an appeal except where the IAD has failed to observe a principle of natural justice?
>
> 2. Is a continuing "danger opinion" a "disqualification" flowing from convictions that have been pardoned and therefore contrary to section 5 of the *Criminal Records Act*?

[6] At the hearing of the appeal, this Court declined to answer the second certified question, because it had not been argued in the Federal Court and was not within the jurisdiction of the IAD to decide in the context of Mr Nazifpour's appeal.

[7] We heard Mr Nazifpour's appeal together with an appeal by Naipaul Baldeo in Court File No. A-79-06 from a decision by Justice Campbell, who had certified the same question concerning the interpretation of section 71: *Baldeo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 79. The factual differences in the two cases are immaterial for present purposes.

[8] For the reasons which follow, I agree with the decisions below, I would answer the first certified question in the affirmative and dismiss both appeals. A copy of these reasons is to be inserted in both files.

B. FACTUAL BACKGROUND

[9] Mr Nazifpour came to Canada from Iran in 1985, when he was twenty years old. He claimed refugee status on his arrival, but his claim was never determined because he was granted permanent resident status in 1987 under a special humanitarian program for Iranians.

[10] In 1991, Mr Nazifpour pleaded guilty to two counts of trafficking relatively small amounts of heroin, for which he was sentenced to concurrent terms of imprisonment of 27 months and 18 months. These convictions had other serious consequences for him.

[11] First, in 1993 a conditional deportation order was issued against him while he was serving his sentences.

[12] Second, soon after his release from prison in 1994, Mr Nazifpour made a refugee claim. Without deciding the merits of the claim, the Convention Refugee Determination Division of the Immigration and Refugee Board rejected it under Article 1F(c) of the Convention, on the ground that he had been convicted of offences that were "contrary to the purposes and principles of the United Nations": see the former *Immigration Act*, R.S.C. 1985, c. I-2 ("*IA*"), subsection 2(1) and Schedule.

[13] Third, in 1997 the Minister formed an opinion under *IA*, subsection 70(5) that Mr Nazifpour was "a danger to the public" on the basis of his convictions, and detained him on immigration hold. The IAD rejected his appeal against the deportation order, since paragraph 70(5)(*c*) of the *IA* removed the jurisdiction of the IAD over appeals by those convicted of a serious crime who were the subject of a danger opinion.

[14] Despite the valid deportation order then in force against him, Mr Nazifpour was not removed, because travel documents could not be obtained to send him to Iran. He was released from detention on bond and required to report to Immigration Canada every two weeks.

[15] In March 2003, the National Parole Board granted Mr Nazifpour pardons for the trafficking offences of which he had been convicted in 1991, and two other offences committed in 1989 and 1990. Immigration Canada amended the conditions of his release by requiring him to report only twice a year.

[16] On the strength of these pardons, Mr Nazifpour applied to the IAD in June 2004 to reopen the appeal which it had rejected previously on jurisdictional grounds, namely, the existence of the danger opinion. He argued that, if returned to Iran, he would suffer great hardship because of the conditions in that country.

[17] In a decision dated August 17, 2004, the IAD again rejected Mr Nazifpour's appeal without determining its merits, this time on the ground that it was made after *IRPA* came into effect and section 71 of *IRPA* removed its jurisdiction to reopen appeals, except for breach of a principle of natural justice. The IAD found that no such breach had occurred. Mr Nazifpour obtained leave of the Federal Court to apply for judicial review of the IAD's dismissal of his appeal on jurisdictional grounds. As already noted, the application for judicial review was dismissed.

[18] In addition, Mr Nazifpour asked the Minister for a reconsideration of the 1997 danger opinion.

[19] The Minister concedes that, because of the pardons, the deportation order issued against Mr Nazifpour on the basis of his previous convictions cannot be executed. However, the order continues to hang over Mr Nazifpour's head, and he is anxious to have it set aside, perhaps to enable him to apply for Canadian citizenship or to facilitate travel abroad. The somewhat peculiar facts of this case do not prevent the Court from determining the proper interpretation of section 71.

C. DECISION OF THE FEDERAL COURT

[20] Justice Heneghan's analysis relied heavily on paragraph 17 of the reasons in the leading case on the interpretation of section 71, *Ye v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 964, 254 F.T.R. 238, where Justice Kelen said:

> I have concluded that four principles of statutory construction mean that section 71 limits or restricts the jurisdiction of the IAD to reopen appeals with respect to breaches of the rules of natural justice. These cannons of statutory interpretation are as follows:
>
> 1. *Expressio unius est exclusio alterius* - this maxim of statutory interpretation means that the expression of one thing is the exclusion of another. When Parliament specifies in law when the IAD can reopen an appeal, Parliament is implicitly expressing an intention to exclude all other grounds;
>
> 2. The French version of section 71 - is clear and stronger than the English version. In French, the IAD can reopen an appeal "*sur preuve de*" (upon proof of) a denial of natural justice. This means that such proof is a condition precedent to reopening. Without such proof, the IAD implicitly cannot reopen;
>
> 3. The implied exclusion rule - in relation to the codification of the common law is referred to by *Sullivan and Driedger on the Construction of Statutes*, 4th Edition [citation omitted] at page 355, which in turn relies upon the Supreme Court of Canada decision in *R. v. McClurg* (1990), 76 D.L.R. (4th) 217. This text book states at page 355:
>
> > When the legislature expressly codifies only part of the law relating to a matter, the Court may rely on implied exclusion reasoning to

> conclude that the part of the law not expressly mentioned was meant to be excluded.
>
> This principle means that specifying in section 71 the right to reopen an appeal with respect to a breach of the rules of natural justice means that Parliament intended the part of the common law not expressly mentioned was intended to be excluded. Accordingly, the right of the IAD to reopen an appeal on equitable grounds was implicitly excluded. [...]
>
> 4. The legislative history - includes an explanation of clause 71 presented to Parliament. The explanation states that section 71 "clearly limits reopenings to instances where there has been a breach of the common law principle of natural justice." The explanation states that section 71 is to prevent the opportunity to reopen an appeal from being used as a tactic to delay removal. [...]
>
> Accordingly, I am of the view that these four principles of statutory construction lead to the conclusion that section 71 limits the jurisdiction of the IAD to reopen appeals and implicitly excludes the common law jurisdiction to reopen appeals to permit the appellant to present additional or new evidence.

D. ISSUES AND ANALYSIS

1. Standard of review

[21] The question at issue in this appeal involves the interpretation of a provision of *IRPA*. On the basis of a pragmatic and functional analysis, the standard of review applicable to the IAD's interpretation of other provisions of its enabling statute has been held to be correctness: see, for example, *Chieu v. Canada (Minister of Citizenship and Immigration*), 2002 SCC 3, [2002] 1 S.C.R. 84 at paras. 20-26.

[22] While *Chieu* concerned the IAD's interpretation of a different statutory provision, namely the section in the previous legislation conferring its "equitable" jurisdiction, I see no reason for applying a different standard of review to the IAD's interpretation of section 71.

2. The interpretation of section 71

[23] Mr Nazifpour argues that section 71 does not preclude the IAD from reopening an appeal against a deportation order on grounds other than a breach of a principle of natural justice. He says that the "equitable" nature of the IAD's appellate jurisdiction enables it to reconsider its own decisions on broader grounds, including the existence of new evidence. If Parliament had intended to restrict the IAD's jurisdiction to reopen decisions to cases where there had been a breach of a principle of natural justice, it would simply have added "only" before "reopen". It is not for the courts, Mr Nazifpour says, to read in a word that is not in the statutory text.

[24] In the absence of unequivocal language, he argues, section 71 should not be interpreted as removing the IAD's common law right to reopen on the basis of new evidence. Any ambiguity should be resolved by the presumption that statutory provisions are deemed to be remedial and should be interpreted liberally in a manner that best attains the objects of the statute, that is, not removing individuals from Canada when removal would be unduly harsh.

[25] I start by noting that statutory provisions must always be interpreted with due regard to the totality of their text, context and purpose: *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 at para 8. However, before considering the text of section 71, I shall briefly review, as part of the contextual background, the basis on which the courts concluded that the jurisdiction exercisable in deportation appeals by the appellate tribunal under previous legislation enabled it to reopen its decisions in order to consider new evidence.

(i) *Grillas v. Canada (Minister of Manpower and Immigration)*

[26] The Supreme Court of Canada rendered its decision in *Grillas* (reported at [1972] S.C.R. 577) about five years after the *Immigration Appeal Board Act*, S.C. 1966-67, c. 90, created the first immigration appellate tribunal, the Immigration Appeal Board. The powers of the Board included the following.

11. A person against whom an order of deportation has been made under the provisions of the *Immigration Act* may appeal to the Board on any ground of appeal that involves a question of law or fact or mixed law and fact.	11. Une personne frappée d'une ordonnance d'expulsion, en vertu de la *Loi sur l'immigration*, peut, en se fondant sur un motif d'appel qui implique une question de droit ou une question de fait ou une question mixte de droit et de fait, interjeter appel à la Commission.
…	[…]
14. The Board may dispose of an appeal under section 11 or section 12 by (*a*) allowing it; (*b*) dismissing it; or (*c*) rendering the decision and making the order that the Special Inquiry Officer who presided at the hearing should have rendered and made.	14. La Commission peut statuer sur un appel prévu à l'article 11 ou à l'article 12, *a*) en admettant l'appel; *b*) en rejetant l'appel; ou *c*) en prononçant la décision et en rendant l'ordonnance que l'enquêteur spécial qui a présidé l'audition aurait dû prononcer et rendre.
15. (1) Where the Board dismisses an appeal against an order of deportation or makes an order of deportation pursuant to paragraph (*c*) of section 14, it shall direct that the order be executed as soon as practicable except that (*a*) in the case of a person who was a permanent resident at the time of the making of the order of deportation, having regard to all the circumstances of the case,	15. (1) Lorsque la Commission rejette un appel d'une ordonnance d'expulsion ou rend une ordonnance d'expulsion en conformité de l'alinéa (*c*) de l'article 14, elle doit ordonner que l'ordonnance soit exécutée le plus tôt possible, sauf que (*a*) dans le cas d'une personne qui était un résident permanent à l'époque où a été rendue l'ordonnance d'expulsion, compte tenu de toutes les circonstances du cas,
…	[…]
the Board may direct that the execution of the order of deportation be stayed, or may quash the order or quash the order and direct the grant of entry or landing to the person against whom the order was made.	la Commission peut ordonner de surseoir à l'exécution de l'ordonnance d'expulsion ou peut annuler l'ordonnance et ordonner qu'il soit accordé à la personne contre qui l'ordonnance avait été rendue le droit d'entrée ou de débarquement.
(2) Where, pursuant to subsection (1), the Board directs that execution of an	(2) Lorsque, en conformité du paragraphe (1) la Commission

order of deportation be stayed, it shall allow the person concerned to come into or remain in Canada under such terms and conditions as it may prescribe and shall review the case from time to time as it considers necessary or advisable.	ordonne de surseoir à l'exécution d'une ordonnance d'expulsion, elle doit permettre à la personne intéressée de venir ou de demeurer au Canada aux conditions qu'elle peut prescrire et doit examiner de nouveau l'affaire, à l'occasion, selon qu'elle l'estime nécessaire ou opportun.
(3) The Board may at any time (*a*) amend the terms and conditions prescribed under subsection (2) or impose new terms and conditions; or (*b*) cancel its direction staying the execution of an order of deportation and direct that the order be executed as soon as practicable.	(3) La Commission peut, en tout temps, (*a*) modifier les conditions prescrites aux termes du paragraphe (2) ou imposer de nouvelles conditions; ou (*b*) annuler sa décision de surseoir à l'exécution d'une ordonnance d'expulsion et ordonner que l'ordonnance soit exécutée aussitôt que possible.
(4) Where the execution of an order of deportation (*a*) has been stayed pursuant to paragraph (*a*) of subsection (1), the Board may at any time thereafter quash the order; or (b) has been stayed pursuant to paragraph (b) of subsection (1), the Board may at any time thereafter quash the order and direct the grant of entry or landing to the person against whom the order was made.	(4) Lorsqu'il a été sursis à l'exécution d'une ordonnance d'expulsion (*a*) en conformité de l'alinéa (a) du paragraphe (1), la Commission peut, en tout temps, par la suite, annuler l'ordonnance; ou (*b*) en conformité de l'alinéa (b) du paragraphe (1), la Commission peut, en tout temps par la suite, annuler l'ordonnance et décréter que le droit d'entrée ou de débarquement soit accordé à la personne contre qui l'ordonnance a été rendue.

[27] The Act was silent on the Board's jurisdiction to reopen. Nonetheless, by a 4-1 majority, the Court held that the Board's appellate jurisdiction in deportation appeals was exercisable from time to time, "until a deportation order has actually been executed" (*per* Abbott J. at 582), and that it could reopen a decision to consider new evidence.

[28] In addition to agreeing with the reasons of Martland and Laskin JJ. on this issue, Abbott J., writing for himself and Judson J., observed that the Board's broad discretion to stay the execution

of, or set aside, a legally valid deportation order was a power previously exercised by the Executive. He said (at 581):

> Whether the discretion to be exercised by the Board under s. 15 be described as equitable, administrative or political, it is not in the strict sense a judicial discretion, but it would appear it should be exercised essentially upon humanitarian grounds.

[29] In more elaborate reasons, Martland J. rejected the Minister's argument that, having rendered its decision to dismiss the appeal and not to stay the appellant's removal, the Board was *functus officio* and could not reopen its decision. He noted (at 589) that the *functus officio* doctrine had been applied to courts from which there was a right of appeal; the losing party's remedy was to appeal, not to request the first-level decision-maker to reopen its decision. While there was a right of appeal on questions of law from the Board to the Supreme Court, there was no appeal by way of rehearing, nor a right to appeal against the Board's exercise of its discretion to stay or set aside a deportation order on "equitable" grounds, "provided it is properly exercised" (at 590). The unusual nature of the discretion to grant a stay of removal was underlined by the fact that it was only exercisable after the Board had dismissed the appeal pursuant to paragraph 14(*b*).

[30] In addition, Martland J. inferred (at 590) a legislative intention that the Board's "equitable" jurisdiction was continuing from the fact that its purpose was to "enable the Board, in certain circumstances, to ameliorate the lot of an appellant". Accordingly, he concluded, Parliament intended the Board "to hear further evidence on the issues involved … even though it has made an order dismissing the appeal".

[31] Pigeon J., the sole dissenter on the jurisdiction issue, held (at 592) that, as creatures of statute, administrative tribunals only have the powers expressly granted to them by the legislature

and that normally they have no general power to amend their decisions. He found (at 593-94) in the Board's enabling Act additional support for its lack of jurisdiction to reopen a decision to consider new evidence:

> If Parliament had intended that the Board be authorized to review or amend its orders in every case, it would have said so. From the fact that provision has been made for amendment and review in specified cases it should, in my opinion, be held, not that a general power was intended to be conferred, but that this continuing jurisdiction was to be limited to the cases specified.

[32] This latter point, which obviously did not persuade the majority, is analogous to the Minister's argument in the present case: the inclusion in the statute of one ground on which the Board may reopen impliedly excludes others.

(ii) Between *Grillas* and *IRPA*

(a) functus officio *and administrative tribunals*

[33] The legal principles governing the jurisdiction of administrative tribunals at large to reopen or rehear a matter already decided were restated in *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848. Writing for the majority, Sopinka J. made the following three points which are relevant to the broader legal context of the present appeal.

[34] First, an important reason for the application of the *functus officio* rule to administrative tribunals is the public interest in the finality of their proceedings: at 861.

[35] Second, the rule should not be applied as rigidly to administrative tribunals from which there is a right of appeal only on questions of law as it is to courts from which there is an

unrestricted right of appeal. Sopinka J. regarded *Grillas* as a case where the *functus* principle was not strictly applied because of indications in the legislation that a power to reopen was consistent with the Board's mandate to determine appeals on an "equitable" basis: at 862.

[36] Third, a tribunal may always rehear a matter anew if its original decision was vitiated by an error rendering it a nullity, including a breach of the principles of natural justice which taints the whole proceeding: at 862-64. In other words, a tribunal does not have to wait for a court order setting aside a fatally flawed decision before it rehears the matter afresh and decides it again.

(b) ***appeals against deportation orders***

[37] Until the enactment of *IRPA*, the various immigration statutes enacted after the decision in *Grillas* remained silent on the jurisdiction of the appeal tribunal to reopen its dismissal of an appeal against a deportation order. However, rule 32(3) of the *Immigration Appeal Division Rules*, SOR/93-46, as am. SOR/97-363, required the IAD to reopen an appeal which it had declared abandoned, where there were "sufficient reasons why the appeal should be reopened" and reopening was "in the interests of justice."

[38] The courts continued to follow *Grillas*, even though later legislation did not provide that the IAD had to dismiss the appeal against the deportation order on questions of law, fact or mixed fact and law, before deciding whether to stay the appellant's removal on "equitable" grounds. However, the jurisprudence defined more specifically the circumstances in which the Board could reopen a decision to dismiss an appeal on the basis of new evidence.

[39] First, the evidence had to be “new”, in the sense that it either related to facts subsequent to the Board’s decision or, if it concerned facts already existing at that time, it was not reasonably discoverable earlier by the exercise of due diligence. Second, the new evidence had to be so significant that, if it proved the facts, there was a reasonable possibility that it would warrant changing the original decision. See, for example, *Sandhu v. Canada (Minister of Employment and Immigration*) (1987), 1 Imm. L.R. (2d) 159 (F.C.A.) at 163; *Castro v. Canada (Minister of Employment and Immigration*) (1988), 5 Imm. L. R. (2d) 87 (F.C.A.) at 91.

[40] Jurisprudence has also modified the broad *obiter* statement by Abbott J. in *Grillas* limiting the Board’s power to reopen to situations when the appellant has not been removed. Thus, it has been held that the IAD may exercise its jurisdiction to grant a motion to reopen a decision made under its “equitable powers” after an appellant has been removed from Canada, provided that the appellant filed notice of the motion to reopen while still in Canada: *Canada (Minister of Citizenship and Immigration) v. Toledo*, [2000] 3 F.C. 563 (C.A.). In contrast, an appellant’s removal from Canada would not appear to have been relevant to the exercise of the right to request a rehearing for breach of a principle of natural justice.

[41] In short, despite the fact that immigration statutes in force from 1976 until the enactment of *IRPA* did not require the dismissal of an appeal before the tribunal exercised its discretionary power to stay a removal, the courts still regarded the “equitable” jurisdiction as continuing.

(c) *Convention refugee determinations*

[42] The jurisdiction conferred on the Immigration Appeal Board in 1976 by the *Immigration Act*, R.S.C. 1985, c. I-2, dealing with the removal of persons claiming to be refugees, was held not to include a power to reopen the refusal of a refugee claim on the basis of new evidence: *Longia v. Canada (Minister of Employment and Immigration)*, [1990] 3 F.C. 288 (F.C.A.). This was because the decision was "wholly adjudicative" (at 292). Once it concluded that a claimant did not satisfy the definition of a refugee, the Board had no general discretion to allow the claimant to remain in Canada on "equitable" grounds.

[43] In 1989, plenary jurisdiction to determine claims to refugee status was conferred on the newly created Convention Refugee Determination Division ("CRDD") of the Immigration and Refugee Board. Rule 30 of the *Convention Refugee Determination Division Rules*, SOR/89-103, prescribed the procedure to be followed on an "application for rehearing" other than pursuant to a court order.

[44] However, this rule was held not to confer on the CRDD jurisdiction to reopen a dismissal of a refugee claim refugee in order to consider new evidence relating, for example, to changed country conditions. *Longia* was still good law: see *Chaudhry v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 104 (T.D.). A failed refugee claimant could only put evidence of this nature to the immigration officer conducting a pre-removal risk assessment ("PRRA"), or use it as the basis of an application to the Minister to remain in Canada on humanitarian and compassionate grounds.

[45] Rule 30 governed applications for rehearing in those cases where the *functus* principle did not apply. Thus, although the legislation never said so, the Immigration Appeal Board and the CRDD, could, like other tribunals, rehear a refugee determination when its first decision was invalidated by a failure to comply with the duty of procedural fairness, even though the first decision was not the subject of an application for judicial review and a Court order setting it aside: *Longia* at 292; *Chaudhry* at 113.

(iii) "Equitable" jurisdiction of the IAD in deportation appeals under *IRPA*

[46] The current "equitable" jurisdiction of the IAD enables it either to allow an appeal against a deportation order, or to stay the appellant's removal, when it is satisfied that, taking into account the best interests of any child directly affected by a deportation order, humanitarian and compassionate considerations warrant special relief "in light of all the circumstances of the case": *IRPA*, paragraph 67(1)(*c*) and subsection 68(1).

[47] Subsection 68(3) authorizes the IAD to amend an order made after it has stayed a removal. Nonetheless, for the reasons given in *Grillas* and *Chandler*, this express power does not indicate that the IAD's jurisdiction under subsection 68(1) is not continuing. That is, an appellant whose appeal has been dismissed could request the IAD to reopen its decision in order to consider new evidence of facts that would warrant a different decision.

[48] The relevant provisions of *IRPA* are as follows.

67. (1) To allow an appeal, the Immigration Appeal Division must be satisfied that, at the time that the appeal is disposed of,
(*a*) the decision appealed is wrong in law or fact or mixed law and fact;
(*b*) a principle of natural justice has not been observed; or
(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

67. (1) Il est fait droit à l'appel sur preuve qu'au moment où il en est disposé :

a) la décision attaquée est erronée en droit, en fait ou en droit et en fait;
b) il y a eu manquement à un principe de justice naturelle;
c) sauf dans le cas de l'appel du ministre, il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

(2) If the Immigration Appeal Division allows the appeal, it shall set aside the original decision and substitute a determination that, in its opinion, should have been made, including the making of a removal order, or refer the matter to the appropriate decision-maker for reconsideration.

(2) La décision attaquée est cassée; y est substituée celle, accompagnée, le cas échéant, d'une mesure de renvoi, qui aurait dû être rendue, ou l'affaire est renvoyée devant l'instance compétente.

68. (1) To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

68. (1) Il est sursis à la mesure de renvoi sur preuve qu'il y a — compte tenu de l'intérêt supérieur de l'enfant directement touché — des motifs d'ordre humanitaire justifiant, vu les autres circonstances de l'affaire, la prise de mesures spéciales.

(2) Where the Immigration Appeal Division stays the removal order
(*a*) it shall impose any condition that is prescribed and may impose any condition that it considers necessary;
(*b*) all conditions imposed by the Immigration Division are cancelled;
(*c*) it may vary or cancel any non-prescribed condition imposed under paragraph (a); and
(*d*) it may cancel the stay, on application or on its own initiative.

(2) La section impose les conditions prévues par règlement et celles qu'elle estime indiquées, celles imposées par la Section de l'immigration étant alors annulées; les conditions non réglementaires peuvent être modifiées ou levées; le sursis est révocable d'office ou sur demande.

(3) If the Immigration Appeal Division has stayed a removal order, it may at any time, on application or on

(3) Par la suite, l'appel peut, sur demande ou d'office, être repris et il en est disposé au titre de la présente

its own initiative, reconsider the appeal under this Division.	section.
(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.	(4) Le sursis de la mesure de renvoi pour interdiction de territoire pour grande criminalité ou criminalité est révoqué de plein droit si le résident permanent ou l'étranger est reconnu coupable d'une autre infraction mentionnée au paragraphe 36(1), l'appel étant dès lors classé.
69. (1) The Immigration Appeal Division shall dismiss an appeal if it does not allow the appeal or stay the removal order, if any.	(1) L'appel est rejeté s'il n'y est pas fait droit ou si le sursis n'est pas prononcé.
…	[…]
(3) If the Immigration Appeal Division dismisses an appeal made under subsection 63(4) and the permanent resident is in Canada, it shall make a removal order.	(3) Si elle rejette l'appel formé au titre du paragraphe 63(4), la section prend une mesure de renvoi contre le résident permanent en cause qui se trouve au Canada.

[49] The question is whether section 71 is a sufficiently clear indication of an intention on the part of Parliament to exclude the inference that would otherwise be drawn from the "equitable" nature of the IAD's jurisdiction.

(iv) Text of section 71

[50] In the interests of convenience, I reproduce again the text of section 71.

71. The Immigration Appeal Division, on application by a foreign national who has not left Canada under a removal order, may reopen an appeal if it is satisfied that it failed to observe a principle of natural justice.	71. L'étranger qui n'a pas quitté le Canada à la suite de la mesure de renvoi peut demander la réouverture de l'appel sur preuve de manquement à un principe de justice naturelle.

[51] The start of Mr Nazifpour's case is that section 71 does not state expressly that the IAD may reopen only for breach of a principle of natural justice. Nor, in my opinion, is the French version materially different when it provides that the IAD may reopen an appeal «*sur preuve de manquement à un principe de justice naturelle*.»

[52] Section 71 speaks of the power to "reopen" («*la réouverture*») an appeal. This verb is generally used in the context of the reconsideration of a decision in the light of new evidence, while "rehearing" is more usual when a matter is heard afresh and decided again after a breach of natural justice has vitiated the first decision.

[53] However, what a text means is more complex than determining what it says: an examination of the words of a statutory provision is the start but not the end of the search for its meaning. Also relevant are the common law presumptions of statutory interpretation, many of which have been codified in the *Interpretation Act*, R.S.C. 1985, c. I-21. The increased importance afforded in the contemporary practice of statutory interpretation to contextual and purposive considerations has diminished the reliability of these abstract presumptions as interpretative guides.

(a) *presumption of implied exclusion*

[54] An express statutory mention of one item is presumptively exhaustive and impliedly excludes other similar items. This is the essence of the presumption known by the Latin tag,

expressio unius est exclusio alterius: Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham, Ontario: Butterworths, 2002), 186-94: Pierre-André Côté**,** *The Interpretation of Legislation in Canada*, 3rd ed. (Toronto: Carswell, 2000), 337-42. Counsel for the Minister relied on this presumption to argue that, as applied to section 71, the presumption indicates that, having mentioned one of the pre-existing grounds on which the IAD may reopen an appeal, Parliament should be taken to have impliedly excluded the others, including its jurisdiction to reopen on the basis of new evidence.

[55] However, counsel for Mr Nazifpour made the fair point that the implied exclusion presumption may have little purchase here, because the power to reopen to consider new evidence is different in kind from the power to rehear a matter for breach of a principle of natural justice.

[56] The IAD's jurisdiction to reopen a valid decision to consider new evidence was derived from the particular statutory function and powers of the IAD on an appeal against a deportation order to which the discretionary or "equitable" grounds apply. In contrast, all tribunals presumptively have the power to rehear a matter for a breach of the principles of natural justice which has rendered the first decision a nullity. In my view, the implied exclusion presumption would provide more support to an argument that section 71 excludes the IAD's jurisdiction to reopen a decision rendered a nullity by a jurisdictional error other than a breach of the principles of natural justice.

[57] On balance, I do not think that the implied exclusion presumption provides significant support for the Minister's contention that section 71 excludes the inference of continuing jurisdiction that would otherwise have been drawn from the statutory grant of jurisdiction conferred by subsection 68(1). Section 71 permits the IAD, in defined circumstances, to reopen a decision on a ground that renders it invalid. This is different from a power to reopen a valid decision to consider new evidence, a power which is inferred from the nature of the jurisdiction conferred by subsection 68(1).

(b) ***presumption against removal of common law rights***

[58] Mr Nazifpour relies on the presumption that legislation does not implicitly intend to change the common law or to remove rights established by the common law: Sullivan, *supra* at 341. Accordingly, he says, section 71 is presumed not to remove the common law power of the IAD to reopen a decision in order to exercise its "equitable" jurisdiction.

[59] In my opinion, however, the cases cited by counsel as authority for this presumption are inapplicable here, since they concern rights that are solely the creation of the common law. In the present case, in contrast, the courts have inferred that the appellate tribunal has jurisdiction to reopen on the basis of new evidence from the broad discretionary nature of its statutory power to stay the execution of a deportation "in all the circumstances of the case".

[60] The IAD is a creature of statute, and its implicit power to reopen to consider new evidence is necessarily statutory in origin. The fact that the courts inferred this power from its express powers does not make the IAD's pre-*IRPA* right to reopen a "common law" right for present purposes.

(c) *section 12 of the Interpretation Act*

[61] Counsel for Mr Nazifpour relied heavily on this presumption:

12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[62] In order to determine what interpretation of section 71 will best achieve the statutory objects, those objects must first be identified. This issue is considered at paras. 72-79 of these reasons, under the heading "Statutory purposes".

(v) Contextual considerations

[63] A determination of what Parliament intended when it enacted section 71 may be inferred from the information before it: Sullivan, *supra* at 469; Côté, *supra* at 437. Of the three items in this category, the most important was put to a hearing of the Senate Standing Committee to which Bill C-11 was referred. Clause 71 of the Bill was identical to section 71 of *IRPA*.

[64] On October 2, 2001, a presentation was made to the Committee on behalf of the Canadian Bar Association, which was very critical of aspects of Bill C-11, including the removal from permanent residents who had received a prison sentence of two or more years of the right to appeal to the IAD against their deportation from Canada. In the course of this presentation, a member of the Committee suggested clause 71 provided some redress.

[65] A member of the delegation, Mr Michael A. Greene, Past Chair, National Citizenship and Immigration Law Section, explained that clause 71 did not deal with the right of appeal, but removed from those who still had a right of appeal, the pre-existing right to ask the IAD to reopen a negative decision in order to consider new evidence: Senate, Standing Committee on Social Affairs, Science and Technology, Issue 27 – Evidence (Morning Session) (October 2, 2001).

[66] While Mr Greene's view of the effect of clause 71 cannot necessarily be attributed to the drafter of Bill C-11 or to the Minister, the Senate Committee was fully aware of the interpretation given to the clause by a prominent member of the immigration bar.

[67] Second, the Minister relies on a document entitled, "Bill C-11: Clause by Clause Analysis", dated September 2001, which was prepared by the Department to explain to Parliamentarians, and others, each provision of the Bill. While the Analysis does not state that clause 71 removes the IAD's existing jurisdiction to reopen to consider new evidence, its explanation of the provision is as follows:

> Under the current regime, there is no legislative provision permitting the Immigration Appeal Division to reopen an appeal once it has rendered a decision on a case. It is a common law principle, however, that a tribunal can reopen a case if there has been a fundamental error of justice. Bill C-11 confirms the authority of the Immigration Appeal Division to re-open an appeal but, in order to prevent this mechanism from being used as a tactic to delay removal, it clearly limits reopenings to instances where there has been a breach of the common law principle of natural justice.
>
> [Emphasis added]

[68] Although not worded altogether clearly, this passage appears to say, in effect, that administrative tribunals may reopen a decision when "there has been a fundamental error of justice", a jurisdiction which Bill C-11, for the first time confirms. However, in order to avoid

undue delays, the Bill limits the IAD's right to reopen to decisions vitiated by a breach of a principle of natural justice.

[69] The explanation of clause 71 in the Clause by Clause Analysis supports the Minister's interpretation of section 71. However, I also agree with counsel for Mr Nazifpour that the support provided is limited by the fact that the explanation did not make it clear to Parliamentarians that the clause removed the pre-existing jurisdiction of the IAD to reopen a decision to consider new evidence, when the original decision could not be said to have been vitiated by "a fundamental error of justice".

[70] Third, a Legislative Summary, "Bill C-11: the Immigration and Refugee Protection Act", is a "plain language" background and analysis of the Bill, prepared by officials of the Law and Government Division of the Parliamentary Research Branch of the Library of Parliament for the assistance of Parliamentarians. It was first published on March 26, 2001, after the Second Reading of Bill C-11, and revised on January 31, 2002, after its enactment on 1 November 2001. It states unequivocally that, as a result of clause 71, new evidence would not justify a reopening of an appeal by the IAD, although it does not also state that this is a departure from the previous law.

[71] On the basis of these three items, the legislative record, in my opinion, indicates that, during the passage into law of Bill C-11, Parliamentarians had access to information indicating that the intent and effect of section 71 was to restrict the IAD's right to reopen to cases where there had

been of breach of a principle of natural justice. It supports the view that section 71 excludes the IAD's jurisdiction to reopen on the basis of new evidence.

(vi) Statutory purposes

[72] One of the objectives of *IRPA* was to give more importance to national security and the expeditious removal of persons ordered deported on the ground of serious criminality. Thus, in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539, Chief Justice McLachlin, writing for the Court, said:

> [10]. The objectives as expressed in the *IRPA* indicate an intent to prioritize security… This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security. … Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.
>
> …
>
> [13]. In summary, the provisions of the *IRPA* and the Minister's comments indicate that the purpose of enacting the *IRPA*, and in particular s. 64, was to efficiently remove criminals sentenced to prison terms over six months from the country.
>
> [Emphasis added]

[73] *Medovarski* dealt with the interpretation of the transitional provisions in *IRPA* defining, among other things, the application of section 64, which removes the right of those sentenced to two or more years in prison to appeal to the IAD. While those deported on the basis of shorter sentences still have a right of appeal, an interpretation of section 71 which removes the IAD's right to reopen its decisions for reasons other than breach of a principle of natural justice would be consistent with the statutory aim "to efficiently remove criminals sentenced to prison terms over six months from the country".

[74] If the purpose of enacting section 71 was not to exclude the IAD's right to reopen a decision for any reason other than a breach of a principle of natural justice, it is difficult to see what purpose the provision serves. The IAD's jurisdiction to reopen an invalid decision to cure a breach of a principle of natural justice was as well established before the enactment of *IRPA* as its jurisdiction to reopen a valid decision to consider new evidence. Whenever possible, statutory provisions should be interpreted so as to give them a function in the statutory scheme.

[75] Counsel suggested that the purpose of section 71 was to bring the right to reopen a decision for breach of natural justice into line with its right to reopen on the basis of new evidence, by eliminating the IAD's right to reopen for breach of natural justice *after* an appellant is removed from Canada. He also argued that section 71 gives the IAD *discretion* to reopen for a breach of the principles of natural justice. Counsel contrasted section 71 with Rule 55(4) of the *Refugee Protection Division Rules*, which provides that the Refugee Protection Division *must* allow the application to reopen if a breach of a principle of natural justice is established.

[76] Despite its ingenuity, this argument seems to me implausible. There is nothing in either the legislative record, or the statutory purposes, to support it.

[77] In my opinion, it is unlikely that the function of section 71 was intended to be as limited as counsel suggests, especially since this was the first time that the jurisdiction of an immigration appeal tribunal to reopen a decision had ever been mentioned in the statute. The minor nature of the changes which counsel suggested section 71 was intended to make is indicated by the fact that a

person who has already been removed from Canada may still seek leave to make an application for judicial review of an IAD decision on the ground of a breach of the duty of fairness or, to use the language of section 71, a breach of a principle of natural justice.

[78] Despite the absence of evidence establishing that the IAD's jurisdiction to reopen on the basis of new evidence had in fact been abused by appellants, it is, in my opinion, likely that Parliament enacted section 71 in order to avoid another round of proceedings before the IAD by unsuccessful appellants on the basis of new evidence.

[79] While the objectives of *IRPA* are not limited to the expeditious removal of criminals, deportees who have new evidence that they would be at serious risk if removed may bring it the attention of a PRRA officer under section 112. New evidence relating, for example, to the appellant's rehabilitation or family circumstances (including the best interests of affected children) may form the basis of an application under section 25 of *IRPA* to remain in Canada on humanitarian and compassionate grounds.

[80] It is true that the drafter could easily have avoided all ambiguity by including the word "only" in the text of section 71. However, in my opinion, the reading which best effectuates the general objects of *IRPA*, and attributes a plausible function to section 71 itself, is that the section implicitly removes the IAD's jurisdiction to reopen appeals on the ground of new evidence, a jurisdiction which would otherwise be judicially inferred from the nature of the statutory discretion

to relieve against deportation. Section 12 of the *Interpretation Act* is therefore not helpful to the appellant.

[81] By way of analogy, rule 55(1) of the current *Refugee Protection Division Rules*, SOR/2002-228, enables a claimant or the Minister to apply to the Refugee Protection Division to reopen a claim for refugee protection that has been decided or abandoned. Rule 55(4) provides that the Division must allow the application if it is established that there has been a breach of a principle of natural justice.

[82] The Federal Court has rejected the argument that, while Rule 55 expressly obliges the Division to reopen for breach of natural justice, since this is not stated to be the only ground for reopening, it does not preclude the Division from reopening decisions on other grounds, including the existence of new evidence. The Court has held that Rule 55 does not expand the jurisdiction to reopen refugee and protection determinations. The Division may reopen only for breach of a principle of natural justice: *Ali v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1153, (2004), 258 F.T.R. 226 at paras. 23-25.

E. CONCLUSIONS

[83] For these reasons, I would dismiss the appeal and answer in the affirmative the following slightly modified version of the certified question:

> Does section 71 of *IRPA* extinguish the continuing "equitable jurisdiction" of the IAD to reopen an appeal against a deportation order, except where the IAD has failed to observe a principle of natural justice?

The second certified question is not answered. A copy of these reasons should also be placed in File No. A-79-06.

"John M. Evans"
J.A.

"I agree
A.M. Linden J.A."

"I agree
M. Nadon J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES BY:

Ms. Geraldine Sadoway	FOR THE APPELLANT
Ms. Marina Stefanovic	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Parkdale Community Legal Services Toronto, Ontario	FOR THE APPELLANT
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT