Chieu *v*. Canada (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 84, 2002 SCC 3

Huor Chieu *Appellant*

v.

Minister of Citizenship and Immigration *Respondent*

and

Canadian Council of Churches and Immigration and Refugee Board *Interveners*

Indexed as: Chieu *v.* Canada (Minister of Citizenship and Immigration)

Neutral citation: 2002 SCC 3.

File No.: 27107.

2000: October 10; 2002: January 11.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour and LeBel JJ.

on appeal from the federal court of appeal

Administrative law — Judicial review — Standard of review — Immigration Appeal Division of Immigration and Refugee Board — Standard of review

applicable to Immigration Appeal Division's decisions on appeals by permanent residents from removal order.

Immigration — Removal orders — Appeals by permanent residents — Scope of discretionary jurisdiction of Immigration Appeal Division of Immigration and Refugee Board under s. 70(1)(b) of Immigration Act — Whether Immigration Appeal Division entitled to consider potential foreign hardship when dealing with appeals from removal orders by permanent residents — Interpretation of phrase "having regard to all the circumstances of the case" in s. 70(1)(b) — Immigration Act, R.S.C. 1985, c. I-2, s. 70(1)(b).

The appellant was born in Cambodia in 1966, but was taken by his family to Vietnam in 1975 in order to escape the Cambodian civil war. He married a Vietnamese citizen in 1988, and their son was born that same year. In 1991, the appellant's sister sponsored the family, including the appellant, to come to Canada. On his application for permanent residence in Canada, the appellant misrepresented his marital status, stating he was single with no dependants, in order to be eligible to be sponsored as an accompanying dependant of his father. The appellant landed in Canada in 1993 with his parents and brothers, and became a permanent resident. He subsequently applied to sponsor his wife and child to come to Canada. The immigration officer reported that the appellant had become a permanent resident by reason of a misrepresentation of material fact contrary to s. 27(1)(*e*) of the *Immigration Act* and, after an inquiry, an adjudicator ordered the appellant's removal pursuant to s. 32(2) of the Act. His appeal to the Immigration Appeal Division ("I.A.D.") of Canada's Immigration and Refugee Board under s. 70(1)(*b*) of the Act was dismissed, and that decision was upheld by the Federal Court, Trial Division and

the Federal Court of Appeal. Both courts held that the I.A.D. was correct in refusing to consider potential foreign hardship when reviewing the removal order.

Held: The appeal should be allowed.

The standard of review applicable to the I.A.D.'s decision is correctness. First, the appeal involves a serious question of general importance certified pursuant to s. 83(1) of the Act, generally of precedential value. Second, the issue is one of jurisdiction, an area of law where little deference is shown by the courts, as administrative bodies must generally be correct in determining the scope of their delegated mandate. Third, the I.A.D. is not protected by a strong privative clause. Lastly, appeals under s. 70(1)(*b*) do not require the I.A.D. to engage in a polycentric balancing of competing interests, but rather to adjudicate the rights of individuals *vis-à-vis* the state.

This case turns on the interpretation given to the phrase "having regard to all the circumstances of the case" in s. 70(1)(*b*) of the *Immigration Act*. The modern approach to statutory interpretation leads to the conclusion that the I.A.D. is entitled to consider potential foreign hardship under s. 70(1)(*b*) when deciding to quash or stay a removal order made against a permanent resident, provided that a likely country of removal has been established. This is a case where the ordinary reading of the statute is in harmony with legislative intent and with the scheme and object of the Act.

An ordinary and grammatical sense of the phrase "all the circumstances of the case" favours a broad interpretation of s. 70(1)(*b*). The words do not provide detailed guidelines as to how this discretionary jurisdiction is to be exercised, but instead leave the scope of the discretion open-ended. The use of the word "all" in that

context suggests that the greatest possible number of factors relevant to the removal of a permanent resident from Canada should be considered. It is evident that one such factor is the conditions an individual would face upon removal. The word "all" also suggests that realistic possibilities are just as relevant as certainties in making this discretionary decision. This indicates that the I.A.D. should be able to consider conditions in the likely country of removal, even when the ultimate country of removal is not known with absolute certainty at the time the s. 70(1)(*b*) appeal is heard.

Moreover, the legislative history of the section indicates that this Court has long approved of a broad approach to s. 70(1)(*b*). The I.A.D. itself has long considered foreign hardship to be an appropriate factor to take into account when dealing with appeals brought under this section. The scheme of the Act favours allowing the I.A.D., a specialized tribunal with ample procedural protections, to take foreign hardship factors into account under s. 70(1)(*b*) whenever a likely country of removal has been established. A harmonious reading of the Act reveals that all relevant considerations should be considered by the I.A.D. whenever possible. It is only when it is not possible for the I.A.D. to consider potential foreign hardship that other provisions of the Act need be resorted to. These alternative provisions are not as robust as a hearing before the I.A.D. The judicial review of a s. 52 ministerial decision as to the country of removal provides only narrow grounds for review, and an application to the Minister for an exemption from regulations under s. 114(2) is essentially a plea to the executive branch for special consideration which is not explicitly envisioned by the Act. Furthermore, the Act does not provide an automatic stay of the removal order when either of these alternative routes is pursued, as it does for appeals before the I.A.D.

At the hearing of a s. 70(1)(*b*) appeal, the onus is on the permanent resident facing removal to establish the likely country of removal on a balance of probabilities. The Minister may make submissions regarding this issue if he disagrees with an individual's submissions on the likely country of removal. Generally, this will only occur when the intended country of removal is other than the individual's country of nationality or citizenship. To allow the I.A.D. to take potential foreign hardship into account does not interfere with the Minister's jurisdiction to decide the country of removal under s. 52, because the discretion can be exercised at any time. The Minister's jurisdiction to decide the country of removal becomes inoperative when a removal order is quashed or stayed as there is no longer anyone to remove.

Finally, the object of the Act and the intention of Parliament also support a broad reading of s. 70(1)(*b*). The open-ended wording of the section indicates that Parliament intended the I.A.D. to have broad discretion to allow permanent residents facing removal to remain in Canada if it would be equitable to do so. The object of s. 70(1)(*b*) is to give the I.A.D. the discretion to determine whether a permanent resident should be removed from Canada. It would be inconsistent with these objectives for a court to narrow the I.A.D.'s discretionary jurisdiction under s. 70(1)(*b*), and thereby leave foreign hardship concerns to be considered only by the Minister under s. 52 or s. 114(2). The I.A.D. is equipped with all of the tools to ensure that principles of natural justice and the *Charter* are met, while the same is not necessarily true of s. 52 decisions or s. 114(2) applications. When faced with the problem of a statute which can be read in two ways, one that accords with the principles of natural justice and one that does not, an interpretation that favours a fuller assurance that the requirements of natural justice will be met should be adopted.

The factors set out in *Ribic* remain the proper ones for the I.A.D. to consider during an appeal under s. 70(1)(*b*). The I.A.D. is thus obliged to consider every relevant circumstance, including potential foreign hardship under s. 70(1)(*b*) when the likely country of removal has been established by an individual facing removal. Neither *Markl* nor *Hoang* establishes a blanket prohibition against the I.A.D. considering potential foreign hardship. This consideration will not lengthen hearings before the I.A.D., as it is designed and equipped to consider this factor. The I.A.D. does not create an alternative refugee system by considering potential foreign hardship and allowing permanent residents to remain in Canada, because the discretion given to the I.A.D. and the factors it considers are quite different from those considered by the Convention Refugee Determination Division in determining whether a person is a Convention refugee. There is no need for absolute consistency in how the Act deals with Convention refugees and non-refugee permanent residents.

In the present case, a likely country of removal had not been established before the I.A.D. and, as a result, the matter must be returned to the I.A.D. for a rehearing. If a likely country of removal is established by the appellant, the I.A.D. may consider, pursuant to s. 70(1)(*b*), potential foreign hardship he will face upon return to that country.

Cases Cited

Applied: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Krishnapillai v. Canada (Minister of Citizenship and Immigration)*, [1997] I.A.D.D.

No. 636 (QL); **approved:** *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL); *Canepa v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 270; **overruled:** *Hoang v. Canada (Minister of Employment and Immigration)* (1990), 13 Imm. L.R. (2d) 35, aff'g [1987] I.A.B.D. No. 6 (QL); *El Tassi v. Canada (Minister of Citizenship and Immigration)*, [1996] I.A.D.D. No. 993 (QL); **distinguished:** *Markl v. Minister of Employment and Immigration*, Imm. App. Bd., No. V81-6127, May 27, 1985; **referred to:** *Al Sagban v. Canada (Minister of Citizenship and Immigration*), [2002] 1 S.C.R. 133, 2002 SCC 4, rev'g [1998] 1 F.C. 501; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2; *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577; *Moore v. Minister of Employment and Immigration*, Imm. App. Bd., No. 78-3016, December 6, 1978; *Arduengo v. Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 468; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376; *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565; *R. v. Lyons*, [1987] 2 S.C.R. 309; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869; *Alliance des professeurs catholiques de Montréal v. Quebec Labour Relations Board*, [1953] 2 S.C.R. 140; *Nicholson v. Haldimand-Norfolk Regional*

Board of Commissioners of Police, [1979] 1 S.C.R. 311; *Grewal v. Canada (Minister of Employment and Immigration)*, [1989] I.A.D.D. No. 22 (QL); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 6(2), 7, 12.

Convention Relating to the Status of Refugees, Can. T.S. 1969 No. 6, Art. 33.

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Immigration Act, 1976, S.C. 1976-77, c. 52, s. 72.

Immigration Appeal Board Act, S.C. 1966-67, c. 90, ss. 11, 15, 21.

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APPEAL from a judgment of the Federal Court of Appeal, [1999] 1 F.C. 605, 169 D.L.R. (4th) 173, 234 N.R. 112, 46 Imm. L.R. (2d) 163, [1998] F.C.J. No. 1776 (QL), affirming a decision of the Trial Division (1996), 125 F.T.R. 76, [1996] F.C.J. No. 1680 (QL), affirming a decision the Immigration and Refugee Board (Appeal Division), [1995] I.A.D.D. No. 1055 (QL), dismissing the appellant's appeal from a removal order. Appeal allowed.

David Matas, for the appellant.

Judith Bowers, Q.C., for the respondent.

Lorne Waldman and *Carol Simone Dahan*, for the intervener the Canadian Council of Churches.

Brian A. Crane, Q.C., and *Krista Daley*, for the intervener the Immigration and Refugee Board.

The judgment of the Court was delivered by

IACOBUCCI J. —

I. Introduction

1 The fundamental question in this appeal is whether the factor of potential foreign hardship can be considered in deciding whether to uphold an order to remove an individual from Canada. More specifically, this appeal concerns the interpretation of the phrase "having regard to all the circumstances of the case", as employed in s. 70(1)(*b*) of the *Immigration Act*, R.S.C. 1985, c. I-2 (the "Act"). These words define, in part, what has come to be called the "discretionary" or "equitable" jurisdiction of the Immigration Appeal Division ("I.A.D.") of Canada's Immigration and Refugee Board ("I.R.B.").

2 The question is whether this jurisdiction allows the I.A.D. to consider the potential foreign hardship a permanent resident would face if removed from Canada, or whether only domestic factors can be taken into account. The appellant, Huor Chieu, argues for the former interpretation, on the grounds that a decision regarding whether an individual is to be removed must be informed by where he or she will be removed to. The respondent Minister of Citizenship and Immigration supports the latter interpretation, arguing that where an individual will be removed to is not decided until after the I.A.D. upholds his or her removal, and it is therefore premature for the I.A.D. to consider foreign factors in deciding whether to quash or stay a removal order. The Minister's position was adopted in the courts below.

3 Ahmad Abdulaal Al Sagban, in the companion case of *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 133, 2002 SCC 4, reasons which are also being released on this date, makes arguments similar to the appellant's regarding the proper interpretation of s. 70(1)(*b*). *Chieu* and *Al Sagban* were heard together before this Court. Some of the facts and lower decisions in *Al Sagban* will be referred to in the course of these reasons.

4 I conclude that the appellant's arguments should prevail and that the I.A.D. can consider foreign hardship in deciding whether to quash or stay a removal order under s. 70(1)(*b*).

II. Relevant Statutory Provisions

5 There are three statutory provisions which are at the heart of this appeal — ss. 70(1), 52 and 114(2) of the Act, which are set out below. Many other provisions are relevant to the particular facts of this case and to the overall scheme of the Act. They will be cited as they become relevant throughout the course of these reasons. Section 70(1) establishes the I.A.D.'s jurisdiction with respect to appeals by permanent residents from removal orders entered against them (although not law, I have included the marginal notes to the relevant provisions of the Act throughout these reasons as an explanatory aid):

> **70.** (1) [Appeals by permanent residents and persons in possession of returning resident permits] Subject to subsections (4) and (5), where a removal order or conditional removal order is made against a permanent resident or against a person lawfully in possession of a valid returning resident permit issued to that person pursuant to the regulations, that person may appeal to the Appeal Division on either or both of the following grounds, namely,
>
> (*a*) on any ground of appeal that involves a question of law or fact, or mixed law and fact; and
>
> (*b*) on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada.

6 Section 52 is the provision under which the country of removal is determined:

52. (1) [Voluntary departure] Unless otherwise directed by the Minister, a person against whom an exclusion order or a deportation order is made may be allowed to leave Canada voluntarily and to select the country for which that person wishes to depart.

(2) [Place to which removed] Where a person is not allowed to leave Canada voluntarily and to select the country for which he wishes to depart pursuant to subsection (1), that person shall, subject to subsection (3), be removed from Canada to

(*a*) the country from which that person came to Canada;

(*b*) the country in which that person last permanently resided before he came to Canada;

(*c*) the country of which that person is a national or citizen; or

(*d*) the country of that person's birth.

(3) [Idem] Where a person is to be removed from Canada and no country referred to in subsection (2) is willing to receive him, the person, with the approval of the Minister, or the Minister, may select any other country that is willing to receive that person within a reasonable time as the country to which that person shall be removed.

(4) [Idem] Notwithstanding subsections (1) and (2), where a removal order is made against a person described in paragraph 19(1)(*j*), the person shall be removed from Canada to a country selected by the Minister that is willing to receive the person.

7 Section 114(2) confers a discretionary decision-making power on the Minister:

114. . . .

(2) [Exemption from regulations] The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

III. Facts

8 The appellant was born in Cambodia on December 2, 1966. In 1975, he and his family fled to Vietnam in order to escape the Cambodian civil war. The Chieu family resided in Vietnam under a series of temporary resident permits until 1993. On February 12, 1988, the appellant married a Vietnamese citizen. They had a son on November 20, 1988.

9 In 1989, the appellant's sister came to Canada, sponsored by her Canadian fiancé. In 1991, she in turn sponsored her family, including the appellant, to come to Canada. The appellant submitted his Application for Permanent Residence in Canada at the Canadian Embassy in Bangkok, Thailand, on March 17, 1992. In the application, he misrepresented his status, stating that he was single with no dependents. He did this in order to be eligible to be sponsored as an accompanying dependent of his father as a member of the family class. A previous application, in which he had correctly stated his marital status, had been refused. The misrepresentation was not discovered at the time, and the appellant was landed in Canada on October 21, 1993, along with his parents and brothers. He became a permanent resident of Canada at that time.

10 On March 29, 1994, the appellant attended at the Canada Immigration offices in Winnipeg and made an application to sponsor his wife and child to come to Canada. As a result of this disclosure, an immigration officer reported that the appellant had become a permanent resident of Canada by reason of the misrepresentation of a material fact contrary to s. 27(1)(*e*) of the Act, which reads:

> **27.** (1) [Reports on permanent residents] An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who

. . .

> (*e*) was granted landing by reason of possession of a false or improperly obtained passport, visa or other document pertaining to his admission or by reason of any fraudulent or improper means or misrepresentation of any material fact, whether exercised or made by himself or by any other person . . . .

An inquiry was directed to be held by the Director of Immigration for the Prairie Northwest Territories Region.

11 At the inquiry of June 29, 1994, the appellant conceded that he had made a material misrepresentation on his application for permanent resident status. He further stated that he would not be making a refugee claim. The adjudicator ordered his removal pursuant to s. 32(2) of the Act, on the basis that the appellant was a person described in s. 27(1)(*e*) of the Act. Section 32(2) reads:

> **32.** . . .
>
> (2) [Where person is a permanent resident] Where an adjudicator decides that a person who is the subject of an inquiry is a permanent resident described in subsection 27(1), the adjudicator shall, subject to subsections (2.1) and 32.1(2), make a deportation order against that person.

The appellant appealed the order to the I.A.D., not on legal grounds pursuant to s. 70(1)(*a*) — as he conceded that the removal order was correct in law — but on discretionary grounds pursuant to s. 70(1)(*b*). On October 30, 1995, the I.A.D. dismissed the appeal, a decision which was upheld by the Federal Court, Trial Division on December 18, 1996 and by the Federal Court of Appeal on December 3, 1998. Leave to appeal to this Court was granted on October 14, 1999.

IV. Judicial History

A. *Immigration Appeal Division*, [1995] I.A.D.D. No. 1055 (QL)

12 Board Member Wiebe noted that, in an appeal pursuant to s. 70(1)(*b*), the onus is on an appellant to establish that, having regard to all the circumstances of the case, he or she should not be removed from Canada. She held that the appellant Chieu failed to meet that burden. The board member found that there was "no evidence of oppression or even of significant hardship" facing the appellant in Vietnam. She also made some brief comments regarding the appellant's lack of connections to Cambodia. However, she gave "minimal" weight to the evidence regarding foreign hardship as she believed, following *Hoang v. Canada (Minister of Employment and Immigration)* (1990), 13 Imm. L.R. (2d) 35 (F.C.A.), that "it is premature for the Appeal Division to take into account the conditions of the person's country of origin, as the determination of to which country the deported person will be sent rests with the Minister of Immigration". The relevant domestic considerations did not weigh in favour of allowing the appellant to remain in Canada, and therefore the appeal was dismissed.

B. *Federal Court, Trial Division* (1996), 125 F.T.R. 76

13 The appellant obtained leave from the Federal Court, Trial Division to commence an application for judicial review of the I.A.D.'s decision pursuant to s. 82.1 of the Act. Before the court, the appellant argued that the I.A.D. had erred in not fully considering the potential hardship he would face in Cambodia, as this was the only country that was legally obliged to accept him upon removal from Canada. The appellant further argued that *Hoang* was a case involving the removal of a refugee and therefore does not apply to the removal of permanent residents who are not Convention refugees. Muldoon J. rejected both arguments. He held that *Hoang* does apply to

appeals by non-refugee permanent residents pursuant to s. 70(1)(*b*) as "no determination has yet been made [under s. 52] regarding the country to which applicant will be deported" and, as a result, "an assessment of country conditions by the board would have been premature" (paras. 8 and 10). Muldoon J. therefore concluded that the I.A.D. was correct in refusing to consider conditions in either Vietnam or Cambodia.

14 Consequently, Muldoon J. dismissed the application for judicial review. In the event that he was in error in applying *Hoang* outside the refugee context, he certified a serious question of general importance so that an appeal could be brought to the Federal Court of Appeal, pursuant to s. 83(1) of the Act. The certified question stated (at para. 16):

> Can the Appeal Division of the IRB, in the exercise of its jurisdiction to have "regard to all the circumstances of the case", under the *Immigration Act*'s s. 70(1)(*b*), consider the country (and its conditions) to which the non-refugee appellant would, on the balance of probabilities, be removed when assessing whether "the person should not be removed from Canada"; or not, in accordance with the decision of Mr. Justice MacGuigan in a refugee case, *Hoang v. Minister of Employment and Immigration* (1990), 120 N.R. 193 at 195; 13 Imm. L.R. (2d) 35 (F.C.A.) quoted above herein?

C. *Federal Court of Appeal*, [1999] 1 F.C. 605

15 The Federal Court of Appeal answered the certified question in the negative. Linden J.A. for the court agreed with Muldoon J. that *Hoang* does apply to permanent residents who are not Convention refugees, on the grounds of consistency. He felt that the confusion over this issue had arisen as a result of the decision of the Immigration Appeal Board ("I.A.B.") in *Ribic v. Canada (Minister of Employment and Immigration)*, [1985] I.A.B.D. No. 4 (QL), which had included "the degree of hardship

that would be caused to the appellant by his return to his country of nationality" as one of the relevant factors to be considered under the discretionary jurisdiction of the I.A.B. The I.A.B. was the predecessor of the I.A.D. and had an identical discretionary jurisdiction pursuant to what was then s. 72(1)(*b*) of the Act.

16 Linden J.A. overruled *Ribic* on this point. He stated at para. 15:

> Let there be no confusion about it — this Court affirms its adherence to *Hoang* and to its application in non-refugee cases such as this. The Board cannot, in exercising its equitable jurisdiction pursuant to paragraph 70(1)(*b*), consider, as a circumstance, country conditions in potential destinations of deportees. Moreover, evidence relating to these countries is irrelevant and, therefore, inadmissible. The Board's jurisdiction under paragraph 70(1)(*b*) is only to determine whether a person should be removed from Canada. The Board has no business considering the merits or demerits of any potential destination.

Linden J.A. based this conclusion on a number of factors: precedent; the overall scheme of the Act; the wording of s. 70(1)(*b*) when read in its total context; a need to avoid prolonged hearings before the I.A.D.; the fact that the I.A.D. is neither designed nor equipped to deal with such issues; that allowing it to do so would create an alternative refugee system; and that the Federal Court could handle any increase in the number of judicial review applications that could potentially result from preventing the I.A.D. from examining potential foreign hardship.

17 Having come to this conclusion, Linden J.A. canvassed four potential avenues of recourse, in lieu of an appeal to the I.A.D., through which an individual facing removal could have foreign hardship concerns taken into account: (1) voluntary departure to a safe country pursuant to s. 52 of the Act; (2) an application under s. 114(2) of the Act, asking the Minister to consider the conditions in the country to which the person is about to be sent; (3) an application for judicial review of the

Minister's s. 52(2) decision regarding the country of removal; or (4) a court challenge of the Minister's decision on *Charter* or international law grounds if removal might endanger life or security of the person. Linden J.A. therefore dismissed the appeal. The I.A.D.'s reference to the appellant's connections to Vietnam was held to be of little importance as "it was a cursory reference of no consequence in arriving at [its decision] in this case" (para. 26).

V. Issue

18 There is one issue to be resolved in this appeal: do the words "having regard to all the circumstances of the case" in s. 70(1)(*b*) of the *Immigration Act* allow the I.A.D. to consider potential foreign hardship when reviewing a removal order made against a permanent resident?

VI. Analysis

19 In my view, this appeal can be decided by applying principles of administrative law and statutory interpretation, as was the case in this Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 11. It is not necessary to address directly the scope and content of ss. 7 and 12 of the *Canadian Charter of Rights and Freedoms*.

A. *Standard of Review*

20 Judicial review of any administrative decision must begin with a determination of the proper standard on which the review is to be carried out. Although not explicitly discussed by the courts below in this case, it is apparent that

they were reviewing the I.A.D.'s decision on a correctness basis. Is this the appropriate standard? The answer is largely provided by this Court's decision in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982. In that case, this Court considered, for the first time, the standard of review to be applied to decisions of the I.R.B. For legal questions of general importance, the appropriate standard was held to be correctness. Although *Pushpanathan* involved the Convention Refugee Determination Division ("C.R.D.D.") of the I.R.B., not the I.A.D., many of the relevant factors are similar on this appeal.

21 The "pragmatic and functional" approach is employed to determine the proper standard of review in any given case: see *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at pp. 1088-90; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, at p. 592; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 28-53; *Pushpanathan, supra*, at para. 27; and *Baker, supra*, at para. 52. This approach takes into consideration factors such as the expertise of the tribunal, the nature of the decision being made, the language of the provision and the surrounding legislation, and the intention of Parliament. It recognizes that standards of review are appropriately seen as a spectrum, ranging from patent unreasonableness at the more deferential end of the spectrum, through reasonableness *simpliciter*, to correctness at the more exacting end of the spectrum: see *Pezim*, at pp. 589-90; *Southam*, at paras. 54-56; *Pushpanathan*, at para. 27; and *Baker*, at para. 55.

22 The appropriate standard of review in this case therefore must be determined by examining the relevant factors. First, the nature of the question under review favours a correctness standard. Like *Pushpanathan*, *supra*, and *Baker*, *supra*, this appeal involves a serious question of general importance certified pursuant to s.

83(1) of the Act. The jurisdiction of the I.A.D. and the mechanisms through which a decision of the I.A.D. can be appealed are established primarily by the following provisions of the Act:

> **69.4** . . .
>
> (2) [Sole and exclusive jurisdiction] The Appeal Division has, in respect of appeals made pursuant to sections 70, 71 and 77, sole and exclusive jurisdiction to hear and determine all questions of law and fact, including questions of jurisdiction, that may arise in relation to the making of a removal order or the refusal to approve an application for landing made by a member of the family class.
>
> **82.1** (1) [Judicial review by Federal Court] An application for judicial review under the *Federal Court Act* with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be commenced only with leave of a judge of the Federal Court — Trial Division.
>
> **83.** (1) [Certification necessary to appeal] A judgment of the Federal Court — Trial Division on an application for judicial review with respect to any decision or order made, or any matter arising, under this Act or the rules or regulations thereunder may be appealed to the Federal Court of Appeal only if the Federal Court — Trial Division has at the time of rendering judgment certified that a serious question of general importance is involved and has stated that question.

23 The resolution of a certified question will generally be of considerable precedential value. The legislative scheme recognizes this fact by providing that questions of general importance, i.e. those that will be applicable to numerous future cases, may be reviewed by the Federal Court of Appeal and, with leave, by this Court. The Act thus evinces a particular concern that questions of general importance be appropriately resolved. For this reason, Bastarache J. concluded in *Pushpanathan, supra*, that "s. 83(1) would be incoherent if the standard of review were anything other than correctness" (para. 43). However, in *Baker, supra*, a decision by the Minister under s. 114(2) of the Act was reviewed by L'Heureux-Dubé J. on the intermediate standard of reasonableness *simpliciter*, even though a question had been certified in

that case. In my opinion, the presence of s. 83(1) is not determinative of the standard of review on its own. As this Court stated in *Southam*, *supra*, at paras. 36-37, the precedential value of a case is only one factor relevant to the determination of the appropriate standard of review. While the review of an issue of "general importance" weighs in favour of a correctness standard, other factors relevant to the pragmatic and functional approach must still be considered. Indeed, both Bastarache J. in *Pushpanathan* and L'Heureux-Dubé J. in *Baker* went on to examine a number of additional factors.

24 In this case, the relevant additional factors also favour the correctness standard. The I.A.D. enjoys no relative expertise in the matter of law which is the object of the judicial review. While in *Pushpanathan* the matter under review was a human rights issue, an area of law in which deference is usually not given, the issue here is one of jurisdiction, a similar area where little deference is shown. Administrative bodies generally must be correct in determining the scope of their delegated mandate, given that they are entirely the creatures of statute. As Bastarache J. stated in *Pushpanathan*, at para. 28, "it is still appropriate and helpful to speak of 'jurisdictional questions' which must be answered correctly by the tribunal in order to be acting *intra vires*". While the I.A.D. has considerable expertise in determining the weight to be given to the factors it considers when exercising the discretionary jurisdiction conferred by s. 70(1)(*b*) of the Act, the scope of this discretionary jurisdiction itself is a legal issue ultimately to be supervised by the courts. The legal nature of the issue is particularly evident in cases like the one before us, where the Minister is arguing that the I.A.D. has usurped her jurisdiction. The factor of expertise weighed in the opposite direction in *Baker*, because the Minister "has some expertise relative to courts in immigration matters, particularly with respect to when exemptions should be given from the requirements that normally apply" (para. 59). The issue

under review in *Baker* did not involve a jurisdictional issue like the one presently before this Court, and therefore a more deferential standard of review was appropriate.

25 In addition, Parliament has not enacted a strong privative clause for decisions of the I.A.D. (s. 69.4(2)). As Bastarache J. stated in *Pushpanathan* (at para. 49), in relation to the similarly worded privative clause for the C.R.D.D. (s. 67(1)), "read in the light of s. 83(1), it appears quite clear that the privative clause, such as it is, is superseded with respect to questions of 'general importance'". In my opinion, this is also the case for the privative clause contained in s. 69.4(2).

26 Finally, appeals under s. 70(1)(*b*) do not engage the I.A.D. in a polycentric balancing of competing interests, but instead require the resolution of an issue in which an individual's rights are at stake. The I.A.D. is not involved in a managing or supervisory function, but is adjudicating the rights of individuals *vis-à-vis* the state. This factor also weighs in favour of a less deferential standard of review. For all of these reasons, I conclude that a correctness standard should be applied in reviewing the decision of the I.A.D. in this case. However, it may well be that a more deferential standard would apply to decisions of the I.A.D. in other contexts, particularly if the issue under review were to fall squarely within the specialized expertise of the board.

B. *Statutory Interpretation*

27 The resolution of this appeal turns on the interpretation given to the words of s. 70(1)(*b*). What does the phrase "having regard to all the circumstances of the case" mean? Did Parliament intend it to be broad enough to allow the I.A.D. to consider potential foreign hardship when deciding whether to quash or stay a removal order made against a permanent resident? This Court has stated on numerous

occasions that the preferred approach to statutory interpretation is that set out by E. A. Driedger in *Construction of Statutes* (2nd ed. 1983), at p. 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at pp. 287-94, and R. Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994), at p. 131. The modern approach to statutory interpretation has been relied on by this Court in many areas, including the administrative law context. See, for example: Estey J. in *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578 (taxation); Dickson C.J. in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, at p. 1134 (administrative); Iacobucci J. in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21 (employment); and McLachlin C.J. in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33 (criminal).

28 While the interpretive factors enumerated by Driedger need not be applied in a formulaic fashion, they provide a useful framework through which to approach this appeal, given that the sole issue is one of statutory interpretation. However, I note that these interpretive factors are closely related and interdependent. They therefore need not be canvassed separately in every case.

1. Grammatical and Ordinary Sense

29 An ordinary reading of "all the circumstances of the case" leads to a broad interpretation of s. 70(1)(*b*). The first consideration is that these words appear in a

provision establishing a discretionary or equitable jurisdiction. The words do not provide detailed guidelines as to how this discretionary jurisdiction is to be exercised, but instead leave the scope of the discretion open-ended.

30 The second factor favouring a broad reading of s. 70(1)(*b*) is the grammatical sense of the phrase "all the circumstances of the case". The word "all" is defined by the *Concise Oxford Dictionary* (8th ed. 1990), at p. 29, as "entire number of" or "greatest possible". In this context, it would therefore mean considering the greatest possible number of factors relevant to the removal of a permanent resident from Canada. It is evident that one such factor is the conditions an individual would face upon removal. This is a natural consideration, because it is difficult to decide if it would be equitable to remove an individual from Canada without engaging in a comparative analysis of the conditions the individual would face if allowed to remain in the country and the conditions he or she would face if removed to a foreign state. For instance, an individual with two relatives in Canada but no relatives in the likely country of removal is in a different position from an individual with two relatives in Canada but an extensive family network in the likely country of removal. Similarly, an individual whose likely country of removal is at peace is in a different situation from an individual whose likely country of removal is in the midst of a civil war.

31 That this is the natural way to read "all the circumstances of the case" is supported by *Krishnapillai v. Canada (Minister of Citizenship and Immigration)*, [1997] I.A.D.D. No. 636 (QL), where the I.A.D. stated, at paras. 37-38:

> The statutory duty of the Appeal Division is to consider all of the circumstances of the case of a permanent resident. This is a mandate to consider the individual in the entirety of his or her context. The connections of that individual to Canada, and the hardship that individual would experience upon removal can not be fully appreciated by assessing

> the individual solely in terms of the connections that individual has to Canada and people living in Canada. To do so would be to abstract that individual from the connections which also link that individual to his or her country of origin, and which connections form part of the reality of every immigrant.
>
> The degree to which a permanent resident maintains a connection with his or her country of origin varies with the circumstances of the individual, and it is the extent of that connection which, quite properly, forms the basis of inquiry in literally every removal appeal before this Division.

32 In addition, the inclusive nature of the word "all" suggests that realistic possibilities are just as relevant as certainties in making this discretionary decision. For instance, the likelihood that an individual will re-offend is an uncertain factor, but one that is commonly considered by the I.A.D. pursuant to s. 70(1)(*b*) when an individual is being removed as a result of a criminal conviction, as is the case in *Al Sagban*. This indicates that the I.A.D. should also be able to consider conditions in the likely country of removal, even when the ultimate country of removal is not known with absolute certainty at the time the s. 70(1)(*b*) appeal is heard.

33 I therefore conclude that when the words of s. 70(1)(*b*) are read in their grammatical and ordinary sense, potential foreign hardship appears to be a relevant factor for the I.A.D. to consider. To conclude otherwise would be akin to reading this provision as entitling the I.A.D. to have regard to only some of the circumstances of the case.

2. Broader Context

34 The grammatical and ordinary sense of the words employed in s. 70(1)(*b*) is not determinative, however, as this Court has long rejected a literal approach to statutory interpretation. Instead, s. 70(1)(*b*) must be read in its entire context. This

inquiry involves examining the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue.

35 When read in this way, I conclude that the I.A.D. is entitled to consider potential foreign hardship under s. 70(1)(*b*), provided that a likely country of removal has been established on a balance of probabilities by the permanent resident facing removal. This is a case where the ordinary reading of the statute is in harmony with legislative intent and with the scheme and object of the Act. I will now explore each of the relevant contextual factors supporting this conclusion, beginning with the history of s. 70(1)(*b*).

(a) *History of Section 70(1)(b)*

36 Individuals facing removal from Canada have long been able to appeal the removal order made against them. Citizenship and Immigration Canada reviewed the history of the appeal process in *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation* (1998), at p. 52:

> Appeals were made directly to the Minister responsible for immigration until 1956, at which time an administrative agency, still subordinate to the Minister, was established. A combination of factors, including dissatisfaction with an appeal process that lacked independence, led to the creation, in 1967, of the [reconstituted] Immigration Appeal Board.

See *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, at pp. 739-42, and N. Kelley and M. Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy* (1998), at pp. 368-69. The reconstituted I.A.B. was an administrative board independent of the Minister. Section 11 of the

Immigration Appeal Board Act, S.C. 1966-67, c. 90, provided for appeals to the I.A.B. on any question of law or fact or mixed law and fact. Section 15 of this legislation conferred upon the I.A.B. the power to stay or quash a deportation order made against a permanent resident on the basis of "all the circumstances of the case". As Kelley and Trebilcock point out, at pp. 368-69, the creation of this new power significantly changed the division of powers between the Minister and the administrative regime:

> The most important innovation in the new act was an extension of IAB powers to include areas of equitable jurisdiction. This new power allowed the IAB to consider humanitarian and compassionate arguments if the appellant was about to be deported under the strict terms of the Immigration Act. [Progressive Conservative M.P.] Richard Bell opposed placing such equitable powers in the hands of an administrative tribunal, preferring that the political arm of government continue to exercise it. However, as he himself acknowledged, his view was not one widely shared by his colleagues: 'without question, sir, the majority opinion is against me.'

However, this new power remained subject to the discretion of the Minister and the Solicitor General, who were empowered under s. 21 of this legislation (ss. 81 through 82 of the present Act) to pre-empt an I.A.B. decision by certifying their opinion, based on security or criminal intelligence reports, that it would be contrary to the national interest to permit such relief. As an aside, I note that the right of appeal may also now be lost if the Minister is of the opinion that an individual constitutes a danger to the public in Canada: s. 70(5) of the present Act.

37 The *Immigration Appeal Board Act* was repealed in 1977 by the *Immigration Act, 1976*, S.C. 1976-77, c. 52. Section 72 of this new legislation consolidated the former ss. 11 and 15 into one section setting out two separate grounds of appeal. In *Chiarelli*, *supra*, Sopinka J. stated, for the Court, at p. 741, that these reforms:

> . . . did not change the nature of the decision that could be made by the Board "having regard to all the circumstances of the case". That decision remained, as it had been under the 1967 Act, an exercise of discretion based on compassionate grounds.

38 The appeals component of the I.A.B. later became the I.A.D., and s. 72 was later renumbered s. 70, but its wording has remained the same. What did change in 1977, however, was that the concept of domicile was removed from the Act. Prior to the 1977 reforms, permanent residents who had lived in Canada for five years acquired Canadian domicile and could not be removed from the country, absent exceptional circumstances: see Kelley and Trebilcock, *supra*, at p. 430. When questioned on the vulnerability of long-term permanent residents under the new approach, the Honourable Bud Cullen, Minister of Manpower and Immigration, responded that the new Act "permits removal of permanent residents only for very serious reasons and leaves ameliorating or compassionate factors such as length of residence in Canada to the discretion of the Immigration Appeal Board to which permanent residents have a right to appeal" (*House of Commons Debates*, July 22, 1977, at p. 7928). I note that no mention was made of relegating to the Minister the consideration of ameliorating or compassionate factors that involve foreign considerations.

39 Indeed, this Court has long approved of a broad approach to s. 70(1)(*b*) (or its predecessor legislation). Martland J. stated in *Grillas v. Minister of Manpower and Immigration*, [1972] S.C.R. 577, at p. 590 (dissenting, but not on this point) that, "[t]he intention of the Act was to enable the Board, in certain circumstances, to ameliorate the lot of an appellant against whom a deportation order had lawfully been made." In the same case, Abbott J. stated, for the majority, at p. 581:

> This somewhat unusual section [s. 15, the provisions of which are now contained in ss. 70(1)(*b*) and 70(3)(*b*)] gives the Board broad discretionary

> powers to allow a person to remain in Canada who is inadmissible under the *Immigration Act*. Before the section was enacted, such power was vested solely in the executive branch of Government.
>
> 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.

This view was confirmed by Sopinka J., for the Court, in *Chiarelli*, *supra*, at p. 737, where he stated that s. 70(1)(*b*) "allows for clemency from deportation on compassionate grounds". In the I.R.B. publication, *Removal Order Appeals* (1999), at p. 9-2, it is stated that s. 70(1)(*b*) "contemplates the realization of a valid social objective, namely, relief from the hardship that may be caused by the pure operation of the law relating to removal". I agree.

40 Employing such a broad approach to s. 70(1)(*b*), the I.A.D. itself has long considered foreign hardship to be an appropriate factor to take into account when dealing with appeals brought under this section. In *Ribic*, *supra*, at pp. 4-5, the I.A.B. summarized the relevant factors to be considered under its discretionary jurisdiction pursuant to what is now s. 70(1)(*b*) of the Act:

> In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality. While the general areas of review are similar in each case the facts are rarely, if ever, identical. [Emphasis added.]

This list is illustrative, and not exhaustive. The weight to be accorded to any particular factor will vary according to the particular circumstances of a case. While the majority of these factors look to domestic considerations, the final factor includes consideration of potential foreign hardship.

41 The "*Ribic* factors" were applied by the I.A.D. for at least 15 years. In fact, the I.A.B. considered potential foreign hardship under s. 70(1)(*b*) as early as 1978: *Moore v. Minister of Employment and Immigration*, No. 78-3016, December 6, 1978. Prior to these appeals, the only other case in which the I.A.D. refused to consider potential foreign hardship when reviewing a removal order against a non-refugee permanent resident under its discretionary jurisdiction was *El Tassi v. Canada (Minister of Citizenship and Immigration)*, [1996] I.A.D.D. No. 993 (QL). As in these appeals, this was the result of the panel interpreting *Hoang*, *supra*, as preventing them from doing so. The types of foreign hardship factors considered by the I.A.D. since the 1977 reforms have included language ability, family connections, availability of necessary medical care, and risk of physical harm.

(b) *The Scheme of the Act*

42 The arguments raised by both sides in this appeal primarily concern the proper role of s. 70(1)(*b*) appeals within the overall scheme of the Act. In addition, most of the concerns expressed by the Federal Court of Appeal with regard to allowing the I.A.D. to consider potential foreign hardship involved the appropriate place for foreign hardship to be considered within the scheme of the Act. The Minister argues that the I.A.D. cannot consider potential foreign hardship under s. 70(1)(*b*) because the Minister has not yet made her decision as to the country of removal under s. 52 at the time of the s. 70(1)(*b*) hearing. To conclude otherwise would allow the I.A.D. to

interfere with the jurisdiction of the Minister to make that decision. The appellant, on the other hand, argues that a likely country of removal is almost always known at the time of the s. 70(1)(*b*) appeal (at least for permanent residents who are not refugees), and therefore can be considered at that time. Furthermore, the appellant submits, there is no other logical place in the Act under which potential foreign hardship can be considered if it is not considered under s. 70(1)(*b*).

43 I will therefore examine the scheme of the Act to explain, in part, why I have concluded that the appellant's position is the correct one. The relevant provisions are those concerned with the way in which permanent residents can be lawfully removed from Canada, and the various avenues of redress available to permanent residents to contest a removal order.

(i) General Provisions with Respect to Removal of Permanent Residents

44 The scheme of the Act with regard to the removal of permanent residents is relatively straightforward, although there are some complexities in more unusual circumstances. Once lawfully admitted to Canada, permanent residents are removable only if they are a person described in s. 27(1) of the Act. Grounds for removal set out in s. 27(1) include obtaining landing by virtue of fraud or misrepresentation of a material fact (s. 27(1)(*e*)), the applicable ground in this case, and conviction of an offence for which a term of more than six months' imprisonment has been imposed, or where a term of imprisonment of five years or more may be imposed (s. 27(1)(*d*)), the applicable ground in *Al Sagban*.

45 Permanent residents have the right to appeal a removal order to the I.A.D. pursuant to s. 70(1), on either legal grounds (s. 70(1)(*a*)) or discretionary grounds (s.

70(1)(*b*)), unless they are designated as a "danger to the public" under s. 70(5) or as a security risk under s. 81. It is important to note that when such an appeal is brought, the execution of the removal order is automatically stayed by s. 49 of the Act until the appeal has been disposed of by the I.A.D. and any judicial review proceedings have come to an end. As I will discuss below, this is not the situation when an individual is seeking the judicial review of a decision by the Minister. In such instances, a stay of the removal order is at the discretion of the Federal Court.

46 Parliament has structured the I.A.D. to provide robust procedural guarantees to individuals who come before it and to provide a significant degree of administrative flexibility to I.A.D. board members and staff. The I.A.D. is a court of record (s. 69.4(1)) with broad powers to summons and examine witnesses, order the production of documents, and enforce its orders (s. 69.4(3)). A removal order appeal is essentially a hearing *de novo*, as evidence can be received that was not available at the time the removal order was made. The I.A.D. has liberal rules of evidence, and may "receive such additional evidence as it may consider credible or trustworthy and necessary for dealing with the subject-matter before it" (s. 69.4(3)(*c*)). Written reasons must be provided for the disposition of an appeal under ss. 70 or 71 when such reasons are requested by either of the parties to the appeal (s. 69.4(5)). As with the statutory stay, Parliament has not provided similar procedural guarantees for decisions by the Minister.

47 Furthermore, the remedial powers of the I.A.D. are very flexible. Pursuant to s. 73(1) of the Act, the I.A.D. can dispose of an appeal made pursuant to s. 70 in three ways: by allowing it; by dismissing it; or, if exercising its equitable jurisdiction under ss. 70(1)(*b*) or 70(3)(*b*), by directing that execution of the order be stayed. When a removal order is quashed, the I.A.D. has the power to make any other removal order

or conditional removal order that should have been made (s. 74(1)). When a removal order is stayed, the I.A.D. may impose any terms and conditions it deems appropriate, and review the case from time to time as it considers necessary (s. 74(2)). Stays may be cancelled or amended by the I.A.D. at any time (s. 74(3)). When a stay is cancelled, the appeal must be either dismissed or allowed, although the I.A.D. retains its powers under s. 74(1) to substitute a different removal order.

48 The I.A.D. can also reopen an appeal prior to execution of the removal order and, if appropriate, exercise its discretion in another way. As a result, this Court has stated that the I.A.D.'s discretionary jurisdiction is ongoing: *Grillas*, *supra*, at p. 582, *per* Abbott J., and at p. 590, *per* Martland J. As Lorne Waldman states, in *Immigration Law and Practice* (loose-leaf ed.), at § 10.133.7:

> It is trite law that the Appeal Division has ongoing jurisdiction over the appellant up to and until the time that the removal order is executed. In such circumstances, there would appear to be no reason for concluding that the Appeal Division could [not] consider subsequently whether or not to reopen an appeal to consider issues related to the impact of removal to a specific country on the appellant.

49 It is within this general scheme that the alternative suggestions made by the Minister as to where foreign hardship should be considered must be evaluated. Essentially, the Minister submits that the scheme of the Act favours considering foreign hardship by seeking judicial review of the Minister's decision as to the country of removal, made under s. 52 of the Act, or by seeking a Minister's permit under s. 114(2) of the Act to exempt the individual from removal due to foreign hardship concerns. In either of these ways, foreign hardship can be considered after the Minister has made her decision regarding the country of removal.

50 In my opinion, these alternative avenues of redress are not the ideal way for foreign hardship concerns to be taken into account. They need be resorted to only in cases where the I.A.D. cannot consider potential foreign hardship — either because a likely country of removal has not been established, because the I.A.D. has lost jurisdiction (i.e. pursuant to ss. 70(5) or 81 of the Act), or because the country of removal changed after the s. 70(1)(*b*) appeal hearing. Furthermore, I do not believe that allowing the I.A.D. to take foreign hardship into account under s. 70(1)(*b*) interferes with the Minister's jurisdiction under s. 52, with regard to the selection of the country of removal. I will now explain why I have reached these conclusions.

(ii) Section 52 of the Act

51 Section 52 of the Act controls the country of removal, which can be selected by the individual being removed, subject to the Minister's approval, or by the Minister, which is the usual occurrence. In practice, the Minister usually makes the s. 52 decision by having an enforcement officer book travel arrangements for the individual being removed. There is no other administrative procedure in place by which a s. 52 decision is made, or by which a s. 52 decision can be contested by the individual being removed, beyond seeking judicial review of the Minister's decision. I note, however, that the judicial review of a s. 52 decision is very limited in scope: *Arduengo v. Canada (Minister of Citizenship and Immigration)*, [1997] 3 F.C. 468 (T.D.).

52 When a removal order is made, the traditional practice is that a decision regarding the country of removal is made by the Minister pursuant to s. 52 of the Act after the I.A.D. has dismissed an appeal. However, as was conceded by the Minister in oral argument, there is no statutory requirement that this be the case. The Minister can select the country of removal at any time after "an exclusion order or a deportation

order is made" (s. 52(1)). The only legislative direction with regard to timing is contained in s. 48 of the Act, which instructs the Minister to execute a removal order "as soon as reasonably practicable" after it is made, or after any stays have been lifted. But s. 48 deals only with the timing of the execution of removal orders, not the selection of a country of removal. If the Minister is concerned about maintaining the ability to exercise her jurisdiction to decide the country of removal in every case, she is free to make the s. 52 decision prior to the I.A.D. hearing.

53 In any event, there is no legal impediment to the Minister making a submission to the I.A.D. at the time of the appeal regarding the likely country of removal. The Minister is always a party to an appeal under s. 70(1)(*b*). The intervener I.R.B. points out that the Minister has made such submissions on many occasions in the past. In addition, the country of removal for a permanent resident who is not a refugee will rarely be one other than the individual's country of nationality or citizenship. Counsel for the appellant and for the intervener I.R.B. argued that, when the appeal involves a non-refugee, approximately 90 percent of the time the country of removal is known at the time the s. 70(1)(*b*) appeal is heard. The Minister conceded in oral argument that the correct figure was "a very high percentage". That this is the case is not surprising, given that the only country usually willing to take an individual being removed is the country that is legally obliged to take them — that of which the individual is a national or citizen: see Reed J.'s decision in *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 F.C. 501 (T.D.), at p. 506.

54 This explains why the option of voluntary departure under s. 52 will not be realistic for many individuals facing removal. Voluntary departure is dependent on an individual finding a suitable country willing to accept him or her. When an individual has criminal convictions, this will be particularly difficult. As Waldman

points out, *supra*, at §10.133.4, "this remedy will, in most cases, be more apparent than real, because it will usually be extremely difficult for a person who has been ordered deported from Canada to gain admission to any country other than the country of his or her nationality". I point this out for two reasons. First, to illustrate that voluntary departure will not usually be an option available to a permanent resident facing removal who has foreign hardship concerns. And second, to further confirm that the likely country of removal will usually be known at the time the s. 70(1)(*b*) appeal is heard.

55 I also do not believe that allowing the I.A.D. to take foreign hardship into account under s. 70(1)(*b*) interferes with the Minister's jurisdiction to decide the country of removal. If the I.A.D. decides to quash or stay a removal order, it does not interfere with the Minister's jurisdiction under s. 52, because there is no longer a removal order in place for which a s. 52 decision needs to be made. In other words, the Minister's jurisdiction to decide the country of removal becomes inoperative when a removal order is quashed or stayed, as there is no longer anyone to remove. While the Act does not prevent the Minister from making the s. 52 decision prior to the hearing of the s. 70(1)(*b*) appeal, if the Minister decides to wait until after the hearing to make a decision under s. 52, she runs the risk of losing jurisdiction to make that decision because there will no longer be anyone to remove. In my opinion, this was the intended scheme of the Act. I therefore see no reason why s. 52 should prevent the I.A.D. from considering foreign hardship in the likely country of removal when hearing an appeal under s. 70(1)(*b*).

56 Before turning to the Minister's arguments with respect to s. 114(2), I wish to add some brief comments regarding the correct procedure to be followed during a s. 70(1)(*b*) appeal. First, the onus is on a permanent resident facing removal to establish

the likely country of removal, on a balance of probabilities. It is only in those cases where the Minister disagrees with an individual's submissions as to the likely country of removal that the Minister would need to make submissions as to why some other country is the likely country of removal, or as to why a likely country of removal cannot yet be determined. This would be the case, for instance, where the Minister is involved in negotiations with a country other than an individual's country of nationality or citizenship with regard to accepting that individual.

57 Second, in appeals under the I.A.D.'s discretionary jurisdiction, the onus has always been on the individual facing removal to establish why he or she should be allowed to remain in Canada. If the onus is not met, the default position is removal. Non-citizens do not have a right to enter or remain in Canada: *Chiarelli*, *supra*, at p. 733, *per* Sopinka J. See also *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 189, *per* Wilson J.; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at p. 834, *per* La Forest J.; and *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] 1 S.C.R. 1053, at p. 1070. In general, immigration is a privilege not a right, although refugees are protected by the guarantees provided by the 1951 *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6, entered into force April 22, 1954, entered into force for Canada September 2, 1969 (the "*1951 Geneva Convention*"), and the *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267, entered into force October 4, 1967, entered into force in Canada June 4, 1969. As Martland J. stated for this Court in *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, at p. 380, a removal order "establishes that, in the absence of some special privilege existing, [an individual subject to a lawful removal order] has no right whatever to remain in Canada. [An individual appealing a lawful removal order] does not, therefore, attempt to assert a right, but, rather, attempts to obtain a discretionary privilege".

58 Finally, I note that the likely country of removal will often not be ascertainable for Convention refugees because s. 53 of the Act prohibits their removal "to a country where the person's life or freedom would be threatened for reasons of race, religion, nationality, membership in a particular social group or political opinion", unless the individual falls within particular enumerated classes and the Minister is of the opinion that the individual constitutes a danger to the public in Canada (s. 53(1)(*a*), (*c*) and (*d*)) or a danger to the security of Canada (s. 53(1)(*b*)). Section 53 implements Canada's international commitment under Article 33 of the *1951 Geneva Convention* to protect against *refoulement*, the principle of international law which requires that no state shall return a refugee to a country where his or her life or freedom may be endangered, except where a refugee is a danger to national security or a danger to the community in the host state. As a result, most Convention refugees cannot be removed to their country of nationality or citizenship, but often no other country will be obliged or willing to accept them. In such cases, there will be no likely country of removal at the time of the appeal and the I.A.D. cannot therefore consider foreign hardship.

59 In contrast, permanent residents who are not Convention refugees have no explicit statutory protection against removal to a state where they believe their life or freedom would be threatened (although they have *Charter* protections against return to certain conditions: see *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1). This illustrates that there is no need to have absolute consistency between how permanent residents who are not refugees are dealt with under the Act and how Convention refugees are dealt with. In fact, the Act treats citizens differently from permanent residents, who in turn are treated differently from Convention refugees, who are treated differently from individuals holding visas and from illegal residents. It is an important aspect of the statutory scheme that these

different categories of individuals are treated differently, with appropriate adjustments to the varying rights and contexts of individuals in these groups. I need only point out that permanent residents have rights under both the *Charter* and the Act that other non-citizens do not, including mobility rights under s. 6(2) of the *Charter* and the right to sponsor individuals to come to Canada under s. 6(2) of the Act.

(iii) Section 114(2) of the Act

60 This brings us to the Minister's argument that foreign hardship is more appropriately considered under an application for a Minister's permit under s. 114(2), which would be made after the s. 52 decision as to the country of removal has been made. I disagree with this position, at least in those cases where a likely country of removal can be established before the I.A.D. For ease of reference, s. 114(2) is repeated here:

> **114.** . . .
>
> (2) [Exemption from regulations] The Governor in Council may, by regulation, authorize the Minister to exempt any person from any regulation made under subsection (1) or otherwise facilitate the admission of any person where the Minister is satisfied that the person should be exempted from that regulation or that the person's admission should be facilitated owing to the existence of compassionate or humanitarian considerations.

First, I note that this provision is generally used by the Minister to facilitate entry to Canada, not to prevent removal from Canada. As L'Heureux-Dubé J. stated for a majority of this Court in *Baker*, *supra*, at para. 1:

> Regulations made pursuant to s. 114(2) of the *Immigration Act,* R.S.C., 1985, c. I-2, empower the respondent Minister to facilitate the admission to Canada of a person where the Minister is satisfied, owing to

> humanitarian and compassionate considerations, that admission should be facilitated or an exemption from the regulations made under the Act should be granted. [Emphasis added.]

61 A waiver granted under s. 114(2) is referred to as a Minister's permit. Although a decision under s. 114(2) is officially made by the Minister, in practice, and like a ministerial decision under s. 52 of the Act, the decision is dealt with in the name of the Minister by immigration officers: see *Baker*, at para. 15, and *Minister of Employment and Immigration v. Jiminez-Perez*, [1984] 2 S.C.R. 565, at p. 569. Most commonly, s. 114(2) is used to exempt persons already in Canada who wish to apply for landing from within the country and therefore must obtain a waiver from the normal requirement to obtain an immigrant visa outside Canada. This was the situation applicable to Mavis Baker in *Baker*, *supra*. Ms. Baker lived illegally in Canada for 11 years as a domestic worker before a removal order was made against her. She then applied to the Minister for an exemption from the requirement to apply for permanent residence outside Canada, based upon humanitarian and compassionate considerations, pursuant to s. 114(2) of the Act. As the intervener I.R.B. points out, s. 114(2) must be relied on by illegal residents who wish to remain in Canada when a removal order has been made against them because such individuals do not have a right to appeal to the I.A.D. Essentially, s. 114(2) is the only recourse provided by the Act for such individuals.

62 However, the Minister argues in this appeal that s. 114(2) can also be used by permanent residents who have recently lost their permanent resident status pursuant to s. 24(1)(*b*) of the Act as a result of the I.A.D. upholding a removal order made against them. The argument is that such individuals could then apply to be "reinstated" as permanent residents by the Minister based on humanitarian and compassionate considerations. In this way, potential foreign hardship would be

considered by the Minister under s. 114(2) after the s. 52 decision as to country of removal has been made, rather than by the I.A.D. under s. 70(1)(*b*) prior to the s. 52 decision. Linden J.A. accepted this argument in the court below.

63 But as Waldman, *supra*, asks at § 10.133.3:

> Can a person who has been admitted to Canada as a permanent resident and who has had that status removed as a result of ministerial action, but who has not yet been deported from Canada, seek to be granted the very status which has so recently been removed from him or her? Can a permanent resident under a deportation order seek and be granted landing prior to the deportation order being executed?

In my opinion, this was not the intended role of s. 114(2) within the scheme of the Act, at least as a matter of general recourse. The scheme of the Act does not support the view that a s. 114(2) application could be made by every individual being removed from Canada. Instead, the Act provides for the I.A.D. to deal with the majority of issues surrounding the removal of individuals from Canada, absent the I.A.D. losing jurisdiction because an individual has been determined to be a danger to the public or a threat to national security. Without foreclosing the operation of s. 114(2) in other circumstances, I conclude that there is no need to resort to it in this case. Provided a permanent resident is able to establish a likely country of removal during the s. 70(1)(*b*) appeal, the I.A.D. should be able to consider potential foreign hardship when deciding whether to quash or stay the removal order.

64 To summarize, the scheme of the Act reveals that an appeal to the I.A.D. under s. 70(1)(*b*) is the most appropriate place for a permanent resident facing removal from Canada to have foreign hardship taken into account. A harmonious reading of the scheme of the Act reveals that all relevant considerations should be considered by the

I.A.D. whenever possible. It is only when it is not possible for the I.A.D. to consider potential foreign hardship that other provisions of the Act need be resorted to. These alternative provisions are not as robust as a hearing before the I.A.D. The judicial review of a s. 52 decision provides only narrow grounds for review, and an application to the Minister under s. 114(2) is essentially a plea to the executive branch for special consideration which is not even explicitly envisioned by the Act. Furthermore, the Act does not provide an automatic stay of the removal order when either of these alternative routes is pursued, as it does for appeals before the I.A.D. For all of these reasons, the scheme of the Act favours allowing the I.A.D., a specialized tribunal with ample procedural protections, to take foreign hardship factors into account whenever a likely country of removal has been established.

3. Object and Intention

65 Turning to object and intention, I conclude that both the object of the Act and the intention of Parliament support such a reading of s. 70(1)(*b*). The object of the Act is to create a comprehensive administrative scheme to deal with immigration issues in Canada. Under this administrative scheme, Parliament has given certain powers to the I.R.B. and certain powers to the Minister, with a limited supervisory role to be played by the courts. The role of this Court in this appeal is to ensure that Parliament's intended division of powers is respected, in accordance with the controlling legislation.

66 Parliament intended the I.A.D. to have a broad discretion to allow permanent residents facing removal to remain in Canada if it would be equitable to do so. This is apparent from the open-ended wording of s. 70(1)(*b*), which does not enumerate any specific factors to be considered by the I.A.D. when exercising its discretion under this

provision. The ability to quash or stay removal orders based on ameliorating or compassionate factors was granted to the I.A.D. partially as a result of the removal of the domicile provisions from the Act in 1977. The object of s. 70(1)(*b*) is to give the I.A.D. the discretion to determine whether a permanent resident should be removed from Canada. This is, admittedly, an unusual provision in that it gives the I.A.D. considerable discretionary power in dealing with the removal of permanent residents. But granting this discretionary power was a decision of Parliament. If Parliament is now concerned that such a broad grant of administrative discretion has been made, it is open to Parliament to amend the legislation.

67 It would be inconsistent with these objectives for this Court to narrow the I.A.D.'s discretionary jurisdiction under s. 70(1)(*b*), and thereby leave foreign hardship concerns to be considered only by the Minister under s. 52 or a s. 114(2) application, or by the courts on either an application for judicial review of a s. 52 or s. 114(2) decision or an independent *Charter* action. Such a bifurcation of the administrative process was not envisioned by Parliament, as evidenced by the absence of procedural provisions and statutory stays for such proceedings, and would result in unnecessary complexity and confusion in the administrative scheme. One of the objects of the Act is to streamline immigration proceedings in Canada, while providing full protection for *Charter* and common law rights.

68 In *Building on a Strong Foundation for the 21st Century: New Directions for Immigration and Refugee Policy and Legislation*, *supra*, the Minister expressed a commitment to reduce delays and "multiple decision layers" in the immigration appeal system (p. 52). I therefore believe that it is consistent with the object of the Act to avoid the bifurcation of the removal appeal process whenever possible. Bifurcation need be resorted to only in those cases where the I.A.D. is unable to consider potential

foreign hardship. As a matter of policy and statutory design, the bifurcation in such cases will not be ideal. However, such shortcomings are not for this Court to remedy, absent the establishment of an unjustifiable *Charter* violation, which has not been argued in this case.

69 Parliament has equipped the I.A.D. with all of the tools necessary to ensure that the requirements of natural justice are met when removing individuals from Canada, including providing for an oral hearing, the calling and cross-examination of witnesses, the tendering of evidence, the giving of reasons (when requested), and a right to seek judicial review of the I.A.D.'s decision (during which time the statutory stay of the removal order is in place). That these procedures are designed to meet the requirements of natural justice can be inferred from Wilson J.'s statement in *Singh*, *supra*, at p. 199, that a hearing before the I.A.B., the I.A.D.'s predecessor, is "a quasi-judicial one to which full natural justice would apply". These procedures help ensure that any relevant *Charter* rights will be respected. Parliament did not give the Minister similar tools for making ss. 52 or 114(2) decisions, where no oral hearing is required, no witnesses can be called, and a statutory stay is not provided either pending the decision or if judicial review is sought.

70 As Cory J. stated, in dissent, in *Pushpanathan*, *supra*, at para. 157, when an individual faces removal from Canada:

> . . . it would be unthinkable if there were not a fair hearing before an impartial arbiter to determine whether there are "substantial grounds for believing" that the individual to be deported would face a risk of torture, arbitrary execution, disappearance or other such serious violation of human rights. In light of the grave consequences of deportation in such a case, there must be an opportunity for a hearing before the individual is deported, and the hearing must comply with all of the principles of natural justice. As well, the individual in question ought to be entitled to have the

> decision reviewed to ensure that it did indeed comply with those principles.

The protections provided in relation to a s. 70(1)(*b*) appeal to the I.A.D. satisfy these requirements. While the Minister's decisions under ss. 52 and 114(2) may well accord with the requirements of natural justice in most cases, I am concerned that this will not always be the case. *Baker*, *supra*, is one example of an instance where the Minister's decision was procedurally deficient. It fell to this Court to clarify that the principles of natural justice guarantee certain rights to individuals who make a s. 114(2) application, including a right to make written submissions to the Minister's delegate who actually makes the decision, a right to receive brief reasons for the decision, and a right to an unbiased decision maker. However, it is clear that the procedural protections required may vary with the context of the case: *Singh*, *supra*, at p. 213, *per* Wilson J.; *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 361, *per* La Forest J.; *Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879, at pp. 895-96, *per* Sopinka J.; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, *per* L'Heureux-Dubé J.; *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869, at p. 882; and *Dehghani*, *supra*, at p. 1076.

71 When faced with the problem of a statute which can be read in two ways, one that accords with the principles of natural justice and one that does not, this Court has consistently adopted the interpretation that favours a fuller assurance that the requirements of natural justice will be met: *Alliance des professeurs catholiques de Montréal v. Quebec Labour Relations Board*, [1953] 2 S.C.R. 140, at p. 166, *per* Fauteux J.; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311, at p. 328, *per* Laskin C.J.; and *Singh*, *supra*, at p. 200, *per*

Wilson J. Therefore, for the purposes of this appeal, a reading of the Act which allows permanent residents to have foreign hardship considered by the I.A.D., where a likely country of removal has been established, is preferable.

C. *Precedent*

72 Given the way the issue involved in this appeal arose, I wish to briefly review the cases relied on by the Federal Court to conclude that the I.A.D. cannot consider potential foreign hardship on an appeal under s. 70(1)(*b*). The debate surrounding the jurisdiction of the I.A.D. developed essentially because the factors stated by the I.A.B. in *Ribic*, *supra*, as being relevant to an appeal under s. 70(1)(*b*) were revisited by the Federal Court of Appeal beginning with *Hoang*, *supra*. This was a somewhat surprising development, given that the *Ribic* factors were applied for many years by the I.A.D. without objection by the Minister. All indications are that the system worked rather well.

73 The confusion that has now arisen appears to have its genesis in the decision of the I.A.B. in *Markl v. Minister of Employment and Immigration*, No. V81-6127, May 27, 1985, which was relied on in *Hoang*, *supra*, and consequently was also considered by the courts below in this case and in *Al Sagban, supra*. Markl was both a permanent resident and a Convention refugee. A removal order was made against him as the result of a series of criminal offences. Although a Convention refugee, Markl could have been removed to his country of nationality because his offence was sufficiently serious to bring him within the exception in s. 55(*c*) of the Act (now s. 53(1)). This provision allows Convention refugees who have committed a serious offence to be removed to a country where they may face persecution. The policy of the Canadian government at the time, however, was not to deport people to

Czechoslovakia, Markl's country of nationality. The I.A.B. was therefore in the unusual position of knowing the likely country of removal but also knowing that Markl would not be deported there at that time. However, the I.A.B. declined to take judicial notice of the government policy in question because such policies change from time to time. As a result, it took into account the conditions Markl would face in Czechoslovakia in making its discretionary decision under s. 70(1)(*b*) — the fact that his parents were still there, that he spoke the language and had lived there until he was 18, and the fact that he would be jailed for 18 months for deserting if he was returned to Czechoslovakia. Weighing these factors along with the relevant domestic ones, it declined to exercise its discretionary jurisdiction in favour of allowing Markl to remain in the country.

74 It was in this context that the I.A.B. stated, at p. 5:

> The Board is seized with an appeal from a deportation order. It has to rule on the validity of this order. Should the appeal fail, the issue of to where the appellant may be deported is a separate one; one over which the Board has no jurisdiction. [Emphasis added.]

However, this passage simply clarifies that once the I.A.D. upholds a removal order, the issue of where the individual will be removed to is a matter for the Minister. If the Minister has a policy not to remove to a particular country, then the removal may be delayed. This passage is not authority for the proposition that the I.A.D. can never consider potential foreign hardship. In fact, it stands for just the opposite, as the I.A.B. was considering factors related to Czechoslovakia in deciding whether or not to deport Markl. Unfortunately, this was not the interpretation given to *Markl* when *Hoang* was decided.

75 When *Hoang v. Canada (Minister of Employment and Immigration)* was before the I.A.B., [1987] I.A.B.D. No. 6 (QL), the majority incorrectly relied on *Markl* as authority for the I.A.B. not being able to consider potential foreign hardship. Board Member Townshend dissented, stating, at para. 32:

> . . . certainly, the Board has no jurisdiction to tell or not to tell the Minister to which country he should or can deport a permanent resident. But I cannot agree that *Markl* stands for the proposition that the prospective removal of a Convention refugee to the very country from which he has escaped persecution is not one of the circumstances which the Board is entitled to consider under paragraph 72(1)(b) [now s. 70(1)(*b*)] which requires the Board to consider "all the circumstances of the case."

With the greatest of respect for the opposite view, Board Member Townshend was correct. The I.A.D. cannot make a decision as to the country of removal, because this decision is reserved to the Minister under s. 52. But when there is a likely country of removal, the I.A.D. can consider potential foreign hardship when exercising its discretionary jurisdiction.

76 Hoang, like Markl, was both a refugee and a permanent resident and had committed a sufficiently serious offence to be returned to a country where he feared persecution (under the exception in s. 55(*c*), now s. 53(1), of the Act). Vietnam was the likely country of removal. The Minister made a submission in this regard at the hearing of the s. 70(1)(*b*) appeal. While it may not have changed the outcome of the appeal, the hardship Hoang would face in Vietnam should have been considered. With respect, I believe that the Federal Court of Appeal erred in concluding that the I.A.B. was correct in refusing to consider potential foreign hardship. MacGuigan J.A. stated, for the court, at para. 8, "that the Board's jurisdiction is only over whether a person should be removed from Canada, not as to the country of removal". This is true, but

the decision of whether an individual should be removed can be informed by considerations of potential foreign hardship when the likely country of removal has been established.

77 In my opinion, neither *Markl* nor *Hoang* establishes a blanket prohibition against the I.A.D. considering potential foreign hardship. I agree with Reed J.'s interpretation of these cases in *Al Sagban*, at p. 509:

> The focus of this comment [about *Markl*, by MacGuigan J.A. in *Hoang*] appears to have been on whether or not the Board had jurisdiction to determine the country of destination for the applicant in this type of case. There is no express statement that the Board is not entitled to assess the harm that would befall an applicant in his country of origin if he were returned there. I consider this issue to be unresolved.

As a result of this appeal, this issue is now resolved: the I.A.D. can consider potential foreign hardship under s. 70(1)(*b*) when the likely country of removal has been established by an individual facing removal. The approach set out by the I.A.B. in *Ribic*, *supra*, remains sound.

78 Although Linden J.A. was correct in noting, at p. 612, that "[c]onsistency is a virtue" in dealing with ss. 52 and 70(1) of the Act, the consistency to be achieved is not that the I.A.D. can never consider potential foreign hardship under its discretionary jurisdiction but that it can do so only when a likely country of removal has been established. In the case of Convention refugees, it is less likely that a country of removal will be ascertainable. But permanent residents who are not Convention refugees will usually be able to establish a likely country of removal, thereby permitting the I.A.D. to consider any potential foreign hardship they will face upon removal to that country.

79 I also wish to clarify any confusion that has arisen over MacGuigan J.A.'s statement in *Canepa v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 270 (C.A.), at p. 286, for the court, that a discretionary decision under s. 70(1)(*b*) requires the consideration of "every extenuating circumstance that can be adduced in favour of the deportee". The Federal Court of Appeal erred in the case at bar in concluding that *Canepa* was not applicable because "there was no discussion of the conditions in the country to which the appellant would be deported" (para. 22). In fact, the I.A.D. had examined the potential hardship Canepa would face in the likely country of removal, as excerpted by MacGuigan J.A. at p. 284:

> Although he has no close relatives in Italy he is a toughened street-wise twenty-six-year-old adult who is in no different a predicament than many immigrants are when they emigrate to Canada. Although he is not now fluent in Italian, he has resided in a family setting where Italian is spoken and he ought to be able to achieve reasonable facility in that language soon after his return to Italy.

The instruction to the I.A.D. to consider every extenuating circumstance is sound. Those circumstances may, in appropriate cases, include potential foreign hardship.

D. *Policy Concerns*

80 I also wish to address briefly the concerns expressed by the Federal Court of Appeal with respect to allowing the I.A.D. to consider potential foreign hardship.

1. Prolonging Hearings

81 The I.A.D. has considered the potential foreign hardship an individual would face upon removal for well over a decade, following *Ribic*, *supra*. There is no evidence that this consideration prolonged hearings before the I.A.D. by any significant extent. The intervener I.R.B. supports this view. Many of the witnesses called to speak about an individual's situation in Canada will also be able to speak to the situation the individual will face in the likely country of removal, particularly family members. Furthermore, the likely country of deportation will rarely be in dispute. When the country of removal is in dispute, the issue can be quickly decided following submissions from the individual facing removal and the Minister.

2. The I.A.D. is not Designed nor Equipped

82 Hearings before the I.A.D. are adversarial in nature, unlike those before the C.R.D.D., which are more inquisitorial in nature. Evidence regarding potential foreign hardship can be adduced before the I.A.D. on a similar basis to establishing a fact in any other adversarial proceeding. Witnesses can be called, and written evidence can be submitted. Unlike the C.R.D.D., where staff research country conditions, the parties are responsible for researching and supplying this evidence before the I.A.D. The Minister is entitled to disclosure of all documents relied on by an individual appealing a removal order, and can have the documents verified prior to the hearing or can challenge their validity at the hearing by way of evidence, cross-examination or argument. In any event, much of the relevant evidence regarding potential foreign hardship will relate to personal concerns, such as language ability, family connections, and availability of necessary health care, which can all be readily established before the I.A.D.

83 The intervener I.R.B., at para. 41 of its written submissions to this Court, confirms that it is designed and equipped to consider such matters, and has done so for two decades:

> For almost 20 years, the I.A.D. and its predecessor tribunal have operated within this statutory scheme and have effectively provided a full oral hearing and consideration of all the circumstances of the case, including circumstances in the likely country of removal.

I therefore have little hesitation in concluding that the I.A.D. is designed and equipped to consider potential foreign hardship. While it is undoubtedly designed differently than the C.R.D.D., there is no reason to believe that the I.A.D. is an unsuitable forum to consider foreign hardship concerns.

3. An Alternative Refugee System

84 Only the C.R.D.D. has the jurisdiction to determine that an individual is a Convention refugee. The I.A.D. cannot make such a finding, nor does it do so when it exercises its discretion to allow a permanent resident facing removal to remain in Canada. When exercising its discretionary jurisdiction, the I.A.D. does not directly apply the *1951 Geneva Convention*, which protects individuals against persecution based on race, religion, nationality, membership in a particular social group, or political opinion. Instead, the I.A.D. considers a broader range of factors, many of which are closely related to the individual being removed, such as considerations relating to language, family, health, and children. Even when examining country conditions, the I.A.D. can consider factors, such as famine, that are not considered by the C.R.D.D. when determining if an individual is a Convention refugee. These foreign concerns are weighed against the relevant domestic considerations in making

the final decision as to the proper exercise of the I.A.D.'s discretion. As a result of this broad-based balancing exercise, the protections offered to non-refugee permanent residents are of a different nature than those provided to Convention refugees. In this respect, I reiterate that it is only refugees who are protected from *refoulement*, as guaranteed by Article 33 of the *1951 Geneva Convention* (enacted into Canadian law by s. 53 of the Act).

85 If a permanent resident has a refugee claim before the C.R.D.D. at the same time that he or she is appealing a removal order to the I.A.D., the I.A.D. holds the appeal in abeyance until the C.R.D.D. has determined the refugee claim. As the intervener I.R.B. submits at para. 34 of its factum:

> This sequencing of cases enables the C.R.D.D. to determine if the person is a Convention refugee. The I.A.D. can then consider this decision as one of the many factors in assessing "all the circumstances of the case". This procedure respects the separation of the adjudicative functions of the two Divisions and the exclusive jurisdiction of the C.R.D.D. to determine Convention refugee status.

I agree. Furthermore, I do not believe that the I.A.D. is attempting to do indirectly what it cannot do directly by considering foreign hardship when hearing a s. 70(1)(*b*) appeal. If the Minister is concerned that the I.A.D. will quash or stay a removal order based on foreign hardship concerns, the Minister is free to make a submission at the s. 70(1)(*b*) appeal hearing that the individual will be removed to a country other than the one in which hardship concerns have been raised. For individuals who have committed sufficiently serious offences, the Minister can also remove their right of appeal to the I.A.D. under s. 70(5) of the Act.

86 I therefore cannot agree that the I.A.D. is creating an alternative refugee system when it allows permanent residents to remain in Canada because of foreign hardship concerns. Parliament gave the I.A.D. the wide jurisdiction to make such discretionary decisions, and the factors weighed by the I.A.D. in exercising this discretion are very different than those considered by the C.R.D.D. when determining whether an individual is a Convention refugee.

4. The Checks and Balances of Sections 69.2 and 44(1) of the Act

87 Section 69.2 of the Act allows the government to attempt to strip a Convention refugee of his or her status. As just noted, s. 44(1) prevents a refugee claim from being made by any person in Canada against whom a removal order has been entered. While Linden J.A. is correct in identifying these provisions as providing checks and balances for Canada's refugee system, their presence indicates little about Parliament's intent in dealing with non-refugee permanent residents. Parliament could just as easily enact a provision establishing a process to strip permanent residents of their status. However, Parliament chose to leave such considerations to the I.A.D., at least for those individuals who have not lost their ability to appeal to the I.A.D. (i.e. pursuant to ss. 70(5) or 81(6) of the Act). To reiterate, there is no need for absolute consistency in how the Act deals with Convention refugees and non-refugee permanent residents. Furthermore, Parliament has provided a balancing mechanism applicable to permanent residents in allowing the I.A.D. to stay a removal order, to which conditions can be attached and which can be reviewed when necessary (s. 74).

E. *Application to the Facts of the Case at Bar*

88 Applying these holdings to the case at bar, it is apparent that the likely country of removal had not been established before the I.A.D. The appellant has a wife and child in Vietnam, but is a national of Cambodia. The I.A.D. did not determine whether the appellant had successfully established Cambodia as the likely country of removal. Indeed, it appears that Vietnam was given greater consideration by Board Member Wiebe. However, the appellant submits that Vietnam is not obliged to accept him, as he is not a national of Vietnam, and therefore that Vietnam cannot be the likely country of removal. This critical issue was not resolved by the I.A.D.

89 As a result, this case must be returned to the I.A.D. for a rehearing. If the appellant establishes a likely country of removal at that time, the I.A.D. can consider the potential foreign hardship the appellant will face in that country in exercising its discretionary jurisdiction under s. 70(1)(*b*).

VII. Summary and Conclusion

90 For these reasons, the I.A.D. is entitled to consider potential foreign hardship when exercising its discretionary jurisdiction under s. 70(1)(*b*) of the Act, provided that the likely country of removal has been established by the individual being removed on a balance of probabilities. The Minister should facilitate the determination of the likely country of removal before the I.A.D. whenever possible, as this improves the efficient functioning of the Act. The factors set out in *Ribic, supra*, remain the proper ones for the I.A.D. to consider during an appeal under s. 70(1)(*b*). On such an appeal, the onus is on the individual facing removal to establish exceptional reasons as to why they should be allowed to remain in Canada. As the I.A.B. stated in *Grewal v. Canada (Minister of Employment and Immigration)*, [1989] I.A.D.D. No. 22 (QL), the making of such a discretionary decision involves “the

exercising of a special or extraordinary power which must be applied objectively, dispassionately and in a *bona fide* manner after carefully considering relevant factors" (p. 2).

91 In the instant case, the I.A.D. did not determine whether the appellant had established a likely country of removal. The appeal is therefore allowed with costs. The judgment of the Federal Court of Appeal is set aside, and the matter is returned to the I.A.D. for reconsideration in accordance with these reasons. The I.A.D. must consider, first, whether there is a likely country of removal and, if so, whether any hardships the appellant could potentially face in that country are sufficient to alter the previous balance of relevant factors and thereby permit the appellant to remain in Canada.

Appeal allowed with costs.

Solicitor for the appellant: David Matas, Winnipeg.

Solicitor for the respondent: The Attorney General of Canada, Vancouver.

Solicitors for the intervener the Canadian Council of Churches: Jackman, Waldman & Associates, Toronto.

Solicitors for the intervener the Immigration and Refugee Board: Gowling Lafleur Henderson, Ottawa.