Chapter Eleven

The Charter and the IRPA

Introduction

The Immigration Appeal Division (IAD) is called upon to consider constitutional questions in a variety of contexts. This chapter reviews the legislation and jurisprudence relating to constitutional challenges in removal order appeals before the IAD.

The Charter and the Jurisdiction of the Immigration Appeal Division

The Courts have issued judgments indicating under what circumstances administrative tribunals may consider issues related to the *Canadian Charter of Rights and Freedoms*[1] (the Charter) and when tribunals may grant Charter remedies. Specifically, the Charter contains three provisions that can be used as grounds for claiming an infringement of Charter rights. Each one will be examined individually.

Subsection 24(1)

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The jurisdiction of the IAD to grant a remedy pursuant to this section depends on whether the IAD is considered a court of competent jurisdiction in the context in which it is being asked to provide a remedy. The entire body of case law indicates that this section does not confer new jurisdiction on any tribunal. A tribunal is competent under subsection 24(1) if it has jurisdiction over the person, the subject-matter and the remedy sought, pursuant to a legal source separate from the Charter.[2] This raises the prospect of the IAD being recognized, in specific circumstances, as a "court of competent jurisdiction," provided it is authorized under the *Immigration and Refugee Protection Act*[3] (IRPA) to grant the remedy sought.

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1 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11.

2 *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177; *Mills v. The Queen*, [1986] 1 S.C.R. 863; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75.

3 S.C. 2001, c. 27, as amended.

In *Borowski,*[4] an adjudicator found that the legislative provision that permits the court to appoint a lawyer in certain types of investigations and not in others was discriminatory and inconsistent with the right to equality set out in section 15 of the Charter. He therefore appointed a lawyer to represent the person concerned. The Federal Court Trial Division ruled that an adjudicator could choose not to take into consideration a provision of the former *Immigration Act*[5] inconsistent with the Charter but could not provide a remedy within the meaning of subsection 24(1) of the Charter.

In *Howard,*[6] the remedy sought was to have the deportation order quashed. The applicant had challenged the constitutionality of certain provisions of the *Young Offenders Act,*[7] a conviction under which had led to the deportation of a permanent resident. A stay of the deportation order had been granted but had been subsequently cancelled by the Appeal Division. The Federal Court upheld the Appeal Division's decision that it did not have jurisdiction to rule on the constitutional arguments and stated that neither the adjudicator nor the Appeal Division was, in the matter at hand, a court of competent jurisdiction within the meaning of subsection 24(1) of the Charter because the former *Immigration Act* did not grant authority to rule on the constitutionality of the *Young Offenders Act.*

In *Mahendran,*[8] a panel of the Refugee Division determined that it did have jurisdiction to grant a remedy pursuant to subsection 24(1) of the Charter for abuse of process resulting from delay to make an application to vacate refugee status. The panel declined, however, to grant any relief.

Subsection 24(2)

> 24(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

This subsection provides for a remedy by means of the inadmissibility of evidence. It is intrinsically linked to subsection 24(1); consequently, the comments made above regarding subsection 24(1) are relevant here as well.

The task then would be to determine first, whether the evidence the tribunal has been asked to set aside was obtained in a manner that infringed Charter rights and second,

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4 *Canada (Minister of Employment and Immigration) v. Borowski*, [1990] 2 F.C. 728 (T.D.).

5 R.S.C. 1985, c. I-2. [repealed]

6 *Howard, Kenrick Kirk v. M.C.I.* (F.C.T.D., no. IMM-5252-94), Dubé, January 4, 1996; see also *Halm v. M.E.I.* (1991), 172 N.R. 315 (F.C.A.).

7 R.S.C. 1985, c. Y-1 [repealed]

8 *Mahendran: M.C.I. v. Mahendran* (CRDD U98-01244), Chan, Joakin, Singer; 26 October 1998.

whether the use of that evidence would likely bring the administration of justice into disrepute. Three factors bear on whether the administration of justice has been brought into disrepute: (1) the impact that use of the evidence might have on the fairness of the proceeding; (2) the seriousness of the infringement of rights; and (3) the consequences of not admitting the evidence. These factors were developed in criminal proceedings,[9] but it is likely that they would apply to administrative matters as well if properly adapted.

Examples of a subsection 24(2) remedy being used by administrative tribunals are few; however, in *Bertold*,[10] the Federal Court Trial Division referred the case back to the Appeal Division, among other things, because the Division had admitted evidence from criminal and investigation files from Germany, obtained through the illegal, fraudulent and deceptive schemes of a third party in violation of sections 7 and 8 of the Charter. The Court stated that this evidence should have been excluded pursuant to subsection 24(2) of the Charter, thus confirming that the Appeal Division had jurisdiction to do so.

Subsection 52(1)

> 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The jurisdiction of certain administrative tribunals, including the IAD, to consider constitutional challenges and rule on violations of the rights guaranteed by the Charter, under subsection 52(1) of the *Constitution Act, 1982*,[11] has been well established for several years now.[12] The Supreme Court of Canada confirmed this position in *Nova Scotia (WCB)*[13] and clarified the issue of the jurisdiction of administrative tribunals to

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[9] *R. v. Collins*, [1987] 1 S.C.R. 265, at 280-1; *R. v. Ross*, [1989] 1 S.C.R. 3, at 15; *R. v. Genest*, [1989] 1 S.C.R. 59, at 83.

[10] *Bertold, Eberhard v. M.C.I.* (F.C.T.D., no. IMM-5228-98), Muldoon, September 29, 1999. In this case, the documents had been obtained from the German authorities. The Appeal Division did not accept the appellant's argument that the documents had been obtained in a manner that infringed his rights guaranteed by the Charter. The argument was based on the decision in *Schreiber v. Canada (Attorney General)*, [1998] S.C.R. 841, in which the Supreme Court of Canada held that it is the law of the country where the information is found that governs the issue whether and how it may be obtained. The judgment of the Federal Court was not the clearest of judgments. The Court appears to have found that the German authorities had, upon request of Canadian immigration authorities, only confirmed information they had received from a certain Langreuther, a creditor of the appellant who had harassed and threatened the appellant. The judgment does not shed any light with respect to determining how the evidence was obtained in a manner that infringes sections 7 and 8 of the Charter. The Court did not make any pronouncement on the issue whether the evidence was likely to bring the administration of justice into disrepute.

[11] Schedule B of the *Canada Act 1982* (1982, U.K., c. 11).

[12] See the Supreme Court of Canada trilogy: *Douglas/Kwantlen Faculty Association v. Douglas College*, [1990] 3 S.C.R. 570; *Tétreault-Gadoury v. Canada (Employment and Immigration Commission)*, [1991] 2 S.C.R. 22; and *Cuddy Chicks, supra*, footnote 2.

[13] *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504; 2003 SCC 54.

declare inoperative legislative provisions that infringe or deny rights guaranteed by the Charter. In that case, the Supreme Court stated as follows in paragraph 3 of its decision:

> Administrative tribunals which have jurisdiction – whether explicit or implied – to decide questions of law arising under a legislative provision are presumed to have concomitant jurisdiction to decide the constitutional validity of that provision. This presumption may only be rebutted by showing that the legislature clearly intended to exclude *Charter* issues from the tribunal's authority over questions of law. To the extent that the majority reasons in *Cooper* […], are inconsistent with this approach, I am of the view that they should no longer be relied upon.

In *Cooper*,[14] the Supreme Court had considered a number of factors and concluded that the Canadian Human Rights Commission did not have the jurisdiction to rule on constitutional questions, despite the jurisdiction it was granted by its enabling statute to decide questions of law. In *Nova Scotia (WCB)*, at paragraphs 35, 36 and 48 of the decision, the Supreme Court explained that it is not a question of determining whether, under the tribunal's enabling statute, Parliament or the legislature intended the tribunal to apply the Charter, but rather of determining whether the statute grants the tribunal the jurisdiction, either explicit or implied, to decide questions of law. If such is the case, the tribunal will be presumed to have the jurisdiction to decide these questions in light of the Charter, unless the legislator has explicitly removed that power from the tribunal.

It is also useful to note that the Supreme Court of Canada, in *Nova Scotia (WCB)*, clearly set out the procedure to be followed by an administrative tribunal in cases involving a challenge to the constitutionality of a provision of its enabling statute. The Court stated as follows in paragraph 33 of its decision:

> […] this Court has adopted a general approach for the determination of whether a particular administrative tribunal or agency can decline to apply a provision of its enabling statute on the ground that the provision violates the *Charter*. This approach rests on the principle that, since administrative tribunals are creatures of Parliament and the legislatures, their jurisdiction must in every case "be found in a statute and must extend not only to the subject matter of the application and the parties, but also to the remedy sought": *Douglas College*, *supra*, at p. 595; see also *Cuddy Chicks*, *supra*, at pp. 14-15. When a case brought before an administrative tribunal involves a challenge to the constitutionality of a provision of its enabling statute, the tribunal is asked to interpret the relevant *Charter* right, apply it to the impugned provision, and if it finds a breach and concludes that the provision is not saved under s. 1, to disregard the provision on constitutional

[14] *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854.

> grounds and rule on the applicant's claim as if the impugned provision were not in force.

Given that section 162 of the IRPA confers upon each Division of the IRB the "sole and exclusive jurisdiction to hear and determine all questions of law and fact…" it can be presumed, according to the principles enunciated in *Nova Scotia (WCB),* that the IAD has the jurisdiction to hear and decide questions regarding the constitutionality of the law it applies unless the presumption is rebutted in any given circumstances. This approach to constitutional challenges before the IAD has been confirmed by the Federal Court.[15]

With respect to the IAD, in some circumstances, the Court has found that the presumption is rebutted in that the legislature has explicitly removed the jurisdiction of the IAD to consider the constitutionality of certain provisions of IRPA. In *Kroon*,[16] the Court held that the IAD lacked the power to consider a constitutional challenge to section 64[17] of IRPA. This section removes the right of appeal in cases where the appellant has been found to be inadmissible on grounds of security (section 34 of the IRPA), violating human or international rights (section 35 of the IRPA), serious criminality (subsection 36(1) of the IRPA, as qualified by subsection 64(2)[18]) or organized criminality (section 37 of the IRPA). The Court stated:

> [32] Applying the reasoning of *Martin* to the present case, I am satisfied that the IAD lacks the power to determine the constitutionality of section 64 of IRPA. There is simply nothing in the legislation which either expressly or implicitly grants this jurisdiction. On the contrary, the challenged provisions expressly limit the jurisdiction of the IAD insofar as they remove any right of appeal to the tribunal by a permanent resident who has been found to be inadmissible on grounds of serious criminality. In my view, Parliament could not have been more clear in its intention to limit the IAD's jurisdiction with respect to individuals who fall within paragraph 36(1)(a) of the Act. I do not read *Martin* as overruling this Court's decision in Reynolds wherein it was held that although the IAD had exclusive jurisdiction to consider questions of law and determine its own jurisdiction, its general powers did not extend to finding that a statutory section which contained an express limitation on its jurisdiction was unconstitutional.

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[15] See, for example, *Ramnanan, Naresh Bhoonahesh v. M.C.I and M.P.S.E.P.* (F.C. no. IMM-1991-07), Shore, 1 April 2008; 2008 FC 404; *Ferri, Loreto Lorenzo v. M.C.I* (F.C. no. IMM-9738-04), Mactavish, 22 November 2005; 2005 FC 1580. A question was certified in this case, but the appeal was not pursued.

[16] *Kroon, Andries v. M.C.I.* (F.C. no. IMM-4119-03), Rouleau, 14 May 2004; 2004 FC 697.

[17] 64. (1) No appeal may be made by a permanent resident or a foreign national or the sponsor of a foreign national where the permanent resident or foreign national has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.

[18] 64. (2) Inadmissibility on the ground of serious criminality is in respect of a crime that was punished in Canada by a term of imprisonment of at least two years.

> [33] In the present case, once the factual determination was made that the applicant was inadmissible for serious criminality, a decision the applicant does not dispute, the IAD lost any mandate to hear an appeal. Since the IAD does not have the power to decide legal questions arising under section 64, it therefore has no power to hear constitutional challenges to that provision.[19]

In *Ferri*,[20] the Federal Court dealt with a constitutional challenge to subsection 68(4)[21] of IRPA which provides that an appeal is cancelled by operation of law in certain circumstances where a stay of a removal order had been granted and the appellant is subsequently convicted of an offence referred to in subsection 36(1). The Court agreed with the IAD decision that it did not have jurisdiction to consider the constitutionality of this section. The Court stated:

> [39] I am of the view that while the IAD may have a general power to decide questions of law and jurisdiction necessary for the resolution of cases coming before it, the effect of the wording of subsection 68(4) is to expressly limit the jurisdiction of the IAD in relation to individuals in Mr. Ferri's situation to the determination of whether the facts of an individual case bring the appellant within the wording of the provision, thus rebutting the presumption in favour of Charter jurisdiction.
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> [40] That is, the IAD's jurisdiction is limited to answering the following questions:
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> - Is the individual in question a foreign national or permanent resident?
> - Has the individual previously been found to be inadmissible on grounds of serious criminality or criminality?
> - Has the IAD previously stayed a removal order made in relation to that individual?
> - Has the individual been convicted of another offence referred to in subsection 36(1)?
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> [41] If the answer to each of these questions is in the affirmative, as is admittedly the case here, then the section is clear:

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19 *Kroon, supra*, footnote 16 at paragraphs 32-33; followed in *Magtouf, Mustapha v. M.C.I.* (F.C. no. IMM-5470-06), Blais, 3 May 2007; 2007 FC 483.

20 *Ferri, supra,* footnote 15.

21 68(4) If the Immigration Appeal Division has stayed a removal order against a permanent resident or a foreign national who was found inadmissible on grounds of serious criminality or criminality, and they are convicted of another offence referred to in subsection 36(1), the stay is cancelled by operation of law and the appeal is terminated.

> the IAD loses jurisdiction over the individual, with the stay being cancelled and the appeal being terminated by operation of law.[22]

This decision was affirmed in *Ramnanan*.[23]

The Charter – General Principles

Removal order appeals can raise constitutional questions in a variety of ways. The most frequently invoked sections of the Charter before the IAD are sections 7, 12 and 15. To begin, the general principles applicable to each of these sections will be briefly canvassed.[24]

Section 7

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This is the section most often used to support constitutional arguments before the IAD. The section has two components. First is the phrase "right to life, liberty and security of the person." These three elements are often argued together, but they can be separated, and an infringement of one of the three alone constitutes an infringement of the first component of section 7.[25] As to the second component, the principles of fundamental justice include as a minimum the principles of natural justice, but are not synonymous with those principles because they also include substantial guarantees. Whether a principle is a principle of fundamental justice depends on the nature, sources, rationale and essential role of the principle in the judicial process and our legal system. "Principles of fundamental justice" can be interpreted as including a great many things. They will take on concrete meaning as the courts consider allegations of section 7 infringements.[26]

Section 12

> 12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

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22 *Ramnanan*, *supra*, footnote 15 at paragraphs 39-41.

23 *Ramnanan*, *supra*, footnote 15.

24 Each of these sections has been extensively interpreted by the Courts. The general principles set out in this paper regarding the interpretation of these sections are not meant to be exhaustive.

25 *Singh*, *supra*, footnote 2, at 205.

26 *Re Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.

Punishment is cruel and unusual if it is so excessive as to outrage standards of decency.[27] Torture will always be fundamentally unjust as it could never be an appropriate punishment, however egregious the offence.[28]

Section 15

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Equality entails more than treating in a similar manner persons in similar situations. Consideration has also to be given to the content of the Act, its purpose and its effect on those to whom it applies and those to whom it does not.[29]

Equality within the meaning of section 15 has a more specific objective than simply eliminating distinctions; its objective is to eliminate discrimination. To determine whether there has been discrimination on grounds related to personal characteristics of an individual or group, it is necessary to examine not only the legislative provision, but also the larger social, political and legal context.[30]

Section 1

> 1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 does not come into play unless the person invoking the Charter (that is, the appellant before the IAD) establishes that there has been an infringement of a right he or she is guaranteed by the Charter. It is then up to the government to show that, based

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[27] *R. v. Smith*, [1987] 1 S.C.R. 1045

[28] *Suresh v. Canada (Minister and Citizenship and Immigration)*, [2002] 1 S.C.R. 3; 2002 SCC 1 at paragraph 51.

[29] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 167; see also *Vriend v. Alberta*, [1998] 1 S.C.R. 493, where the Supreme Court of Canada held that a legislative omission can infringe the right guaranteed under section 15 of the Charter. In this case, the employment of the appellant had been terminated because of his homosexuality. He turned to the Human Rights Commission of Alberta, created by the *Individual's Rights Protection Act*, and the Commission informed him that he could not bring a complaint as sexual orientation was not one of the grounds enumerated in the Act. In a liberal interpretation, the Supreme Court of Canada read sexual orientation into the enumerated grounds of discrimination prohibited by the Act and concluded that this omission by the Legislator constituted a negation of the right of homosexuals to the equal benefit and protection of the law.

[30] *R. v. Turpin*, [1989] 1 S.C.R. 1296, at 1329.

on a balance of probabilities, the limitation of rights is reasonable.[31] The test for determining the "reasonableness" of the limitation is based on a proportionality test between the objective in question, which must be sufficiently important to justify the limitation of a right, and the means chosen, which must be such that the right is impaired as little as possible.[32]

The Charter and Removal

Section 7

As to the constitutionality of legislative provisions allowing the deportation of permanent residents because of criminal activity, the predominant position[33] of the Federal Court and the Federal Court of Appeal has been that deportation does not infringe section 7 of the Charter.

In determining whether or not the removal of a permanent resident or foreign national from Canada engages section 7 of the Charter, the Supreme Court of Canada, in a series of recent cases, has adopted a contextual approach to this determination. In order to understand the recent Supreme Court cases, it is necessary to look at how the law has developed, particularly the Federal Court of Appeal and the Supreme Court of Canada decisions in *Chiarelli*.[34]

In *Chiarelli*, the Federal of Court of Appeal determined that deportation for serious offences cannot be considered a deprivation of liberty. In *Hoang*,[35] the Court

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[31] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[32] *Ibid*.

[33] *Powell v. M.C.I.* (F.C. no. IMM-4964-03), 13 August 2004; 2004 FC 1120. See also *Nguyen v. M.E.I.* (1993), 18 Imm. L.R. (2d) 165 (F.C.A), where Marceau J. implied in contrast that deportation could constitute a deprivation of liberty. See also *Farhadi, Jamshid v. M.C.I.* (F.C.T.D., no. IMM-3846-96), Gibson, March 20, 1998, at 9, where the Federal Court concluded that the necessary factual foundation to support a Charter argument was absent, but nevertheless referred to the words of Mr. Justice Marceau in *Nguyen*. It is interesting to note Mr. Justice Gibson's conclusion in this case, namely that, to respect the principles of natural justice and fairness, the applicant had the right to a pre-removal risk assessment, in addition to the procedure already followed leading to the issuance of the opinion as to danger under subsection 70(5) of the former *Immigration Act.* In *Barre, Mohamed Bulle v. M.C.I.* (F.C.T.D., no. Imm-3467-98), Teitelbaum, July 29, 1998, Mr. Justice Teitelbaum refused to follow this approach and he reached the contrary conclusion that the former *Immigration Act* did not impose such a requirement. In *Jeyarajah, Nishan Gageetan v. M.C.I.* (F.C.T.D., no. IMM-6057-98) Denault, December 15, 1998, Mr. Justice Denault followed the decision in *Barre* in the context of an application for an interim stay of removal. At the same time, the applicant had brought an action for a declaration that, in the absence of a risk assessment of return independent from the procedure leading to the issuance of an opinion under subsection 70(5) infringed the rights guaranteed under sections 7 and 12 of the Charter. The Federal Court Trial Division dismissed the action and the appeal against this decision was likewise dismissed by the Federal Court of Appeal.

[34] *Chiarelli v. Canada (Minister of Employment and Immigration.)*, [1990] 2 F.C. 299 (C.A); *Chiarelli v. Canada (Minister of Employment and Immigration.)*, [1992] 1 S.C.R. 711.

[35] *Hoang v. M.E.I.* (1990), 13 Imm. L.R. (2d) 35; (F.C.A., no. A-220-89), Urie, MacGuigan, Linden, November 30, 1990; *(1990)*, 13 Imm L.R. (2d) 35 at 6.

reiterated its position: "[. . .] deportation [. . .] is not to be conceptualized as a deprivation of liberty." While it concluded in *Chiarelli* that the deportation of permanent residents did not infringe the right guaranteed by section 7 of the Charter, the Supreme Court of Canada did not uphold the ruling of the Federal Court of Canada, namely that deportation was not a deprivation of liberty. Sopinka J. instead based his conclusions on the second component of section 7:

> [. . .] The Federal Court of Appeal [. . .] held that deportation for serious offences is not to be conceptualized as a deprivation of liberty. I do not find it necessary to answer this question, however, since I am of the view that there is no breach of fundamental justice.[36]

He added at page 733:

> Thus in determining the scope of the principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.

The IAD made determinations in a number of cases[37] that were along the same lines as the ruling of the Supreme Court of Canada in *Chiarelli*. The jurisprudence of the Federal Court Trial Division was divided on the issue of whether deportation infringes the right to life, liberty and security of the person,[38] an issue on which the Supreme Court of Canada did not rule in *Chiarelli.*

In *Suresh,*[39] *Medovarski,*[40] *Charkaoui #1*[41] and *Charkaoui #2*[42] the Supreme Court of Canada clarified somewhat how to approach the question of whether or not section 7 is engaged in removal cases. Based on the case law, the principle emerges that removal *per se* does not engage section 7, but features of a removal may.

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[36] *Chiarelli*, *supra*, footnote 34, at 732.

[37] See, for example, *Kelly, Rolston Washington v. M.E.I.* (IAD T93-04542), Bell, December 1, 1993; *Fernandes, Jose Paulo Arruda v. M.C.I.* (IAD T89-584), Teitelbaum, Wiebe, Ramnarine, May 4, 1994. Application for judicial review dismissed: *Fernandes, Jose Paulo Arruda v. M.C.I. (*F.C.T.D., no. IMM-4385-94), Joyal, November 22, 1995; *Machado, Joao Carneiro John v. M.E.I.* (IAD W89-00143), Aterman, Wiebe, March 4, 1996.

[38] *Canepa v. Canada (Minister of Employment and Immigration),* [1992] 3 F.C. 270 (C.A); *Romans, Steven v. M.C.I.* (F.C.T.D., no. IMM-6130-99), Dawson, May 11, 2001; *Powell v. M.C.I.* (F.C. no. IMM-4964-03), Gibson, 13 August 2004; 2004 FC 1120.

[39] *Suresh*, *supra*, footnote 28.

[40] *Medovarski v. Canada (Minister of Citizenship and Immigration),* [2005] 2 S.C.R. 539; 2005 SCC 51.

[41] *Charkaoui v. Canada (Minister of Citizenship and Immigration),* [2007] 1 S.C.R. 350; 2007 SCC 9.

[42] *Charkaoui v. Canada (Minister of Citizenship and Immigration),* 2008 SCC 38.

In its judgment in *Suresh*, the Supreme Court of Canada rejected the position of the Federal Court of Appeal,[43] namely, that even if Mr. Suresh were at risk of torture upon his return to Sri Lanka, there was no infringement of section 7 of the Charter because Canada is merely an "involuntary intermediary" when it deports a person to a country where his or her life, liberty and security of the person are threatened. In rejecting this position, the Court stated:

> […] where Canada's participation is a necessary precondition for the deprivation and the deprivation is an entirely foreseeable consequence of Canada's participation, the Government does not avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand.
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> […]
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> There is always the question […] of whether there is a sufficient connection between Canada's action and the deprivation of life, liberty, or security.[44]

In *Medovarski*, the Court cited *Chiarelli* for the principle that non-citizens do not have an unqualified right to enter or remain in Canada. It then stated that: "Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.[45]"

In *Charkaoui #1*, the Court was faced with the question of the constitutionality of the provisions of IRPA setting out the process for determining whether security certificates were reasonable and the process for detention and release of persons who are subject to the security certificates. In determining that section 7 of the Charter was engaged, the Court stated that:

> - *Medovarski* thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the deportation of a non-citizen in the immigration context may not in itself engage s. 7 of the Charter, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture may do so.
> - In determining whether s. 7 applies, we must look at the interests at stake rather than the legal label attached to the impugned legislation.

Finally, recently in *Charkaoui #2*, the Supreme Court reiterated that determining whether or not section 7 is engaged is not an exercise in deciding which area of law is invoked. Rather, one must look to the "the severity of the consequences of the state's

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[43] *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2000] 2 F.C. 592 (C.A.).

[44] *Suresh*, *supra*, footnote 28 at paragraphs 54-55.

[45] *Medovarski*, *supra*, footnote 40 at paragraph 46.

actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life."[46]

Based on these Supreme Court of Canada cases, it can be stated that deportation in and of itself does not infringe the rights guaranteed under section 7 of the Charter. However, each case must be decided on its own particular facts, and depending on the consequences that deportation might have for the person, the rights protected by section 7 could be engaged.

Before leaving section 7, it should be noted that children who are Canadian citizens do not have standing[47] to challenge the deportation of their parents on constitutional grounds. They are not subject to a removal order, and their departure from Canada with their parents results from a personal decision, with no government intervention.[48]

Section 12

In *Chiarelli,*[49] the Supreme Court of Canada upheld the Federal Court of Appeal's ruling that the deportation of permanent residents for serious offences does not infringe the right to protection from cruel and unusual treatment or punishment guaranteed by section 12 of the Charter. It supported the position taken by the Federal Court of Appeal that deportation is not imposed as a punishment.[50] Deportation could, however, be considered cruel and usual "treatment":

> Deportation may, however, come within the scope of a "treatment" in s. 12. The *Concise Oxford Dictionary* (1990) defines treatment as "a process or manner of behaving towards or dealing with a person or thing [...]." It is unnecessary, for the purposes of this appeal, to decide this point since I am of the view that the deportation authorized by ss. 27(1)(*d*)(ii) and 32(2) is not cruel and unusual.[51]

Sopinka J. added at page 736:

> The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by

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46 *Charkaoui, supra,* footnote 42, at paragraph 53.

47 *Skapinker: Law Society of Upper Canada v. Skapinker,* [1984] 1 S.C.R. 357.

48 *Langner, Ewa Pawlk J. v. M.E.I.* (F.C.T.D., no. T-3027-91), Denault, July 12, 1994. See also *Fernandes, Jose Paulo Arruda v. M.C.I. (*F.C.T.D., no. IMM-4385-94), Joyal, November 22, 1995 and *Dwyer, Courtney v. M.C.I.* (IAD T92-09658), Aterman, Wright, March 21, 1996.

49 *Chiarelli, supra,* footnote 34.

50 See, for example, *Hurd v. Canada (Minister of Citizenship and Immigration),* [1989] 2 F.C. 594 (C.A).

51 *Chiarelli, supra,* footnote 34, at 735.

> imprisonment of five years or more, cannot be said to outrage standards of decency. (see 11.3.1.1, section 12)

In a subsequent case, *Canepa*,[52] the Federal Court of Appeal considered the issue of whether the deportation of a permanent resident subject to subparagraphs 27(1)(*d*)(i) and (ii) of the former *Immigration Act* constituted cruel and unusual "treatment" within the meaning of section 12 of the Charter and concluded that it did not. The Court noted that an appeal on equitable grounds renders the order reversible, depending upon an assessment of the appellant's personal qualities and faults. After analyzing the reasons given by the Appeal Division, the Court found:

> The foregoing indicates a careful and balanced examination of the appellant's claim to remain in Canada from an equitable rather than a legal point of view. It seems to me that it is the very kind of inquiry mandated by Gonthier J. in *Goltz* [*R. c. Goltz*, [1991] 3 S.C.R. 485] [at page 505], involving an "assessment of the challenged penalty or sanction from the perspective of the person actually subjected to it, balancing the gravity of the offence in itself with the particular circumstances of the offence and the personal characteristics of the offender." I find nothing "grossly disproportionate as to outrage decency in those real and particular circumstances."[53]

In *Lei*,[54] the IAD ruled that the loss of permanent residence status for failure to comply with residency obligations cannot be characterized as treatment that is so excessive as to outrage standards of decency.

Based on the case law, it is therefore possible to envisage that the deportation of a permanent resident for reasons other than the commission of serious offences could, in some circumstances, constitute cruel and unusual "treatment." Even when deportation is for the perpetration of serious crimes, removal to the country of origin could, in certain circumstances, constitute an infringement of section 12 of the Charter. The comments regarding the implications of *Chieu*[55] and *Suresh*[56] under the section regarding discretionary jurisdiction also apply to section 12 of the Charter.

Section 15

The deportation of permanent residents has also been challenged on the basis of the right to equality guaranteed by section 15 of the Charter, in that subparagraph

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[52] *Canepa*, *supra*, footnote 38.

[53] *Canepa*, *supra*, footnote 38, at 284.

[54] *Lei, Manuel Joao v. M.P.S.E.P.* (IAD VA4-01999), Mattu, 20 July 2006.

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

[56] *Suresh*, *supra*, footnote 28.

27(1)(*d*)(ii) and subsection 32(2) of the former *Immigration Act* provided for the deportation of persons convicted of an offence punishable by imprisonment for five years or more, regardless of the circumstances of the offence or the offender (analogous to the criminality provisions in IRPA). The Supreme Court of Canada made a definitive ruling on this issue in *Chiarelli*,[57] namely that the Charter itself provides for different treatment of citizens and permanent residents:

> As I have already observed, s. 6 of the *Charter* specifically provides for differential treatment of citizens and permanent residents in this regard. While permanent residents are given various mobility rights in s. 6(2), only citizens are accorded the right to enter, remain in and leave Canada in s. 6(1). There is therefore no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.[58]

Residency Obligations

In *Chu*,[59] the Court dealt with the question of the constitutionality of the retroactive application of the residency obligation requirements found in section 28 of IRPA. In that case the Federal Court (endorsed on appeal) cited *Chiarelli*[60] for the proposition that non-citizens do not have an unqualified right to enter or remain in the country. The Court concluded that while the appellant's presence in Canada may have been desirable for personal reasons, it was not grounded upon a right that would engage section 7 of the Charter.

Limitations on the right of appeal

The IRPA contains provisions limiting or removing the right of appeal in some cases. For example, subsections 64(1) and (2) remove an appeal right for appellants who were found to be inadmissible on grounds of security, violating human or international rights, serious criminality (if punished by a term of imprisonment of at least two years) or organized criminality. Also, section 68(4) stipulates that an appeal for which a stay had been granted is automatically terminated by the operation of law if the appellant is subsequently convicted of another offence referred to in section 36(1). These provisions limit or remove the jurisdiction of the IAD to hear or decide an appeal.

The constitutionality of both of these provisions has been challenged as being contrary to section 7 of the Charter. The Court has consistently held that the IAD <u>does not</u> have jurisdiction to entertain constitutional challenges with respect to these sections

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[57] *Chiarelli*, s*upra*, footnote 34.

[58] *Chiarelli*, *supra*, footnote 34, at 736. See also *Gonzalez, Norvin Ramiro v. M.C.I.* (F.C. no. IMM-1158-06); Shore, 26 October 2006; 2006 FC 1274 at paragraph 51.

[59] *Chu, Kit Mei Ann v. M.C.I.* (F.C. no. IMM-121-05), Heneghan, 18 July 2006; 2006 FC 893 reasons of Madame Justice Heneghan endorsed on appeal without further comment in *Chu, Kit Mei Ann v. M.C.I*,(F.C.A. no A-363-06), Décary, Linden, Sexton; 29 May 2007; 2007 FCA 205

[60] *Chiarelli*, s*upra*, footnote 34.

of the Act. This issue is fully canvassed earlier in this chapter in the section on jurisdiction.

In addition to the jurisdictional issue, the courts have ruled on the substantive issue of whether the removal of an appeal right violates the Charter. The Courts have consistently held that a removal of a right to appeal does not violate the Charter.

The leading case is *Medovarski*[61] wherein the Supreme Court of Canada rejected a constitutional challenge to section 196 of IRPA. This section is a transitional provision which discontinued any appeal filed under the former *Immigration Act* for persons for whom subsection 64(1) of the IRPA would apply. The Court cited *Chiarelli*[62] for the proposition that deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the Charter and then stated:

> 47. Even if liberty and security of the person were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice. The humanitarian and compassionate grounds raised by Medovarski are considered under s. 25(1) of the *IRPA* in determining whether a non-citizen should be admitted to Canada. The *Charter* ensures that this decision is fair: e.g., *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Moreover, *Chiarelli* held that the s. 7 principles of fundamental justice do not mandate the provision of a compassionate appeal from a decision to deport a permanent resident for serious criminality. There can be no expectation that the law will not change from time to time, nor did the Minister mislead Medovarski into thinking that her right of appeal would survive any change in the law. Thus for these reasons, and those discussed earlier, any unfairness wrought by the transition to new legislation does not reach the level of a *Charter* violation.[63]

Previously, in *Williams*,[64] a permanent resident had filed his appeal under paragraphs 70(1)(*a*) and (*b*) of the former *Immigration Act*, but before the appeal was heard,[65] the Minister issued a danger-to-the-public certificate under subsection 70(5) of the former *Act*. Strayer J., writing for the Court, began by pointing out the effects of such a certificate, one of which is to deprive the permanent resident of his or her right of appeal before the Appeal Division. He then distinguished a limitation of the right of

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61 *Medovarski, supra,* footnote 40. Also see *Kroon*, *supra,* footnote 16.

62 *Chiarelli, supra*, footnote 34.

63 *Medovarski, supra,* footnote 40 at paragraph 47.

64 *Williams v. Canada (Minister of Citizenship and Immigration)*, [1997] 2 F.C. 646 (C.A)

65 See also *Ibraham v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J 1559 (T.D.), in which the Federal Court Trial Division ruled that where the Minister issues a certificate of danger to the public after the hearing but before the Appeal Division has made its decision, there is no violation of section 7 of the Charter because that approach is not inconsistent with the principles of fundamental justice.

appeal from deportation *per se*. Finally, while recognizing that the Court had itself made different rulings on the matter,[66] he concluded that even though he had to agree that the Minister's opinion resulted in the deportation of a permanent resident, the right to liberty and security of the permanent resident guaranteed by section 7 of the Charter was not affected.

THE CHARTER AND DISCRETIONARY JURISDICTION

Country of Removal – Potential foreign hardship

Introduction

With regard to the removal itself, prior to the decision of the Supreme Court of Canada in *Chieu*,[67] the IAD was, more often than not, able to dispose of constitutional arguments concerning removal quite easily since, according to the jurisprudence, they were premature inasmuch as the Minister could not determine the country of removal until the IAD had decided the appeal.[68] Arguments that removal would infringe Charter-protected rights were therefore made before the Federal Court on judicial review or on an application to stay a removal order.

In *Chieu*, and the Supreme Court of Canada modified somewhat the decisions rendered by the Federal Court of Appeal with respect to this issue. In order to understand the developments in this area, it is important to set out a brief history.

Historical Context (pre-Chieu)

In *Hoang*,[69] the appellant had been determined to be a refugee from Vietnam and had subsequently obtained permanent resident status. On appeal from a deportation order that followed convictions for serious crimes, the Appeal Division, in its assessment of the circumstances of the case, refused to take into account the country to which the appellant would be removed, even though the Minister's representative had clearly stated during the hearing that the Department intended to remove the appellant to Vietnam. The appellant argued that his deportation violated the rights he was guaranteed by sections 7 and 12 of the Charter.

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[66] The Court cited decisions in which it had ruled that deportation did not constitute a deprivation of liberty: *Hoang, supra,* footnote 35, at 41; *Canepa, supra*, footnote 38, at 277; and *Barrera v. Canada (Minister of Employment and Immigration),* [1993] 2 F.C. 3 (C.A), at 16. Regarding decisions to the effect that deportation does or might in some circumstances constitute a deprivation of liberty, the Court cited: *Chiarelli, supra*, footnote 34; *Nguyen, supra,* footnote 33.

[67] *Chieu, supra* footnote 55.

[68] *Barrera, supra*, footnote 66. See also *Chieu v. Canada (Minister of Citizenship and Immigration),* [1999] 1 F.C. 605 (C.A); *Hoang, supra,* footnote 35.

[69] *Hoang, supra,* footnote 35.

The Federal Court of Appeal was called on to distinguish between the removal of permanent residents and the removal of refugees, in that it must be presumed that a person who has obtained refugee status will be persecuted if returned to the country of origin. The Court recognized that the outcome would be different, but maintained the position it had taken in *Chiarelli*,[70] namely that deportation for serious crimes is not an infringement of liberty. As to the claim of infringement of the right guaranteed by section 12 of the Charter, the Court fell back on its decision in *Hurd*,[71] namely that deportation does not constitute punishment: "Deportation for committing serious offences does not infringe the rights guaranteed by s. 7 or s. 12, as it is not to be conceptualized as a deprivation of the right to liberty or punishment."[72]

The decision in *Barrera*[73] confirmed the position taken by the Federal Court of Appeal that deportation for serious crimes does not constitute a deprivation of liberty and therefore does not violate section 7 of the Charter, regardless of the status the person might have acquired in Canada, that is, permanent resident, refugee, or both. In this particular case, the Court also reiterated its position that deportation does not constitute punishment within the meaning of section 12 of the Charter. However, the issue before the Court was whether the deportation of a Convention refugee constituted cruel and unusual "treatment" within the meaning of section 12 (an issue that the Supreme Court of Canada had raised in *Chiarelli* but did not determine) and, by extension, the constitutionality of section 53 of the former *Immigration Act*, which governed the removal of Convention refugees.

The Federal Court of Appeal upheld the Appeal Division's finding that it was premature to rule on these two issues because no ministerial decision had yet been made to deport the refugee to a country in which his life or freedom would be in jeopardy. It opined that the execution of a removal order is a decision to be made by the Minister, and removal of a refugee will not proceed unless the Minister determines that the refugee is a person who is a danger to the public. However, the Minister cannot make a decision regarding the country to which the refugee would be removed until the issue of deportation has been resolved by the Appeal Division.[74]

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[70] *Chiarelli*, *supra*, footnote 34. Note that the Supreme Court of Canada did not confirm the position taken by the Federal Court of Appeal in this regard. It found, however, that there was no violation of section 7 because deportation for serious crimes is not inconsistent with the principles of fundamental justice.

[71] *Hurd*, *supra*, footnote 50. In that case, it was argued that deportation violated paragraph 11(*h*) of the Charter which reads as: "Any person charged with an offence has the right if finally acquitted of the offence, not to be tried […] or punished for it again."

[72] *Hoang*, *supra*, footnote 35, at 41.

[73] *Barrera*, *supra*, footnote 66.

[74] *Barrera*, *supra*, footnote 66, at 23.

Present approach (post-Chieu)

In 2002, the Supreme Court of Canada rendered an important decision in *Chieu*.[75] The issue in this case was whether the factor of potential foreign hardship should be considered in the IAD's exercise of its equitable jurisdiction. As stated above, before the decision in *Chieu*, the question of the potential country of removal and hardship was often treated as premature in the sense that the Minister could not decide on the country of removal until such time as the removal order was upheld. In *Chieu*, the board member had considered potential foreign hardship but had accorded it minimal weight due to the fact it was premature for the division to take into account conditions in the appellant's country of origin. The Court reversed this decision, indicating that:

> …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.[76]

The Supreme Court of Canada distinguished the treatment of permanent residents from that of refugees, in particular, on the basis that refugees benefit from express legal protection (section 53 of the former Act and section 115 of IRPA) against removal to a country where they believe their life or freedom would be threatened. The Court expressed it in these terms: "[…] there is no need for absolute consistency in how the Act deals with Convention refugees and non-refugee permanent residents."[77]

In light of the Supreme Court of Canada decision, *Chieu*, the case of a permanent resident must be treated differently from that of a protected person. In *Chieu*, the Court noted that the country of removal is generally known in respect of a permanent resident who is not a refugee,[78] and the IAD must examine all the difficulties the permanent resident could encounter following his or her removal to the country of probable destination, including the situation in that country. With respect to a refugee, the Supreme Court of Canada did not specifically exclude the possibility that the IAD may take into account the likely country of removal, if it is known. However, the Court recognized that often the likely country of removal in the case of protected person cannot be determined in view of section 115 of IRPA which sets out the principle of non-refoulement.

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[75] *Chieu, supra*, footnote 55.

[76] *Chieu, supra*, footnote 55 at paragraph 90.

[77] *Chieu, supra*, footnote 55 paragraph 87.

[78] This is not generally the case with regard to protected persons, given the principle of non-refoulement set out in section 115 of the IRPA. See *Atef v. Canada (Minister of Citizenship and Immigration)*, [1995] 3 F.C. 86 (Trial Division).

Hardship in country of removal – Charter challenges

In determining hardship, the IAD is sometimes called upon to decide Charter arguments based on the appellant's removal being contrary to sections 7 or 12 of the Charter. The approach in assessing Charter violations in the context of removal was commented on in *Suresh.*[79] The *Suresh* approach was clarified in *Malmo-Levine*[80] and followed in subsequent IAD cases.

In *Suresh*, the constitutional validity of paragraph 53(1)(*b*) of the former *Immigration Act* was challenged to the extent that the provision did not prohibit the Minister of Citizenship and Immigration from removing a person to a country where the person might be at risk of being tortured. The Supreme Court of Canada ruled that the provision is not unconstitutional as long as the principles of fundamental justice are observed. However, the Minister, in exercising the discretionary power conferred on her under paragraph 53(1)(*b*) of the former Act, must act in accordance with the principles of fundamental justice guaranteed under section 7 of the Charter. These principles require a balancing process, the result of which may vary from case to case. In principle, when the evidence reveals the existence of a serious risk of torture, the refugee must not be removed. The balancing process requires that various factors be taken into consideration such as "[…] the circumstances or conditions of the potential deportee, the danger that the deportee presents to Canadians or the country's security, and the threat of terrorism to Canada."[81]

Based on the decision of the Court, it is clear that the refugee must meet a preliminary criterion, which is to establish *prima facie* that he or she could be at risk of torture if deported. To the extent that this criterion is met, certain procedural safeguards apply; in particular, the refugee must be informed of the evidence against him or her; subject to any privilege attaching to certain documents or the existence of other valid grounds for limiting disclosure, all the evidence on which the Minister is basing his decision must be disclosed to the refugee; and the Minister must give written reasons for decision with respect to all the relevant issues.

In *Suresh*, the Court also determined that provisions 19(1)(*e*)(iv)(C), 19(1)(*f*)(ii) and 19(1)(*f*)(iii)(B) [equivalent to sections 34(1)(c) and 34(1)(f) of IRPA], which had been challenged on the basis that they infringed freedom of expression and freedom of association guaranteed under subsections 2(*b*) and 2(*d*) of the Charter, were constitutional.

The case of *Malmo-Levine*[82] was a criminal case wherein the Supreme Court had to determine the constitutionality of criminalizing simple possession of marijuana. In so doing, the majority of the Court commented at paragraph 143 on the balancing process enunciated in *Suresh* as follows:

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[79] *Suresh, supra,* footnote 28.

[80] *R. v. Malmo-Levine*; *R. v. Caine* [2003] 3 S.C.R. 571; 2003 SCC 74.

[81] *Suresh, supra,* footnote 28 at paragraph 45.

[82] *Malmo-Levine, supra,* footnote 80

> 143 In short, after it is determined that Parliament acted pursuant to a legitimate state interest, the question can still be posed under s. 7 whether the government's legislative measures in response to the use of marihuana were, in the language of *Suresh*, "so extreme that they are *per se* disproportionate to any legitimate government interest" (para. 47 (emphasis added)). As we explain below, the applicable standard is one of gross disproportionality, the proof of which rests on the claimant.

In *Romans* (2003),[83] the Federal Court concluded that the IAD had erred in law by failing to consider Charter-protected rights in exercising its discretionary jurisdiction. Mr. Romans had his appeal heard before the IAD three times and considered by the Federal Court on two occasions. In order to understand how this happened, it is important to set out the evolution of this case.

A deportation order had been issued by the Immigration Division against Mr. Romans, a permanent resident, for criminality, as he was a person referred to in paragraph 27(1)(*d*) of the former *Immigration Act*. The IAD first dismissed his appeal in 1999. As a result of the decision of the Federal Court of Appeal in *Chieu*, the IAD did not take into consideration the conditions in the country of removal in rendering its decision (the Supreme Court of Canada later set aside the decision of the Federal Court of Appeal on this issue).

At the judicial review of the IAD's decision, Mr. Romans argued that his deportation would be contrary to the principles of fundamental justice set out in section 7 of the Charter as he had been granted landing at the age of 18 months and suffered from chronic paranoid schizophrenia. The Federal Court dismissed the application for judicial review.[84] It concluded that it could not distinguish Mr. Romans' case from the decision rendered by the Supreme Court of Canada in *Chiarelli*.[85] The Federal Court of Appeal upheld the Federal Court's decision.[86]

Subsequent to the Federal Court of Appeal's decision, the Supreme Court of Canada rendered its decision in *Chieu*. Therefore, in light of that decision, the IAD allowed an application to reopen the appeal wherein it would examine, among other things, the difficulties the appellant would encounter if removed. At the reopening of the appeal, Mr. Romans wanted to present constitutional arguments. The IAD decided that the appellant could not challenge the constitutional validity of the removal order because, in the context of a reopened hearing, the IAD jurisdiction was limited to the exercise of its discretionary power.

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[83] *Romans, Steven Anthony v. M.C.I.* (F.C., IMM-358-03), Russell, December 29, 2003.

[84] *Romans, Steven Anthony v. M.C.I.* (F.C.T.D., IMM-6130-99), Dawson, May 11, 2001.

[85] *Chiarelli*, *supra*, footnote 34.

[86] *Romans, Steven Anthony v. M.C.I.* (F.C.A., A-359-01), Décary, Noël, Sexton, September 18, 2001.

The Federal Court quashed the IAD's decision because, while the Division had assessed foreign hardship, it had failed to address the infringement of section 7 Charter rights raised by the appellant.[87] The Court rejected the argument that the IAD did not have an obligation to analyse the Charter arguments presented, but that it only had an obligation to exercise its discretion and perform its statutory duty within the terms of the Charter and in accordance with the principles of fundamental justice.

As a result of the Federal Court quashing the second IAD decision, the case was heard for a third time in 2005 before the IAD (*Romans* 2005).[88] This time, the IAD stayed the removal order for three years. The tribunal opined that despite the bleak prospect of the appellant's rehabilitation, the appellant should be given more time to pursue treatment in Canada given the foreign hardship he would occur if returned to Jamaica and the fact that he was a long-term resident of Canada. The approach adopted by the panel in this case has been followed in subsequent IAD cases and merits mention.

In *Romans* (2005), the IAD considered what the proper approach is with respect to evaluating foreign hardship in the context of the non-exhaustive factors enumerated in *Chieu*. The panel indicated that despite the fact it is foreign hardship that will, in most cases, trigger the proportionately analysis mandated by *Suresh*[89] and other cases, it does not mean that foreign hardship is a freestanding basis for non-removal, divorced from the other discretionary factors. The tribunal continued, stating that:

> However, where the IAD, after conducting the balancing process mandated by section 7 of the Charter, finds that the potential foreign hardship an appellant faces is grossly disproportionate to parliament's interest in removing the appellant and is therefore not in accordance with the principles of fundamental justice, it is difficult to see how the other factors in *Chieu* can overcome such a fundamental breach of the appellant's rights under section 7….In any event, where, after conducting the fundamental justice balance, the IAD finds that the potential foreign hardship is not grossly disproportionate to the government interest in executing the removal order, the level of foreign hardship must still be weighed against the other discretionary factors.[90]

In deciding to stay the removal order for three years, the panel concluded that the appellant's removal would not contravene the principles of fundamental justice as his removal would not be grossly disproportionate to the goal of protecting the public. However, when the hardship that the appellant would face if removed to Jamaica was weighed with the other discretionary factors, particularly the fact he was a long-term

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87 *Romans*, s*upra*, footnote 83.

88 *Romans, Steven Anthony v. M.C.I.* (IAD file no. T99-06694), Sangmuah; 15 September 2005.

89 *Suresh*, s*upra*, footnote 28.

90 *Romans*, s*upra*, footnote 88 at paragraph 17.

resident of Canada, the panel determined that a stay was appropriate. The approach used in *Romans* has been adopted in other IAD cases.[91]

In *Thanabalasingham,*[92] the same Board member who decided *Romans*, without citing *Romans* specifically, dismissed a removal order appeal and adopted a similar approach to assessing hardship as he had used in *Romans*. The Federal Court[93] upheld the decision finding that the IAD had made no reviewable error, including with respect to the hardship analysis, although the issue before the court was the board member's assessment of the evidence rather than specifically the legal framework he had adopted.

In a recent case, in dismissing a removal order appeal, the IAD clearly described the Charter balancing process that is conducted in the context of assessing hardship. The tribunal stated that:

> [74] What is being weighed or balanced in the circumstances of this case by way of a Charter balancing analysis is whether the contemplated deportation of the appellant in his specific circumstances is a grossly disproportionate means for the government to use in order to meet its legitimate objectives of protecting the Canadian public from being harmed by the potential criminal conduct of the appellant. The onus is on the appellant to establish in the circumstances the disproportionately of means used by the state to attain its legitimate objects, and that the same violates the principles of fundamental justice.[94]

The tribunal in that case also found that it should consider the issue of hardship against two possible countries of removal, Jamaica and Panama. It opined that while there was not conclusive evidence as to which one of the countries the appellant would be removed, it was clear that it would be one of the two and, as such, it proceeded to assess potential hardship upon return to either country.

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91 See, for example, *Sambasivam v. M.P.S.E.P.* (IAD TA5-14898), Ahlfeld, 31 March 2007 wherein the tribunal concluded that a removal to Sri Lanka in the circumstances of the appellant, who was inadmissible for serious criminality, would not contravene section 7 of the Charter. In dismissing the appeal, the Board accepted that the appellant suffered from a serious mental illness, the mental health facilities in Canada are superior to those in Sri Lanka, and there was a problem of the availability of the medications he required in Sri Lanka, but found that his removal would not result in disproportionate hardship as there was no evidence that the appellant had actually availed himself of the resources available to him in Canada. Also see *Samuels, Miguel Alfonso v. M.P.S.E.P.* (IAD TA4-06288), Band, 26 September 2008.

92 *Thanabalasingham, Kaileshan v. M.C.I.* (IAD TA2-04078), Sangmuah, 6 January 2006.

93 *Thanabalasingham, Kaileshan v. M.P.S.E.P.* (F.C. no. IMM-421-06), Gauthier, 5 June 2007; 2007 FC 599.

94 *Samuels, supra,* footnote 91 at paragraph 74.

The Federal Court has indicated, as the Board did in *Romans* (2005), that hardship is not a freestanding basis for non-removal. In *Bielecki*,[95] the Court stated that the issue is whether there are sufficient humanitarian and compassionate considerations to stay the removal order weighed in the context of all the circumstances of the case, of which hardship is but one factor.

As for an appeal filed by a protected person against a removal order, based on the principle of non-refoulement set out in section 115 of the IRPA, the country of removal is not generally known at the time of the appeal. Consequently, where the country of removal is not known, constitutional arguments made before the IAD in relation to such removal orders may be premature. It is therefore the Minister's decision to execute a removal order that could infringe Charter-protected rights and thus be the subject of a constitutional challenge.

However, if the Minister clearly indicates an intention during an appeal to effect removal to a particular country, case law indicates that the IAD must then, as in the case of a permanent resident, consider the difficulties the protected person could face in the probable country of removal without, however, reconsidering the application for protection, which comes under the jurisdiction of the Refugee Protection Division. In *Chieu*, the Supreme Court of Canada ruled clearly on this issue, stating as follows:

> 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. […]

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

[95] *Bielecki, Fabian v. M.C.I.* (F.C. no. IMM-2465-07), Gibson, 4 April 2008; 2008 FC 442.

> 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. […][96]

The Federal Court jurisprudence has continued this distinction between considering hardship for protected persons when the country of removal is known, but not otherwise. In *Soriano,*[97] a removal order appeal involving a Convention Refugee, the Court reversed an IAD decision dismissing the appeal and determined that the IAD was obligated to consider hardship given that the country of removal had been established as El Salvador. Likewise, in *Thanabalasingham,*[98] the Federal Court upheld a decision of the IAD wherein it had considered hardship in the case of a Convention refugee. In that case, the minister had taken the steps required in section 115 to overcome the principle of non-refoulement and had identified the country of removal as Sri Lanka. In *Balathavarajan*[99] the Federal Court of Appeal distinguished *Soriano* in that the appellant was a Convention refugee and the Minister had not specified the country of removal nor had taken the necessary steps to prepare a danger opinion pursuant to section 115 of IRPA. In the circumstances, the Court stated that assessing hardship "would have been a hypothetical and speculative exercise."[100]

Other challenges

In removal order appeals, the IAD has jurisdiction to allow the appeal for humanitarian and compassionate considerations pursuant to section 67(1)(c)[101] of IRPA. The former *Immigration Act*, section 70(1)(b), also conferred equitable jurisdiction on the IAD to allow an appeal "on the ground that, having regard to all the circumstances of the case, the person should not be removed from Canada." Although the wording of the two sections is different, it is instructive to look at some of the challenges involving the former act.

In *Ostojic,*[102] it was argued that paragraph 70(1)(*b*) of the former *Immigration Act* was inconsistent with the right guaranteed by section 12 of the Charter in that paragraph

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96 *Chieu, supra*, footnote 55 at pp. 129 and 130.

97 *Soriano, Omar Alexander Merino v. M.C.I.* (F.C. no. IMM-2957-02), Campbell, 24 April 2003; 2003 FCT 508.

98 *Thanabalasingham, supra*, footnote 93.

99 *Balathavarajan, Sugendran v. M.C.I.* (F.C.A. no. A-464-05), Linden, Nadon, Malone, 19 October 2006; 2006 FCA 340.

100 *Ibid* at paragraph 9.

101 67(1)(*c*) other than in the case of an appeal by the Minister, taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case.

102 *Ostojic, Stevo* v. *M.E.I.* (IAD T93-02051), Goebelle, Weisdorf, Rotman, February 24, 1994.

70(1)(b), the purpose of which is to mitigate the severity of a deportation order, is vague and imprecise, primarily because it did not establish any criteria to be considered by the Appeal Division, specifically the criterion of long-term residency.

The Appeal Division relied on the comments made by Gonthier J. in *Nova Scotia Pharmaceutical Society* to reject that argument:

> [L]aws that are framed in general terms may be better suited to the achievement of their objectives, inasmuch as in fields governed by public policy circumstances may vary widely in time and from one case to the other. A very detailed enactment would not provide the required flexibility, and it might furthermore obscure its purposes behind a veil of detailed provisions. The modern State intervenes today in fields where some generality in the enactments is inevitable. The substance of these enactments remains nonetheless intelligible. One must be wary of using the doctrine of vagueness to prevent or impede State action in furtherance of valid social objectives, by requiring the law to achieve a degree of precision to which the subject-matter does not lend itself. A delicate balance must be maintained between societal interests and individual rights.[103]

Relying on *Canepa,*[104] the Appeal Division also rejected the argument that long-term residency should be a predominant factor in evaluating all the circumstances of the case. In that case, the Federal Court of Appeal had ruled that long-term residency does not grant any legal status that would support a distinction between long-term and other permanent residents.

In *Machado,*[105] it was also argued that the wording of paragraph 70(1)(*b*) of the former *Immigration Act* is vague and imprecise in that the lack of criteria related to the phrase "having regard to all the circumstances of the case" leads to the arbitrary application of discretionary power in the case of a decision that can deprive the appellant of the right to liberty and security of the person, which must be considered inconsistent with the principles of fundamental justice. The argument was dismissed by relying on the same case law cited above.

The Charter and Unreasonable Delays

This argument has been used primarily in criminal proceedings to assert the right of an accused to be tried within a reasonable time in accordance with paragraph 11(*b*) of the Charter. If the argument is accepted, the result is a stay of criminal proceedings. In the wake of the Supreme Court of Canada's decision in *Askov,*[106] where Cory J. stated

[103] *R.v Nova Scotia Pharmaceutical Society,*[1992] 2 S.C.R 606. at 641-2.

[104] *Canepa, supra,* footnote 38.

[105] *Machado, supra,* footnote 37.

[106] *Askov v. The Queen,* [1990] 2 S.C.R. 1199.

that a delay of six to eight months between the committal for trial and the actual trial is the outer limit of reasonableness, several attempts were made to use the unreasonable delay argument before the various divisions of the IRB.

Two elements are required to sustain such an argument: the person who is the subject of the proceedings must show, first, that he or she has suffered prejudice or an injustice as a result of the delay and, second, that the prejudice constitutes an infringement of a Charter right.

In *Chan,*[107] several years passed after the deportation order was issued without the Minister's acting on it because of the absence of identity papers and a lack of co-operation by the appellant himself and the authorities of the country to which he was to be deported. The appellant argued that the unreasonable delay in executing the deportation order had caused him psychological and emotional stress, since he did not know when, or even if, he would be removed, and that this infringed his rights guaranteed under sections 7 and 12 of the Charter. The Appeal Division, after reviewing the Department's efforts to execute the removal order and the appellant's personal situation, rejected the argument because the evidence did not show that there had been an injustice or that the appellant had sustained prejudice because he was not deported.

In *Chiarelli,*[108] in the absence of evidence of prejudice to the appellant, the Appeal Division did not accept the argument that the 14 months it took the Minister to issue the security certificate and order an inquiry into the matter infringed his right guaranteed under section 7 of the Charter.

Higher courts have not been asked to rule on matters where unreasonable delay in the hearing of an appeal before the Appeal Division was used as an argument. However, in *Akthar,*[109] it was argued that the right guaranteed by section 7 of the Charter was infringed because of the two-and-a-half-year delay between the initial refugee claim and the tribunal's decision. The Federal Court of Appeal made a clear distinction between a person claiming refugee status and a person accused of a criminal offence; the former benefits from no presumption, whereas the latter is presumed to be innocent. The Court did not, however, rule out the possibility that an unreasonable delay in being heard might constitute an infringement of the right guaranteed by section 7 of the Charter. The Court stated:

> In the first place, the applicants are not at all in the same legal position as an accused person. This, of course means that they do not enjoy the specific protection afforded by paragraph 11(*b*) of the Charter. That in itself is not conclusive, for it is well accepted that the

[107] *Chan, Ngorn Hong v. M.E.I. (IAD V90-00287), Wlodyka, Guillanders, Verma, July 31, 1992*

[108] *Chiarelli, Joseph v. M.E.I.* (IAD T89-07380), Weisdorf, Fatsis, Chu, May 19, 1993; the appellant did not make this argument before the Federal Court of Appeal, *supra*, footnote 34 or before the S.C.C., *supra*, footnote 34.

[109] *Akthar v. Canada (Minister of Employment and Immigration),* [1991] 3 F.C. 32 (C.A).

specific dispositions of section 11 are only particular applications of the principles of fundamental justice enshrined in section 7.[110]

It added, however, that in non-criminal cases any infringement of the Charter based on a delay must be supported by evidence that the person making the claim suffered prejudice or an injustice attributable to the delay.

In *Urbanek*,[111] the Federal Court of Appeal held that the delay in hearing the claim, which resulted in the claimant's not being granted refugee status because of a change in circumstances in his country of origin, did not constitute prejudice.

The Charter – Procedural Considerations

Notice

Section 52 of the *Immigration Appeal Division Rules*[112] (the Rules) requires that a notice of constitutional question be provided to the attorney general of Canada and the attorney general of each province no later than 10 days before the argument will be made if an appellant wishes to challenge the constitutional validity, applicability or operability of a legislative question. The form and content of the notice is set out in the rule and includes the relevant facts to be relied upon and a summary of the legal argument to be made. If the constitutional arguments are not aimed at invalidating a legislative provision, as, for example, in the case of an argument of unreasonable delay, notice to the attorneys general is not required.

If notice to the attorneys general is not given in circumstances where it is required by the Rules, the Appeal Division may either adjourn the hearing to allow the parties to meet the requirements of the Rules,[113] order that the notice period be changed, or refuse to hear the constitutional arguments.[114]

Hearing Considerations

The Appeal Division may hear the appeal on its merits before hearing arguments based on the Charter because, if the decision is favourable, Charter arguments need not be made.[115]

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[110] *Ibid.*, at 38.

[111] *Urbanek, Kristian v. M.E.I.* (F.C.A., no. A-22-90), Hugessen, MacGuigan, Desjardins, June 19, 1992.

[112] DORS/2002-230.

[113] *Mursal v. M.C.I.* (F.C. IMM-3360-02), Gibson, 25 August 2003; 2003 FC 995.

[114] *Carpenter, Herbert Wayne v. M.C.I.* (IAD V94-02423), Clark, January 3, 1997; *Gonsalves, Gwendolyn Barbara v. M.C.I.* (F.C.T.D., no. IMM-1992-96), Muldoon, May 9, 1997; *Magtouf, supra*, footnote 19.

[115] *Singh v. M.E.I.* (1991), 14 Imm. L.R. (2d) 126 (F.C.T.D.); *Bissoondial v. M.E.I.* (1991), 14 Imm. L.R. (2d) 119 (F.C.T.D.); *Gayle, Everton Simon v. M.C.I.* (IAD T94-02248), Hopkins, June 5, 1995.

Finally, a full hearing is not necessarily required if a constitutional question is raised. In *Hamedi*,[116] the Federal Court upheld a decision that was made by way of a preliminary ruling based solely on written submissions where a constitutional argument had been raised before the IAD.

[116] *Hamedi, Marzia v. M.C.I.* (F.C. no. IMM-6293-05), O'Reilly, 2 October 2006; 2006 FC 1166.

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