Inadmissibility and Deportation of Permanent Residents in Canada: A Human Rights Analysis

2019

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Executive Summary

Unlike Canadian citizens, non-citizens can be deported from Canada for various reasons. For example, for committing crimes, for breaching immigration laws, for being a security threat, for political reasons, etc. Deportation occurs when immigration authorities order individuals to leave a specific country. People who are deported are usually sent back to their country of origin.

Under the Canadian *Constitution*, the federal government enacts immigration laws and is in charge of deporting non-citizens from the country. In 2001, Canada enacted the *Immigration and Refugee Protection Act* (the IRPA).

The *Immigration and Refugee Protection Act* (the IRPA)

Under the IRPA, permanent residents have a limited right to enter and remain in Canada. Unlike citizens, permanent residents do not have a constitutional right to stay in the country. See section 6 of the *Charter of Rights and Freedoms* (the Charter).

The IRPA determines who is admissible to Canada. If a person lives in Canada and becomes inadmissible, that person may be subject to a removal order and might be deported. Sections 34-42 of the IRPA list nine categories of inadmissibility, among them serious criminality, health grounds and financial reasons. This paper will focus on inadmissibility on the grounds of serious criminality.

The Faster Removal of Foreign Criminals Act (the FRFCA)

In June 2013, Bill C-43 or the *Faster Removal of Foreign Criminals Act* (the FRFCA) came into effect. The FRFCA included changes related to admissibility and the right to appeal.

The FRFCA amended section 36(1) of the IRPA which now states:

> A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

> a) having been convicted in Canada of an offence … punishable by a maximum term of imprisonment of at least 10 years, or of an offence…for which a term of imprisonment of more than six months has been imposed…

The FRFCA also amended section 64 of the IRPA which reads:

> (1) No appeal may be made to the Immigration Appeal Division… if the foreign national or permanent resident has been found to be inadmissible on grounds of …serious criminality…
> (2)…serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six month…

Consequently, Canada can deport permanent residents who are convicted of an offence and sentenced to jail for more than six months. The deportation decision cannot be appealed.

Criminal Code Changes

In December 2018, Bill C-46 (section 320.19 (1)) amended the Canadian *Criminal Code* to include tougher immigration consequences for permanent residents and foreign nationals convicted of an impaired driving offence.

Impaired driving offences are punishable, under the updated Code, by a sentence of up to ten years of imprisonment rather than up to five years. This will render them a "serious crime", which falls under section 36(1) of the IRPA. Therefore, permanent residents could lose their status and face deportation if they get convicted of an impaired driving offence in or outside Canada.

Criticism of the FRFCA

If a permanent resident receives a removal order, they cannot legally stay in Canada. They must leave the country. Permanent residents can lose their permanent resident status if a removal order is made against them and comes into force.

Under the former IRPA, permanent residents sentenced to a period of imprisonment of two years or more lost their right to appeal the removal order to the Immigration Appeal Division (IAD). The FRFCA amended this requirement and stated that permanent residents sentenced to six or more months of imprisonment become inadmissible on the grounds of serious criminality and lose their appeal rights to the IAD (section 64 of the IRPA).

The FRFCA made the change by amending the definition of "serious criminality" and consequently denying these individuals their right to appeal.

When it comes to the importance of the IAD, the Canadian Bar Association (CBA) stated:

> The IAD considers the seriousness of criminality, likelihood of rehabilitation, establishment in Canada, level of community and family support, and hardship on family in Canada. It balances the need to protect Canadian society from further criminal behavior, and consideration of the circumstances of the permanent resident. It is a rational, transparent and necessary process. In some cases, a stay order is the sensible resolution: the permanent resident is given the opportunity to demonstrate that they should be allowed to remain in Canada. In other cases, deportation is appropriate.

The fact that the FRFCA denied permanent residents the right of appeal means these individuals will be removed automatically without an independent decision-maker looking into their unique situation, which might include:

> The fact that they came to Canada as a child and have lived effectively all their life in this country. They may have no family or connections in the country of their birth and may not even speak the language.
>
> They are suffering from mental health problems, which contributed to the commission of the crime.

However, in some criminal cases, sentencing judges take these considerations into account to avoid deportation.

There have been recent court decisions (discussed below), where the court imposed sentences of less than six months, so permanent residents, convicted of a crime, would not face automatic deportation without a full consideration of the circumstances of their case by an independent tribunal. However, if the court does not adjust the sentences, there can be serious consequences.

Violation of the Charter

The consequences for a permanent resident of receiving a sentence of six months or more may violate the principles of fundamental justice under section 7 of the *Charter*. The denial of an appeal under IRPA section 64(2) violates the principles of fundamental justice in

section 7 by not looking into the relationships that permanent residents developed in Canada through family, education, culture, work, etc.

The principles of fundamental justice determine what is at stake. Liberty and security will be removed from permanent residents, who may be deported to a country they have no relation to or have never been to, where they do not speak the language and will be separated from their family in Canada.

In addition, imposing a six-month sentence under the IRPA on permanent residents may be considered cruel and unusual punishment under section 12 of the *Charter*. Individuals can be deported to countries where they may be facing persecution and torture.

Forbidding permanent residents from appealing the inadmissibility findings and the removal order can be cruel—especially for those who have been living in Canada for a long time.

Not all permanent residents with imposed sentences of six months or more should be deported from Canada without looking at other factors. The amended IRPA does not take into consideration whether:

- this was a single conviction or the individual had previous convictions as well
- family and children are dependent on the individual for care and support
- the individual has been in Canada for a short or long time
- the individual moved to Canada as a child
- the individual can be rehabilitated

Therefore, we recommend , among others, that the federal government revise sections 36(1)(a) and 64(2) of the IRPA. In addition, the IAD should look into, when it comes to removal cases, the seriousness of the criminality, the country to which permanent residents would be deported, their connections in Canada, and the effect of deportation on their family in Canada.

Inadmissibility and Deportation of Permanent Residents in Canada: A Human Rights Analysis

I. Introduction

Permanent residents in Canada enjoy many benefits, but they do not have the same rights and advantages as Canadian citizens. Unlike Canadian citizens, non-citizens can be deported from Canada for various causes (e.g., for committing crimes, for breaching immigration laws, for being a security threat, etc.).

Deportation occurs when immigration authorities order individuals to leave a specific country. People who are deported are usually sent back to their country of origin.

Under the Canadian *Constitution*,[1] the federal government enacts immigration laws and is in charge of deporting non-citizens from the country. Since 1869, Canada has had different laws and regulations determining the acceptance of immigrants. Race and assimilation played a role, as well as social, political and economic factors.[2]

Since the eighteenth-century, deportation has been an essential part of the immigration policy in Canada. Justifications for deportation have changed over time and immigrants have been deported for many reasons, including politics, security, religion, gender, race, poverty and imbecility, etc.

Deportation processes regulated who could stay in Canada and who could not. Non-citizens who breached the laws were considered to create troubles and hurt the country's security. Until the twentieth century, there was no formal system of deportation in Canada. Immigrants were deported in an improvised way usually during times of war or as the result of war.[3]

The *Immigration Act* of 1869[4] focused on the safety of immigrants during their travel to Canada and their protection from abuse upon their arrival.[5] This *Act* did not allow anyone who could become a public charge from entering Canada. Dennis Molinaro states that:

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[1] *The Constitution Act, 1867* (UK), 30 & 31 Victoria, c 3.
[2] Lindsay Van Dyk, "Canadian Immigrations Acts and Legislation", online: <https://pier21.ca/research/immigration-history/canadian-immigration-acts-and-legislation> [Van Dyk].
[3] Dennis Molinaro, "Deportation from Canada" (2018), online: The Canadian Historical Association <https://cha-shc.ca/_uploads/5c374fbf48bff.pdf> at pp 1-2. [Molinaro].
[4] *An Act Respecting Immigration and Immigrants, 1869.* Ottawa: SC 32-33 Victoria, c. 10.
[5] Van Dyk.

> such persons included any 'lunatic, idiotic, deaf and dumb, blind or infirm person, or any person above the age of sixty years, or any widow with a child or children, or any woman with a child or children without her husband.' Section 10 of the act expanded the list of persons to include 'criminals' and other 'vicious' immigrants.[6]

After Confederation, Canada was interested in attracting and keeping immigrants. It wanted to supervise those who arrived in the country and to deport those who were undesirable. Few recorded deportations took place in those years because Canada did not have a formal process to do so. Authorities deported people when they thought it was suitable.[7]

In 1906, a new *Immigration Act*[8] was passed, which set a formal system managed by the Department of Immigration and Colonization. The Department of Immigration and Colonization could deport non-citizens for becoming a "public charge" or for medical reasons.[9]

The 1906 Act gave the Department the right to deport immigrants within two years of entry. The deportation powers are mentioned in different sections of the Act. Section 28 provided that "any person landed in Canada who, within two years thereafter, has become a charge upon the public funds, whether municipal, provincial, or federal, or an inmate of or a charge upon any charitable institution, may be deported and returned to the port or place whence such immigrant came or sailed for Canada".[10]

The *Immigration Act* of 1910[11] established permanent resident or "domicile" status. An immigrant, whose permanent home was Canada for three years (extended to five years in 1919), obtained domicile status and were considered naturalized British subjects (Canadian citizenship was not available until 1947). In the meantime, if an immigrant was to be deported, the company that brought them to Canada had to send them back to their country of origin, saving the government the costs of deportation. Immigrants were deported for different

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[M]Molinaro, at p 4.
[7] Molinaro, at p 4.
[8] *An Act Respecting Immigration and Immigrants, 1906.* Ottawa: SC 6 Edward VII, c 19.
[9] Molinaro, at p 5.
[10] Barbara Roberts, "Whence They Came, Deportation from Canada 1900-1935", online: (1988) University of Ottawa at p 12. < https://ruor.uottawa.ca/bitstream/10393/12961/1/Whence_the_came_deportation_from_Canada.pdf
[11] *Statutes of Canada. An Act Respecting Immigration, 1910. Ottawa:* SC 9-10 Edward VII, c 27.

grounds such as being a public charge, for committing a crime, for medical reasons, and if Canadian-born dependants were accompanying a deportee.[12]

The *Immigration Act* of 1910 expanded the list of unwanted immigrants. It granted the government significant powers in admitting and deporting immigrants.[13]

The *Immigration Act* was amended in 1919 and set strict rules "due to the postwar economic decline, labour unrest and growing anti-foreign sentiment".[14] Section 41 of this *Act* "allowed officials to deport any alien or naturalized citizen who advocated the overthrow of the government by force". The legislation was, at least in part 3, brought about in reaction to the 1917 Bolshevik Revolution in Russia and the 1919 Winnipeg General Strike.[15]

The *Immigration Act* of 1952[16] was the first new immigration act since 1910. It was not much different from the previous law and it gave the government the power to enact additional regulations. The aim of this *Act* was to strengthen the authority of the governor-in-council (i.e., federal cabinet) and grant the minister of citizenship and immigration more power to decide who will be admissible and who will be deported from Canada.[17]

In 1976, a new *Immigration Act*[18] was passed. It set out the basic goals of immigration policy in Canada and acknowledged refugees as a different group of immigrants. It also forced the government to manage the future of immigration.

This *Act* acknowledged three classes of admissible immigrants:

> Independent immigrants selected on the basis of the points system; a family class which included the immediate family members of Canadian citizens and permanent residents; and refugees as defined by the United Nations (UN) Convention Relating to the Status of Refugees. This was the first formal inclusion

[12] Molinaro, at pp 5-6.
[13] Van Dyk.
[14] Van Dyk.
[15] *1919 Winnipeg General Strike*, online: Canada's Human Rights History <https://historyofrights.ca/encyclopaedia/main-events/1919-winnipeg-general-strike-2/>.
[16] *Statutes of Canada. An Act Respecting Immigration, 1952.* Ottawa: SC 1 Elizabeth II, c 42.
[17] Immigration Act 1952, online: Canadian Museum of Immigration at Pier 21 <https://pier21.ca/research/immigration-history/immigration-act-1952>.
[18] *An Act Respecting Immigration to Canada, 1976.* Ottawa: SC 25-26 Elizabeth II, c 52.

> of refugees as a distinct class of immigrants and it established Canada's commitment to fulfil its legal obligation as a signatory to the convention.[19]

In addition, under this *Act*, inadmissibility was related to "health, public safety, criminality, propensity for violence and fraudulent immigration claims."[20]

In 2001, Canada replaced the 1976 *Immigration Act* with the *Immigration and Refugee Protection Act (*the *IRPA).*[21] The 2001 *Act* kept many of the principles and policies of the 1976 *Act*, but it gave the government increased authority to detain and deport immigrants suspected of being a security threat.[22]

II. The Immigration and Refugee Protection Act (the IRPA)

A. Background

The *IRPA* came into force on July 1, 2002. It manages immigration and secures refugees who are in risky situations. It facilitates the attainment of the economic, social and cultural benefits of bringing immigrants into Canada, but at the same time it is intended to protect Canadians' health, safety and security.

The *IRPA* determines who is admissible to Canada. Administration and Enforcement of the IRPA is currently a shared responsibility between the Minister of Citizenship and Immigration and the Minister of Public Safety. Those who are considered inadmissible to Canada cannot enter the country either as temporary or permanent residents. If a person lives in Canada and becomes inadmissible, that person may be subject to a removal order and could be deported.[23]

Sections 34-42 of the *IRPA* created nine categories of inadmissibility: (1) security (s 34), (2) human or international rights violations (s 35), (3) criminality and serious criminality, (s 36),

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[19] *Immigration Act 1976*, online: Canadian Museum of Immigration at Pier 21 <https://pier21.ca/research/immigration-history/immigration-act-1976#footnote-1>.
[20] *Immigration Act 1976,* online: Canadian Museum of Immigration at Pier 21 <https://pier21.ca/research/immigration-history/immigration-act-1976#footnote-1>.
[21] *Immigration and Refugee Protection Act*, SC 2000, c 27.
[22] The Canadian Encyclopedia. *Immigration Policy in Canada*, online: <https://www.thecanadianencyclopedia.ca/en/article/immigration-policy>.
[23] Government of Canada, *Archived-Introducing the Faster Removal of Foreign Criminals Act*, online: <https://www.canada.ca/en/immigration-refugees-citizenship/news/archives/backgrounders-2012/introducing-faster-removal-foreign-criminals-act.html>.

(4) organized criminality (s 37), (5) medical (s 38), (6) financial reasons (s 39), (7) misrepresentation (s 40), (8) non-compliance with the Act or Regulations (s 41), and (9) an inadmissible family member (s 42).

As noted by the Government of Canada:

> There are a variety of ways to overcome inadmissibility in order to enter or remain in Canada. Depending on the circumstances, an individual may be issued a temporary resident permit. Other avenues include individual or deemed criminal rehabilitation, record suspension (formerly called 'pardons' in Canada), an exemption from inadmissibility on humanitarian and compassionate (H&C) grounds from the Minister of Citizenship and Immigration, and permanent relief from inadmissibility from the Minister of Public Safety. [24]

This report will focus on inadmissibility on the grounds of serious criminality.

Before we start talking about inadmissibility, let us see who is considered a permanent resident or a foreign national under the *IRPA*.

B. Definition of a Permanent Resident and Foreign National

Anyone in Canada who is not a Canadian citizen is either a permanent resident or a foreign national.

Section 6(1) of the *Charter of Rights and Freedoms* (the *Charter*) states: "Every citizen of Canada has the right to enter, remain in and leave Canada". That means only citizens have a secure status. A citizen can never be deemed inadmissible even for committing a serious crime, but they might not be able to sponsor individuals to immigrate to Canada. In addition, citizens can lose their citizenship if it was acquired through fraud or misrepresentation.[25]

Under the *IRPA* section 2*,* "permanent resident" means a person who has acquired permanent resident status and has not subsequently lost that status under section 46. Section

[24] Government of Canada, *Archived-Introducing the Faster Removal of Foreign Criminals Act*, online: <https://www.canada.ca/en/immigration-refugees-citizenship/news/archives/backgrounders-2012/introducing-faster-removal-foreign-criminals-act.html>.

[25] Peter Edelmann, "Immigration Consequences at Sentencing" (September 2013), online: https://legalaid.bc.ca/sites/default/files/inline-files/immigrationConsequencesAtSentencing.pdf> at pp 2-3.

27(1) of the *IRPA* states that a permanent resident of Canada has the right to enter and remain in Canada, subject to the provisions of this Act.

A permanent resident (PR) also called a landed immigrant, is a foreign national who receives the right to live permanently in Canada. A PR is issued a Permanent Resident Card as proof of status when they travel outside of Canada and return. This status is usually secure unless a PR is found inadmissible and a removal order against them becomes effective.[26]

Section 2 of the *IRPA* states that a "foreign national means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person".

A foreign national can be a refugee claimant, a student, a visitor, a foreign worker or an illegal. A foreign national has a less secure status than a PR, and is at higher risk to be removed from Canada than a PR.

C. Rights of a Permanent Resident

A PR has the following rights; to:

- get most social benefits that Canadian citizens receive, including health care coverage,
- live, work or study anywhere in Canada,
- apply for Canadian citizenship, and
- receive protection under Canadian law and the *Canadian Charter of Rights and Freedoms*.

A PR must pay taxes and has to follow Canadian laws on all levels: federal, provincial and municipal.[27]

A PR is not allowed to:

- vote or run for political office, or
- hold some jobs that need a high-level security clearance.[28]

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[26] Community Legal Education Ontario, *How a criminal conviction can lead to deportation*, online: <https://www.cleo.on.ca/en/publications/mentill/how-criminal-conviction-can-lead-deportation>.
[27] Government of Canada, *Understand Permanent Resident Status*, online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html>.
[28] Government of Canada, *Understand Permanent Resident Status*, online: Government of Canada <https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html>.

According to section 28 of the *IRPA,* a permanent resident (PR) must be physically present in Canada for at least 730 days in every five-year period in order to maintain their residency status. Failure to comply with this residency requirement can lead to a determination by an immigration officer that they have lost their PR status. This would give rise to a right of appeal to the Immigration Appeal Division of the Immigration and Refugee Board. The loss of status would not become effective unless the person failed to file an appeal or the appeal was dismissed.

A PR can lose their PR status if:

- they voluntarily renounce their PR status;
- a removal order is made against them and comes into force; or
- they become a Canadian citizen.[29]

According to the *IRPA* (section 36), permanent residents lose their PR status and face deportation from Canada if they become inadmissible on grounds of serious criminality. Serious criminality includes having been convicted in Canada of a federal offence for which one could be given a sentence of ten years or more, or for which they received a sentence of imprisonment of six months or more. It also includes being convicted outside Canada of an offence, which could be punished by a sentence of ten years or more if convicted in Canada, or if an immigration officer has reasonable grounds to believe that a person has committed such an offence outside Canada.

III. The Faster Removal of Foreign Criminals Act (the FRFCA)

In 2010, the government, which had just attained a majority in Parliament, instructed Citizenship and Immigration Canada, the Canada Border Services Agency and other federal agencies to assess the inadmissibility provisions and enforcement powers listed in the *IRPA,* with a view to streamlining removal processes and expanding officers' powers. The assessment also looked into various admissibility issues that had taken place since the *IRPA* came into force in 2002.[30]

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[29] Government of Canada *Understand Permanent Resident Status*, online: <https://www.canada.ca/en/immigration-refugees-citizenship/services/new-immigrants/pr-card/understand-pr-status.html>.
[30] Government of Canada, *Archived-Introducing the Faster Removal of Foreign Criminals Act*, online: <https://www.canada.ca/en/immigration-refugees-citizenship/news/archives/backgrounders-2012/introducing-faster-removal-foreign-criminals-act.html>.

In June 2012, *Bill C-43* or the *Faster Removal of Foreign Criminals Act*[31] *(Bill C-43)* was introduced in the House of Commons by the federal government. The *Bill* contained many revisions to the *IRPA*, particularly concerning the investigation and removal of foreign nationals and permanent residents.[32]

On June 19, 2013, *Bill C-43* received Royal Assent. According to the government, "the Act amended the inadmissibility provisions and related sections of the *IRPA* to further support Canadian interests, enhance the safety and security of Canadians, and strengthen the integrity of the immigration program".[33] Critics did not share that view and saw it instead as a massive stripping of due process.[34]

Bill C-43 came into effect on June 19, 2013.

A. Objectives of the *FRFCA*

During the House of Commons Debates on September 24, 2012, Mr. Rick Dykstra (Parliamentary Secretary to the Minister of Citizenship and Immigration at the time) stated that:

> the faster removal of foreign criminals act focuses on three areas. One, it would make it easier for the government to remove dangerous foreign criminals from our country. Two, it would make it harder for those who pose a risk to Canada to enter the country in the first place. Three, it would remove barriers for genuine visitors who want to come to Canada to enjoy our hospitality and the beauty of this country.[35]

Bill C-43's major changes were related to admissibility and the right of appeal. Bill C-43 focused on the inadmissibility-related provisions of the *Immigration and Refugee Protection Act* (IRPA), which determine who may not enter or remain in Canada. Background information provided by

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[31] *Faster Removal of Foreign Criminals Act*, SC 2013, c 16.
[32] Canadian Association of Refugee Lawyers, *Bill C-43: The Faster Removal of Foreign Criminals Act,* online: < https://carl-acaadr.ca/bill-c-43-the-faster-removals-of-foreign-criminals-act/>.
[33] Government of Canada, Regulations supporting the Faster Removal of Foreign Criminals Act, online: G <https://www.canada.ca/en/immigration-refugees-citizenship/corporate/mandate/acts-regulations/forward-regulatory-plan/regulations-supporting-faster-removal-foreign-criminals-act.html>.
[34] The Canadian Bar Association, See: *Bill C -43, Faster Removal of Foreign Criminals Act* (November 2012), online: https://www.cba.org/CMSPages/GetFile.aspx?guid=3430cb88-6d81-4e27-8fd7-1a9ef3e0869d>.
[35] House of Commons Debates, 41st Parliament 1st Session (24 September 2012), online: Parliament of Canada <https://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-151/hansard#7684027>.

Citizenship and Immigration Canada (CIC) suggests that the legislation is the outcome of an inter-departmental review of IRPA's inadmissibility and other related provisions.[36]

Specifically, Bill C-43 makes several changes related to:

- evaluating inadmissibility;
- the consequences of being found inadmissible on certain grounds and of having an inadmissible family member; and
- granting relief from inadmissibility.

In addition, it gives the Minister of Citizenship and Immigration the power to prevent an individual from obtaining or renewing temporary resident status.[37]

Finally, the Bill introduces two other changes:

- it provides for new regulatory authorities for immigration applications; and
- it creates a formal procedure for the renunciation of permanent resident status.

With respect to inadmissibility, Bill C-43 amended section 36(1) of the *IRPA,* which now states:

> A permanent resident or a foreign national is inadmissible on grounds of serious criminality for:
>
> (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;
>
> (b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or
>
> (c) committing 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 punishable by a maximum term of imprisonment of at least 10 years.

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[36] Library of Parliament, *Legislative Summary of Bill C-43: An Act to Amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act),* (S. Elgersma and J. Béchard,) (2012 online: https://bdp.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/LegislativeSummaries/411C43E [Elergsma and Béchard].

[37] Elergsma and Béchard.

With respect to the appeal procedures, Bill C-43 also amended section 64 of the *IRPA* and presently states:

> (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality.
> (2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least six months or that is described in paragraph 36(1)(b) or (c).

These two sections are discussed below.

B. Inadmissibility

Good behavior is a condition for permanent residents to be able to stay in Canada.[38] When a PR is deemed inadmissible according to section 36 of the *IRPA* (mentioned above), an inadmissibility process may be commenced.

The process of inadmissibility, for those who are in Canada, starts with a report prepared by an Immigration, Refugees and Citizenship Canada (IRCC) (previously Citizenship and Immigration Canada (CIC)) or Canada Border Services Agency (CBSA) officer who believes that a PR or a foreign national is inadmissible. The report is then submitted to a delegate of the Minister of Citizenship and immigration. If the Minister's delegate is of the opinion that the report is well-founded, they may refer the report to the Immigration Division for an admissibility hearing (section 44 (1)(2) of the *IRPA*).[39]

If the Immigration Division is satisfied that the individual has been convicted of an offence mentioned in section 36(1)(a) of the *IRPA*, a deportation order is automatically issued. The Immigration Division does not have the authority to look into humanitarian and

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[38] Sasha Baglay, "In the Aftermath of *R v Pham* : A Comment on Certainty of Removal and Mitigation of Sentences" (2018) 41: 4 Manitoba Law Journal, online: http://themanitobalawjournal.com/wp-content/uploads/articles/MLJ_41.4/In%20the%20Aftermath%20of%20R%20v%20Pham%20A%20Comment%20on%20Certainty%20of%20Removal%20and%20Mitigation%20of%20Sentences.pdf> at p 187.
[39] Elergsma and Béchard at p 2.

compassionate factors. Moreover, defences that are usually heard at a sentencing hearing are not taken into consideration at an admissibility hearing.[40]

According to section 45(d) of the *IRPA,* if the Immigration Division finds the person inadmissible, it is required to issue a removal order. Under section 49(1)(a) of the *IRPA*, a removal order comes into force on the date that it is made if there is no right to appeal. Once a removal order comes into force, a person concerned loses his or her PR status, and the order must be enforced "as soon as possible" (*IRPA* sections 46(1)(c) & 48). Prior to Bill C-43, removals were to be effected "as soon as reasonably practicable", which allowed officers to delay removals for various humanitarian and compassionate reasons.

C. Appeal

Prior to Bill C-43, permanent residents had the right to appeal a removal order to the Immigration Appeal Division (IAD) unless they had been sentenced to imprisonment of two years or more. However, Bill C-43 changed that by amending the definition of "serious criminality" and consequently by denying permanent residents their right to appeal if they received a sentence of imprisonment of six months or more.

Prior to IRPA, all permanent residents had a right to appeal a deportation order to the IAD. Following a full hearing with written and oral evidence, the IAD member would assess the evidence of the person's criminality and their personal circumstances. Then the tribunal would either dismiss the appeal and confirm the deportation order or issue an order where the removal order is stayed, subject to the requirement that the person must follow certain conditions. The only exceptions were persons who had been found by the Minister to be a danger to the public. Such cases were rare and often gave rise to Federal Court litigation.

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[40] Sasha Baglay, "In the Aftermath of *R v Pham* : A Comment on Certainty of Removal and Mitigation of Sentences" (2018) 41: 4 Manitoba Law Journal, online: < http://themanitobalawjournal.com/wp-content/uploads/articles/MLJ_41.4/In%20the%20Aftermath%20of%20R%20v%20Pham%20A%20Comment%20on%20Certainty%20of%20Removal%20and%20Mitigation%20of%20Sentences.pdf> at p 188 (citing *Canada (Minister of Citizenship and Immigration) v Fox*, 2009 FC 987 at para 42, [2010] 4 FCR 3). [Baglay 2018].

The IRPA introduced a controversial limit on the right to appeal; permanent residents who received a sentence of imprisonment of two years or more were denied a right of appeal. The change was strongly opposed by many organizations, including the Canadian Bar Association and the Canadian Civil Liberties Association.[41] In defending the proposed change, the Minister and his senior spokespersons assured the Parliamentary Committee that persons who were denied appeal rights would receive full and fair consideration of all the circumstances of their case (the language of the *Ribic*[42] case) before a decision was made to seek deportation.[43] Developments since then have shown this assurance to be hollow.[44]

When the enforcement branch of the Immigration Department was transferred to the newly created Canada Border Services Agency in 2003, the decisions in these cases also moved to the new agency. Instead of the Minister of Immigration making these critical decisions, it was now a minister whose sole responsibility was law enforcement. As well, the power to make these decisions was delegated down to front line enforcement officers and their immediate supervisors. The fates of permanent residents with two year sentences were no longer decided by senior immigration officers who were trained and experienced in balancing humanitarian and compassionate factors; they were now decided by law enforcement officers who were trained and mandated to enforce the IRPA as quickly and vigorously as possible.

Bill C-43 significantly expanded the power of these officers. They now had jurisdiction to decide the fate of any PR with a sentence of six months or more, as well as those who had been convicted of, or were believed to have committed an offence abroad. Once, again, many groups and individuals opposed the proposed changes, but to no avail, as the legislation was pushed through the House without amendment.

The Canadian Bar Association (CBA) stated with regard to the importance of the IAD:

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[41] Canadian Bar Association Bill C-43 *Faster Removal of Foreign Criminals Act,* Ottawa, 2012; Nathalie Des Rosiers and Noa Mendelsohn Aviv "Brief to the Standing Committee on Citizenship and Immigration regarding Bill C-43, An Act to amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act)" (13 November 2012), online: Canadian Civil Liberties Association.

[42] *Ribic, Marida v M.E.I.* (IAB 84-9623), D. Davey, Benedetti, Petryshyn, August 20, 1985.

[43] See for example, *House of Commons. Debates (Hansard) No. 199 - January 29, 2013 (41-1).*

[44] Sasha Baglay, Collateral Immigration Consequences in Sentencing: a Six-Year Review, 2019 82-1 *Saskatchewan Law Review* 47, 2019 CanLIIDocs 412, <https://canlii.ca/t/sg83>/.

> The IAD considers the seriousness of criminality, likelihood of rehabilitation, establishment in Canada, level of community and family support, and hardship on family in Canada. It balances the need to protect Canadian society from further criminal behavior, and consideration of the circumstances of the permanent resident. It is a rational, transparent and necessary process. In some cases a stay order is the sensible resolution: the permanent resident is given the opportunity to demonstrate that they should be allowed to remain in Canada. In other cases, deportation is appropriate.[45]

The CBA added:

> The IAD is the only place where this consideration and balance is mandated for permanent residents facing deportation. The IAD jurisdiction to consider all the circumstances of the case when deciding whether a deportation order should be enforced is especially significant for permanent residents who have been in Canada for many years (if not since early childhood). These permanent residents have well established social networks, employment, children and extended families in Canada. If their criminality is not sufficiently grave, and rehabilitation is demonstrated, then immediate deportation may be an overly harsh consequence. These are appropriate cases for a stay order. In past years the government has excluded the most serious cases of criminality from access to the IAD. These are cases where the government believes that the IAD should not have an option to consider a stay order. For the past ten years, the test for "serious criminality" has been a sentence in Canada of imprisonment for two years or more. A permanent resident convicted of a criminal offence in Canada and given a two year sentence of prison could be ordered deported without any IAD review of his circumstances.[46]

The right to appeal is important because it allows permanent residents to present evidence before an impartial decision maker as to why they should not be deported, such as:

- they came to Canada as a child and have lived most of their life in this country;
- they have young children who would be affected if their parent is deported; and/or
- they are living with mental health issues which would be seriously worsened if they were deported.[47]

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[45] The Canadian Bar Association *Bill C -43, Faster Removal of Foreign Criminals Act* (November 2012), online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=3430cb88-6d81-4e27-8fd7-1a9ef3e0869d> at p 7.
[46] The Canadian Bar Association *Bill C -43, Faster Removal of Foreign Criminals Act* (November 2012), online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=3430cb88-6d81-4e27-8fd7-1a9ef3e0869d> at pp 7-8.
[47] Canadian Council for Refugees, *Permanent residents and criminal inadmissibility*, online: <https://ccrweb.ca/en/permanent-residents-and-criminal-inadmissibility>.

According to Nathalie Des Rosiers and Noa Mendelsohn Aviv of the Canadian Civil Liberties Association:

> *Bill C-43* provides that a person could be deemed inadmissible and will have no right of appeal in the following cases:
>
> - A conviction in a country that may not have a fair legal process;
> - A conviction for an offence committed as a political act against a repressive regime;
> - A conviction for an offence with a mandatory minimum sentence, in circumstances that would otherwise greatly reduce a person's culpability, such as: low level involvement, desperation, no danger, or no risk of re-offending;
> - A conviction that resulted in a sentence of 6 months' imprisonment. This could include any number of offences that do not justify the term 'serious criminality' such as various kinds of theft, with varying degrees of culpability; or
> - An act for which no conviction or trial is required, if there are reasonable grounds to believe that it may have been committed, is being committed, or could in the future be committed outside of Canada.[48]

During the House of Commons Debates on *Bill C-43*, Mr. Kevin Lamoureux gave the following example:

> A person could be a permanent resident in Canada for 10 months or for 10 years and commit an offence. Focusing attention on 10 years, maybe the person is married with two or three young children, possibly born in Canada. One night that person is at a function or event, maybe a celebration, and drinks too much, ending up in having an assault charge placed against him or her. Quite often assault charges will lead to some form of six-month sentence and that means the individual could be deported. Not the entire family, but just that individual could be deported. Members say, 'yes, if he is convicted, yes'. He has been here for 10 or 12 years, has been an outstanding citizen, finds himself in a situation that many Canadians from coast to coast get into and makes an emotional decision. Yes, it is a bad decision but stuff of that nature does happen, I agree. However, with this particular legislation, we would deport. What the member is recognizing by just his general acknowledgement of the fact is that this individual

[48] Nathalie Des Rosiers and Noa Mendelsohn Aviv "Brief to the Standing Committee on Citizenship and Immigration regarding Bill C-43, An Act to amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act)" (13 November 2012 at p 5.

> would be deported. The children who were born here in Canada would be able to stay and the spouse would be able to stay, but he would be deported.[49]

In a somewhat extreme case example, in 2016, CBC News reported that a homeless man who called himself "captain" and who lived in Canada for almost 50 years, was facing deportation. Although he is a long time permanent resident, Captain is not a Canadian citizen. In Feb. 21, 2013, Captain was sentenced to eight months in jail for breaking and entering, and therefore could be removed without any right of appeal.[50]

IV. Criticisms of Bill C-43

A. Appeal

The fact that Bill C-43 denies certain permanent residents the right of appeal means that these individuals can be removed automatically without an independent decision-maker looking into their personal circumstances, which might include:

- The fact that they came to Canada as a child and have lived effectively all their life in this country. They may have no family or connections in the country of their birth, and not even speak the language.

- They are suffering from mental health problems, which contributed to the commission of the crime.[51]

Despite the change of government in 2016, there does not appear to have been a review of this harsh and unforgiving legislation. In a letter sent to the Minister of Immigrants, Refugees and Citizenship on July 6, 2018, the CBA asked the government to reinstate elements of due process and procedural fairness to the *IRPA* which were diminished with the passage of the *FRFCA.*

The CBA argued that:

> These categories of 'serious criminality' were too broad to justify loss of appeal rights. In these cases, a CBSA officer may make a determination to send the

[49] House of Commons Debates, 41st Parliament 1st Session (24 September 2012), online: Parliament of Canada <https://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-151/hansard#7684027> at (1305).
[50] CBC Radio, The Current, 'My life is here': Homeless man living in Canada for 48 years faces deportation, online: <https://www.cbc.ca/radio/thecurrent/the-current-for-may-16-2016-1.3583826/my-life-is-here-homeless-man-living-in-canada-for-48-years-faces-deportation-1.3583935>.
[51] Canadian Council for Refugees. Summary of comments on Bill C-43, online: <https://ccrweb.ca/en/summary-comments-bill-c-43>.

> matter to an unappealable Immigration Division hearing to confirm the inadmissibility. A CBSA determination is no substitute for the right to a full IAD appeal hearing before an impartial decision-maker, particularly given the potential for dire consequences. Discretionary relief is inconsistent with CBSA's enforcement mandate and the process lacks impartiality, fairness and consistency. The CBSA is not overseen by an independent body and, in the experience of CBA Section members, CBSA officers err on the side of enforcement. CBSA officers also lack tools possessed by the IAD, most notably the ability to issue a stay of deportation on terms and conditions.[52]

The Canadian Association of Refugee lawyers stated:

> Everyone supports the notion of speedily removing foreign criminals. But does everyone support the notion of deporting a father who is supporting his family, a mother who is the sole caregiver for her Canadian children, a child who is caring for ailing parents? Many permanent residents have deep roots in Canada.[53]

It was submitted by Ms. Robin Seligman (Immigration Lawyer, As an Individual), to the Standing Committee on Citizenship and Immigration (in November 2012) that *Bill C-43* denies permanent residents the right to appeal even for a minor sentence, or even if that PR is abroad and is convicted of an act outside Canada which, if done in Canada, would have a sentence of 10 years. It does not matter if the person was convicted abroad. A fine could lead to the implementation of *FRFCA* and consequently separate that person from his or her family.[54]

Seligman gave the following example:

> Someone who has come to Canada as a child and is now 50 years old. They are married, have children, grandchildren, and a home in Canada, and are working and supporting their family. They have never had any trouble with the law, but never applied for their Canadian citizenship. There are many people in Canada under those circumstances: Americans, Italians, Greeks, Portuguese. They just never became Canadians, although they came to Canada when they were small children.
>
> On one occasion, this person makes a bad choice and gets into a fight, or drives dangerously, or commits theft under $5,000. If they get a sentence, … this

[52] The Canadian Bar Association, Reversal of measures under C-43 regarding IRB procedures and impact of C-46, online: <https://www.cba.org/CMSPages/GetFile.aspx?guid=e8f3c3be-fa2c-422d-9956-232329dc004d> at pp 1-3.
[53] Canadian Association of Refugee Lawyers, *Bill C-43: The Faster Removal of Foreign Criminals Act,* online: < https://carl-acaadr.ca/bill-c-43-the-faster-removals-of-foreign-criminals-act/>.
[54] House of Commons, "Standing Committee on Citizenship and Immigration" (5 November 2012), online: <http://www.ourcommons.ca/DocumentViewer/en/41-1/CIMM/meeting-57/evidence>.

> person would be deported from Canada without any right of appeal to the immigration appeal division, notwithstanding they have basically spent their entire life in Canada, and have no connections and sometimes don't even speak the language in their home country.[55]

The Canadian Council for Refugees gave the following examples of individuals denied the right to appeal:

1. A permanent resident is convicted of a drug related offence and sentenced to one year imprisonment. Since the sentence is more than six months, he faces deportation without any opportunity to appeal the decision.
2. A 19 year old permanent resident uses a fake ID to try to get into a bar in the United States. She admits this to a Canadian immigration officer. Using a false document is a crime punishable in Canada by up to 10 years imprisonment – she could therefore be inadmissible on grounds of serious criminality. Even though she was not charged or convicted in the US, she could face deportation from Canada without any opportunity to appeal the decision.[56]

Barring permanent residents from appealing the inadmissibility findings and the removal order can be harsh especially for those who have been living in Canada since childhood. Unfortunately, there will not be a chance to take into consideration, for example, family separation, best interests of affected children, rehabilitation, criminal history, etc.

B. Conditional Sentence

According to section 742 of the Canadian *Criminal Code,*[57] a conditional sentence is served in the community, instead of in jail. According to this section, the court may issue a conditional sentence when it is satisfied that there would be no danger to the safety of the community. Also, the court does not use conditional sentence if the sentence is longer than two years, if there is a mandatory minimum jail term or if the offence is violent.

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[55] House of Commons "Standing Committee on Citizenship and Immigration" (5 November 2012), online: <http://www.ourcommons.ca/DocumentViewer/en/41-1/CIMM/meeting-57/evidence>.
[56] Canadian Council for Refugees, Permanent residents and criminal inadmissibility, online: <https://ccrweb.ca/en/permanent-residents-and-criminal-inadmissibility>.
[57] *Criminal Code*, RSC 1985, c C-46.

Previously, the IAD ruled that a six-month conditional sentence order met the requirements for serious criminality which would affect the admissibility of permanent residents, and result in their deportation.[58]

In 2017, in *Tran v Canada (Public Safety and Emergency Preparedness)*, the SCC ruled that conditional sentences are not necessarily serious crimes under the *IRPA*:

> Conditional sentences are not captured in the meaning of the phrase 'term of imprisonment' in s 36(1) (a) of the *IRPA* . The purpose of s 36(1) (a) is to define 'serious criminality' for permanent residents convicted of an offence in Canada. It is clear from the wording of the provision that whether or not an imposed sentence can establish serious criminality depends on its length — it must be 'more than six months'. However, the seriousness of criminality punished by a certain length of jail sentence is not the same as the seriousness of criminality punished by an equally long conditional sentence. Conditional sentences, even with stringent conditions, will usually be more lenient than jail terms of equivalent duration, and generally indicate less serious criminality than jail terms. Since a conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders, interpreting 'a term of imprisonment of more than six months' as including both prison sentences and conditional sentences undermines the efficacy of using length to evaluate the seriousness of criminality.
>
> Furthermore, the meaning of 'term of imprisonment' varies according to the statutory context. Its meaning in ss 36(1) (a) and 64 of the *IRPA* has been interpreted by this Court to mean 'prison'. This interpretation avoids absurd results. Since more serious crimes may be punished by jail sentences that are shorter than conditional sentences imposed for less serious crimes, it would be an absurd outcome if less serious and non-dangerous offenders who received conditional sentences were deported, while more serious offenders receiving jail terms shorter than those conditional sentences were permitted to remain in Canada. Public safety, as an objective of the *IRPA* , is not enhanced by deporting less culpable offenders while allowing more culpable persons to remain in Canada.[59]

According to this ruling, a conditional sentence does not automatically mean serious criminality under the *IRPA.* Therefore, a PR who receives a conditional sentence for more than

[58] Immigration and Refugee Board of Canada, *Chapter Seven: Criminal Grounds for Removal*, online: <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Documents/RoaAmr07_e.pdf> at p 6.
[59] *Tran v Canada (Public Safety and Emergency Preparedness)*, [2017] 2 SCR 289, 2017 SCC 50 (CanLII).

six months and whose removal order has not been implemented, has the opportunity to appeal the order to the IAD.

C. Criminal Code

On December 18, 2018, amendments to the Canadian *Criminal Code* took place. *Bill C-46*[60] (section 320.19 (1)) amended the *Code* by increasing the maximum possible sentences for impaired driving from 5 years to 10 years imprisonment. This coincided with the government's legalization of cannabis. The apparently unintended effect is more serious immigration consequences for permanent residents and foreign nationals convicted of an impaired driving offence.

As a result of the change to the maximum sentence, the offence now constitutes "serious criminality" under s 36(1)(a) and permanent residents could lose their status and face deportation if they get convicted of an impaired driving offence in or outside Canada.[61]

Moreover, under subsections 36(1)(b)&(c), permanent residents who commit an impaired driving offence overseas can lose their status regardless of the sentence imposed in the foreign country and even if there was no conviction, where it is sufficient if an immigration officer merely believes that the person has committed the offence.

V. Deportation

Under the *IRPA*, permanent residents have a limited right to enter and remain in Canada. But unlike citizens, permanent residents do not have a constitutional right to remain in the country. As mentioned earlier, they can be deported from Canada if convicted of an offence for which a term of imprisonment of more than six months has been imposed.

Only non-citizens can be deported by the government either voluntarily, under threat of being removed by force, or coercively.

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[60] Parliament of Canada, *Bill C-46*: Statutes of Canada Chapter 21, online: <https://www.parl.ca/DocumentViewer/en/42-1/bill/C-46/royal-assent>.

[61] Stephen Sherman, "What do Canada's new DUI mean for immigration candidates and permanent residents?" (December 2018), online: CIC News <https://www.cicnews.com/2018/12/what-do-canadas-new-dui-laws-mean-for-immigration-candidates-and-permanent-residents-1211620.html#gs.56nabx>.

If a permanent resident receives a Removal Order they cannot legally remain in Canada and they have to leave the country. There are three types of Removal Orders issued by the IRCC or CBSA: Departure Orders, Exclusion Orders and Deportation Orders. Canada Border Services Agency describes the orders:

> With a **Departure Order**, a resident must leave Canada within 30 days after the order takes effect. They must also confirm their departure with the CBSA at their port of exit. If they leave Canada and follow these procedures, they may return to Canada in the future provided they meet the entry requirements at that time. If they leave Canada after 30 days or do not confirm their departure with the CBSA, their Departure Order will automatically become a Deportation Order. In order to return to Canada in the future, they must obtain an Authorization to Return to Canada (ARC).
>
> With an **Exclusion Order**, they cannot return to Canada for one year.
>
> - If they do wish to return before the 12 months have passed, they must apply for an ARC.
> - If an exclusion order has been issued for misrepresentation, they cannot return to Canada for five years.
> - If the CBSA paid for their removal from Canada, they must repay that cost.
>
> With a **Deportation Order**, a resident is permanently barred from returning to Canada and cannot return unless they apply for an ARC. If the CBSA paid for their removal from Canada, they must also repay that cost before they are eligible to return. [62]

Peter H Schuck stated:

> In view of what is inevitably and personally at stake, then, it is undeniable that deportation punishes the alien and punishes her severely. To maintain, as classical immigration law consistently has done, that deportation resembles a sanction like being ejected from a national park rather than that of being banished or sentenced to jail, suggests that something deeply symbolic, not dryly logical, has been at work in the shaping of the doctrine.... The government's obligations to the alien are viewed as resting upon her formal status rather than upon her actual relationship to the society.[63]

[62] Government of Canada, *Removal from Canada*, online: <https://www.cbsa-asfc.gc.ca/security-securite/rem-ren-eng.html>.
[63] Peter H Schuck, "The Transformation of Immigration Law" (1984) 84 Columbia Law Review 1 at p 27 <https://www.jstor.org/stable/1122369?seq=27#metadata_info_tab_contents>.

Not all permanent residents with imposed sentences of six months or more should be deported from Canada regardless of any other factors. The amended *IRPA* does not indicate what factors officers are to consider. The result is a mish mash of court authorities. While some judges have held that the significance of the decision requires substantial procedural fairness,[64] others have held that the duty is minimal.[65]

As a result, it is unclear whether officers are required to take into account such factors as whether this was a single conviction or the individual had committed previous convictions as well; whether family and children are dependent on them for care and support; whether the individual has been in Canada for a short or long time, whether they have been in Canada since they were a child and whether the individual can be rehabilitated.

However, in some court decisions, judges had taken into consideration some of those factors in order to avoid automatic deportation without a proper hearing.

VI. Criminal Sentencing Decisions

The harshness of the stripping of appeal rights based upon length of sentence has led sentencing and appellate courts to impose a lesser sentence so as to preserve a permanent resident's right to appeal to the IAD. Sentencing judges now find themselves in part performing the role of the IAD by considering immigration consequences and the factors set out in the *Ribic* decision. Apparently, this was an irritant to the government and led to their drastic lowering of the threshold for loss of appeal rights. During the House of Commons debates on *Bill C-43*, while defending the objectives of *Bill C-43*, Lorne Dykstra, MP, (mentioned previously) stated:

> We have all witnessed on a regular basis serious crimes that receive a minimum penalty, whether by judge or jury, of a minimum of two years. However, we have noticed across the country that courts are often using two years less a day to penalize individuals for their crime. At the same time it obviously changes the aspect of that criminal conviction, because it is less than two years, and therefore the scope of the current legislation does not allow us to pursue those individuals for the purpose of getting them out of the country and deporting them. Therefore, we

[64] *Hernandez v Canada (Minister of Citizenship and Immigration),* 2005 FC 429 (CanLII).
[65] *Bermudez v Canada (Citizenship and Immigration)*, 2016 FCA 131, para 44.

> would lower that threshold of two years down to six months for acts of serious criminality.[66]

Contrary to Mr. Dykstra's statement, there have been recent court decisions where the court imposed sentences of less than six months, so permanent residents, convicted of a crime, would not face automatic deportation without a full consideration of the circumstances of their case by an independent tribunal. Some examples follow:

A. ***R v Belakziz***

Ms. Kenza Belakziz was a permanent resident born in Morocco. She was convicted of conspiracy to rob a bank. The Alberta Court of Queen's Bench rejected, after she plead guilty, the joint submission of the Crown and defence asking for a sentence of six months less one day, plus two years' probation. She was sentenced two years less one day, reduced to 18 months for pre-trial custody and delay. Ms. Belakziz appealed the sentence.[67]

The Court of Appeal stated:

> The defence and the Crown were entitled to take into account the severe collateral immigration consequence that would result from a sentence over six months. The appellant was born in Morocco, and had never become a Canadian citizen despite having lived most of her life in Canada. She had no family in Morocco, was relatively youthful, and had no prior criminal record. Deportation or the threat of deportation would be a particularly harsh consequence for this appellant. It was not an error of principle for these factors to be considered by the Crown and the defence in formulating the joint submission, and the recognition of them in that joint submission would not bring the administration of justice into disrepute. The joint submission was not 'unhinged from the circumstances of this offender'. Merely because the collateral immigration consequences may have been given different weight in a conventional sentencing analysis does not make the joint submission unacceptable. This was not a case of an unfit sentence being rendered merely to accommodate immigration concerns. The issue, when properly framed, was whether the joint submission, considered overall, was so unfit as to bring the administration of justice into disrepute.[68]

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[66] Parliament of Canada. House of Commons Debates, 41st Parliament 1st Session (24 September 2012), online: <https://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-151/hansard#7684027>.
[67] *R v Belakziz*, 2018 ABCA 370 at para 1.
[68] *R v Belakziz*, 2018 ABCA 370 at para 29.

The Court of Appeal sentenced Ms. Belakziz to six months less one day of imprisonment, followed by two years of probation.[69]

B. ***R v Yare***

Mr. Mustaf Ahmed Yare, a Somalian Refugee and permanent resident, was convicted of hitting a police vehicle with his car, and threatening to kill the police officers who arrested him. The sentencing judge imposed five months and 25 days in order to escape deportation.

The Manitoba Court of Appeal stated that that "the sentencing judge acknowledged that a sentence greater than six months might result in the accused's deportation from Canada." The court added that the sentencing judge had concluded that the accused "ought to be jailed for about a year for these charges, but imposed a sentence that appears to be less than six months' incarceration".[70]

The Court of Appeal added that:

> The total sentence imposed was five months and 25 days' incarceration with four months and 25 days remaining to be served.
>
> The sentencing judge explained his decision when he stated:
>
> > The reason why you are staying in jail is because these charges merit you to stay in jail, even though you have been in jail for a long time; however, when the math is done with respect to your sentence, it is less than six months. I am not inclined to subject you to deportation hearings, but you need to know how lucky you are.[71]

The Court of Appeal overruled the sentence, and increased it to a total of 13 months, and 10 days' incarceration, noting that this could subject Yare to deportation. The Court added:

> The sentencing judge imposed an artificial sentence in order to circumvent Parliament's will and, in doing so, he erred in principle by overemphasising the collateral consequences. Moreover, reducing the sentence by more than six months from what he considered appropriate to avoid immigration consequences resulted in a sentence that is not

[69] *R v Belakziz*, 2018 ABCA 370 at para 32.
[70] *R v Yare*, 2018 MBCA 114 at paras 9-10.
[71] *R v Yare*, 2018 MBCA 114 at paras 11-12.

> proportionate having regard to the circumstances of the offence and the moral culpability of the offender.[72]

This case shows how judges try to balance the seriousness of offences committed by non-citizens with the consequences of a sentence over six months.

Toronto immigration lawyer Lorne Waldman said in response to the case:

> The right to appeal deportation orders has been unfairly restricted over the years. It used to be that anyone could appeal a removal order, he said, but in the early 2000s, that right of appeal was denied to those sentenced to more than two years. Under the Harper government, that was expanded to anyone sentenced to more than six months.

Maura Forrest noted that Waldman added:

> 'I think there should always be the right to a review,' arguing that individual circumstances like how long someone has been in the country and whether they have children need to be considered.
>
> 'I don't think it's unreasonable for Canada to consider taking action against a non-citizen who has violated the criminal law, but I think the changes that were brought in by the former Conservative government were very extreme,' Waldman said. 'That's why you're seeing judges imposing sentences of less than six months.'[73]

C. *R v Frater*

Mr. Nigel George Frater was a Jamaican citizen and a Canadian permanent resident. Mr. Frater was convicted of assault and breach of probation. He was 53 years old, married to a Canadian citizen, and they had four children. He also had a grandchild.[74]

Mr. Frater appealed his sentence to avoid deportation and asked that his sentence be reduced.[75]

The Ontario Court of Appeal stated:

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[72] *R v Yare*, 2018 MBCA 114 at para 23.
[73] Maura Forrest, "Judge gave excessively light sentence to avert deportation of refugee who threatened to kill police: appeal court" (19 November 2018), online: National Post <https://nationalpost.com/news/canada/judge-gave-excessively-light-sentence-to-avert-deportation-of-refugee-who-threatened-to-kill-police-appeal-court>.
[74] *R. v Frater*, 2016 ONCA 386 (CanLII) at paras 1-3.
[75] *R. v Frater*, 2016 ONCA 386 (CanLII) at para 4.

> The Crown does not oppose the relief sought by the appellant. The Crown summarizes its position in its factum, at para 1:
>
> > The respondent accepts the facts contained in Parts I and II of the appellant's factum. The respondent also accepts that the fresh evidence tendered by the appellant should be admitted on the appeal in this matter. The respondent is satisfied that due diligence is not a factor weighing against the admissibility of the evidence and that the fresh evidence is relevant and credible. The respondent also concedes that, had the collateral immigration consequences been known at the time of the appellant's guilty plea, it can be expected to have affected the result. The respondent further acknowledges that a sentence of six months less a day would have been a fit sentence within the acceptable range for this offence and offender.[76]

The appeal was allowed and the sentence imposed following plea was set aside and a sentence of six months imprisonment less a day was substituted.[77]

D. ***R v Pinas***

Ms. Gauthuri Pinas was born in the Netherlands and was a Canadian permanent resident. She was sentenced by the Ontario Superior Court of Justice to a one-year sentence of imprisonment following pleading guilty to robbery. She appealed the decision.

The Ontario Court of Appeal stated:

> The appellant has resided in Toronto since she was seven years old. She has sole custody of two young children, one of whom has been diagnosed with autism spectrum disorder. The appellant, although born in the Netherlands, no longer understands or speaks Dutch. She has no family or close ties in the Netherlands. Her children, were they to accompany her, would be uprooted from the only community they have known and all of their family and community support, except for their mother.
>
> Reduction of the sentence by one day would not take the sentence outside the acceptable range and would improve the rehabilitative prospects for the appellant without any countervailing negative impact on broader societal interests.

[76] *R. v Frater*, 2016 ONCA 386 (CanLII) at para 5.
[77] *R. v Frater*, 2016 ONCA 386 (CanLII) at para 7.

> Accordingly, the sentence imposed following plea is set aside and a sentence of six months incarceration less a day is substituted.[78]

While these cases demonstrate the willingness of judges to reduce the sentence imposed on non-citizens in order to prevent automatic deportation, they underline the fact that, for permanent residents who are sentenced to six months or more of imprisonment, there is effectively no due process..

VII. Violation of the *Charter*

It is arguable that the denial of an appeal under *IRPA* section 64(2) violates the principles of fundamental justice in *Charter* s 7 by not permitting independent consideration of all the circumstances of an individual's case. For most people, deportation effectively results in permanent exile. It severs family ties, destroys the life that they may have established over many years and sends them back to a country which may be completely unfamiliar to them and where they lack the language ability, cultural knowledge and economic ties to survive or succeed.

A. Section 7 of the *Charter*

Section 7 of the *Canadian Charter of Rights and Freedoms* (the *Charter*) reads:

> 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.

According to Des Rosiers and Aviv "a person could be deprived of the opportunity to appeal a decision after being deemed inadmissible in highly subjective circumstances, where factual and legal errors are possible. The absence of appeal in these circumstances violates principles of fundamental justice and fairness."[79]

In *Charkaoui v Canada (Citizenship and Immigration)*, the Supreme Court of Canada (SCC) stated:

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[78] *R v Pinas*, 2015 ONCA 136 (CanLII) at paras 12-14.
[79] Nathalie Des Rosiers and Noa Mendelsohn Aviv "Brief to the Standing Committee on Citizenship and Immigration regarding Bill C-43, An Act to amend the Immigration and Refugee Protection Act (Faster Removal of Foreign Criminals Act)" (13 November 2012), online: Canadian Civil Liberties Association at p 5.

> Section 7 of the Charter requires that laws or state actions that interfere with life, liberty and security of the person conform to the principles of fundamental justice — the basic principles that underlie our notions of justice and fair process. These principles include a guarantee of procedural fairness, having regard to the circumstances and consequences of the intrusion on life, liberty or security (citing *Suresh v Canada (Minister of Citizenship and Immigration),* [2002] 1 SCR 3, 2002 SCC 1 at para. 113).[80]

Section 7 requires a two-step action. First, the claimant must establish that life, liberty or security of the person have been violated. Second, the claimant must confirm whether any such violation is in not accordance with the principles of fundamental justice. It has been argued that deporting permanent residents, who have lived for a long time in Canada, who have families in Canada and who work in Canada, breaches the liberty, security of those individuals and the principles of fundamental justice.[81]

The principles of fundamental justice determine what is at stake. Liberty and security will be removed from permanent residents, who may be deported to a country that they have no relation to, have never been to, where they do not speak the language, and will be separated from their family in Canada.[82]

In addition, there will be a violation of section 7 if a permanent resident gets deported to a country where there is a possibility that they will be persecuted and tortured. The SCC in *Suresh v Canada (Minister of Citizenship and Immigration)* said:

> Section 7 of the *Charter* guarantees '[e]veryone . . . 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'. It is conceded that 'everyone' includes refugees and that deportation to torture may deprive a refugee of liberty, security and perhaps life.
> …

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[80] *Charkaoui v Canada (Citizenship and Immigration)*, [2007] 1 SCR 350 at paragraph 19.
[81] Russell P. Cohen, "Fundamental (In) Justice: The Deportation of Long-Term Residents from Canada" (1994) 32 Osgoode Hall Law Journal 2 at p 460 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1666&context=ohlj>.
[82] Russell P. Cohen, "Fundamental (In) Justice: The Deportation of Long-Term Residents from Canada" (1994) 32 Osgoode Hall Law Journal 2 at p 485 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1666&context=ohlj>.

> The principles of fundamental justice are to be found in 'the basic tenets of our legal system'.[83]

Daniela Bassan affirmed:

> By considering international customary and conventional law one can identify the principles of fundamental justice which are inextricably linked to the inherent dignity of all persons. In fact, the protection of human dignity is a principle of fundamental importance which lies not only at the essence of a free and democratic society, but also at the heart of the *Charter* itself. As such, the notion of human dignity is vital to the interpretation of all *Charter* protections, including section 7. Respect for human dignity also represents the genesis of such international instruments as the UN Charter, the Universal Declaration, and the ICCPR. Once the principles of fundamental justice have been identified, it is necessary to balance the interests of the state with those of the individual. This 'balancing of interests' must be consistent with the aforementioned principles of fundamental justice. Thus, to determine whether the deportation of an alien violates the principles of fundamental justice, it is necessary to balance the interests of the deportee with those of the expelling State.[84]

Although there may be other claims available (e.g., applying for a refugee claim or pre-removal risk assessment) in some circumstances, it may be argued that the deportation consequences for a non-citizen of receiving a sentence of six months or more may violate the principles of fundamental justice under section 7 of the *Charter*.

B. Section 12

Section 12 of the *Charter* reads:

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

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[83] *Suresh v Canada (Minister of Citizenship and Immigration),* [2002] 1 SCR 3, 2002 SCC 1 (CanLII) at paras 44-45.

[84] Daniela Bassan, "The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens", online: (1996) 34 Osgoode Hall Law Journal 3 at pp 603-604 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1625&context=ohlj>.

Deporting a permanent resident without a fair hearing may also be considered cruel and unusual punishment, under section 12, in the same way that some courts have found mandatory minimum sentences to violate ss. 7 and 12.

The SCC, in *Suresh* v *Canada (Minister of Citizenship and Immigration),* stated:

> Canadian law and international norms reject deportation to torture. Canadian law views torture as inconsistent with fundamental justice. The *Charter* affirms Canada's opposition to government-sanctioned torture by proscribing cruel and unusual treatment or punishment in s 12. Torture has as its end the denial of a person's humanity; this lies outside the legitimate domain of a criminal justice system. The prohibition of torture is also an emerging peremptory norm of international law which cannot be easily derogated from. The Canadian rejection of torture is reflected in the international conventions which Canada has ratified. Deportation to torture is prohibited by both the *International Covenant on Civil and Political Rights* and the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*.[85]

In *Nguyen v Canada*, the Federal Court of Appeal stated:

> … the Minister would act in direct violation of the *Charter* if he purported to execute a deportation order by forcing the individual concerned back to a country where, on the evidence, torture and possibly death will be inflicted. It would be a participation in a cruel and unusual treatment within the meaning of section 12 of the *Charter*, or, at the very least, an outrage to public standards of decency, in violation of the principles of fundamental justice under section 7 of the *Charter*. There are means to enjoin the Minister not to commit an act in violation of the *Charter*. [86]

Moreover, In *Pushpanathan v Canada (Minister of Citizenship and Immigration),* the SCC stated:

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

[85] *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 SCR 3, 2002 SCC 1 (CanLII)..
[86] *Nguyen v Canada (Minister of Employment and Immigration)*, [1993] 1 FC 696, 1993 CanLII 2926 (FCA).

> not the individual is excluded from claiming status as a refugee, to avoid unacceptably harsh consequences arising from the exclusion.[87]

Mr. Jama Warsame fled Somalia with his family and came to Canada when he was a child. Mr. Warsame received a deportation order, after living 20 years in Canada, due to his criminal history. The United Nations Human Rights Committee held that deporting Mr. Warsame to Somalia would breach Canada's human rights obligations under the *International Covenant on Civil and Political Rights*. Despite the fact that the UN Committee had found that Mr. Warsame's deportation would infringe his right to freedom from cruel, inhuman or degrading treatment, Mr. Warsame was deported from Canada in 2012.[88]

However, in the *Abdoul Abdi* case, the federal court rejected the removal order imposed by the Minister's Delegate for violating the *Charter*'s provisions.

C. Abdoul Abdi's Case

In 2000, Mr. Abdoul Abdi arrived in Canada, as a Somalian refugee, with his aunts and sister. His mother had died in a refugee camp in Djibouti. In 2001, Abdi was placed in the custody of the Nova Scotia Department of Community Services. His family never reclaimed custody of him and he never got Canadian citizenship.

While in Nova Scotia, Mr. Abdi started having problems with the law at an early age. In 2014, he "pleaded guilty to aggravated assault and assaulting a police officer and served time in prison before being released". That lead to a deportation hearing under the *IRPA*.[89]

Mr. Abdi faced the possibility of being deported to Somalia—where he had never been; he did not speak the Somalian language and had no connections.

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[87] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1998] 1 SCR 982, 1998 CanLII 778 (SCC) at para 157.
[88] Andrew Stobo Sniderman, "Jama Warsame is a citizen of nowhere" (10 December 2013), online: Macleans <https://www.macleans.ca/news/canada/jame-warsame-is-a-citizen-of-nowhere/>.
[89] Shaina Luck, "Abdoul Abdi no longer facing deportation hearing, for now" (16 July 2018), online: CBC News <https://www.cbc.ca/news/canada/nova-scotia/abdoul-abdi-deportation-hearing-federal-court-ruling-1.4748515>.

Mr. Abdi asked for a judicial review of the decision of the Minister's Delegate (MD), arguing that his rights under the *Charter* (sections 15(1), 12, 7, 2(d)) had been infringed and his treatment was not in keeping with Canada's international law obligations.[90]

On July 13, 2018, the Federal Court overturned the Minister's Delegate's decision to refer his case to a deportation hearing. Justice Ann Marie McDonald stated:

> The Minister's Delegate (MD) failed to properly assess the *Charter* arguments raised by Mr. Abdi. Under s 3(3) of the *IRPA*, which incorporates general principles of constitutional law, the MD was statutorily mandated to render a decision consistent with the *Charter*. The MD failed to consider any facts which would allow this Court to determine if the MD rendered a decision in keeping with the *Charter*. Accordingly, I am allowing this judicial review as the decision of the MD does not meet the test set out in Dunsmuir v New Brunswick, 2008 SCC 9 at para 47 of 'justification, transparency, and intelligibility'.[91]

She added:

> Administrative decision-makers must 'always consider fundamental values' when exercising their discretion and are 'empowered, and indeed required, to consider *Charter* values within their scope of discretion' (citing *Doré v Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 at para 35). Therefore, decision-makers must render decisions in accordance with the *Charter* by considering *Charter* values themselves.[92]

On July 17, 2019, Public Safety Minister Ralph Goodale announced "that the federal government respects the decision filed on July 13 by the Federal Court concerning Mr. Abdoul Abdi. The Government will not pursue deportation for Mr. Abdi".[93]

VIII. Violation of Canada's International Obligations

The amended *IRPA* provisions also appear to violate many international human rights treaties to which Canada is a party.

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[90] *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 733, online: <http://ccla.org/cclanewsite/wp-content/uploads/2018/07/2017-07-13-FC-decision-Abdoul-Abdi.pdf> at paras 2 & 68.
[91] *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 733, online: <http://ccla.org/cclanewsite/wp-content/uploads/2018/07/2017-07-13-FC-decision-Abdoul-Abdi.pdf> at para 5.
[92] *Abdi v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 733, online: http://ccla.org/cclanewsite/wp-content/uploads/2018/07/2017-07-13-FC-decision-Abdoul-Abdi.pdf > at para 74.
[93] Aly Thomson, "Feds won't pursue deportation of former child refugee Abdoul Abdi: minister" (18 July 2019), online: Global News <https://globalnews.ca/news/4337905/feds-wont-pursue-deportation-of-former-child-refugee-abdoul-abdi-minister/>.

A. The *IRPA* and International Obligations

Section 64(2) of the *IRPA* violates Canada's international obligations because it removed the right of appeal to permanent residents if they are sentenced to six or more months in prison or if they are convicted of, or are believed to have committed, an offence overseas that is punishable in Canada by a maximum term of imprisonment of at least 10 years.

Daniela Bassan wrote:

> Canada's obligation at international law to protect the family and the child be recognized in Canadian law as one of the principles of fundamental justice under section 7 of the *Charter*. The protection of the family is engaged by the deportation of domiciled aliens because, by definition, these deportees have been in Canada for a long period of time and have fully assimilated into Canadian society: deportation will, therefore, have an adverse impact on the aliens' family life and their children. Indeed, the adverse effect of deportation on families and children is increasingly recognized, by courts and commentators, as a violation of internationally protected human rights.[94]

She added:

> Where a domiciled alien is deported without regard to 'mitigating' or 'personal' circumstances, it may amount in practice to the deportation of the rest of the family, including dependent children who may be citizens of Canada. Moreover, state-ordered deportation engages 'security of the person' by imposing psychological stress on a domiciled alien who is forcibly removed from family, children, and community.[95]

International law does not allow governments to remove permanent residents whenever they want. Governments do not have the right to act arbitrarily in deporting those individuals.

Before *Bill C-43* came into force, Amnesty International had affirmed:

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[94] Daniela Bassan, "The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens", online: (1996) 34 Osgoode Hall Law Journal 3 at p 583 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1625&context=ohlj>.

[95] Daniela Bassan, "The Canadian Charter and Public International Law: Redefining the State's Power to Deport Aliens", online: (1996) 34 Osgoode Hall Law Journal 3 at p 602 <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1625&context=ohlj>.

> *Bill C-43* violates Canada's obligation under international law to uphold the right of appeal. Section 62(2) denies the right of appeal for permanent residents if they are sentenced to six or more months in prison (the current law sets the bar at two years) or if the person is convicted of (or committed an act that would constitute) an offence outside of Canada that is punishable in Canada by a maximum term of imprisonment of at least 10 years (regardless of the length of sentence imposed). Denying the right of appeal to these individuals constitutes discrimination. Section 62(2) would include many offences that fall far short of "compelling reasons of national security" and thus runs afoul of international law.[96]

Moreover, deportation that separates families infringes international law which secures the integrity of the family and the right to family life. This principle is mentioned in the *Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, and Convention on the Rights of the Child*. Also, according to sections 3(1)(d), 3(2)(f) of the *IRPA,* family reunification is one of the *IRPA*'s goals.[97]

B. Torture Under International Law

Canada was pushed by the UN Human Rights Committee and the UN Committee against Torture to revise its legislation to apply the unconditional ban on deporting individuals to a country where they might be tortured or ill-treated, which violates article 7 of the International Covenant on Civil and Political Rights.[98]

Article 3(1) of the *Convention Against Torture*[99] states that "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture".

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[96] Amnesty International, *Accountability, Protection and Access to Justice*: Amnesty International's Concerns with respect to Bill C-43 (31 October 2012), online: <https://amnesty.ca/sites/amnesty/files/ai_submissions_c43_oct31.pdf >.at p 11.
[97] Amnesty International, *Accountability, Protection and Access to Justice:* Amnesty International's Concerns with respect to Bill C-43 (31 October 2012), online: https://amnesty.ca/sites/amnesty/files/ai_submissions_c43_oct31.pdf > at pp 9-10.
[98] Amnesty International Canada, *Submission to the UN Human Rights Committee (*114th Session, 5 June 2015), online: <https://www.amnesty.org/download/Documents/AMR2018062015ENGLISH.pdf> at p 12.
[99] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (10 December 1984), online: United Nations Human Rights, Office of the High Commissioner <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>.

Under international law, every person has the right not to be tortured or persecuted, or sent to a country where there is a risk of torture or persecution. Torture is prohibited by the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights*, and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. *The Refugee Convention* and *Convention Against Torture* mention the prohibition on refoulement. The *Criminal Code* and *Charter of Rights and Freedoms* also prohibit torture, and the *Immigration and Refugee Protection Act* affirms that one of its goals is to offer protection from persecution and torture.[100]

IX. Remedies for *Charter* Violations

If a violation of the *Charter* is found in the legislation or by government actions, the remedies may be found in *Charter* section 24 and 52 of the *Constitution*. Under section 24, individuals challenge a government action that takes place during a prosecution or investigation. Under section 52, individuals challenge a statute or law. Section 24(1) applies when there is a violation of the *Charter*, while section 52 applies to any violation of the whole *Constitution*. These two sections have distinct rules and give different remedies.

A. Section 24(1) of the *Charter*

Section 24(1) of the *Charter* states:

> 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.

Section 24(1) applies in cases where the investigation or prosecution has been unjust or unfair. Individuals can ask the court, under this section, to provide a proper remedy if their *Charter* rights have been infringed.[101]

In *Vancouver (City) v Ward*, the SCC stated:

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[100] Amnesty International, *Accountability, Protection and Access to Justice:* Amnesty International's Concerns with respect to Bill C-43 (31 October 2012), online: https://amnesty.ca/sites/amnesty/files/ai_submissions_c43_oct31.pdf at p 4.

[101] Toronto Defence Lawyers, "Remedies Pursuant to the Canadian Charter of Rights and Freedoms (ss. 24 and 52)"(5 October 2010), online: <https://www.torontodefencelawyers.com/blog/general-category/remedies-pursuant-to-the-canadian-charter-of-rights-and-freedoms-ss-24-and-52/>.

> Damages under s 24(1) of the *Charter* are a unique public law remedy, which may serve the objectives of: (1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches. Achieving one or more of these objects is the first requirement for "appropriate and just" damages under s 24(1) of the *Charter*.[102]

Under section 24(1), individuals can ask for remedies if their rights have already been violated, and if their rights are going to be violated in the future.[103] For example, in criminal cases, a court may provide an order to stop a trial if it was determined that the person has been denied the right to a fair trial within a reasonable time.[104]

In *New Brunswick (Minister of Health & Community Services) v G.(J.)*, the SCC declared:

> This Court has held on a number of occasions that remedies can be ordered in anticipation of future *Charter* violations, notwithstanding the retrospective language of s 24(1) : *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Vermette*, [1988] 1 S.C.R. 985; *R. v. Harrer*, [1995] 3 S.C.R. 562. In *Harrer*, McLachlin J., concurring in the result, held at para 42 that "[s]ection 24(1) applies to prospective breaches, although its wording refers to 'infringe' and 'deny' in the past tense".[105]

In *United States of America v Kwok,* the SCC stated:

> Remedial action by the courts for future violations is not precluded as a matter of law despite the use of a past tense in the language of s 24(1). In *Operation Dismantle Inc. v The Queen*, [1985] 1 SCR 441, this Court suggested that a remedy under s 24(1) could be granted not only in the case of an actual interference with *Charter* rights but also to prevent probable future harms when an applicant can establish an apprehension of such interference at a future trial. *R v Vermette*, [1988] 1 SCR 985, confirmed, at p 992, that *Charter* remedies may be available in cases where an applicant can establish the threat of a future violation.[106]

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[102] *Vancouver (City) v Ward*, [2010] 2 SCR 28, 2010 SCC 27 (CanLII) at para 31.
[103] Kent Roach, "Enforcement of the Charter – Subsections 24(1) and 52(1)", online: (2013) 62 S.C.L.R (2d) at p 477 <https://www.law.utoronto.ca/utfl_file/count/documents/Roach/Chapter%209%20Roach.pdf>.
[104] Government of Canada, *Guide to the Canadian Charter of Rights and Freedoms,* online: <https://www.canada.ca/en/canadian-heritage/services/how-rights-protected/guide-canadian-charter-rights-freedoms.html#a2i>.
[105] *New Brunswick (Minister of Health and Community Services) v G. (J.)*, [1999] 3 SCR 46 at para 51.
[106] *United States of America v Kwok*, [2001] 1 S.C.R. 532, 2001 SCC 18 at para 66.

Section 24(1) remedies can be granted by the court to avoid any irreversible damage caused by the breach of *Charter* rights for example if a person's life or security was at risk, or if someone was going to be deported. However, if courts wait until there is a *Charter* violation (such as wait until a deportation takes place), it will be too late to provide individuals any just and appropriate remedies.

B. Section 52(1) of the *Constitution*

The *Constitution* is the supreme law of the land, and any law that violates its provisions is invalid.

Section 52(1) of the *Constitution* reads:

> 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.

In *R v Therens,* the SCC said:

> It is also clear that the *Charter* must be regarded, because of its constitutional character, as a new affirmation of rights and freedoms and of judicial power and responsibility in relation to their protection. This results from s 52 of the *Constitution Act, 1982*, which removes any possible doubt or uncertainty as to the general effect which the *Charter* is to have by providing that it is part of the supreme law of Canada and that any law that is inconsistent with its provisions is to the extent of such inconsistency of no force and effect, and from s 24 of the *Charter*, which provides that anyone whose guaranteed rights or freedoms 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.[107]

In *R v 974649 Ontario Inc.*, the SCC stated:

> The *Charter* guarantees the fundamental rights and freedoms of all Canadians. It does this through two kinds of provisions. The first are provisions describing the rights and freedoms guaranteed. The second are provisions providing remedies or sanctions for breaches of these rights. If a law is inconsistent with the *Charter,* s 52 of the *Constitution Act, 1982* provides that it is invalid to the

[107] *R v Therens*, [1985] 1 SCR 613, 1985 CanLII 29 (SCC) at para 48.

> extent of the inconsistency. On the other hand, if a government action is inconsistent with the *Charter*, s 24 provides remedies for the inconsistency.[108]

According to section 52(1), all laws must be consistent with the *Constitution*. Section 64(2) of the IRPA is inconsistent with the *Constitution* because it denied the right to appeal where permanent residents have been found inadmissible on grounds of serious criminality. Therefore, section 64(2) could be declared invalid.

X. Recommendations

*While sections 64(2) and 36(1) may or may not be constitutionally valid, there is no doubt that they result in a substantial denial of due process and fairness in the consideration of permanent residents who have been sentenced to six months or more of imprisonment or who have been convicted or are believed to have committed an offence abroad. The arbitrary establishment of six months as the dividing line has resulted in a great many permanent residents being deported with no meaningful consideration of their factual circumstances. The process of allowing an enforcement officer to make that determination is shockingly biased and unfair. It should not be allowed to continue.

Accordingly, we strongly recommend that the Government of Canada conduct a review of this process with a view to restoring appeal rights to all permanent residents facing removal on the grounds of serious criminality.

At the very least, we recommend that Section 64(2) of the *IRPA* should be revised so that permanent residents or foreign nationals lose the right to appeal when they are convicted of an offence for which they get a two year sentence instead of six months.

The Immigration Appeal Division should take into consideration, when looking into removal cases, the seriousness of the criminality, the country to which permanent residents would be deported, their connections in Canada and consequences of deportation on their family in Canada.

[108] *R v 974649 Ontario Inc*., [2001] 3 S.C.R. 575, 2001 SCC 81 at para 14.

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