Chapter Two

Criminal Refusals

Introduction

An application for permanent residence made by a member of the family class can be refused if the member of the family class or a dependant is inadmissible to Canada on any of the following grounds related to matters of criminality:

- "serious criminality" – *IRPA,* s. 36(1)
- "criminality" – *IRPA,* s. 36(2)
- "organized criminality" – *IRPA,* s. 37
- "security" – *IRPA,* s. 34
- "human or international rights violations" – *IRPA,* s. 35

Section 64(1) and (2) of *IRPA* provides that no appeal may be made to Immigration Appeal Division (IAD), by either a foreign national or their sponsor, if the foreign national has been found to be inadmissible on the following grounds:

- "serious criminality", where the offence was punished in Canada by a term of imprisonment of at least two years – *IRPA,* s. 36(1)
- "organized criminality" – *IRPA,* s. 37
- "security" – *IRPA,* s. 34
- "human or international rights violations" – *IRPA,* s. 35

The Federal Court has held that the IAD has no jurisdiction to entertain appeals in such cases. The appeal must be dismissed for lack of jurisdiction if the visa officer has determined the foreign national 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]

[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 section 196 of the Transitional Provisions, which provides for the discontinuation of an appeal if the appeal could not have been made because of section 64 of *IRPA.*

This chapter will therefore deal only with the grounds of serious criminality and criminality, as both of these can constitute proper grounds for the IAD to refuse a sponsorship appeal on the merits.

The relevant sections of *IRPA* dealing with serious criminality and criminality can be broken down as follows:[2]

- "serious criminality" – conviction in Canada; punishable by maximum prison term of 10 years or more *or* where a prison term of more than 6 months was imposed – *IRPA*, s. 36(1)(*a*)

- "serious criminality" – equivalent conviction outside Canada; punishable in Canada by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*b*)

- "serious criminality" – committed equivalent offence outside Canada; punishable in Canada by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*c*)

- "criminality" – conviction in Canada; punishable by maximum prison term of less than 10 years – *IRPA*, s. 36(2)(*a*)

- "criminality" – equivalent conviction outside Canada; punishable in Canada by maximum prison term of less than 10 years – *IRPA*, s. 36(2)(*b*)

- criminality – committed equivalent offence outside Canada; punishable in Canada by maximum prison term of less than 10 years – *IRPA*, s. 36(1)(*c*)

- "criminality" – two summary convictions in Canada (not arising out of a single occurrence) – *IRPA*, s. 36(2)(*a*)

- "criminality" – equivalent of two summary convictions outside Canada (not arising out of a single occurrence) outside Canada – *IRPA*, s. 36(2)(*b*)

The common point of reference for the grounds of serious criminality and criminality, whether for a Canadian conviction or a foreign conviction or crime, is that the underlying offence is or is equivalent to "an offence under an Act of Parliament", that is an offence found in a Canadian federal statute.

The most common basis for inadmissibility is the visa officer's conclusion that the applicant for permanent residence or a dependant has been convicted of or has committed an offence outside Canada that, if committed in Canada, would constitute an offence in Canada. This ground of inadmissibility raises issues known as equivalency of foreign offences to Canadian ones.

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

Standard of Proof

Section 33 of *IRPA* provides that inadmissibility under section 36 includes facts arising from omissions and 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 statements 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 & Immigration)* (2000), 9 Imm. L.R. (3d) 61 (F.C.T.D.).

The Court also noted, at para. 116, that the "reasonable grounds to believe" standard applies only to questions of fact:

> 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, which are decided on the balance of probability and reviewed by the Federal Court on the correctness standard.[4] When dealing with a foreign conviction or crime outside Canada, it is a question of law whether the conviction or crime satisfies the requirements of an offence under an Act of Parliament, i.e., whether equivalency is established.

Canadian convictions

A foreign national applying for permanent residence may be inadmissible for having been convicted of a criminal offence during a previous period of residence or stay in Canada. Only

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[3] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 91, at para. 114; 2005 SCC 40.

[4] Ibid., para 37.

convictions under Canadian federal laws ("an offence under an Act of Parliament") render a person inadmissible on grounds of serious criminality or criminality.[5]

Whether a Canadian conviction will render the person 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 law, and the actual sentence that was imposed on conviction for the offence. Inadmissibility on the grounds of serious criminality or criminality cannot be based on offences alleged to have been committed in Canada for which there has been no conviction registered by the courts.

The relevant sections of *IRPA* dealing with serious criminality and criminality based on Canadian convictions can be broken down as follows:[6]

- "serious criminality" – conviction in Canada; punishable by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*a*)

- "criminality" – conviction in Canada; punishable by maximum prison term of less than 10 years (indictable or hybrid offence) – *IRPA*, s. 36(2)(*a*)

- "criminality" – two summary convictions in Canada (not arising out of a single occurrence) – *IRPA*, s. 36(2)(*a*)

Criminal offences are either indictable or summary conviction, depending on their seriousness. Certain 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, section 36(3) of *IRPA* provides that for the purposes of *IRPA*, a "hybrid offence" is deemed to be indictable, even if it has been prosecuted summarily.[7]

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

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.[8] Offences

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[5] This was underscored in *Massie, Pia Yona v. M.C.I.* (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000, where the Court held that someone convicted of criminal contempt of court, an uncodified common law offence would not be caught.

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

[7] This provision was applied in *Derbas, Rachid v. M.C.I.* (F.C., no. IMM-1923-07), Shore, November 15, 2007; 2007 FC 1194, where the person was found described in section 36(2)(*a*) despite the fact that he was found guilty of a "hybrid" offence that was punished on summary conviction.

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

designated as contraventions under the *Contraventions Act* cannot be the basis for inadmissibility for serious criminality or criminality (see section 36(3)(*e*)).

The words "term of imprisonment … imposed" found in section 36(1)(*a*) refer to the sentence imposed by the court and not the actual time served in prison.[9] The Federal Court has 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) of *IRPA*.[10] The same rationale would apply to section 36(1)(*a*).

The IAD has ruled that a conditional sentence constitutes a "term of imprisonment" under section 32(1)(*a*) of *IRPA.* The rationale is that a conditional sentence is not an alternative to imprisonment; it is a term of imprisonment served in the community.[11] This appears to be consistent with the dicta of the Supreme Court of Canada.[12]

The words "not arising out of a single occurrence" found in section 36(2)(*a*) were interpreted in two Federal Court cases decided in relation to the predecessor provision under the *Immigration Act.* It was held that an "occurrence" is synonymous with the terms "event" and "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.[13]

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[9] 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 section 64(2) of *IRPA* with respect to a term of imprisonment.

[10] *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. However, in *R. v. Mathieu*, 2008 SCC 21, the Supreme Court of Canada 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 spent 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."

[11] *Meerza, Rizwan Mohamed v. M.C.I.* (IAD TA2-21315), Hoare, September 15, 2003. An adjudicator came to the same conclusion with respect to a person described in section 27(1)(*d*) of the *Immigration Act.* See *M.C.I. v. Santizo, Marco Antonio* (Adjudication A1-00471), Nupponen, September 27, 2001. A member of the Immigration Division held to the contrary: *M.C.I. v. Sahota, Ranjit Singh* (ID A3-02512), Iozzo, March 11, 2004.

[12] 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 term." (emphasis added).

[13] *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,

The Canadian criminal law provisions in place at the time of the appeal to the IAD are used to determine the criminal admissibility of the foreign national. Thus persons may become inadmissible or may no longer be inadmissible by virtue of changes to the *Criminal Code* or other statute occurring after a conviction.[14]

The use of the word "convicted" in section 36 of *IRPA* means a conviction that has not been expunged.[15]

Section 36(3)(*b*) of *IRPA* 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.

If a person pleads guilty to, or is found guilty of, an offence in Canada and is granted a conditional or absolute discharge, this will not constitute a conviction for the purposes of *IRPA.*[16] Section 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.

Section 36(3)(*b*) of *IRPA* 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, and 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 an offence under an Act of Parliament or a regulation made under an Act of Parliament can apply to the National Parole Board for a pardon of that offence.

Generally, the concept of rehabilitation applies only to persons who have been convicted of or who committed crimes outside Canada. Section 18.1 of the *Immigration and Refugee Protection Regulations*, however, provides for the possibility of deemed rehabilitation for persons inadmissible solely on the basis of having been convicted in Canada of two or more

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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.

[14] *Robertson v. Canada (Minister of Employment and Immigration)*, [1979] 1 F.C. 197 (C.A.); *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. 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.

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

[16] 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.

offences that may only be prosecuted summarily, as a prescribed class for the application of 36(2)(*a*) of *IRPA*, provided that at least five years have elapsed since the completion of the imposed sentence. (See the section dealing with Rehabilitation below.)

Section 36(3)(*e*) of *IRPA* provides that offences under the *Young Offenders Act* are not a basis for inadmissibility on the grounds of serious criminality or criminality. (A young offender is someone who is 12 years of age or older but less than 18 years of age.) However, if the proceedings were transferred to adult court, they may render the person inadmissible.[17] The *Young Offenders Act* was repealed on April 1, 2003 and replaced with the *Youth Criminal Justice Act, 2002.* However, *IRPA* has not been amended accordingly. Bill C-3 (An Act to amend the *Immigration and Refugee Protection Act* (certificate and special advocate) and to make a consequential amendment to another Act), in clause 3, updates the reference to the *Young Offenders Act* in section 36(3)(*e*) of *IRPA* with a new reference to the *Youth Criminal Justice Act*. Under the *Youth Criminal Justice Act*, the transfer provision is eliminated. Instead, the youth court first determines whether or not the young person is guilty of the offence and then, under certain circumstances, the youth court may impose an adult sentence. Citizenship and Immigration Canada has publicly 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.[18] The *Youth Criminal Justice Act* is presently under legislative review.

Foreign convictions and crimes

A person may be inadmissible on the grounds of serious criminality or criminality either because of a conviction for an offence committed outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament or for having committed an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament. These grounds of inadmissibility raise issues known as equivalency of foreign offences to Canadian ones, a concept that is discussed in detail below.

The relevant sections of *IRPA* dealing with serious criminality and criminality for foreign convictions or crimes committed outside Canada can be broken down as follows:[19]

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[17] 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 section 16 of the *Young Offenders Act* are not covered by the exemption in section 36(3)(e) of *IRPA*. Section 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.

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

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

- "serious criminality" – equivalent conviction outside Canada; punishable in Canada by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*b*)

- "serious criminality" – committed equivalent offence outside Canada; punishable in Canada by maximum prison term of 10 years or more – *IRPA*, s. 36(1)(*c*)

- "criminality" – equivalent conviction outside Canada; punishable in Canada by maximum prison term of less than 10 years – *IRPA*, s. 36(2)(*b*)

- criminality – committed equivalent offence outside Canada; punishable in Canada by maximum prison term of less than 10 years – *IRPA*, s. 36(1)(*c*)

- "criminality" – equivalent of two summary convictions outside Canada (not arising out of a single occurrence) – *IRPA*, s. 36(2)(*b*)

Foreign convictions

Foreign dispositions in criminal matters may take forms unknown under Canadian law and their effect will have to be determined by the IAD.[20] The use of the word "convicted" in section 36 of *IRPA* means a conviction that has not been expunged.[21] Foreign convictions can also be expunged.

In the case of a foreign jurisdiction, the legislation providing for the expunging of a conviction should be accorded respect where the laws and the legal system are similar to Canada's.[22] The Federal Court of Appeal in *Saini*,[23] endorsed the following statement of the law with respect to the effect to be given to a foreign discharge or pardon:

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[20] See, for example, *Drake, Michael Lawrence v. M.C.I.* (F.C.T.D., no. IMM-4050-98), Tremblay-Lamer, March 11, 1999. Reported: *Drake v. Canada (Minister of Citizenship and Immigration)* (1999), 49 Imm. L.R. (2d) 218 (F.C.T.D.), which considered the effect of an "Alford plea" in the State of Washington.

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

[22] *M.E.I. v. Burgon, David Ross* (F.C.A., no. A-17-90), MacGuigan, Linden, Mahoney (concurring in the result), February 22, 1991. Reported: *Canada (Minister of Employment and Immigration) v. Burgon*, [1991] 3 F.C. 44 (C.A.). The Court had to consider the application to the definition of "convicted" in the former *Immigration Act* of the United Kingdom *Powers of Criminal Courts Act, 1973*, which legislation provided that a person who was convicted of an offence (like Burgon's offence) and received a probation order was deemed not to be convicted of the offence. In the Court's view, Burgon was not considered convicted under United Kingdom law; therefore, because the United Kingdom and Canadian legal systems were so similar, there was no conviction for purposes of the *Immigration Act*. See also *Barnett, John v. M.C.I.* (F.C.T.D., no. IMM-4280-94), Jerome, March 22, 1996. Reported: *Barnett v. Canada (Minister of Citizenship and Immigration)* (1996), 33 Imm. L.R. (2d) 1 (F.C.T.D.). The Court considered another piece of legislation, the United Kingdom *Rehabilitation of Offenders Act, 1974*, which provided that, where a person was convicted and sentenced for certain offences and was then rehabilitated, the conviction was expunged. The Court applied the rationale in *Burgon* and found that, although there were differences in the two pieces of legislation, the effect was the same: under both statutes, the person could not be said to have been convicted. Therefore, Barnett was not considered to have been convicted in the United Kingdom and he was not convicted for purposes of the *Immigration Act*.

> [24] To summarize, our jurisprudence requires that three elements must be established before a foreign discharge or pardon may be recognized: (1) the foreign legal system as a whole must be similar to that of Canada; (2) the aim, content and effect of the specific foreign law must be similar to Canadian law; and (3) there must be no valid reason not to recognize the effect of the foreign law.

The Court in *Saini* also held that in the absence of evidence as to the motivating considerations which led to the grant of a pardon by another state jurisdiction, the Board is not bound by the pardon.

The Federal Court had considered the application of these principles in several cases.[24] In one case, the Federal Court held that an acquittal based solely on a pardon by the victim of a crime is not similar to that of Canadian law and should not be recognized in Canada.[25]

The applicability of section 36(3)(*e*) of *IRPA*, dealing with the *Young Offenders Act*, to foreign convictions is not entirely clear.[26]

Equivalency of foreign convictions or crimes

Paragraphs 36(1)(*b*) and (*c*) and 36(2)(*b*) and (*c*) of *IRPA* contain the equivalency provisions. Equivalencing is the equating of a foreign conviction or crime, whether an act or omission to a Canadian offence.

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[23] *M.C.I. v. Saini, Parminder Singh* (F.C.A., no. A-121-00), Linden, Sharlow, Malone, October 19, 2001; 2001 FCA 311. Reported: *Canada (Minister of Citizenship and Immigration) v. Saini*, [2002] 1 F.C. 200 (F.C.A.). The Court also held that the crime in question, hijacking, is so serious that it provided a solid rationale to depart from the principle that a pardon granted by another jurisdiction, whose laws are based on a similar foundation as in Canada, should be recognized in Canada.

[24] See, for example: *Sicuro, Fortunato v. M.C.I.* (F.C., no. IMM-695-02), Mosley, March 25, 2004; 2004 FC 461; *S.A. v. M.C.I.* (F.C., no. IMM-3512-05), Gibson, April 27, 2006; 2006 FC 515.

[25] *Magtibay, Brigida Cherly v. M.C.I.* (F.C., no. IMM-2701-04), Blais, March 24, 2005; 2005 FC 397.

[26] In a decision which considered the applicability of the former *Immigration Act*, where there was no provision dealing specifically with young offenders, the Court held that since the person convicted abroad for crimes committed as a minor was tried in adult court, that constituted a conviction under that Act: *M.C.I. v. Dinaburgsky, Yuri* (F.C., no. T-234-04), Kelen, September 29, 2006; 2006 FC 1161. For a different interpretation which made specific reference to the provisions of the *Young Offenders Act*, see *Wong, Yuk Ying v. M.C.I.* (F.C.T.D., no. IMM-4464-98), Campbell, February 22, 2000.

According to information posted on the Citizenship and Immigration Canada website, Internet: <http://www.cic.gc.ca/english/information/applications/guides/5312E2.asp>, a young offender is not inadmissible if he or she was treated as a young offender in a country which has special provisions for young offenders, or was convicted in a country which does not have special provisions for young offenders but the circumstances of the conviction are such that he or she would not have received an adult sentence in Canada. However, a young offender would be inadmissible if he or she was convicted in adult court in a country that has special provisions for young offenders, or was convicted was convicted in a country that does not have special provisions for young offenders but the circumstances of the conviction are such that he or she would have been treated as an adult in Canada.

There is a distinction between paragraphs (*b*) and (*c*) in both sections 26 and 37. Paragraph (*b*) is used where there has been a conviction outside Canada, whereas paragraph (*c*) is used where it is alleged that the person has "committed" an offence. While the latter provision has been applied in cases where the person fled justice after being charged but before being tried or has never been charged in the jurisdiction where the crime was committed, it is not clear whether the provision was intended to apply to persons who were convicted for the crime committed in the foreign jurisdiction[27] or who were tried in that jurisdiction but court chose not to enter a conviction.[28] The Immigration Division has applied it in the former case, and the Federal Court appears to have accepted that it can apply in the latter case.

To satisfy paragraph (*b*), there must have been a conviction outside Canada and this conviction must then be compared to a Canadian offence. Under section 36(1)(*b*), the determination to be made is whether the offence outside Canada would, if it had been committed in Canada, be an offence punishable by a maximum term of imprisonment of at least 10 years. Under section 36(2)(*b*), the determination to be made is whether the offence outside Canada would, if it had been committed in Canada, be an indictable offence (which includes "hybrid" offences) punishable by a maximum term of imprisonment of less than 10 years, or whether, in the case of two offences not arising out of a single occurrence, those offences would, if committed in Canada, be federal offences.

To satisfy paragraph (*c*) in sections 36(1) and 36(2) the focus is on the commission of an offence. The first determination which must be made is whether the person has committed an act or omission which would be an offence in the place where it occurred. Once this determination has been made, there must be a determination as to whether that act or omission, if committed in Canada, would be an offence in Canada.[29] Under section 36(1)(*c*), the relevant Canadian offence must be punishable by a maximum term of imprisonment of at least 10 years. Under section

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[27] In *M.P.S.E.P v. Watson, Malcolm* (ID A6-00450), Lasowski, December 18, 2006 (reasons signed January 22, 2007), the subject of the admissibility hearing was convicted in New York State of the offences of sexual abuse in the third degree and endangering the welfare of a child. The Immigration Division found that the offence of sexual abuse in the third degree is equivalent to the offence of sexual exploitation under section 153 of the Canadian *Criminal Code*. The foreign offence is broader than the Canadian offence, as the latter contains the essential element that the accused be in a position of trust or authority towards the victim. Since the subject of the proceeding was the victim's ninth grade English teacher, he was in a position of trust with respect to the victim. He was therefore found to be a person described in section 36(1)(*b*) of *IRPA.* He was also found to be described in section 36(1)(*c*) of the Act based on the same facts.

[28] In *Magtibay, Brigida Cherly v. M.C.I.* (F.C., no. IMM-2701-04), Blais, March 24, 2005; 2005 FC 397, the Court in the Philippines found that although the applicant's spouse had committed an offence, since the victim pardoned her aggressor, no conviction resulted. An immigration officer found the offence equivalent to sexual assault in Canada and gave no effect to the pardon. The Court held that the immigration officer was correct in not giving effect to the pardon and finding inadmissibility under s. 36(1)(*c*) of *IRPA*, since there was no need to prove a conviction; rather, certain acts must have been committed that render the person inadmissible.

[29] This approach was followed in decisions such as *M.C.I. v. Legault, Alexander Henri* (F.C.A., no. A-47-95), Marceau, MacGuigan, Desjardins, October 1, 1997. Reported: *Canada (Minister of Citizenship and Immigration) v. Legault* (1997), 42 Imm. L.R. (2d) 192 (F.C.A.) and *Zeon, Kyong-U v. M.C.I.* (F.C., no. IMM-7766-04), Campbell, September 29, 2005; 2005 FC 1338. However, in *Pardhan, Wazir Ali v. M.C.I.* (F.C., no. IMM-936-06), Blanchard, July 20, 2007; 2007 FC 756, the Court suggested that the essential elements of the foreign and Canadian offences must be compared to ascertain whether or not the evidence adduced was sufficient to establish equivalency.

36(2)(*c*), the relevant Canadian offence must be an indictable offence (which includes "hybrid" offences) punishable by a maximum term of imprisonment of less than 10 years.

As mentioned earlier, there is the requirement that the offence be punishable in Canada "under an Act of Parliament". This requirement is not met where the offence is punishable through the inherent jurisdiction of the court rather than through federal legislation.[30]

The standard of proof for the serious criminality and criminality provisions, including equivalency, is "reasonable grounds to believe," which is less than a balance of probabilities. In determining whether there are "reasonable grounds to believe" a person has committed an offence abroad, the IAD should examine evidence pertaining to the offence.[31] In *Legault*, the Federal Court – Trial Division held that the contents of the warrant for arrest and the indictment did not constitute evidence of the commission of alleged criminal offences.[32] The Federal Court of Appeal overturned this decision and determined that the warrant for arrest and the indictment were appropriate pieces of evidence to consider.[33]

If the Canadian offence used for equivalencing is unconstitutional then there can be no equivalent Canadian offence.[34] However, there is no obligation to consider the constitutionality of foreign criminal law.[35]

The principles to be followed when determining equivalency have been set out in several Federal Court of Appeal decisions.

In *Brannson,*[36] the Court said:

> Whatever the names given the offences or the words used in defining them, one must determine the essential elements of each and be satisfied that these essential

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[30] There is sentencing jurisdiction under the common law and under the *Criminal Code*. In *Massie, Pia Yona v. M.C.I.* (F.C.T.D., no. IMM-6345-98), Pinard, May 26, 2000, the Court found that the powers available to a judge in imposing punishment for contempt of court was inherent from common law. Thus, the offence, criminal contempt, was not one "that may be punishable under any Act of Parliament."

[31] *Legault, Alexander Henri v. S.S.C.* (F.C.T.D., no. IMM-7485-93), McGillis, January 17, 1995. Reported: *Legault v. Canada (Secretary of State)* (1995), 26 Imm. L.R. (2d) 255 (F.C.T.D.).

[32] See *Kiani, Raja Ishtiaq Asghar v. M.C.I.* (F.C.T.D., no. IMM-3433-94), Gibson, May 31, 1995. Reported: *Kiani v. Canada (Minister of Citizenship and Immigration)* (1995), 31 Imm. L.R. (2d) 269 (F.C.T.D.), which distinguishes *Legault* on its facts because in *Kiani* the adjudicator made an independent determination on the basis of the evidence adduced.

[33] *Legault* (F.C.A.), *supra*, footnote 31.

[34] *Halm v. Canada (Minister of Employment and Immigration)*, [1995] 2 F.C. 331 (T.D.). The Federal Court – Trial Division, in *Howard, Kenrick Kirk v. M.C.I.* (F.C.T.D., no. IMM-5252-94), Dubé, January 4, 1996, stated that the IAD does not have the jurisdiction to rule on the constitutionality of any legislation other than the *Immigration Act* (since replaced by *IRPA*). Challenges to the constitutionality of other federal legislation, as it may arise in an appeal before the IAD, must be brought in another forum.

[35] *Li, Ronald Fook Shiu v. M.C.I.* (F.C.A., no. A-329-95), Strayer, Robertson, Chevalier, August 7, 1996. Reported: *Li v. Canada (Minister of Citizenship and Immigration)*, [1997] 1 F.C. 235 (C.A.). Affirming in part, *Li, Ronald Fook Shiu v. M.C.I.* (F.C.T.D., no. IMM-4210-94), Cullen, May 11, 1995.

[36] *Brannson v. Canada (Minister of Employment and Immigration)*, [1981] 2 F.C. 141 (C.A.), at 152-153.

> elements correspond. One must, of course expect differences in the wording of statutory offences in different countries.

After *Brannson*, the Court in *Hill*[37] provided some further guidance and said that there were three ways to establish equivalency:

> 1. by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences;
>
> 2. by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; and
>
> 3. by a combination of paragraph one and two.

In *Li*,[38] the Court stated that the fundamental test of equivalency is whether the acts committed abroad and punished there would have been punishable in Canada?

The visa officer is required to establish a *prima facie* case for equating the offence with a provision of the Canadian criminal law.[39] The visa officer, not a legal expert, must be satisfied that all the elements set out in the relevant provision have been met.[40] The onus, however, is always on the sponsor to show that the visa officer erred in determining that the applicant is criminally inadmissible to Canada.

To determine equivalency between a foreign and a Canadian offence, it is not necessary for the Minister to present evidence of the criminal statutes of the foreign state; however, proof of foreign law ought to be made if the foreign statutory provisions exist.[41] Where there is no evidence of the foreign law, the evidence before the panel must be examined to determine whether the essential ingredients of the Canadian offence had to have been proven to have secured the foreign conviction.[42]

In some cases where the law of the foreign jurisdiction has not been adduced in evidence, use has been made of the legal concept of *malum in se*. *Black's Law Dictionary* (6th edition) defines *malum in se* as follows (in part):

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[37] *Hill, Errol Stanley v. M.E.I.* (F.C.A., no. A-514-86), Hugessen, Urie (concurring), MacGuigan, January 29, 1987. Reported: *Hill v. Canada (Minister of Employment and Immigration)* (1987), 1 Imm. L.R. (2d) 1 (F.C.A.), at 9.

[38] *Li, Ronald Fook Shiu* (F.C.A.), *supra*, footnote **35**, 249.

[39] *Tsang, Sau Lin v. M.E.I.* (I.A.B. 85-9587), D. Davey, Chu, Ahara, January 8, 1988.

[40] *Choi, Min Su v. M.C.I.* (F.C.T.D., no. IMM-975-99), Denault, May 8, 2000.

[41] *Dayan v. Canada (Minister of Employment and Immigration),* [1987] 2 F.C. 569 (C.A.).

[42] *Ibid.*

> An act is said to be *malum in se* when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Such are most or all of the offenses cognizable at common law (without the denouncement of a statute); as murder, larceny, etc.

In *Dayan*, the concept of *malum in se* was used because there was no proof of the foreign law for the purposes of equivalencing. Justice Urie said the following about the use of this doctrine:

> Reliance on the concept of offences as *malum in se* to prove equivalency with provisions of our *Criminal Code*, is a device which should be resorted to by immigration authorities only when for very good reason, established to the Adjudicator's satisfaction, proof of foreign law has been difficult to make and then only when the foreign law is that of a non-common law country. It is a concept to which resort need not be had in the case of common law countries.[43]

If the scope of the Canadian offence is narrower than the scope of the foreign offence, then it is necessary to ascertain the particulars of the offence of which the applicant was convicted.[44] It is necessary to "go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings."[45]

If the scope of the Canadian offence is wider than the scope of the foreign offence, it is not necessary to go beyond the wording of the statute in order to determine whether the essential ingredients of the offence in Canada had been proven in the foreign proceedings.[46]

There is no legal requirement to find the equivalent that is "most similar" and make the decision with respect to that provision only.[47]

Where neither a Canadian equivalent offence nor the essential ingredients of the foreign offence are identified in the record, it may be impossible to conclude that the visa officer had made a comparison between an offence under Canadian law and the foreign offence.[48]

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[43] *Ibid.*, at 578. See also *M.C.I. v. Obaseki, Eghe* (IAD T99-07461), Kalvin, November 15, 2000, where the IAD noted that the doctrine of *malum in se* is to be used only where there is a very good reason why the foreign law was not adduced in evidence. Moreover, it held that it is not appropriate to extend the doctrine of *malum in se* to a case in which, not only was the law of the foreign jurisdiction not adduced, but the person concerned was not convicted of an offence.

[44] *Brannson, supra*, footnote **36.**

[45] *Lei, Alberto v. S.G.C.* (F.C.T.D., no. IMM-5249-93), Nadon, February 21, 1994. Reported: *Lei v. Canada (Solicitor General)* (1994), 24 Imm. L.R. (2d) 82 (F.C.T.D.).

[46] *Lam, Chun Wai v. M.E.I.* (F.C.T.D., no. IMM-4901-94), Tremblay-Lamer, November 16, 1995.

[47] *M.C.I. v. Brar, Pinder* Singh (F.C.T.D., no. IMM-6313-98), Campbell, November 23, 1999.

[48] *Jeworski, Dorothy Sau Yun v. M.E.I.* (I.A.B. W86-4070), Eglington, Goodspeed, Vidal, September 17, 1986. Reported: *Jeworski v. Canada (Minister of Employment and Immigration)* (1986), 1 Imm. L.R. (2d) 59 (I.A.B.).

In a judicial review from a visa officer's refusal based on section 19(2)(*b*)(ii) of the *Immigration Act* [i.e., the equivalent of two Canadian summary convictions, now *IRPA*, s. 36(2)(*a*)], the applicant argued that the offences for which he was convicted were equivalent to municipal by-law infractions and not *Criminal Code* offences. The visa officer had no oral or documentary evidence as to the circumstances of the commission of the offences. In allowing the application, the Court noted that in order for an offence to be equivalent to a *Criminal Code* offence, it usually consists of the *actus reus* and *mens rea*. The Court held:

> In general, the essential elements of an offence are those components of an offence usually consisting of the *actus reus* and *mens rea*, which must be proven for a finding of guilt.[49]

An issue which has arisen on many occasions concerns the availability of defences and how defences fit into the evaluation of the essential elements of the offence for the purpose of equivalencing. The Federal Court of Appeal dealt with this issue in the case of *Li.*[50] In that case, the Federal Court – Trial Division had found that the availability of defences is not an essential element of the equivalency test.[51] The Court of Appeal disagreed and said as follows:

> A comparison of the "essential elements" of the respective offences requires a comparison of the definitions of those offences including defences particular to those offences or those classes of offences.[52]

In addition, the Court of Appeal concluded that the procedural or evidentiary rules of the two jurisdictions should not be compared, even if the Canadian rules are mandated by the Charter. The issue to be resolved in any equivalencing case is not whether the person would have been convicted in Canada, but whether there is a Canadian equivalent for the offence of which the person was convicted outside Canada.

The Federal Court of Appeal has held that the validity of a foreign conviction on the merits cannot be put in issue.[53] However, in a decision of the Federal Court, it was held that the Adjudicator was required to consider the applicant's allegation that the statements he made to the police that resulted in his conviction in India were given under torture.[54]

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[49] *Popic, Bojan v. M.C.I.* (F.C.T.D., no. IMM-5727-98), Hansen, September 14, 2000. The Court held that the visa officer erred by importing into the analysis considerations which are not relevant to a determination of the essential elements of an offence, namely that like all residents of Germany, the applicant knew he must pay for public transit and that being caught three times is quite exceptional

[50] *Li, Ronald Fook Shiu* (F.C.A.), *supra,* footnote **35.**

[51] *Li, Ronald Fook Shiu* (F.C.T.D.), *supra,* footnote **35**. *Li* (F.C.T.D.) distinguished *Steward, Charles Chadwick v. M.E.I.* (F.C.A., no. A-962-87), Heald, Marceau, Lacombe, April 15, 1988. Reported: *Steward v. Canada (Minister of Employment and Immigration),* [1988] 3 F.C. 487 (C.A.) on the basis that "colour of right" in the *Steward* offence was an essential element of the offence and not a defence.

[52] *Li, Ronald Fook Shiu* (F.C.A.), *supra,* footnote **35**, at 258.

[53] *Brannson, supra,* footnote 36, at 145; *Li, Ronald Fook Shiu* (F.C.A.), *supra,* footnote **35**, at 256.

[54] *Sian, Jasvir Singh v. M.C.I.* (F.C., no. IMM-1673-02), O'Keefe, September 3, 2003; 2003 FC 1022.

Equivalency decisions have been overturned because of inadequate analysis of the relevant statutes, the essential elements of the offences, and the evidence.[55] For a more detailed discussion of equivalency please see Chapter 8 of the Removal Order Appeals paper.

Rehabilitation

Section 36(3)(*c*) of *IRPA* provides that sections 36(1)(*b*) and (*c*) and 36(2)(*b*) and (*c*) – i.e., foreign convictions and crimes committed outside Canada – do not constitute inadmissibility for permanent residents or foreign nationals, if they:

(i) satisfy the Minister that they have been rehabilitated after the *prescribed period* (5 years after the completion of the sentence imposed or the commission of the offence), in accordance with section 17 of the *Immigration and Refugee Protection Regulations*; or

(ii) are a member of a *prescribed class* that are deemed to have been rehabilitated, in accordance with section 18 of the Regulations.

Section 17 of the Regulations provides that, after a period of 5 years from the completion of any sentence imposed or from the commission of an offence, a person will no longer be inadmissible if the person is able to satisfy the Minister that he or she has been rehabilitated, provided that the person has not been convicted of a subsequent offence other than a contravention under the *Contraventions Act* or an offence under the *Young Offenders Act*.

Deemed rehabilitation under section 18 of the Regulations is triggered by the passage of a period of time after the completion of a sentence or the commission of an offence, as the case may be, without having to apply to the Minister. Deemed rehabilitation does not apply to persons who are inadmissible on the ground of serious criminality. Persons inadmissible on the ground of serious criminality, as well as others who do not qualify for deemed rehabilitation, can apply to the Minister for individual rehabilitation under Regulation 17.

Section 18 of the Regulations sets out three prescribed classes of persons who can qualify for deemed rehabilitation:

(a) persons convicted outside Canada of only one offence that, if committed in Canada, would constitute an indictable offence (including a "hybrid" offence) punishable in Canada by a sentence of less than 10 years, and they meet the following requirements:
   - at least 10 years have elapsed since the completion of their sentence
   - they have not been convicted in Canada of an indictable offence
   - they have not been convicted in Canada of any summary conviction offence in the last 10 years or more than one summary conviction offence in the 10 years before that (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)

[55] *Pardhan, Wazir Ali v. M.C.I.* (F.C., no. IMM-936-06), Blanchard, July 20, 2007; 2007 FC 756.

- they have not in the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the 10 years before that been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence
- they have not committed an act described in section 36(2)(*c*)

(b) persons convicted outside Canada of two or more offences that, if committed in Canada, would constitute summary conviction offences, and they meet the following requirements:
- at least 5 years have elapsed since completion of their sentences
- they have not been convicted in Canada of an indictable offence
- they have not been convicted in Canada of a federal offence in the last 5 years (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the 5 years before that been convicted in Canada of more than one summary conviction offences (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the last 5 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have been convicted outside Canada of an offence referred to in s. 36(2)(*b*) that, if committed in Canada, would constitute an indictable offence
- they have not committed an act described in section 36(2)(*c*)

(c) persons who have committed only one act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an indictable offence (including a "hybrid" offence), punishable in Canada by a maximum sentence of less than 10, and they meet the following requirements:
- at least 10 years have elapsed since the commission of the offence
- they have not been convicted in Canada of an indictable offence
- they have not been convicted in Canada of any summary conviction offence in the last 10 years or more than one summary conviction offence in the 10 years before that (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the last 10 years been convicted outside Canada of an offence that, if committed in Canada, would constitute a federal offence (other than a contravention under the *Contraventions Act* or an offence under the *Youth Criminal Justice Act*)
- they have not in the 10 years before that been convicted outside Canada of more than one offence that, if committed in Canada, would constitute a summary conviction offence
- they have not been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence

There is very little jurisprudence from the Federal Court interpreting the legislation providing for deemed rehabilitation.[56] Unlike individual rehabilitation (section 18 of the

[56] See, for example, *Driessen, Kenneth Leroy v. M.C.I.* (F.C., no. IMM-9044-04), Snider, November 1, 2005; 2005 FC 1480.

Regulations), which is at the discretion of the Minister, it is arguable that the deemed rehabilitation provisions can be applied by the IAD.

As under section 17 and 18 of the Regulations, one of the criteria for rehabilitation in the predecessor sections 19(1)(*c.1*) and 19(2)(*a.1*) of the *Immigration Act*, was that at least five years have elapsed "since the expiration of any sentence imposed for the offence." For immigration purposes, the IAD held that "any sentence imposed" would include any period of incarceration, probation or the suspension of a privilege.[57]

The Minister of Public Safety and Emergency Preparedness must decide the question of rehabilitation. Reasons are required to be provided for decisions of this nature.[58] The IAD held, with respect to the predecessor section 19(1)(*c.1*) or 19(2)(*a.1*) of the *Immigration Act*, that it did not have jurisdiction to determine whether a person has or has not been rehabilitated.[59] The same would appear to hold true for section 17 of the Regulations, which specifies that it is the Minister who must be satisfied. Rehabilitation is, however, a factor which the IAD can consider in the exercise of its discretionary jurisdiction.[60]

The Minister can delegate the power to determine rehabilitation.[61] The Court held, however, that the visa officer has no duty to question the reasonableness of the Minister's decision on rehabilitation even where, on the face of the record, the decision may be unreasonable.[62] Conversely, the Court held that it is not necessary for the visa officer to consider pardons obtained under foreign legislation; rather the pardon could be one of the Minister's considerations when determining whether or not the person has been rehabilitated.[63]

An issue which has arisen is whether there is a duty on the visa officer to inform the applicant of the existence of the rehabilitation provisions. The Federal Court has only dealt with this issue as it relates to earlier legislation which required, in the case of section 19(1)(*c*) of the *Immigration Act*, for the Governor in Council to be satisfied as to rehabilitation. In *Wong,*[64] the

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[57] *Shergill, Ram Singh v. M.E.I.* (IAD W90-00010), Rayburn, Arpin, Verma, February 19, 1991.

[58] *Thamber, Avtar Singh v. M.C.I.* (F.C.T.D., no. IMM-2407-00), McKeown, March 12, 2001, in *obiter*, citing *Baker v. M.C.I.*, [1999] 2 S.C.R. 817 (S.C.C.). The Court held that the Minister erred by not considering relevant evidence (the fact that the applicant had not reoffended for a period of ten years) and by coming to an unreasonable conclusion, given the totality of evidence.

[59] *Crawford, Haslyn Boderick v. M.E.I.* (I.A.B. T86-9309), Suppa, Arkin, Townshend (dissenting), May 29, 1987. Reported: *Crawford v. Canada (Minister of Employment and Immigration) (*1987), 3 Imm. L.R. (2d) 12 (I.A.B.).

[60] See chapter 9, Compassionate or Humanitarian Considerations, for a more detailed discussion.

[61] See section 6(2) of *IRPA.* This power was also found in section 121 of the former *Immigration Act*.

[62] In *Leung, Chi Wah Anthony v. M.C.I.* (F.C.T.D., no. IMM-1061-97), Gibson, April 20, 1998, the Court certified the question: "Is a visa officer under a duty to question the reasonableness of the Minister's decision made pursuant to section 19(1)(*c.1*)(i) of the *Immigration* Act where on the face of the record the decision may be unreasonable?" The Federal Court of Appeal answered in the negative: *Leung, Chi Wah Anthony v. M.C.I.* (F.C.A., no. A-283-98), Stone, Evans, Malone, May 3, 2000.

[63] *Kan, Chow Cheung v. M.C.I.* (F.C.T.D., no. IMM-728-00), Rouleau, November 21, 2000.

[64] *Wong, Yuen-Lun v. M.C.I.* (F.C.T.D., no. IMM-2882-94), Gibson, September 29, 1995.

applicant provided material to establish his rehabilitation to the visa officer instead of to the Governor in Council. The Court found it "unfortunate" that the visa officer did not assist the applicant in getting the material to the proper place, but did not find this to be a reviewable error as the burden to show that the Governor in Council was satisfied as to rehabilitation rests with the applicant. In addition, the cases of *Mohammed*,[65] *Gill*,[66] and *Dance*[67] indicated that the responsibility of the visa officer is to be satisfied that no decision by the Governor in Council has been made.

The issue which has not been resolved is whether this applies to the situation where the Minister (rather than the Governor in Council) makes the decision as to rehabilitation, given the proximity of the visa officer to the Minister. Is there an obligation of fairness on the visa officer to advise the applicant about the rehabilitation provisions?[68] In a case involving an application for permanent residence within Canada on humanitarian and compassionate grounds, the Court held that since section 36(3)(*c*) of *IRPA* places the onus on the applicant to satisfy the Minister that she has been rehabilitated, it follows that she must be given an opportunity to discharge the onus by making submissions concerning the particular facts of her case which favour such a finding.[69]

Right of appeal – pre-sentence custody

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

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[65] *Mohammed v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 363 (C.A.).

[66] *M.E.I. v. Gill, Hardeep Kaur* (F.C.A., no. A-219-90), Heald, Hugessen, Stone, December 31, 1991. *Gill* was applied in *Dhaliwal, Jagdish Kaur v. M.E.I.* (IAD V91-01669), MacLeod, Wlodyka, Singh, March 29, 1993.

[67] *Dance, Neal John v. M.C.I.* (F.C.T.D., no. IMM-366-95), MacKay, September 21, 1995.

[68] In *Crawford, supra,* footnote 59 at 3, the majority of the Immigration Appeal Board found that when the Minister was to determine rehabilitation, a duty existed to advise the applicant of the possibility of coming within the exception. The majority stated as follows:

> … the visa officer is responsible to act as a representative of the Minister on the issue of rehabilitation. Once the prohibition has been established under paragraph 19(2)(*a*) the visa officer has an obligation to inform the applicant of the possibility of coming within the exception from the general rule of criminal inadmissibility by showing rehabilitation to the Minister.

[69] *Aviles, Martha Alcadia Gonzales v. M.C.I.* (F.C., no. IMM-1036-05), Rouleau, October 7, 2005; 2005 FC 1369. The Court was perplexed why the applicant's counsel's letter, which set out all the factors demonstrating that the applicant has been rehabilitated, was not treated as an application for rehabilitation. Moreover, if it was not an application for rehabilitation, the applicant should be given an opportunity to make the application. For a related decision on an application for permanent residence abroad see *Shum, Mei Wing v. M.C.I.* (F.C., no. IMM-5527-06), Lutfy, July 5, 2007; 2007 FC 710, where the Court held that the applicant or spouse should have been given effective notice of the legal issues in play.

The words "punished" found in section 64(2) refers to the sentence imposed by the court and not the actual time served in prison.[70]

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) of *IRPA*.[71]

Compassionate or humanitarian considerations

For a complete discussion of this subject in sponsorship appeals, see chapter 9, "Compassionate or Humanitarian Considerations".

Where the refusal is valid in law, the IAD may consider whether or not compassionate or humanitarian considerations exist to warrant the granting of special relief pursuant to section 67(1)(*c*) of *IRPA*.

In the situation of criminal refusals, the fact that the Minister is not satisfied that the applicant has been rehabilitated or that the five-year period has expired does not prevent a consideration of the applicant's rehabilitation under compassionate or humanitarian considerations.[72]

[70] *Martin, Claudette v. M.C.I.* (F.C.A., no. A-126-05), Nadon, Sexton, Sharlow, October 25 2005; 2005 FCA 347.

[71] *Cheddesingh (Jones), Nadine Karen v. M.C.I.* (F.C., no. IMM-2453-05), Beaudry, February 3, 2006; 2006 FC 124.

[72] *Perry, Ivelaw Barrington v. M.C.I.* (IAD V94-01575), Ho, November 1, 1995.

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