

In the Aftermath of *R v Pham*: A Comment on Certainty of Removal and Mitigation of Sentences

S A S H A B A G L A Y *

ABSTRACT

This comment discusses the findings of the review of 63 sentencing decisions made in the 4-year period immediately following the *R v Pham* decision. The main objective of the study is to explore how courts have been applying *Pham* – specifically how their construction of the inadmissibility process impacted the weight given to collateral immigration consequences and whether it led to slight mitigation of sentences. The study reveals some inconsistencies in judicial approach to the certainty of removal and its use as a factor in sentence mitigation. It is hoped that these findings will prompt both courts and defence counsel to become more cognizant of the nuances of the inadmissibility regime and strive to develop a more principled framework for consideration of these consequences in sentencing.

Keywords: sentencing; immigration; *R v Pham*; collateral consequences; inadmissibility; permanent residents; deportation; right to IAD appeal; proportionality

I. INTRODUCTION

Permanent residents convicted of certain offences face dual state-imposed consequences: first, they are subject to criminal sanctions and, second, they may become inadmissible and be removed from Canada - in some cases without the right to appeal a removal order. Inadmissibility may result in a person's return to an unsafe and/or

* Sasha Baglay is an Associate Professor, Faculty of Social Science and Humanities, University of Ontario Institute of Technology.

unknown country (e.g. for long-term residents who immigrated to Canada as children) and lengthy separation from family in Canada. These collateral consequences can make a criminal sentence disproportionately harsh. However, until recently, questions remained about the parameters of appellate intervention to vary a sentence due to immigration consequences, the guiding principles for sentence determinations where collateral consequences are involved, and the weight to be given to such consequences.¹

In *R v Pham*,² the Supreme Court was asked to clarify whether an otherwise fit sentence can be varied on appeal to take into account collateral immigration consequences. Hoang Anh Pham, a permanent resident, was convicted of producing and possessing marihuana for the purpose of trafficking and was sentenced to two years of imprisonment. At the time, a 2-year sentence barred Mr. Pham from appealing the removal order. He sought to have the sentence reduced by one day in order to preserve the right to immigration appeal. The Supreme Court held that collateral (immigration) consequences³ may be taken into account. They are not aggravating or mitigating factors, but are a part of the personal circumstances of the accused. The Court emphasized that while having discretion to take into account collateral consequences, judges must ensure that they do not compromise the proportionality of a sentence. The closer the sentence is to the sentencing range, the more likely it is to remain proportionate. Conversely, the greater the departure, the more questionable the fitness of a sentence.⁴ As subsequently interpreted by lower courts, immigration consequences may help situate the case within the range of appropriate sentences, but they cannot be used to re-calibrate that range.⁵

¹ For an overview of approaches prior to *Pham*, see *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739 at 23–28 (Factum of the Appellant), online: <<https://www.scc-csc.ca/case-dossier/info/af-ma-eng.aspx?cas=34897>> [*Pham*, appellant’s factum].

² *R v Pham*, 2013 SCC 15, [2013] 1 SCR 739 [*Pham*].

³ Collateral consequences can be defined as any negative effects of a sentence beyond its immediate impact, such as the loss of liberty in case of a prison sentence or the loss of money as a result of an imposed fine. Examples of collateral consequences include social stigma, travel and employment restrictions, far-reaching impact of prohibitions, and immigration consequences. Eric Monkman, “A New Approach to the Consideration of Collateral Consequences in Criminal Sentencing” (2014) 72:2 UT Fac L Rev 38 at 43.

⁴ *Pham*, *supra* note 2 at para 18.

⁵ *R v Tweneboah-Koduah*, 2017 ONSC 640 at para 62, 136 WCB (2d) 722 [*Tweneboah*].

Further, the weight given to collateral consequences would vary from case to case; in some, it may be appropriate to mitigate a sentence, while in others it may not.

R v Pham has undoubtedly increased the awareness of courts and other participants of the criminal justice process of collateral immigration consequences. However, the Supreme Court did not elaborate on how judges should go about determining the weight to be given to them in individual cases. The article's working hypothesis is that the certainty of the offender's removal would be one of the key factors in such decision-making.⁶ The more certain the removal and/or the harsher its consequences, the more likely it is to make collateral consequences more compelling. This comment examines how sentencing courts construe provisions of the *Immigration and Refugee Protection Act*⁷(IRPA) to determine the certainty of removal and whether/how this factor leads to slight mitigation of sentences. The analysis is based on review of sentencing decisions from across Canada in the 4-year period immediately following *Pham* (March 13, 2013 to March 13, 2017). Given that the topic of collateral immigration consequences received virtually no scholarly attention to date,⁸ it is hoped that this comment will provide useful information to both researchers and practitioners.

The comment is in five parts. Part Two explains the interrelationships between immigration and criminal law, setting out the context for understanding collateral immigration consequences. Part Three presents the findings of the case review. The analysis reveals that sentencing courts are not uniform in their interpretation of the IRPA: some presume that removal is almost certain in the absence of immigration appeal, others do not make a clear pronouncement on the issue, and a small minority overemphasizes immigration officers' discretion not to proceed with inadmissibility. In light of these different interpretations, Part Four turns to

Koduah]; *R v RC*, 2016 ONCJ 605 at para 28, 2016 CarswellOnt 16137 [RC].

⁶ It should be noted that certainty of removal is not the only factor that may influence the courts' evaluation of immigration consequences. For discussion of other relevant considerations, see Sasha Baglay, "Sentencing, Inadmissibility, and Hope 'Management' Post-Bill C-43 and Post-*Pham*" (2018) [unpublished, on file with author].

⁷ *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

⁸ The only recent article on collateral consequences in sentencing is Monkman, *supra* note 3. However, it does not focus specifically on immigration consequences.

the Federal Court jurisprudence⁹ and immigration processing manuals to verify if sentencing courts' characterization of the inadmissibility process, particularly as relates to discretion of immigration officials, is accurate. The comment concludes with suggestions that could facilitate the development of more consistent and accurate decision-making on immigration consequences.

II. CONTEXT: CRIMMIGRATION CONNECTIONS

The topic of this comment broadly fits into extensive and evolving literature on interrelationships between immigration law and crime/criminal law/criminalization – or crimmigration. The crimmigration connections exhibit themselves in a myriad of ways, including media and political discourses equating migrants with criminals and security threats; increased screening and surveillance of migrant populations; prolonged immigration detention that borderlines on punitive; expanded criminality- and security-based grounds for denial or revocation of citizenship; and many others.¹⁰ For the purpose of our discussion, three points of intersection between immigration and criminal law need to be highlighted:

⁹ The Federal Court has jurisdiction to review all decisions made under the IRPA and can be considered to have specialized expertise with respect to the immigration statute.

¹⁰ For discussion of crimmigration in a Canadian context, see e.g. the special issue of *Queen's Law Journal*: (2014) 40:1 *Queen's LJ*; Karine Côté-Boucher, "Bordering Citizenship in 'an Open and Generous Society': The Criminalization of Migration in Canada" in Sharon Pickering & Julie Ham, eds, *The Routledge Handbook on Crime and International Migration* (London, UK: Routledge, 2015) at 75; Mary Bosworth & Sarah Turnbull, "Immigration Detention, Punishment, and the Criminalization of Migration" in Sharon Pickering & Julie Ham, eds, *The Routledge Handbook on Crime and International Migration* (London, UK: Routledge, 2015) at 91. For discussion in other jurisdictions, see e.g. the special issue of *European Journal of Criminology*: (2017) 14:1 *European J Criminology*; Thomas Ugelvik, "The Limits of the Welfare State? Foreign National Prisoners in the Norwegian Crimmigration Prison" in Peter Scharff Smith & Thomas Ugelvik, eds, *Scandinavian Penal History, Culture and Prison Practice: Embraced by the Welfare State* (London, UK: Palgrave, 2017) 405; Izabella Majcher & Clément de Senarclens, "Discipline and Punish? Analysis of the Purposes of Immigration Detention in Europe" (2014) 11:2 *AmeriQuests*; César Cuauhtémoc García Hernández, "The Life of Crimmigration Law" (2015) 92:4 *Denver UL Rev* 697; Daniel Martinez & Jeremy Slack, "What Part of 'Illegal' Don't You Understand? The Social Consequences of Criminalizing Unauthorized Mexican Migrants in the United States" (2013) 22:4 *Soc & Leg Stud* 535; Rebecca Sharpless, "Immigrants Are Not Criminals: Respectability, Immigration Reform, and Hyperincarceration" (2016) 53 *Hous L Rev* 691; Mark L

- (i) Criminal convictions/sentences as a trigger of inadmissibility;
- (ii) Interpretation of the “term of imprisonment” for the purpose of inadmissibility and access to immigration appeal;
- (iii) Role of collateral immigration consequences in the determination of fit sentences.

Although crimmigration connections have always existed in our system, their intensity can change over time moving between more and less punitive ends of the spectrum. The following sections will detail applicable rules and procedures helping us situate current crimmigration connections on that spectrum.

In addition, it is important to keep in mind that grounds, procedures and consequences of inadmissibility may vary, depending on the immigration status of the person concerned, namely whether they are a permanent resident, a foreign national, a protected person or a refugee claimant. Although permanent residents are the primary focus of this article’s discussion, for the purpose of clarity, it is necessary to briefly define each of the mentioned groups. Permanent residents are persons who have been admitted to Canada through an immigration process. They are entitled to remain in Canada as long as they comply with the residency obligation¹¹ and maintain ‘good behavior.’¹² Foreign nationals are persons

Noferi, “Mandatory Immigration Detention for US Crimes: The Noncitizen Presumption of Dangerousness” in Maria João Guia, Robert Koulish & Valsamis Mitsilegas, eds, *Immigration Detention, Risk and Human Rights: Studies on Immigration and Crime* (London, UK: Springer, 2016) 215; Ingrid V Eafly, “Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement” (2013) 88 NYUL Rev 1126; Yolanda Vázquez, “Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System” (2011) 54:3 How LJ 639; Juliet P Stumpf, “States of Confusion: The Rise of State and Local Power over Immigration” (2008) 86:6 NCL Rev 1557.

¹¹ A permanent resident must be physically present in Canada for at least 730 days in every five-year period in order to maintain his or her residency status. IRPA, *supra* note 7, s 28.

¹² For example, the Supreme Court noted in *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at paras 1–2 [*Tran* SCC] that “... successful integration of permanent residents involves mutual obligations for those new immigrants and for Canadian society This obligation [the obligation to avoid “serious criminality”] is breached when a permanent resident is convicted of a federal offence punishable by a maximum term of imprisonment of at least 10 years, or of a federal offence for which a term of imprisonment of more than 6 months has been imposed.” Permanent residents may also lose their status on other grounds of inadmissibility, such as security, violation of human or international rights, and

who are not Canadian citizens or permanent residents; they are usually admitted for strictly defined periods of time and for a specific purpose: as students, foreign workers or visitors. Protected persons and refugee claimants constitute a special group of foreign nationals who were forced to leave their home countries due to fear of persecution, torture or of risk to life; they enjoy greater protections and supports reflective of the humanitarian nature of their admission. Refugee claimants are persons who have lodged claims for protection and are awaiting decisions on them; those whose claims are eventually accepted, receive status of protected persons.

In the hierarchy of immigration statuses, foreign nationals have more limited entitlements in Canada compared to the other groups. This is reflected, *inter alia*, in the inadmissibility regime which allows for their removal, in some cases, without a hearing¹³ and always without access to immigration appeal (unless the foreign national holds a permanent resident visa or is a protected person). In contrast, permanent residents can be removed only following a tribunal hearing and, in most cases, can appeal the removal order. Finally, protected persons and refugee claimants cannot be returned to the countries of persecution/danger unless they are considered a threat to Canada or Canadians.¹⁴ These differences in the inadmissibility and removal procedures are due not only to different conceptualizations of each group's entitlement to be in Canada, but also to the different implications of removal. A permanent resident with strong and long-term connections in Canada will likely experience greater hardship than a foreign national who has been in Canada for a limited time and has not developed roots in the country. Further, protected persons and refugee claimants by definition would face not merely hardship, but risks to their lives. The understanding of these nuances is important in order to accurately assess the certainty of person's removal and ensuing consequences for the purpose of sentence determinations.

misrepresentation. IRPA, *supra* note 7, ss 34-37, 40.

¹³ For example, immigration officers can issue a removal order, without referral for the Immigration Division hearing, where a foreign national is inadmissible on the grounds of serious criminality or non-compliance with the IRPA. *Immigration and Refugee Protection Regulations*, SOR/2002-227, s 228 [IRPR].

¹⁴ IRPA, *supra* note 7, s 115.

A. Criminal Convictions/Sentences as a Trigger of Inadmissibility

Immigration legislation traditionally conceives of non-citizen admissions as a balancing act between, on the one hand, the nation's need to facilitate mobility and entry of 'desirable' newcomers and, on the other, the imperatives of protecting the safety of the host society from the 'undesirables'. To this end, inadmissibility provisions seek to guard the host nation from non-citizens who are deemed dangerous or burdensome. For permanent residents, the ability to remain in Canada is conditional, among other things, on their "good behavior." According to s. 36(1) of the *Immigration and Refugee Protection Act (IRPA)*, a permanent resident may become inadmissible on the grounds of serious criminality upon:

- (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.¹⁵

Importantly, an offence is treated as indictable even if it was prosecuted summarily.¹⁶ By effectively converting a less serious offence into a more serious one, this rule expands the reach of inadmissibility provisions.¹⁷ A permanent resident falling within one of the above grounds would suffer consequences stemming from criminal as well as immigration legislation. First, they will serve the imposed sentence and then an inadmissibility process will be commenced. For the purposes of our discussion, we will consider only inadmissibility arising from convictions in Canada as outlined in s. 36(1)(a).

¹⁵ *Ibid*, s 36(1).

¹⁶ *Ibid*, s 36(3)(a).

¹⁷ For example, use of a forged document is a hybrid offence. If prosecuted by indictment, it is punishable by a maximum of no more than ten years. *Criminal Code*, RSC 1985, c C-46, s 368.

The inadmissibility process consists of the following stages:

- (i) preparation of a report on inadmissibility and its referral to a superior immigration officer;
- (ii) referral of the report to the Immigration Division of the Immigration and Refugee Board (IRB);
- (iii) an admissibility hearing before the Immigration Division (where a removal order may be issued);
- (iv) if a permanent resident has a right to appeal, appeal of the removal order to the Immigration Appeal Division (IAD) of the IRB.

The initial inadmissibility report is prepared by an immigration officer and outlines the circumstances of the case and relevant ground(s) of inadmissibility.¹⁸ The report is referred to a superior officer (the Minister's delegate) for review. If the Minister's delegate finds the report well-founded, the case is sent to the Immigration Division of the IRB for an admissibility hearing.¹⁹ The relevant *IRPA* provisions contain the word 'may' suggesting the existence of discretion not to prepare a report or not to refer the report to the Immigration Division. The interpretation of these provisions by sentencing courts and the Federal Court as well as relevant administrative practices will be discussed in subsequent sections of the article. Such interpretation can be an important factor in assessment of the certainty of removal. If discretion is considered to be very limited, the removal may appear more certain; if discretion is broad, courts may be more likely to conclude that removal is not inevitable.

For convictions in Canada, the admissibility hearing is almost a rubber stamp process: the Division has to be satisfied that the person indeed has been convicted of the specified offence and, as per s. 36(1)(a) of the *IRPA*, either a sentence of more than 6 months was imposed or the offence carries a maximum penalty of at least 10 years of imprisonment. Extenuating circumstances that may be considered at a sentencing hearing are not considered at an admissibility hearing. Neither does the Immigration Division have the power to take into account humanitarian and compassionate factors.²⁰ As noted by the Federal Court, "[t]he Immigration

¹⁸ *IRPA*, *supra* note 7, s 44(1).

¹⁹ *Ibid*, s 44(2).

²⁰ *Canada (Minister of Citizenship and Immigration) v Fox*, 2009 FC 987 at para 42, [2010] 4 FCR 3.

Division's admissibility hearing is not the place to embark upon a humanitarian review or to consider the fairness or proportionality of the consequences that flow from a resulting deportation order. Those are consequences that flow inevitably by operation of law and they impart no mitigatory discretion upon the Immigration Division."²¹ If the Immigration Division finds the person inadmissible, it is required to issue a removal order.²² The statistics in Table 1 confirm that the absolute majority of hearings result in findings of inadmissibility and a removal order; outcomes favourable to the person concerned are extremely rare.

Table 1. Breakdown of admissibility hearings by outcome, access to information request A-2017-01601/RA

Year	Favourable to person concerned	Removal order issued	Failed to appear	Withdrawal /other	Total
2002	0	151	8	21	180
2003	4	548	111	49	712
2004	2	625	160	23	810
2005	2	727	184	34	947
2006	0	719	190	45	954
2007	1	798	191	48	1,038
2008	3	910	230	57	1,200
2009	4	1,052	225	41	1,322
2010	1	749	164	25	939
2011	2	712	184	30	928
2012	0	694	140	25	859
2013	5	430	101	17	553
2014	1	324	80	20	425
2015	3	515	131	39	688
2016	2	509	149	35	695
2017 (Jan to Aug)	0	344	64	16	424
Grand total	30	9,807	2,312	525	12,674

²¹ *Wajaras v Canada (Minister of Citizenship and Immigration)*, 2009 FC 200 at para 11, 175 ACWS (3d) 1129.

²² IRPA, *supra* note 7, s 45(d).

A removal order can be appealed to the Immigration Appeal Division (IAD) of the IRB. However, permanent residents inadmissible on the grounds of serious criminality – defined in the *IRPA* as an offence “that was punished in Canada by a term of imprisonment of at least six months” - do not have a right to appeal.²³ Thus, a term of imprisonment of over six months would make a permanent resident not only inadmissible but will also deprive them of the right to appeal. Those who do not have such a right, will be streamlined for removal,²⁴ unless they face risks in the destination country.²⁵

The IAD may grant special relief – such as a stay of removal or quashing a removal order - where humanitarian and compassionate (H&C) considerations so warrant.²⁶ In contrast to the admissibility hearing, which narrowly focuses on the fact of a conviction, the IAD undertakes a more individualized assessment of a case, weighing both the safety of the public and the interests of the person concerned. This approach is reflected in the *Ribic* factors, which guide IAD decision-makers:²⁷

- (i) the seriousness of the offence leading to the deportation order;
- (ii) the possibility of rehabilitation and the risk of re-offending;
- (iii) the length of time spent in Canada and the degree to which the appellant is established here;
- (iv) the family in Canada and the dislocation to the family that removal would cause;
- (v) the family and community support available to the appellant;

²³ *Ibid*, ss 64(1), (2).

²⁴ 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 permanent resident status, and the order must be enforced as soon as possible. *IRPA*, *supra* note 7, ss 46(1)(c), 48.

²⁵ Persons alleging risks of persecution, torture, or risk to life in destination countries can file a Pre-Removal Risk Assessment (PRRA) application. The gist of this process is discussed in part three of the comment.

²⁶ *IRPA*, *supra* note 7, ss 67, 68.

²⁷ *Ribic v Canada (Minister of Employment and Immigration)*, [1985] IABD No 4. These factors have subsequently been approved by the Supreme Court of Canada in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 SCR 84; *Al Sagban v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4, [2002] 1 SCR 133.

- (vi) the degree of hardship that would be caused to the appellant by his return to his country of nationality;
- (vii) the best interests of any child directly affected by the decision.

The above factors are non-exhaustive and the weight given to them will vary from case to case.²⁸ For instance, a violent offence and/or repeated criminal conduct will weigh heavily against the appellant, while the converse will be true if the offence is a single occurrence and is minor in nature. Similarly, strong and long-term establishment in Canada favours the appellant, while short-term residence with little connection to Canada will be of little assistance.²⁹ Connections to family, friends and community will also be important in determining the possibility of rehabilitation as the existence of strong supports is usually viewed as a factor favouring the appellant. In addition, the IAD can consider hardship – both resulting from uprooting from Canada and from removal to a country with which the appellant and their family have little or no connection.³⁰

After a hearing, the IAD can confirm the removal order, quash it or order a stay of removal. The latter option gives permanent residents a ‘second chance’: they are allowed to remain in Canada if they abide by imposed conditions for a specified period of time (usually anywhere between 6 months and 5 years).³¹ The legislation provides for a series of mandatory and optional conditions, which focus on monitoring the individual and supporting their rehabilitation.³² After a passage of specified

²⁸ *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339. For detailed discussion of these factors, see Immigration and Refugee Board (IRB), “Removal Order Appeals,” ch 9, online: <<http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RoaAmr.aspx>> [IRB, “Removal Order Appeals”].

²⁹ The factors relevant to determining the strength of an appellant’s connection are length of residence in Canada; the age of arrival to Canada; length of residence elsewhere; frequency of trips abroad and the quality of contacts with people there; place of education; location of appellant’s immediate family, friends, and professional and/or employment contacts. See *Archibald v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 747 (QL) at para 10, 95 FTR 308.

³⁰ IRB, “Removal Order Appeals”, *supra* note 28 at 21–23.

³¹ Lorne Waldman, *Canadian Immigration and Refugee Law Practice* (Toronto: LexisNexis Canada, 2010) at 421.

³² The full list of mandatory conditions can be found in section 251 of the IRPR, *supra* note 13. The conditions include not committing any federal offences, reporting changes of address, attending counselling, making reasonable efforts to obtain and/or keep employment, and others.

time, the IAD reconsiders the case and determines whether to ultimately allow or dismiss the appeal. However, if a person is convicted of another serious criminality offence, the stay is cancelled and the person is subject to removal.³³

As Table 2 demonstrates, between one third and a half of appeal cases result in stays of removal. Thus, access to appeal is an essential and only opportunity to contextually determine if removal is indeed warranted in a given case. It injects humanity into the administration of inadmissibility provisions and helps guard from their overreach. It is, thus, not surprising that preservation of the right to appeal becomes an important consideration at sentencing.

Table 2. Breakdown of IAD appeals by outcome, access to information request A-2017-01601/RA

Year	Allowed	Dismissed	Abandoned	Withdrawn /other	Stay ordered	Total
2002	1	0	0	2	1	4
2003	1	50	30	11	84	178
2004	12	101	65	17	170	365
2005	28	135	68	19	266	516
2006	58	174	53	25	347	657
2007	91	161	76	38	526	892
2008	149	180	108	114	509	1,060
2009	218	238	109	51	758	1,374
2010	262	199	93	48	653	1,255
2011	260	176	76	28	608	1,148
2012	352	193	88	20	525	1,178
2013	334	175	86	21	498	1,114
2014	374	170	74	29	372	1,019
2015	335	129	83	26	325	898
2016	265	151	77	32	331	856
2017 (Jan to Aug)	149	87	44	26	157	463
Total	2,889	2,319	1,130	507	6,130	12,975

³³ IRPA, *supra* note 7, s 68(4).

B. Interpretation of the “Term of Imprisonment” for the Purpose of Inadmissibility and Access to Immigration Appeal

The “term of imprisonment” of a particular length is often used as a measure of person’s inadmissibility or access to IAD appeal. For example, under s. 36(1)(a), a permanent resident is inadmissible where “a term of imprisonment of more than six months has been imposed.”³⁴ Section 64 deprives of the right to IAD appeal persons convicted of offences “punished... by a term of imprisonment of at least six months.”³⁵ However, the “term of imprisonment” is not defined in the *IRPA*. For example, it does not make it clear if pre-trial custody should be counted towards a term of imprisonment or whether conditional sentences constitute a term of imprisonment. Depending on interpretation the phrase, the inadmissibility regime will acquire either a wider reach or will be somewhat more constrained.

Until 2017, the predominant view at the IRB and the Federal Court was that conditional sentences constituted a “term of imprisonment.”³⁶ However, in the 2017 *Tran* decision, the Supreme Court held that, for the purpose of s. 36(1)(a), the “term of imprisonment” does not include conditional sentences.³⁷ This interpretation acknowledges that conditional sentences are used for less serious and non-dangerous offenders and that the length of a conditional sentence alone is not a reliable indicator of “serious criminality.”³⁸

With respect to pre-trial custody, the Federal Court has long held that, for the purposes of the *IRPA*, it forms part of the “term of imprisonment.”³⁹

³⁴ *Ibid*, s 36(1)(a).

³⁵ The word “punished” in section 64(2) of the *IRPA* refers to the sentence imposed, not the actual duration of incarceration. See *Martin v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 347, 341 NR 341.

³⁶ See e.g. *Adu-Poko v Canada (Minister of Citizenship and Immigration)*, [2005] IADD No 1538; *Kwan v Canada (Minister of Public Safety and Emergency Preparedness)*, [2006] IADD No 52. However, some decision-makers arrived at the opposite conclusion: see *Sadowski v Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] IADD No 637; *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2014 FC 1040, 246 ACWS (3d) 649, rev’d *Tran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 237, [2016] 2 FCR 459.

³⁷ *Tran* SCC, *supra* note 12.

³⁸ *Ibid* at paras 28, 32.

³⁹ *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FC 7, 245 FTR 170

Most of the existing caselaw concerns interpretation of the “term of imprisonment” for the purpose of eligibility for an IAD appeal,⁴⁰ but the same position has also been adopted in some cases concerning s. 36(1)(a).⁴¹ Thus, an individual who, for example, receives a 5-month sentence and a 2-month credit for pre-trial custody will be regarded as having a 7-month sentence and, hence precluded from making an IAD appeal.⁴² As a result of

[*Atwal*]; *Cheddesingh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 124, 286 FTR 310; *Jamil v Canada (Minister of Citizenship and Immigration)*, 2005 FC 758, 277 FTR 163; *Magtouf v Canada (Minister of Citizenship and Immigration)*, 2007 FC 483, 162 ACWS (3d) 650 [*Magtouf*]; *Canada (Minister of Citizenship and Immigration) v Gomes*, 2005 FC 299, 265 FTR 179. It is worth noting, however, that some IRB decisions interpreted section 64 as not including pre-trial custody. See e.g. IAD decision referred to in *Atwal* at paras 12–15.

⁴⁰ *Atwal*, *supra* note 39 at para 12; *Sherzad v Canada (Minister of Citizenship and Immigration)*, 2005 FC 757 at paras 57–61, 276 FTR 72 [*Sherzad*]; *Ariri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 834 at para 18, 180 ACWS (3d) 113 [*Ariri*]; *Brown v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 660 at paras 18–23, 2009 CarswellNat 1917 [*Brown FC*]; *Magtouf*, *supra* note 39 at paras 21–24.

⁴¹ See e.g. *Canada (Minister of Public Safety and Emergency Preparedness) v Ramos Pacheco*, [2009] IDD No 22; *Tieu v Canada (Minister of Citizenship and Immigration)*, [2005] IADD No 1735. However, such interpretation should be taken with caution. Speaking in *obiter*, the Federal Court noted in *Cartwright v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 792, 236 FTR 98 at 111–113 [*Cartwright*] that the interpretations of sections 64 and 36(1)(a) might be different as the former refers to “punishment” and the latter to “sentence.”

⁴² The conclusion hinges on the wording of section 64, which refers to the offences “punished” by six months or more rather than a “sentence” of over six months. See *Cartwright*, *supra* note 41; *Sherzad*, *supra* note 40. According to the Supreme Court caselaw, there is an important distinction between “sentence” and “punishment.” As explained in *R v Wust*, 2000 SCC 18, [2000] 1 SCR 455 [*Wust*], a “sentence” is a judicial determination of a legal sanction. It commences on the day that it is imposed and refers to the term imposed at the time of sentencing (hence, a five-month sentence will be a five-month sentence regardless of credit for pre-trial custody) (see *R v Mathieu*, *below*). In contrast, “punishment” is the infliction of the legal sanction. Although pre-trial custody is not intended as punishment when it is imposed, it can be deemed part of the punishment upon the offender’s conviction. Drawing on this distinction, the Supreme Court concluded in *Wust* that pre-trial custody can be considered part of a sentence and be credited towards it even if this has the effect of reducing the sentence below the mandatory minimum. *R v Mathieu*, 2008 SCC 21, [2008] 1 SCR 723 [*Mathieu*] – dealing with the interpretation of *Criminal Code* section 731(1)(b) on the availability of probation orders – added further nuance to the understanding of the “sentence of imprisonment.” The Supreme Court held that, in the context of access to probation,

this interpretation of the “term of imprisonment,” the inadmissibility’s reach is broader than the plain reading of ss. 36 and 64 may suggest (namely, that they refer to the term imposed at the time of sentencing).

C. Role of Collateral Immigration Consequences in Determination of Fit Sentences

In the past, collateral immigration consequences were rarely considered in sentencing, but more recently, they started being recognized as a relevant factor.⁴³ This change is likely due not only to greater judicial awareness of collateral consequences generally, but also to an increasingly restrictive access to the IAD appeal, which made immigration consequences of a conviction/sentence much more immediate and severe.⁴⁴ Under the 1976 *Immigration Act*, all permanent residents (except for those under security certificates) had access to an IAD appeal. In 1995, the right to appeal was restricted to exclude persons whom the Immigration Minister declared to be a danger to the public. In 2002, when the *Immigration and Refugee Protection Act* came into effect, a further limitation on IAD appeals was imposed: those sentenced to 2 years or more will not have access to it. In

the phrase “sentence of imprisonment” meant the term imposed by the judge at the time of sentencing, after the deduction of credit for pre-trial custody. Hence, the Court concluded at para 17: “a sentence of less than two years does not ... become a sentence of more than two years simply because the trial judge, in imposing the sentence of less than two years, took into account the time already spent in custody as a result of the offence.” At the same time, the Court acknowledged that, it is possible, on an exceptional basis, to count pre-sentence custody as part of the term of imprisonment imposed at the time of sentence. For example, such exceptions exist with respect to minimum sentences (see *Wust*, *supra* note 42) and conditional sentences (*R v Fice*, 2005 SCC 32, [2005] 1 SCR 742), and they are not overruled by *Mathieu*. Building on availability of the above exceptions and the difference between immigration and criminal contexts, the Federal Court continues to maintain its position that pre-sentence custody is a part of the “term of imprisonment.” See *Brown FC*, *supra* note 40; *Nguyen v Canada (Minister of Citizenship and Immigration)*, 2010 FC 30, 184 ACWS (3d) 773; *Arii*, *supra* note 40.

⁴³ *Pham*, appellant’s factum, *supra* note 1 at 20. See also *R v Hamilton* (2004), 72 OR (3d) 1, 186 CCC (3d) 129 (CA) [*Hamilton*]; *R v Kanthasamy*, 2005 BCCA 135, 195 CCC (3d) 182; *R v Wisniewski*, 2002 MBCA 93, 166 Man R (2d) 73; *R v Almajidi*, 2008 SKCA 56, 310 Sask R 142.

⁴⁴ For an overview of the changing access to IAD appeal, see John A Dent, “No Right of Appeal: Bill C-11, Criminality, and the Human Rights of Permanent Residents Facing Deportation” (2002) 27 *Queen’s LJ* 749.

2013, this threshold was lowered to sentences of 6 months or more. Despite the above developments, until *Pham*, it was not standard practice for either parties or courts to turn their minds to immigration consequences of a sentence. Thus, since 2013, all participants of sentencing hearings faced a steep learning curve related to the nuances of relevant immigration rules and procedures.

As the preceding sections demonstrate, the state perceives an offence committed by a non-citizen through two lenses: criminal law and immigration law. Their intersection in the context of inadmissibility provisions, at times, produces exaggerated images of criminality. Section 36(3)(a) of the *IRPA* – which treats hybrid offences as indictable for inadmissibility purposes even if those offences were prosecuted summarily – acts as a magnifying glass, amplifying the seriousness of those offences. In addition, offences punished by 6 months or more are perceived as “serious criminality” for the purpose of IAD appeal (although they would not necessarily be considered such at criminal law).⁴⁵ Finally, the long-standing interpretation of the “term of imprisonment” to include pre-sentence custody effectively curtails the right to appeal even further. Taken together, these rules and interpretations reflect an exaggerated concern over “foreign criminality” and provide for a quite expansive notion of inadmissibility. The only recent developments that slightly temper the regime’s scope are the Supreme Court’s decisions in *Pham* and *Tran*.

⁴⁵ For example, common assault, fraud under \$5,000, theft under \$5,000, possession of a stolen property under \$5,000, trespassing at night, public mischief, and flight from a peace officer may now be considered serious enough to deprive one of access to IAD. Although sentences for these offences vary significantly, depending on the circumstances and absence/presence of prior criminal record, in some cases custodial sentences of over six months would be appropriate. See generally, Clayton Ruby et al, *Sentencing*, 8th ed (Toronto: LexisNexis Canada, 2012) at 864–873; Clayton Ruby et al, *Sentencing*, 6th ed (Toronto: LexisNexis Canada, 2004) at 805, 815–820. These examples were provided in the Opposition’s response speech (Mr. Kevin Lamoureux (Liberal)) at the second reading of Bill C-43 “Faster Removal of Foreign Criminals Act,” which reduced the threshold for access to IAD appeal from two years to six months. See *House of Commons Debates*, 41st Parl, 1st Sess, No 151 (24 September 2012), online: <<http://www.ourcommons.ca/DocumentViewer/en/41-1/house/sitting-151/hansard#7684027>>.

III. EVALUATING CERTAINTY OF REMOVAL: CASELAW ANALYSIS

A number of factors are relevant to the assessment of certainty of removal: the type of offence in question; the length of imposed sentence; the immigration officers' discretion in the inadmissibility process; the immigration status of the person concerned; and the availability of avenues (other than the IAD appeal) to avoid removal. Thus, sentencing courts have to muster not only the basics of the inadmissibility process outlined in ss. 36 and 64 of the *IRPA*, but also be familiar with other aspects of the immigration system.

Section 36(1)(a) sets out two bases for serious criminality – each with different implications for sentencing:

- (i) Offences punishable by a maximum of 10 or more years of imprisonment. In relation to these offences, inadmissibility is triggered regardless of the actually imposed sentence. That sentence matters only for access to IAD appeal. A sentence of over 6 months exposes a permanent resident to certain removal, unless the CBSA exercises discretion not to proceed. If a sentence is under 6 months, then the risk of removal is somewhat harder to estimate as it would depend, first, on immigration officers' exercise of discretion, and presuming, they do proceed with inadmissibility, on the outcome of the IAD appeal.
- (ii) Offences punishable by a maximum under 10 years of imprisonment. For these offences, the actually imposed sentence will determine if inadmissibility is triggered. If the sentence is under 6 months, then no concerns over inadmissibility arise and the offender will not be at risk of immigration consequences. If a sentence is over 6 months, then it both triggers inadmissibility and deprives of the right to appeal. Then, a permanent resident faces certain removal, unless immigration authorities exercise discretion not to proceed.

Although the IAD appeal is usually the most effective way to obtain special relief on the basis of humanitarian and compassionate (H&C) considerations, there are also other avenues that may allow a person concerned to remain in Canada. In the absence of the right to appeal, he/she may explore a Pre-Removal Risk Assessment (PRRA) application or an application to remain in Canada on H&C grounds. If a sentencing court

considers that PRRA and/or H&C application are available, it may be inclined to conclude that the loss of access to IAD appeal is not detrimental to the person concerned and may give less weight to this collateral consequence.

An H&C application is a procedure entirely different from consideration of H&C factors by the IAD. It is made to the immigration minister, is paper-based and does not involve a hearing. Under s. 25 of the IRPA, the Minister has a broad power to “grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.”⁴⁶ The determination of H&C applications usually involves assessing whether an applicant will suffer either “unusual and undeserved” or “disproportionate” hardship as a result of having to comply with existing immigration rules.⁴⁷ However, this power can be exercised in relation to foreign nationals and not permanent residents. Thus, an H&C application can be made only after the removal order comes into force; until that time, the person remains a permanent resident. As this application becomes available only at the final stage of the inadmissibility process and does not stay removal, it is unlikely to be an effective alternative for the person concerned.

A PRRA is also available only to those who are ready for removal, but it narrowly focuses on the risks of torture, of persecution, of cruel and unusual treatment or punishment or risk to life in the destination country.⁴⁸ Thus, it may be relevant to a relatively small number of persons facing removal. In most cases, a successful PRRA will lead to conferral of refugee protection, barring applicant’s removal from Canada. However, persons considered inadmissible on grounds of serious criminality face a number of

⁴⁶ IRPA, *supra* note 7, s 25(1).

⁴⁷ Immigration Refugees and Citizenship Canada (IRCC), *Inland Processing Manual*, “IP 5: Immigrant Applications in Canada made on Humanitarian or Compassionate Grounds,” s 5.10 cited in *Kanthasamy v Canada (Citizenship and Immigration)*, [2015] SCJ No 61 (QL) at para 26.

⁴⁸ Keeping in mind its objective to ensure compliance with Canada’s non-refoulement obligations, an individual will not be removed until his or her PRRA is assessed, unless it is a repeat application or a PRRA that was filed after the prescribed application deadline. See IRPR, *supra* note 13, ss 162, 163, 232.

restrictions.⁴⁹ First, their PRRA can consider only the risk of torture, risk to life or risk of cruel or unusual treatment or punishment, but not the risk of persecution.⁵⁰ Second, officers must consider not only the risks to the applicants, but also dangers that they may pose to the Canadian public.⁵¹ As a result of this balancing, a person may be removed despite the existence of risks in a destination country. Finally, even if PRRA is successful, it will only lead to a stay of removal, but not to refugee protection.⁵² This stay is not permanent and may be cancelled by the Minister.⁵³

The above information makes it clear that H&C and PRRA are not true alternatives to an IAD appeal and are unlikely to effectively prevent the person's removal. Without the understanding of the nature and workings of these procedures, sentencing courts may be left with a mistaken presumption that a person has viable means to remain in Canada.

Pham pushed sentencing courts to venture further into complex and less unfamiliar area of immigration law. How are they navigating these complexities? What are their resulting conclusions on the certainty of removal and how do these conclusions impact sentence determinations? The foregoing analysis is based on the review of sentencing decisions made between March 13, 2013 (the date of *R v Pham* decision) and March 13, 2017.⁵⁴ The Quicklaw noteup of the *Pham* decision turned up more than 300 lower court decisions. However, these results included discussion of various types of collateral consequences, not only immigration ones. Hence, a more focused search was conducted by using keywords 'sentencing',

⁴⁹ Importantly, serious criminality is defined differently than for the purpose of the IAD appeal. Section 112(3)(b) of the IRPA defines it as "a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence 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."

⁵⁰ *Ibid*, s 113(d).

⁵¹ Where these extraordinary grounds of refusal are to be considered, the person concerned must be provided with a written assessment related to the grounds in question and allowed 15 days to submit a response. See IRPR, *supra* note 13, ss 172(1), (2).

⁵² IRPA, *supra* note 7, ss 112(3)(b), 114(1)(b).

⁵³ *Ibid*, s 114(2).

⁵⁴ The search captured decisions of all levels of courts in all provinces (but not territories). Due to the author's lack of proficiency in French, only Quebec decisions available in English were reviewed.

'immigration', 'consequences', and 'collateral'. A total of 89 trial and appellate decisions discussing collateral immigration consequences was identified.⁵⁵ Out of these, 63 decisions dealt with permanent residents and touched upon questions of certainty of removal; the rest involved foreign nationals or discussed the validity of guilty pleas in light of immigration consequences. Geographically, the decisions were represented as follows: 18 from British Columbia; 2 from Alberta; 1 from Saskatchewan; 4 from Manitoba; 34 from Ontario; 4 from Quebec.

For the purpose of analysis, the cases were broken down into two groups: those with fit sentences well over 6 months (40 cases) and those with fit sentences in the range of 6 months (23 cases). This division reflects the approach developed in jurisprudence, namely that certain removal can factor into decisions on sentence mitigation in two circumstances: (1) where deportation is inevitable, but for pragmatic reasons some reduction in the term of imprisonment may be warranted, and (2) where deportation can be avoided by a modest adjustment to the sentence.⁵⁶

A. Sentences Over 6 Months

Following *Pham*, courts have become more alert to the 6-month cutoff for the purposes of the IAD appeal. However, they are ultimately guided by the principle of proportionality and recognize that in some cases, a fit sentence will always be over 6 months. Where the right of appeal cannot be preserved, the question turns on whether a sentence should nevertheless be slightly mitigated to take into account the collateral consequence of removal. The existing caselaw does not reflect a uniform position on this issue. One line of cases follows *R v Critton*, where the Superior Court of Ontario concluded that certain deportation may, in some circumstances,

⁵⁵ The initial search turned up close to 200 decisions, but upon review, only 89 of them were identified as relevant for the purpose of this study. A large number of decisions in the initial search either contained only one-to-two sentences with peripheral mention of immigration consequences and did not involve any substantial discussion of that factor or mentioned immigration consequence in description of cases cited by the defence or the Crown.

⁵⁶ *Hamilton*, *supra* note 43 at para 156.

serve to mitigate the severity of a sentence.⁵⁷ The other line of cases does not consider certain removal a relevant consideration.⁵⁸

In *Critton*, the court justified mitigation on purely pragmatic grounds, namely:

- (1) the risk of incomplete rehabilitation on release from custody is not a risk imposed upon the Canadian people
- (2) frequently, the offender subject to deportation serves "harder time" in Canada because he or she is incarcerated a significant distance from family who are resident in a foreign country
- (3) Canadians are spared the expense of continued incarceration of the accused where the offender is deported.⁵⁹

Although *Critton* involved a foreign national, it has also been invoked in sentencing of permanent residents.⁶⁰ However, in the latter case, ground (2) will not apply as permanent residents are likely to have family in Canada. At the same time, parity-related reasons can be added to the list. Persons under removal orders are not eligible for parole until they become eligible for full parole.⁶¹ Hence, they are likely to end up spending longer in detention and a slight reduction of the overall sentence may help mitigate the effect of this rule.

Not all of the examined decisions followed or even mentioned *Critton*. In fact, four different approaches regarding certainty of removal have been discovered in the sample:

(i) Certainty of removal is explicitly mentioned and sentences are slightly mitigated. Out of the total of 40 cases with sentences over 6 months, the certainty of deportation was taken into account to slightly reduce a sentence in 6 cases.⁶² In 3 more cases, *Critton* was not mentioned specifically,

⁵⁷ *R v Critton*, [2002] OJ No 2594 (QL) at para 86, 54 WCB (2d) 543 [*Critton*]; *R v Edwards*, 2015 ONCA 537 at para 7.

⁵⁸ In fact, *Critton* itself acknowledged the existence of conflicting caselaw on the issue – see paras 77–86. See also discussion in *R v Grant*, 2015 ONCJ 751 at paras 41–51.

⁵⁹ *Critton*, *supra* note 57 at para 86.

⁶⁰ As previously mentioned, there are significant differences in the inadmissibility process and its consequences for permanent residents versus foreign nationals.

⁶¹ *Corrections and Conditional Release Act*, SC 1992, c 20, s 128(4).

⁶² *R v Boyce*, 2016 ONSC 1118 (two years less a day for conspiracy to import controlled substance); *R v Ali*, 2016 ONSC 2600 [*Ali* ONSC] (5.5 years for importing cocaine); *R v Jha*, 2015 ONSC 4656 (ten years for second degree murder); *R v Virk*, 2014 BCPC 289, 117 WCB (2) 634 (global sentence of four years on several counts of assault and possession of prohibited firearms); *R v Kim*, 2014 BCPC 1, 111 WCB (2d) 525; *R v*

but judges took into account all personal circumstances of the offender, including the possibility of removal.⁶³

(ii) Certainty of removal is not mentioned explicitly and its role in sentence determination is unclear. In 19 cases, the certainty of deportation was not discussed and *Critton* was not mentioned.⁶⁴ In some of them, the reference to immigration consequences was so brief that it was difficult to determine if they played any role at all. In others, courts focused on *Pham* and emphasized that reducing a sentence to under 6 months would lead to an unfit sentence.

(iii) Certainty of removal or other immigration consequences need not be considered. 6 decisions reflected the position that immigration consequences do not need to be taken into account if they cannot make any difference for access to IAD appeal. For example, in *R v Adam*,⁶⁵ a court stated that ‘there is no basis to consider the risk of Mr. Adam being

GW, 2017 ONSC 3149.

⁶³ *R v Azizi*, 2017 MBQB 22 (six years for robbery); *Tweneboah-Koduah*, *supra* note 5 (26 months for sexual assault); *R v Dehal*, 2016 BCSC 479 (three years for possession of ketamine for the purpose of trafficking).

⁶⁴ *R v Gonzales*, 2016 BCCA 436, 134 WCB (2d) 446 (eight months for identity theft); *R v SB*, 2014 SKQB 202, 449 Sask R 263 (three years for sexual assault); *R v DRC*, 2016 ONSC 5169 (4.5 years for five counts of assault); *R v Dusanjh*, 2016 ONSC 4317 (three years, three months for robbery); *R v Stein*, 2015 ONCA 720 (12 months for possession of cocaine for the purpose of trafficking); *R v Thomas*, 2017 BCSC 982 (five years and six months for two counts of sexual assault of persons under 16; two counts of uttering threats; one count of having a firearm or imitation for a dangerous purpose); *R v Clase*, 2017 ONSC 2484 (one count of sexual assault; one count of assisting himself to commit an indictable offence by means of choking); *R v Diaz*, 2017 ONSC 1883 (20 months for sexual assault); *R v Uribe*, 2013 ONSC 6830, 111 WCB (2d) 108 (18 months for robbery); *R v Sanghera*, 2016 BCCA 251, 131 WCB (2d) 326 (three years for aggravated assault); *R v Bizimana*, 2016 MBB 172, 133 WCB (2d) 369 (37 months for aggravated assault); *R v Dhillon*, 2013 BCPC 259, 109 WCB (2d) 311 (one year for dangerous driving causing death); *R v Aleksev*, 2016 ONSC 6080, 133 WCB (2d) 172 (two years less a day for criminal negligence causing death); *R v Kabanga-Muanza*, 2014 ONSC 7521, 119 WCB (2d) 630 (15 months for drug trafficking); *R v Rich*, 2014 BCCA 24, 111 WCB (2d) 629 (2.5 years for sexual exploitation); *R v Young*, 2014 BCSC 1195 (18 months concurrently for breaking and entering, robbery, assault with a weapon, and unlawful confinement); *R v Jahanraakhsan*, 2013 BCCA 322, 108 WCB (2d) 577 (four years for multiple counts of possession and use of forged credit cards); *R v Crespo*, [2016] ONCA 454, 132 OR (3d) 287 (15 months for sexual assault); *R v Todorov*, 2015 QCCQ 8505 (two years less a day for breaking and entering and sexual assault).

⁶⁵ *R v Adam*, 2017 ONSC 2526.

deported' since Mr Adam's sentence was considerably over 6 months.⁶⁶ In *R v Gill*,⁶⁷ the court said that "potential collateral consequences regarding deportation do not arise"⁶⁸ since a fit sentence would be significantly over 6 months.⁶⁹ In *R v Zhai*,⁷⁰ the court wrote that it was not necessary to factor immigration consequences into the quantum of sentence. In *R v Stankovic*,⁷¹ the court decided not to consider immigration consequences because they would not make any difference for the access to an IAD appeal. In *R v Jihad*,⁷² the same position was agreed upon by both the Crown and defence. In *R v Lauture*,⁷³ it was noted that nothing could be done to address immigration consequences as a sentencing court was not an appropriate forum to consider them.

(iv) Removal is not considered inevitable or sentencing courts cannot conclusively determine the nature of immigration consequences and, hence, this factor is not given much or any weight. In 2 cases, courts emphasized the existence of discretion not to commence inadmissibility proceedings. For example, in *R v Carrera-Vega*,⁷⁴ a judge noted that serious criminality created a possibility of removal, but did not mean that it would necessarily occur. He decided it would be contrary to *Pham* to alter a sentence on the basis of 'sheer speculation'⁷⁵ of what might happen as a result of a sentence of incarceration. Similarly, in *R v Brown*,⁷⁶ a court noted that inadmissibility creates only potential for deportation, but does not mean that the offender will be deported. In 4 other cases – 2 of them involving refugees – the court could not ascertain what the immigration consequences would be. In *R v*

⁶⁶ *Ibid* at para 23 (five years on each count of robbery).

⁶⁷ *R v Gill*, 2015 BCSC 1907.

⁶⁸ *Ibid* at para 62.

⁶⁹ *Ibid* (three years for sexual assault).

⁷⁰ *R v Zhai*, 2016 BCSC 2495 at para 56 (two counts of trafficking in a controlled substance; one count of unauthorized transfer of a firearm, which carries a mandatory three-year minimum).

⁷¹ *R v Stankovic*, 2015 ONSC 6246 (three years for sexual assault).

⁷² *R v Jihad*, [2015] OJ No 7240 (QL) (66 months for attempted murder).

⁷³ *R v Lauture*, 2015 QCCQ 3470 (four years for robbery, conspiracy, and aggravated assault).

⁷⁴ *R v Carrera-Vega*, 2015 ONSC 4958.

⁷⁵ *Ibid* at para 64 (6.5 years for drug importation).

⁷⁶ *R v Brown*, 2015 ONSC 6430 (18 months for robbery).

Ali,⁷⁷ (a refugee from Iraq convicted of aggravated assault), a letter from the Canada Border Services Agency (CBSA) indicated that his status as a refugee was under review, which may or may not result in deportation. Parties agreed that due to the unknown outcome of the review, collateral consequences will not be taken into account for the purpose of sentencing.⁷⁸ In *R v Henareh*,⁷⁹ for similar reasons, the court concluded that exact immigration consequences could not be ascertained. In *R v Gamarra Moran*⁸⁰ and *R v Onwualu*,⁸¹ the judges noted that the question of whether the risk of removal will be realized lies outside the jurisdiction of the sentencing court.

B. Sentences Under 6 Months

Where a fit sentence is in the range of 6 months, *Pham* prompts courts to consider if a sentence at the bottom range or even slightly below it should be imposed in order to avoid immigration consequences. The type of those consequences depends on whether a given offence is punishable by a maximum under 10 years of imprisonment or by a maximum of 10 or more years. Out of a total of 23 decisions, 17 involved offences with a possible maximum of 10 or more years of imprisonment;⁸² hence, the immediate immigration consequence at stake was availability of IAD appeal. In the 6 remaining cases, the offences carried a maximum under 10 years and

⁷⁷ *R v Ali*, 2015 BCSC 2539.

⁷⁸ However, even if consequences could be ascertained, it is not likely that they would have made a difference due to the seriousness of the offence. Mr. Ali was sentenced to 8.5 years.

⁷⁹ *R v Henareh*, 2015 BCSC 2455 (possession of opium for the purpose of trafficking).

⁸⁰ *R v Gamarra Moran*, 2015 QCCQ 12400 (12 months for breaking and entering).

⁸¹ *R v Onwualu*, 2015 QCCA 1515, JE 2015-1560 [Onwualu].

⁸² *R v Pinas*, 2015 ONCA 136, 120 WCB (2d) 11 [Pinas]; *R v Nassri*, 2015 ONCA 316, 125 OR (3d) 578 [Nassri]; *R v Zheng*, 2013 ONSC 4582, 107 WCB (2d) 813 [Zheng]; *R v Abude*, 2016 BCSC 543 [Abude]; *R v Ameeri*, 2016 BCSC 1187 [Ameeri]; *R v Zhou*, 2016 ONSC 3233 [Zhou]; *R v Gomez*, 2017 BCPC 7, 136 WCB (2d) 313 [Gomez]; *R v Gugaruban*, 2013 ONSC 3243 [Gugaruban]; *R v Vu*, 2015 ONCJ 432 [Vu]; *R v Layugan*, 2016 ONSC 2077, 129 WCB (2d) 622 [Layugan]; *R v Atta*, 2016 ONCJ 34 [Atta]; *R v Jin*, 2016 ONSC 1194 [Jin]; *R v Orders*, 2014 BCSC 771, 113 WCB (2d) 153 [Orders]; *R v Habeta*, 2014 ABPC 110, 113 WCB (2d) 802 [Habeta]; *R v Dhindsa*, 2014 MBPC 55, 119 WCB (2d) 319 [Dhindsa]; *R v RL*, 2013 ONCJ 617, 110 WCB (2d) 369 [RL]; *R v Al-Mashwali*, 2015 ABPC 240 [Al-Mashwali].

immigration consequence revolved around a question of whether inadmissibility will be triggered at all.⁸³ Some decisions made a clear distinction between these two types of cases, but others merely used general reference to ‘immigration consequences’ without naming what specifically they might entail.

Like in cases with sentences well above 6 months, there is no uniformity in courts’ perceptions of the certainty of removal. 15 out of 23 decisions adopted a working presumption that deportation will follow.⁸⁴ Although often not specifically stating that the individual faces certain removal, they do speak of harsh consequences of a sentence over 6 months, which seems to suggest that removal is considered almost certain. In 6 other decisions, the reasons do not allow ascertaining if the risk of removal played any particular role in imposition of a sentence under 6 months or of a discharge.⁸⁵ In 2 cases, the court acknowledged that removal would happen only after consideration of the circumstances by immigration officials and, hence, could not be considered automatic.⁸⁶

C. Counsel Submissions on Immigration Consequences

As seen from above, judicial positions on the certainty of removal vary quite significantly. While some of these differences can be attributed to the peculiar circumstances of each case, the nature of defence’s submissions regarding immigration consequences may also be a contributing factor. Out of 40 cases with fit sentences over 6 months, only 1 decision – *R v Ali*⁸⁷ – mentioned an affidavit of an immigration lawyer explaining immigration

⁸³ *R v Wheatley*, 2017 ONCJ 175, 138 WCB (2d) 163 [*Wheatley*]; *RC*, *supra* note 5; *R v Frater*, 2016 ONCA 386 [*Frater*]; *R v Carlisle*, 2016 ONCA 950 [*Carlisle*]; *R v Morris*, 2015 ONCJ 591 [*Morris*]; *R v Zhang*, 2017 BCCA 185, 138 WCB (2d) 317 [*Zhang*].

⁸⁴ *Pinas*, *supra* note 82; *Nassri*, *supra* note 82; *Zheng*, *supra* note 82; *Abude*, *supra* note 82; *Jin*, *supra* note 82; *Dhindsa*, *supra* note 82; *Zhou*, *supra* note 82; *Gomez*, *supra* note 82; *Gugaruban*, *supra* note 82; *Vu*, *supra* note 82; *R v Carlisle*, *supra* note 83; *Zhang*, *supra* note 83; *RC*, *supra* note 5; *Frater*, *supra* note 83; *Wheatley*, *supra* note 83. Five of these (the last five) involved offences with a maximum under ten years.

⁸⁵ *Layagan*, *supra* note 82; *R v RL*, *supra* note 82; *Morris*, *supra* note 83; *Atta*, *supra* note 82; *Orders*, *supra* note 82; *Ameeri*, *supra* note 82. Discharge was granted in the following cases: *R v Mata-Escobar*, [2015] OJ No 7142 (QL); *R v MA*, 2014 ONCJ 667, 118 WCB (2d) 183.

⁸⁶ *AlMashwali*, *supra* note 82; *Habeta*, *supra* note 82.

⁸⁷ *Ali* ONSC, *supra* note 62.

consequences. In contrast, a higher proportion of cases with sentences in the range of 6 months (6 out of 23) included an opinion letter of an immigration lawyer. The rest of the decisions did not mention such evidence and only referred to the *IRPA* provisions on inadmissibility and/or *Pham*. It should be noted, however, that court transcripts were not analyzed and it is possible that submission on the issue were made, but were not mentioned in the decisions. Arguably, the lack of complete and detailed information on immigration procedures and their consequences may skew judicial assessment not only of the certainty of removal, but also of its relevance as a factor in sentence determination.⁸⁸ The contrasting pairs of cases described below demonstrate how the nature of the defence's argument and the level of detail on relevant immigration processes can make a difference in the final outcome.

The first pair – *Nassri* and *Onwualu* – deals with appeals seeking a reduction of 9-month sentences in order to preserve the right to appeal. In *Nassri*, the appellant was sentenced to 9 months of imprisonment for robbery and possession of a weapon. On appeal, he argued that potential removal to Syria made the sentence disproportionate. The Ontario Court of Appeal acknowledged that Syria was one of the most dangerous places in the world and found that a sentence under 6 months was within range, ultimately imposing 6 months less 15 days. The court accepted defence's evidence (based on the opinion of an immigration lawyer) that it was 'almost certain' that a case would be referred for an admissibility hearing and a removal order will be issued. In contrast, in *Onwualu*, the Quebec Court of Appeal refused to reduce a 9-month sentence for simple possession of 8 grams of crack cocaine. The court concluded that it did not need to consider the risks that Mr. Onwualu may face in his country of origin (Nigeria). The court emphasized that this task fell on immigration officials and not the sentencing court:

⁸⁸ However, it is important to acknowledge that detailed information does not always make the court's determination of the certainty of removal easy and clear cut. For example, in *R v Henareh*, *supra* note 79, an immigration officer was called as a witness to provide a step-by-step explanation of the inadmissibility process as it is applied to a refugee (Mr. Henareh was a refugee). The court ultimately concluded that immigration consequences were unclear, as much depended on the immigration officials' evaluation of Mr. Henareh's circumstances, the conditions in the destination country, and other factors.

[51] Sections 112 to 115 of the IRPA provide for a pre-removal risk assessment in most cases where an individual is subject to a removal order....

[52] It is therefore not for the courts to substitute themselves for the mechanisms set out in the IRPA so as to proceed to a review of pre-removal risks as part of the sentencing decision following a criminal offence. On the contrary, the courts must rather assume that the assessment and review mechanisms set out in the IRPA will be effective in preventing the offender from being sent back to a country where he is at risk of persecution...⁸⁹

The different outcomes in *Onwualu* and *Nassri* can be explained in part by the differences in courts' characterizations of the immigration process and its consequences. In *Nassri*, the court was made aware that the appellant could file a PRRA application in order to highlight to the immigration authorities the risks he might face upon removal to Syria. However, at the time of the appeal, the assessment was not completed and its outcome was unknown. The affidavit of an immigration lawyer explained why PRRA would be futile, making an IAD appeal the only viable option to avoid removal. This information was an important factor in Ontario Court of Appeal's conclusion that Mr. Nassri's removal would be 'virtually certain' in the absence of access to the IAD and, correspondingly, in the ultimate decision to vary the sentence.

In contrast, in *Onwualu*, no affidavit from an immigration lawyer was submitted (at least there is no mention of it in the decision). The Quebec Court of Appeal construed availability of a PRRA as the basis to presume that Mr. Onwualu's removal was not certain and automatic. The scarcity of evidence about the appellant's social situation, family circumstances, prospects for rehabilitation, or the risk of re-offending could have also contributed to the overall conclusion not to vary the sentence. Had more detailed information been provided, especially keeping in mind limitations of PRRAs, it might have led the Court to evaluate the case quite differently.

The second pair of cases – *Habeta* and *AlMashwali* – involved applications for discharge in order to avoid triggering inadmissibility provisions.⁹⁰ In *R v Habeta*,⁹¹ a refugee from Ethiopia was convicted of

⁸⁹ *Onwualu*, *supra* note 81 at paras 51–52.

⁹⁰ A discharge does not lead to a conviction and, thus, does not trigger section 36(1). Assault causing bodily harm is punishable by a maximum of ten years and the use of a forged document also carries a maximum of ten years if prosecuted by indictment. See *Criminal Code*, *supra* note 17, ss 267, 368. Hence, discharge was the only way to avoid triggering inadmissibility in both cases.

⁹¹ *Habeta*, *supra* note 82.

assault causing bodily harm. In *R v Al-Mashwali*⁹² a refugee claimant from Yemen was convicted of producing a forged repair invoice for a car that he sold. In both cases, courts accepted that removal was not automatic and that if it were to happen, it would be only after immigration officials reviewed the cases. In *Habeta*, the defence argued that the extreme fear and anxiety that the very prospect of removal will cause Mr. Habeta would make a conviction a disproportionate penalty. The court accepted the argument. It is likely that other factors such as the absence of prior criminal record, remorse, and a positive pre-sentence report contributed to the decision to allow for a discharge.⁹³ In contrast, in *Al-Mashwali*, the application for discharge was rejected. Taking the approach similar to *Onwualu*, the court concluded:

[I]t would be wrong for me to grant a discharge to Mr. Al-Mashwali on the assumption that if I do not grant a discharge, and a conviction is entered against him, that those who are granted discretion under the IRPA will improperly exercise that discretion against Mr. Al-Mashwali's interests. To make that assumption is to presume, without a factual foundation, that those entrusted with powers under the IRPA will abuse them.⁹⁴

The defence produced a letter from an immigration lawyer explaining consequences of a criminal record, but the court concluded that opinion evidence on matters of domestic law was not receivable. The exact content of the letter is not known, but, surprisingly, there are some inaccuracies in the court's characterization of the inadmissibility process, which factor into the overall assessment of the certainty of removal and the gravity of immigration consequences of a conviction. For example, it noted that the Immigration Division can make one of four possible decisions, only one of those being issuance of a removal order. However, the court did not acknowledge that the Division has no discretion not to issue a removal order if it finds the person inadmissible.⁹⁵ The court also overemphasized immigration officers' discretion not to proceed with the inadmissibility process; as will be shown below, no such discretion exists where a foreign national is involved. Finally, the court mentioned that the Minister may

⁹² *Al-Mashwali*, *supra* note 82.

⁹³ A discharge was considered to be within range, although injuries were non-trivial.

⁹⁴ *Al-Mashwali*, *supra* note 82 at para 42.

⁹⁵ The removal process would be very different had Mr. Al-Mashwali received status of a protected person. However, his refugee claim was pending at the time of sentencing.

choose to stay a removal order, but such stays are not permanent and persons inadmissible on criminality grounds usually cannot benefit from them.⁹⁶

IV. FEDERAL COURT ON DISCRETION IN INADMISSIBILITY PROCESS

Several cases in the sample gave much weight to the existence of immigration officers' discretion not to proceed with inadmissibility determination, concluding as a result that removal was far from given. While the number of such cases is relatively small, it is important to ascertain the scope of officers' discretion. For this purpose, we turn to Federal Court jurisprudence and immigration processing manuals.

As outlined in section II, the discretion not to proceed is located at the first two stages of the process, namely, the preparation of a report on inadmissibility and referral of the report to the Immigration Division. Section 44 of the IRPA, which governs those stages, reads:

44(1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing...⁹⁷

The above provisions give rise to several questions:

- (i) Under s. 44(1), does an officer who is of the opinion that a permanent resident is inadmissible for serious criminality have discretion not to prepare and transmit a report to the Minister?
- (ii) What is the meaning of "relevant facts" under s. 44(1), namely, are only facts related to the conviction relevant or are personal circumstances of the permanent resident, including humanitarian and compassionate (H&C) considerations, relevant, too?
- (iii) Under s. 44(2), what factors is the Minister to take into account in forming an opinion whether the report is well-founded?

⁹⁶ The Minister may order stays or temporary administrative deferrals of removal in situations of humanitarian crisis. Administrative deferrals of removal are currently in place for certain regions in Somalia, the Gaza Strip, Syria, Mali, the Central African Republic, South Sudan, Libya, Yemen, and Burundi. See CBSA, "Removal from Canada," online: <<https://www.cbsa-asfc.gc.ca/security-secureite/rem-ren-eng.html>>.

⁹⁷ IRPA, *supra* note 7, s 44 [emphasis added].

(iv) Under s. 44(2), does the Minister have discretion not to refer a report to the Immigration Division?⁹⁸

The above issues have been discussed in both processing manuals of the immigration department and Federal Court jurisprudence. The Manuals support the interpretation that discretion exists under both s. 44(1) and 44(2). For example, with respect to the preparation of a report, they say:

[T]his discretion gives officers flexibility in managing cases where no removal order will be sought, or where the circumstances are such that the objectives of the Act may or will be achieved without the need to write a formal inadmissibility report under the provisions of A44(1).⁹⁹

The Manuals makes it clear that such discretion is to be exercised sparingly and a record of the decision is to be kept for future reference.¹⁰⁰ The Manuals outline factors to be considered when deciding whether to write a report under s. 44(1), namely:

- In minor criminality cases, is a decision on rehabilitation imminent and likely to be favourable?
- Has the permanent resident been convicted of any prior criminal offence? Based on reliable information, is the permanent resident involved in criminal or organized criminal activities?
- What is the maximum sentence that could have been imposed?
- What was the sentence imposed?
- What are the circumstances of the particular incident under consideration?
- Did the conviction involve violence or drugs?¹⁰¹

If a report is prepared, a permanent resident is to be informed of the criteria used to assess their case and provided with an opportunity to make submissions.¹⁰² At this stage, the officer will consider factors such as the individual's age at the time of acquiring permanent residence, the length of their residence in Canada, the degree of establishment, location of family

⁹⁸ *AMM v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 809, [2010] 3 FCR 291 at para 12 [AAM].

⁹⁹ Immigration Refugees and Citizenship Canada (IRCC), *Processing Manual*, "ENF 5 - Writing 44(1) Reports," online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf05-eng.pdf>> at 8.

¹⁰⁰ *Ibid* at 10.

¹⁰¹ *Ibid* at 9.

¹⁰² *Ibid* at 12.

and family support responsibilities, criminal activity in which he/she was involved and any other factors the officer deems appropriate.¹⁰³

Similarly with respect to s. 44(2), the Manuals suggest existence of discretion not to refer a report to the Immigration Division.¹⁰⁴ It instructs that exercise of discretion should be guided by the same factors that are considered in writing s. 44(1) reports.¹⁰⁵ In addition, Minister's delegates need to consider the seriousness of the offence, criminal history, length of sentence, and prospect of rehabilitation.¹⁰⁶ For instance, cases like *R v Carrera-Vega* and *R v Brown* (discussed in section III(A)), which involved serious offences of drug trafficking and robbery respectively, would be extremely unlikely to trigger positive exercise of discretion. At the same time, sentencing courts in those cases referred to the discretion not to proceed and concluded that removal was not a given.

The author filed an access to information request seeking to find out the annual breakdown of cases in which discretion under ss. 44(1) and (2) was exercised. The CBSA responded that information on the exercise of discretion under s. 44(1) was not collected electronically and hence could not be reported. With respect to decisions not to refer a report under s. 44(2), the system could provide information only from November 2015 onwards (see table 3).¹⁰⁷ Although this data is not sufficient to draw any generalized conclusions, it is in line with previously mentioned instructions to the officers that the discretion is to be exercised only very rarely. Hence, sentencing courts should not be overly reliant on the existence of discretion

¹⁰³ *Ibid.*

¹⁰⁴ IRCC, *Processing Manual*, "ENF 6 - Review of Reports Under Subsection A44(1)," online: <<https://www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf06-eng.pdf>> at 34-38 [IRCC, ENF 6]. For example, in *R v Ali*, 2015 MBCA 64, 319 Man R (2d) 298 [*Ali* MBCA], the CBSA exercised its discretion not to refer a case to the Immigration Division. The case involved a permanent resident from Somalia sentenced to nine months of imprisonment for dangerous operation of a motor vehicle causing bodily harm. Discretion not to pursue deportation was also exercised in *R v Vazquez-Cabello*, 2015 ABCA 214, 602 AR 129 (convictions of attempted sexual exploitation and breach of recognizance).

¹⁰⁵ IRCC, ENF 6, *supra* note 104 at 33. For a list of factors, see page 34.

¹⁰⁶ *Ibid* at 35-36.

¹⁰⁷ The Field Operational Support System (FOSS), which was used prior to November 2015, was not collecting such data in a reliable manner.

and can safely presume that in the absence of IAD appeal removal is virtually certain.

Table 3. Minister’s delegates’ exercise of discretion not to refer an inadmissibility report to the Immigration Division of the IRB, A-2017-12736/MEL (CBSA)

Year	Number of cases
2015	1
2016	1
2017 (Jan to Aug)	0

Despite the instructions found in the Manuals, a number of cases sought further clarification on the interpretation of s. 44 from the Federal Court. To date, the jurisprudence remains somewhat mixed,¹⁰⁸ but generally accepts that some discretion exists, at least with respect to permanent residents. Some judges opine that the discretion under ss. 44(1) and (2) is broad enough to consider factors outlined in the Manuals, including those that touch upon humanitarian and compassionate considerations. This is, for example, the position taken by Madam Justice Snyder in *Hernandez*.¹⁰⁹ However, the predominant view (both prior and post-*Hernandez*) is that such discretion is more limited. For example, in *Correia*¹¹⁰ Justice Phelan concluded that only conviction-related issues, but not H&C, rehabilitation or other factors could be taken into account. He characterized the process as “a very limited inquiry being essentially a confirmation that the conviction was in fact handed down.”¹¹¹ This position was subsequently adopted by Justice von Finckenstein in *Leong*.¹¹²

¹⁰⁸ This has been acknowledged by judges: *Spencer v Canada (Minister of Citizenship and Immigration)*, 2006 FC 990 at para 15, 298 FTR 267 [*Spencer*]; AMM, *supra* note 98 at para 32.

¹⁰⁹ *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, [2006] 1 FCR 3. See also a similar approach in *Spencer*, *supra* note 108.

¹¹⁰ *Correia v Canada (Minister of Citizenship and Immigration)*, 2004 FC 782, 253 FTR 153.

¹¹¹ *Ibid* at paras 22–23. The same point was made in *v Canada (Solicitor General)*, 2004 FC 1126 at para 19, 256 FTR 298 [*Leong*]: “Issues relating to humanitarian and compassionate considerations or the safety of the Applicant are obviously vital to the Applicant. They have no place in these routine administrative proceedings. Rather the Act sets out specific procedures for dealing with them in ss. 25, and 112 respectively.”

¹¹² *Leong*, *supra* note 111.

In *Cha*,¹¹³ the Federal Court of Appeal suggested that there is little discretion under both s. 44(1) and (2) and that nothing beyond conviction could be considered. However, given that the case concerned a foreign national and the Minister's delegate was empowered to make a removal order without referral to the Immigration Division, the Court specified that it did not wish to be taken as approving or disapproving of earlier determinations in *Hernandez*, *Leong* and *Correia*, which concerned permanent residents.¹¹⁴ The Court of Appeal concluded that the scope of discretion may vary, depending on the grounds on inadmissibility, whether the person concerned is a permanent resident or a foreign national, and whether the report has to be referred to the Immigration Division.¹¹⁵ The Court held that officers have no discretion not to proceed in relation to foreign nationals:

[T]he wording of sections 36 and 44 of the Act and of the applicable sections of the Regulations does not allow immigration officers and Minister's delegates, in making findings of inadmissibility under subsections 44(1) and (2) of the Act in respect of persons convicted of serious or simple offences in Canada, any room to manoeuvre apart from that expressly carved out in the Act and the Regulations. Immigration officers and Minister's delegates are simply on a fact-finding mission, no more, no less. Particular circumstances of the person, the offence, the conviction and the sentence are beyond their reach. It is their respective responsibility, when they find a person to be inadmissible on grounds of serious or simple criminality, to prepare a report and to act on it.¹¹⁶

Given that *Cha* left the conclusions in *Hernandez* and *Correia* untouched, officers are considered to have some discretion under ss. 44(1) and (2) in relation to permanent residents.¹¹⁷ However, there is no consensus on what the scope of that discretion is.¹¹⁸ Generally, the majority

¹¹³ *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126, [2007] 1 FCR 409 [Cha].

¹¹⁴ *Ibid* at para 13.

¹¹⁵ *Ibid* at para 22.

¹¹⁶ *Ibid* at para 35.

¹¹⁷ For example, AMM, *supra* note 98, reviewed prior caselaw and suggested that there is discretion in case of permanent residents, but not foreign nationals.

¹¹⁸ *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, [2009] 1 FCR 675, noted at para 14 that in *Cha*, *supra* note 113, "the question was left open whether some minimal amount of discretion was available." In *Spencer*, *supra* note 108, the Court held that officers may take into account factors outlined in the Manual.

of post-*Hernandez* jurisprudence holds that it is rather narrow.¹¹⁹ For instance, in *Awed*, Justice Mosley interpreted the word ‘may’ in s. 44(1) not as connoting discretion, but as merely authorizing an officer to perform an administrative function.¹²⁰ Relying on *Awed*, he reemphasized in *Richer* that the IRPA does not empower officers to consider personal factors in making s. 44(1) reports.¹²¹ *Melendez* provides the best summary of the existing Federal Court jurisprudence on ss. 44(1) and (2):

1. There is conflicting case law as to whether an immigration officer has any discretion under subsection 44(1) of the IRPA beyond that of simply ascertaining and reporting the basic facts which underlie an opinion that a permanent resident in Canada is inadmissible.

2. Nevertheless, the jurisprudence and the Manual do suggest that a Minister's delegate has a limited discretion, when deciding whether to refer a report of inadmissibility to the Immigration Division pursuant to subsection 44(2) or to issue a warning letter, to consider H&C factors, including the best interests of a child, at least in cases where a permanent resident, as opposed to a foreign national, is concerned.

3. Although the Minister's delegate has discretion to consider such factors, there is no obligation or duty to do so.

4. However, where H&C factors are presented to a delegate of the Minister, the delegate's consideration of the H&C factors should be reasonable in the circumstances of the case, and in cases where a delegate rejects such factors, the reasons for rejection should be stated, even if only briefly.¹²²

V. CONCLUDING REFLECTIONS

The nature of immigration consequences that a given individual is likely to face depends on a variety of factors, including the person's immigration status (permanent resident/foreign national/refugee claimant/protected person), the type of offence committed (with reference to the maximum

¹¹⁹ The Federal Court of Appeal noted this trend in *obiter* in *Bermudez*: “... a number of decisions post *Hernandez* ... have tended to significantly narrow the discretion contemplated at section 44 of the IRPA in *Hernandez*.” See *Bermudez v Canada (Citizenship and Immigration)*, 2016 FCA 131, [2017] 1 FCR 128 at para 44. Note that the case dealt with cessation of refugee protection and an officer's discretion to consider H&C factors under section 108(2) of the IRPA.

¹²⁰ *Awed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 469 at para 18, 148 ACWS (3d) 282.

¹²¹ *Ibid* at para 13.

¹²² *Melendez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 1363, [2017] 3 FCR 354 at para 34.

sentence that it carries), the conditions in the destination country, and the exercise of immigration officers' discretion. The participants of sentencing hearings are still developing their understanding of the nuances of immigration law, of the relevant factors and their implications for evaluation of immigration consequences. The suggestions below can contribute to the development of a more consistent and accurate decision-making on immigration consequences:

1. *Clearly acknowledging the certainty of removal as a factor relevant to determining the weight to be given to immigration consequences.*

Arguably, the certainty of removal should be the starting point in the analysis of immigration consequences. How else would courts be able to determine the seriousness of those consequences? If removal is nearly certain, the immigration consequences should be given more weight; and vice versa. The hypothesis that the certainty of removal is likely to be an important factor in sentence determination was confirmed in many, but not all reviewed cases. Only about a third of all examined decisions clearly stated their position on the certainty of removal. Another third was ambiguous on the issue and the remainder either considered removal speculative due to the existence of discretion in the inadmissibility process, or could not determine what the exact consequences would be, or did not consider such consequences relevant.

2. *Defence should be better versed in immigration law.*

Although we have to be careful not to transform a sentencing hearing into an immigration inquiry, it seems that accurate evaluation of immigration consequences is impossible without detailed information on relevant factors and procedures. There is an increased responsibility on defence counsel to inform their clients of immigration consequences¹²³ and to provide submissions to courts on the issue. In fact, Lawyers' Professional Indemnity Company (LawPRO), which provides professional liability insurance to lawyers, advises that "a lawyer who fails to address the potential

¹²³ For example, caselaw on validity of guilty pleas suggests that an offender's lack of understanding of a significant collateral consequence (such as an immigration one) may render the guilty plea uninformed. See *R v Quick*, 2016 ONCA 95; see also *R v Shiwprashad*, 2015 ONCA 577. Nevertheless, unlike in the United States (see *Padilla v Kentucky*, 130 S Ct 1473), Canadian courts stopped short of imposing a duty on defence counsel to advise clients if a guilty plea would trigger deportation.

immigration consequences of a client's conviction could be exposed to a claim."¹²⁴ In particular, it would be good practice for defence to:

(i) know the differences in inadmissibility and removal procedures for permanent residents, foreign nationals and refugees/protected persons and to specify the exact status of their clients in submissions to courts. In fact, some courts suggested that it should be standard practice for counsel to provide information on an offender's immigration status as is "done with respect to an offender's age and criminal record."¹²⁵

(ii) seek an opinion of an immigration lawyer, explaining implications of a sentence/conviction, viability of alternatives to IAD appeal, and other relevant factors;

(iii) provide sentencing courts with an overview of the Federal Court jurisprudence on the interpretation of discretion under s. 44. This will help alleviate concerns noted in some of the examined cases where sentencing courts interpreted this section as conferring significant discretion on immigration officers. Statistical data on s. 44 decisions could add a useful reality-based perspective demonstrating how rare the positive exercise of such discretion is.

(iv) where an individual is a refugee, it may be worthwhile adopting a line of argument developed in *Habeta*, which focuses on the extreme stress that the very prospect of removal would cause the applicant. This would shift the attention away from trying to second-guess how immigration authorities would evaluate the case to focusing on the actual experiences of individuals faced with a prospect of removal to danger.

(v) be aware that pre-sentence custody is included in calculation of the term of imprisonment for immigration purposes and ensure credit given for such custody does not make the client ineligible for IAD appeal.

3. Considering the certainty of removal as a relevant factor in all cases, regardless of the length of a fit sentence.

There currently exist different regimes with respect to consideration of immigration consequences based on the length of a fit sentence. In cases with a range around 6 months, *Pham* directs courts to consider immigration

¹²⁴ Katie James & Nora Rock, "Can a Criminal Conviction Make Your Client Inadmissible for Residency/Citizenship?" online: <https://www.practicepro.ca/information/doc/conviction_inadmissible.pdf>.

¹²⁵ *Ali* MBCA, *supra* note 104 at para 12.

consequences and failure to do so constitutes an error in law.¹²⁶ In contrast, no similar requirement has been firmly recognized with respect to cases with a range well over 6 months. Although prior jurisprudence noted that the certainty of removal may be taken into account to slightly mitigate a sentence, no uniform approach has emerged. Currently, the approach depends on a court and, as a result, in some cases, such consequences may remain unaddressed. Defence seems to perpetrate the disparity between the two groups of cases as it tends not to submit immigration lawyers' opinions as evidence in cases where a sentence is well over 6 months. In the examined sample, such an opinion was submitted in only one out of 40 cases. In contrast, such opinions were more frequently submitted where a range of sentence was around 6 months: 6 out of 23 in the examined sample. This tends to reinforce the idea that where removal is inevitable, immigration consequences need not be considered at all. As mentioned earlier, failure to at least slightly mitigate a sentence may give rise to parity concerns as, due to the current legislative framework, persons subject to removal orders are likely to spend longer in prison without access to parole than those who are not.

Ultimately, however, all parties to the process – the defence, the Crown and courts – have a role to play in developing a more principled and nuanced approach to the evaluation of collateral immigration consequences. While courts should be motivated to reflect more deeply on how they determine the nature and weight of such consequences, Crown and defence should ensure that courts have all necessary information to make such determinations.

¹²⁶ *R v De Aquino*, 2017 BCCA 266.