Chapter Seven

Criminal Grounds for Removal

Introduction

The most frequently heard appeals at the IAD are criminality-based removal orders involving permanent residents of Canada. A permanent resident may be ordered removed from Canada if found described in subsection 36(1) of *IRPA* for "serious criminality". The ground of "criminality" found in subsection 36(2) does not apply to permanent residents. A foreign national, however, may be ordered removed from Canada if found described in subsection 36(1) or 36(2) of *IRPA.*

The relevant removal order in relation to subsections 36(1) or (2) is a deportation order. In the case of a permanent resident, only the Immigration Division has the jurisdiction to issue the order. The Immigration Division has exclusive jurisdiction over foreign nationals who are inadmissible under paragraph 36(2)(*d*) (see *Immigration and Refugee Protection Regulations,* s. 228(1)(*a*), s. 229(1)(*c*) and (*d*)). In cases involving foreign nationals convicted in Canada, the removal order may be made by an immigration officer.

A permanent resident, a protected person, and a foreign national who holds a permanent resident visa may appeal to the Immigration Appeal Division (IAD) against a decision at an admissibility hearing or examination to make a removal order against them. The appeal can be based on both grounds of appeal, that is, that the removal order is not legally valid and that the discretionary jurisdiction of the IAD should be exercised in the appellant's favour (see *IRPA*, s. 63(2) and 63(3)).

With respect to the ground of "serious criminality", however, there is no right of appeal, either for permanent residents or for foreign nationals, if the crime was punished in Canada by a term of imprisonment of at least two years (*IRPA*, s. 64(1) and (2)).

The Federal Court has held that the IAD has no jurisdiction to entertain appeals (on the merits) in such cases. The appeal must be dismissed for lack of jurisdiction if the person has determined to be inadmissible on one of the enumerated grounds. The IAD is not empowered to determine whether the foreign national is in fact inadmissible.[1]

While it is possible for the Minister to appeal to the IAD against a decision of the Immigration Division on any ground of inadmissibility (*IRPA*, s. 63(5)), such appeals occur infrequently.

[1] *Kang, Sarabjeet Kaur* v. *M.C.I.* (F.C., no. IMM-2445-04), Mactavish, February 25, 2005; 2005 FC 297. The case in question also considered the effect of s.196 of the Transitional Provisions, which provides for the discontinuation of an appeal if the appeal could not have been made because of s.64 of *IRPA*.

This chapter deals only with Canadian convictions or crimes committed on entering Canada. Foreign convictions and crimes committed outside Canada are dealt with in chapter 8, Criminal Equivalency.

Relevant Legislation

The relevant provisions of *IRPA* dealing with "serious criminality" and "criminality", based on Canadian convictions or crimes committed on entering Canada, can be broken down as follows:[2]

- "serious criminality" – IRPA, s. 36(1)(a) – conviction in Canada for a federal offence
- punishable by a maximum term of imprisonment of 10 years or more or
- where a term or imprisonment of more than 6 months has been imposed
- "criminality" – conviction in Canada for a federal offence punishable by a maximum term of imprisonment of less than 10 years – IRPA, s. 36(2)(a)
- "criminality" – two summary convictions in Canada for federal offences, not arising out of a single occurrence – IRPA, s. 36(2)(a)
- "criminality" – committing, on entering Canada, a federal offence prescribed by regulations ("transborder crime") – IRPA, s. 36(2)(d)

To trigger the operation of these grounds of inadmissibility, the offence must be punishable "under an Act of Parliament". In other words, the underlying offence must be one that is found in a federal statute.

Subsection 36(3) of *IRPA* sets out a number of principles governing the application of the grounds of inadmissibility in subsections 36(1) and (2). They will be addressed in the course of this and the following chapters.

Burden and Standard of Proof

As a general proposition, the onus is on the Minister to establish the ground of inadmissibility alleged.

The burden of proof relating to admissibility hearings is found in subsection 45(*d*) of *IRPA*, which provides that:

- in the case of a permanent resident or a foreign national who has been authorized to enter Canada, the Immigration Division must make the

[2] For the full text of the inadmissibility provisions refer to the relevant sections of the *Immigration and Refugee Protection Act*.

applicable removal order "if it is satisfied that the foreign national or the permanent resident is inadmissible".

- in the case of a foreign national who has *not* been authorized to enter Canada, the Immigration Division must make the applicable removal order "if it is not satisfied that the foreign national is not inadmissible".

At the IAD, the appellant must establish that they are not inadmissible on the relevant ground of inadmissibility, as determined by the Immigration Division or by an immigration officer.

Section 33 of *IRPA* provides that inadmissibility under section 36 (as well as under sections 34, 35 and 37) includes facts arising from omissions. Unless otherwise provided, admissibility may be based on facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.

The meaning of the term "reasonable grounds to believe", which was found as well in the former *Immigration Act,* was considered in *Mugesera*,[3] where the Supreme Court of Canada endorsed the following statement of the law:

> [114] The first issue raised by s. 19(1)(*j*) of the *Immigration Act* [i.e., the predecessor of *IRPA*, s. 35(1)(*a*)] is the meaning of the evidentiary standard that there be "reasonable grounds to believe" that a person has committed a crime against humanity. The FCA has found, and we agree, that the "reasonable grounds to believe" standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities: *Sivakumar v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 433 (C.A.), at p. 445; *Chiau v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 297 (C.A.), at para. 60. In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information: *Sabour v. Canada (Minister of Citizenship and Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.) [*Sabour, Mohammad Reza v. M.C.I.* (F.C.T.D., no. IMM-3268-99), Lutfy, October 4, 2000].

The Supreme Court also noted, at para. 116, that the "reasonable grounds to believe" standard applies only to questions of fact, i.e., the findings of fact made by the tribunal.

> When applying the "reasonable grounds to believe" standard, it is important to distinguish between proof of questions of fact and the determination of questions of law. The "reasonable grounds to believe" standard of proof applies only to questions of fact: *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 (C.A.), at p. 311.

Thus the "reasonable grounds to believe" standard does not apply to conclusions of law. Conclusions of law are reviewed by the Federal Court on the correctness standard.[4]

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[3] *Mugasera* v. *Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, at para. 114; 2005 SCC 40.

[4] Ibid, para. 37.

Canadian Convictions

Only convictions under Canadian federal laws ("an offence under an Act of Parliament") render a person inadmissible on grounds of serious criminality or criminality. Thus a person convicted of criminal contempt of court would not be caught, as the punishment for criminal contempt is not codified, but is derived from the common law.[5]

Whether a Canadian conviction will render someone inadmissible on the ground of serious criminality or criminality depends on the nature of the offence, the possible punishment based on the maximum term of imprisonment the offence carries under the law, and the actual sentence that was imposed on conviction for the offence.

In some cases, a permanent resident or foreign national may be inadmissible for a conviction registered during a previous period of residence or stay in Canada. Inadmissibility cannot be based on offences alleged to have been committed in Canada for which there has been no conviction, except where a foreign national is inadmissible for a "transborder crime" under paragraph 36(2)(*d*) of *IRPA*.

Classification of Criminal Offences

Canadian criminal offences are either indictable or summary conviction, depending on their seriousness. Many criminal offences, known as "hybrid offences", can be prosecuted either by way of indictment or summary conviction, at the election of the Crown. By virtue of paragraph 34(1)(*a*) of the *Interpretation Act*, hybrid offences are indictable until the prosecution elects to proceed by summary conviction. However, paragraph 36(3)(*a*) of *IRPA* provides that for the purposes of *IRPA*, a "hybrid offence" is deemed to be indictable, even if it has been prosecuted summarily.[6] (This represents a change from the situation that prevailed under the *Immigration Act,* where a hybrid offence was considered to be a summary conviction if the offence was prosecuted summarily.[7])

Where an offence is prosecuted by way of summary conviction, section 787(1) of the *Criminal Code* provides that the maximum term of imprisonment is six months, unless otherwise indicated.[8] The maximum possible sentence for an indictable offence is five years, unless otherwise specified (see section 743 of the *Criminal Code*).

Offences designated as contraventions under the *Contraventions Act* cannot be the basis for inadmissibility for serious criminality or criminality (*IRPA*, s. 36(3)(*e*)).[9]

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5 *Massie, Pia Yona* v. *M.C.I.* (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000.

6 This provision was applied in *Derbas, Rachid* v. *M.C.I.* (F.C., no. IMM-1923-07), Shore, November 1, 2007; 2007 FC 1194. The person was found described in s.36(2)(a), despite the fact that he was found guilty of a "hybrid" offence that was punished on summary conviction.

7 See *Potter* v. *Canada (Minister of Citizenship and Immigration)*, [1980] 1 F.C. 609 (C.A.).

8 The *Criminal Code* contains several offences, colloquially called "super summary" offences, punishable on summary conviction by a maximum sentence of 18 months' imprisonment. See, for example, s.267 (assault with a weapon or causing bodily harm), s.269(b) (unlawfully causing bodily harm).

9 Under the *Contraventions Act*, the Governor in Council may make regulations designating federal offences as "contraventions" and enforcement authorities may issue tickets to persons charged with such offences, rather than

Meaning of Conviction

The validity of a Canadian conviction on the merits cannot be put in issue at a hearing before the IAD. A conviction under a wrong name is nonetheless a conviction.[10]

If a person pleads guilty to, or is found guilty of, an offence and is granted a conditional or absolute discharge, this will not constitute a conviction for the purposes of *IRPA.* Subsection 730(3) of the *Criminal Code*, which establishes the effect of conditional and absolute discharges, provides that, in such cases as are specified, "the offender shall be deemed not to have been convicted of the offence", subject to certain exceptions.

The word "conviction" means a conviction that has not been expunged.[11] Paragraph 36(3)(*b*) provides that inadmissibility on the grounds of serious criminality or criminality may not be based on a conviction in respect of which there has been a final determination of acquittal, for example, on appeal to a higher court. Thus, a person may no longer be inadmissible at the time of their hearing before the IAD where their conviction has been overturned on appeal or where granted a discharge.[12]

Where no issue of an appeal of a conviction is raised at the hearing, the member is entitled to rely on the evidence adduced by the parties There is no duty to conduct an inquiry beyond the evidence before the member.[13]

Term of Imprisonment

The words "term of imprisonment … imposed" found in paragraph 36(1)(*a*) refer to the sentence imposed by the court and not the actual time served in prison.[14] The Federal Court has

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using procedures under the *Criminal Code*. The offences designated as contraventions in the *Contraventions Regulations* are relatively minor offences under legislation such as the *Canada Shipping Act, Department of Transport Act*, *Government Property Act*, and *National Parks Act*. *IRPA* also sets out procedures in section 144 for "ticketable offences" prescribed by regulation.

10 *Lampros, Michael George* v. *M.C.I.* (F.C., no. IMM-434-05), Lemieux, February 18, 2005; 2005 FC 267.

11 *Canada (Minister of Employment and Immigration)* v. *Burgon*, [1991] 3 F.C. 44 (C.A.).

12 See *Lew* v. *Canada (Minister of Manpower and Immigration)*, [1974] 2 F.C. 700 (C.A.), where the appellant successfully appealed the conviction, and was granted an absolute discharge after he had been ordered deported, but before the matter was determined on appeal to the Immigration Appeal Board. The Court held that the Board ought to have considered the appeal in light of the circumstances existing at the time of the appeal (i.e., the absolute discharge). In *Kalicharan* v. *Canada (Minister of Manpower and Immigration)*, [1976] 2 F.C. 123 (T.D.), the Court held that a person convicted at trial is a convicted person notwithstanding that he may have an unexhausted right of appeal. However, when a court of appeal substitutes a conditional discharge for a sentence imposed by a trial court, then the conviction is deemed never to have been passed and the basis for making the removal order not only no longer exists in fact, but it is deemed, not to have existed at all. But see also *Wade, William Jerry* v. *M.C.I.* (F.C.T.D., no. IMM-1021-94), Gibson, August 11, 1994, where execution of a deportation order based on a conviction that was subsequently quashed on appeal. In overturning the conviction, the appeal court ordered a new trial only on the issue of whether the applicant was guilty of second degree murder or manslaughter; it left beyond doubt the applicant's culpability for a very serious offence.

13 *Soriano, Teodore* v. *M.C.I.* (F.C.T.D., no. IMM-2335-99), MacKay, August 29, 2000.

14 Compare *Martin, Claudette* v. *M.C.I.* (F.C.A., no. A-126-05), Nadon, Sexton, Sharlow, October 25, 2005; 2005 FCA 347, where the Court interpreted the word "punished" used in s.64(2) of *IRPA* with respect to a term of imprisonment.

held that time spent in pre-trial or pre-sentence custody which is computed by the criminal court in arriving at the person's sentence should be considered part of the "term of imprisonment" for the purposes of determining appeal rights under subsection 64(2) of *IRPA*.[15] The same rationale has been applied by the Immigration Division and IAD in relation to paragraph 36(1)(*a*).[16] The Immigration Division has held that the decision of the Supreme Court of Canada in *R. v. Mathieu*,[17] which was decided in the context of criminal law, does not apply in the immigration law context, when interpreting paragraph 36(1)(*a*)[18]. The IAD has held likewise in relation to the similarly worded subsection 64(2).[19]

The IAD has ruled that a conditional sentence constitutes a "term of imprisonment" under paragraph 32(1)(*a*). The rationale is that a conditional sentence is not an alternative to imprisonment; it is a term of imprisonment served in the community.[20] This appears to be consistent with the dicta of the Supreme Court of Canada.[21]

Two Offences Not Arising Out of a Single Occurrence

The words "not arising out of a single occurrence" found in paragraph 36(2)(*a*), in the context of inadmissibility for foreign nationals based on two summary conviction offences, were interpreted in two Federal Court cases decided in relation to a similar provision under the *Immigration Act.* It was held that an "occurrence" is synonymous with the terms "event" and

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15 *M.C.I.* v. *Atwal, Iqbal Singh* (F.C., no. IMM-3260-03), Pinard, January 8, 2004; 2004 FC 7; *Cheddesingh (Jones), Nadine Karen* v. *M.C.I.* (F.C., no. IMM-2453-05), Beaudry, February 3, 2006; 2006 FC 124.

16 See, for example, *M.P.S.E.P.* v. *Nazaire, Jacques Narcisse* (ID A8-00625), Ladouceur, October 23, 2008 (*RefLex* Issue 347); *M.P.S.E.P.* v. *Ramos Pacheco, Giovanni Joaquin* (ID A8-01078), Kohler, January 9, 2009 (*RefLex* (Issue 351).

17 In *R.* v. *Mathieu*, 2008 SCC 21, the Supreme Court held that "the term of imprisonment in each case is the term of imposed by the judge at the time of sentence. The offender's prior detention is merely one factor taken into account by the judge in determining that sentence." The Court also stated: "Although it is possible, on an exceptional basis, to treat the time spend in pre-sentence custody as part of the term of imprisonment imposed at the time of sentence – in the context of a minimum sentence, for example, or of a conditional sentence – these are exceptions that prove the rule. As to minimum sentences, see *R.* v. *Wust*, [2000] 1 S.C.R. 455; 2000 SCC 18; regarding conditional sentences, see *R.* v. *Fice*, [2005] 1 S.C.R. 742; 2005 SCC 32."

18 See *M.P.S.E.P.* v. *Nazaire, Jacques Narcisse* (ID A8-00625), Ladouceur October 23, 2008 (*RefLex* Issue 347); *M.P.S.E.P.* v. *Ramos Pacheco, Giovanni Joaquin* (ID A8-01078), Kohler, January 9, 2009 (*RefLex* Issue 351).

19 See *Mihalkov, Miroslav Vassil* v. *M.P.S.E.P.* (IAD TA7-05378), Dolin, October 21, 2008 (*RefLex* Issue 346); *Nana-Effah, Benbella* v. *M.P.S.E.P.* (IAD MA8-02628), Paquette, October 29, 2008 (*RefLex* Issue 346); *Mjasiri, Amin Mohamed* v. *M.P.S.E.P.* (IAD TA4-07045), MacLean, December 18, 2008 (*RefLex* Issue 350); *Pierre, Nahomie* v. *M.C.I.* (IAD MA8-10166), Paquette, January 16, 2009 (*RefLex* Issue 350).

20 *Meerza, Rizwan Mohamed* v. *M.C.I.* (IAD TA2-21315), Hoare, September 15, 2003 (*RefLex* Issue 224). An adjudicator came to the same conclusion with respect to a person described in s.27(1)(d) of the *Immigration Act*. See *M.C.I.* v. *Santizo, Marco Antonio* (Adjudication A1-00471), Nupponen, September 27, 2001 (*RefLex* Issue 176). A member of the Immigration Division held to the contrary: *M.C.I.* v. *Sahota, Ranjit Singh* (ID A3-02512), Iozzo, March 11, 2004. A conditional sentence was the basis for the deportation order in *Canada (Citizenship and Immigration)* v. *Khosa*, 2009 SCC 12, which upheld the IAD's decision on s.67(1)(c) of *IRPA*; however, that point was not argued before the courts.

21 In *R.* v. *Fice*, 2005 SCC 32, Justice Bastarache, writing for the majority, stated at para. 17: "in enacting s.742.1 [of the *Criminal Code* – Imposing of Conditional Sentence], Parliament intended to cast a small net and only capture conduct serious enough to attract *a sentence of incarceration* but not so severe as to warrant a penitentiary sentence." (emphasis added)

"incident" and not with "a course of events". Therefore, summary conviction offences which were committed on different dates arose out of different occurrences rather than a single occurrence.[22] (Since "hybrid" offences are deemed to be indictable for the purpose of inadmissibility under section 36 of *IRPA*, this provision is now used less frequently than under the *Immigration Act*.)

Transborder Crime

Foreign nationals may be found inadmissible for committing, on entering Canada, a federal offence prescribed in section 19 of the *Immigration and Refugee Protection Regulations*. In this case, no conviction is required.[23] The prescribed offences are indictable offences (including "hybrid" offences) under the *Criminal Code*, *IRPA, Firearms Act, Customs Act,* and *Controlled Drugs and Substances Act.*

Relevant Time for Determining Inadmissibility

The facts at the time of the offence must be assessed based on the Canadian law as it reads at the time of the admissibility hearing or appeal to the IAD. Thus a person may no longer be inadmissible as a result of changes to the *Criminal Code* occurring after their criminal conviction.

In *Robertson*[24], the applicant was ordered deported pursuant to paragraph 19(1)(*c*) of the *Immigration Act* based on a 1971 conviction of possession of stolen property valued at more than $50, an offence which carried a maximum of 10 years' imprisonment. However, the *Criminal Code* was subsequently amended such that that penalty applied to stolen goods exceeding $200, which amendment was in force at the time of the inquiry in 1978. (According to the evidence, the retail value of the stolen property in question did not exceed $150, and the wholesale value was approximately $45 to $60; thus the maximum punishment at the time would have been imprisonment for two years.) In setting aside the deportation order, the Federal Court of Appeal stated:

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22 *Alouache, Samir* v. *M.C.I.* (F.C.T.D., no. IMM-3397-94), Gibson, October 11, 1995. Reported: *Alouache* v. *Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 68 (F.C.T.D.). Affirmed on other grounds by *Alouache, Samir* v. *M.C.I.* (F.C.A., no. A-681-95), Strayer, Linden, Robertson, April 26, 1996. In this case, the applicant was convicted of three offences that occurred on different dates. The applicant argued that these convictions arose out of a single occurrence, namely a marital dispute. The Court did not accept this argument as the breakdown of the applicant's marriage was "a course of events" and not a single occurrence. Compare with *Libby, Tena Dianna* v. *M.E.I.* (F.C.A., no. A-1013-87), Urie, Rouleau, McQuaid, March 18, 1988. Reported: *Libby* v. *Canada (Minister of Employment and Immigration)* (1988), 50 D.L.R. (4th) 573 (F.C.A.), where the Court held that the applicant's original charge of theft and his failure to report for fingerprinting in connection with that charge arose out of the same occurrence.

23 In *Wang, Wei* v. *Canada (Minister of Citizenship and Immigration)* (F.C., no. IMM-4212-05), von Finckenstein, May 19, 2006, 2006 FC 625, the applicant uttered a forged document to an immigration officer on examination at the port of entry in an attempt to gain readmissions to Canada as a student.

24 *Robertson* v. *Canada (Minister of Employment and Immigration)*, [1979] 1 F C. 197 (C.A.). See also *Weso, Mohamed Omar* v. *M.C.I.* (F.C.T.D., no. IMM-516-97), Cullen, April 21, 1998.

> In my opinion, 19(1)(*c*) can only be used to deport a person where that person has been convicted of an offence for which the maximum punishment at the date of the deportation order is ten years. The word "constitutes" in the present tense supports this view.

Conversely, a person may not have been inadmissible at the time of their conviction, but has become so as a result of a subsequent amendment to the *Criminal Code*.

In *Ward*,[25] at the time of the applicant's conviction in Ireland of the offence of false imprisonment, the Canadian equivalent offence, namely forcible confinement, carried a term of imprisonment of five years, whereas at the date of the deportation order, the offence provided for a term of imprisonment not exceeding 10 years. The Federal Court–Trial Division held that there was no reason to distinguish the principle enunciated in *Robertson*, and that the adjudicator had not erred in considering the (more severe) punishment for the offence as of the date of the deportation order.

The Federal Court–Trial Division has held that an amendment to the *Immigration Act* could render someone inadmissible based on an earlier conviction that would not have attracted inadmissibility before the amendment.[26] However, an amendment to *Immigration Act* between the time of the admissibility hearing (at which a removal order was issued) and the time the appeal was heard, was held not to accrue to the benefit of the person, who would no longer have been inadmissible as a result of the amendment. The Federal Court of Appeal stated that unless Parliament has clearly indicated otherwise, the correctness of the adjudicator's decision must be measured by the law in force at the time of the decision.[27]

Pardons and Rehabilitation

Paragraph 36(3)(*b*) provides that inadmissibility on the grounds of serious criminality or criminality may not be based on a conviction in respect of which a pardon has been granted, where that pardon has not ceased to have effect or been revoked under the *Criminal Records Act.* Section 3 of the *Criminal Records Act* provides that a person who has been convicted of a federal offence or a regulation made under an Act of Parliament can apply to the National Parole Board for a pardon of that offence.

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[25] *Ward, Patrick Francis* v. *M.C.I.* (F.C.T.D., no. IMM-504-96), Heald, December 19, 1996. Reported: *Ward* v. *Canada (Minister of Citizenship and Immigration)* (1996), 37 Imm. L.R. (2d) 102 (F.C.T.D.). In the related Immigration Appeal Board decision of *Reyes* v. *Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 148 (I.A.B.), there was the added complication that the foreign offence was not equivalent to an indictable offence in Canada at the time the application for permanent residence was filed, but became one prior to the conclusion of the processing of the application. The Board held that such an offence could not bring the applicant within the ambit of section 19 and that the visa officer could not apply amendments to the *Criminal Code* enacted after the filing of the application to the detriment of the applicant.

[26] *Kanes, Chellapah* v. *M.E.I.* (F.C.T.D., no. IMM-1918-93), Cullen, December 14, 1993. Reported: *Kanes* v. *Canada (Minister of Employment and Immigration)* (1993), 22 Imm. L.R. (2d) 223 (F.C.T.D.); *Cortez, Rigoberto Corea* v. *S.S.C.* (F.C.T.D., no. IMM-2548-93), Rouleau, January 26, 1994. Reported: *Cortez* v. *Canada (Secretary of State)* (1994), 23 Imm. L.R. (2d) 270 (F.C.T.D.), at 276.

[27] *Bubla* v. *Canada (Solicitor General)*, [1995] 2 F.C. 680 (C.A.).

Section 18.1 of the *Immigration and Refugee Protection Regulations* provides for the possibility of deemed rehabilitation for persons inadmissible solely on the basis of having been convicted in Canada of two or more offences that may only be prosecuted summarily. For this prescribed class to override paragraph 36(2)(*a*) of *IRPA*, at least five years have elapsed since the completion of the imposed sentence.

Young Offenders

A young offender is someone who is 12 years of age or older but less than 18 years of age. Paragraph 36(3)(*e*) provides that inadmissibility for serious criminality or criminality may not be based on an offence for which the person is found guilty under the *Young Offenders Act*, which has been repealed, or under the *Youth Criminal Justice Act*. However, if the proceedings were transferred to adult court under the provisions of the *Young Offenders Act*, they may render the person inadmissible.[28]

The *Young Offenders Act* was repealed on April 1, 2003 and replaced with the *Youth Criminal Justice Act, 2002*. The transfer provision is eliminated under the latter legislation. Instead, the youth court first determines whether or not the young person is guilty of the offence and then, under certain circumstances, it may impose an adult sentence. Citizenship and Immigration Canada has taken the position that a young offender convicted under the *Youth Criminal Justice Act* is not inadmissible, unless he or she received an adult sentence.[29]

Right of Appeal

The IAD has no jurisdiction to entertain an appeal (on the merits) against a removal order on the ground of serious criminality where the offence was punished in Canada by a term of at least two years.

The words "punished … by a term of imprisonment" found in subsection 64(2) refers to the sentence imposed by the court and not the actual time served in prison.[30]

The Federal Court had held that time spent in pre-trial or pre-sentence custody which is computed by the criminal court in arriving at the person's sentence should be considered part of the "term of imprisonment" for the purposes of section 64(2).[31]

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[28] In *Tessma (Ayele), Letwled Kasahun* v.*M.C.I.* (F.C., no. IMM-5652-02), Kelen, October 2, 2003; 2003 FC 1126, the Court held that proceedings transferred from youth court to ordinary court under s.16 of the *Young Offenders Act* are not covered by the exemption in s.36(3)(e) of *IRPA*. Subsection 16(7) of the *Young Offenders Act*, provided that, after the youth court judge made an order transferring the proceedings to ordinary court, the proceedings under that Act were discontinued, and the proceedings with respect to the criminal charges were taken before the ordinary court.

[29] Citizenship and Immigration Canada website, Internet: http://www.cic.gc.ca/english/information/applications/guides/5312E2.asp.

[30] *Martin, supra*, footnote 14.

[31] *Atwal, supra*, footnote 15*; Cheddesingh, supra*, footnote 15.

The IAD has held that the decision of the Supreme Court of Canada in *R. v. Mathieu,*[32] which was decided in the context of criminal law, does not apply in the immigration law context, when interpreting subsection 64(2).[33]

Legal Validity

If the appeal from the removal order is based on the first ground of appeal, that is, on any ground of appeal that involves a question of law or fact, or mixed law and fact, the IAD will have to determine whether the removal order is valid in law.

An appellant may argue that they were wrongly convicted. The IAD has held that it cannot go behind the conviction in considering the legal validity of the removal order.[34] However, in assessing the legal validity of the removal order, the IAD may consider whether the conviction was accurately categorized by the Immigration Division member as falling within subsection 36(1).

If the conviction which is the basis for the removal order has been overturned on appeal, then the IAD can quash the removal order[35] because the hearing is a hearing *de novo.* However, the IAD does not have to wait for the appeal of the conviction to be heard before disposing of the appeal.[36]

Discretionary Jurisdiction

Where the refusal is valid in law, the IAD may consider whether or not sufficient compassionate or humanitarian considerations exist to warrant the granting of special relief in light of "all the circumstances of the case", pursuant to section 67(1)(*c*) of *IRPA.* For a detailed discussion of the IAD's discretionary jurisdiction see Chapter 9.

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[32] *R.* v. *Mathieu*, *supra*, footnote 17.

[33] See *Mihalkov, Miroslav Vassil* v. *M.P.S.E.P.* (IAD TA7-05378), Dolin, October 21, 2008 (*RefLex* Issue 346); *Nana-Effah, Benbella* v. *M.P.S.E.P.* (IAD MA8-02628), Paquette, October 29, 2008 (*RefLex* Issue 346); *Mjasiri, Amin Mohamed* v. *M.P.S.E.P.* (IAD TA4-07045), MacLean, December 18, 2008 (*RefLex* Issue 350); *Pierre, Nahomie* v. *M.C.I.* (IAD MA8-10166), Paquette, January 16, 2009 (*RefLex* Issue 350).

[34] *Encina, Patricio* v. *M.C.I.* (IAD V93-02474), Verma, Ho, Clark, January 30, 1996.

[35] See *Kalicharan*, *supra*, footnote 35 where the applicant appealed the sentence but not the conviction, and subsequently, the sentence appeal was allowed and the applicant was granted a conditional discharge.

[36] *Kalicharan*, *supra*, footnote 35.

CASES