Intersection of Immigration and Criminal Law

Refugee Law Office, Legal Aid Ontario

The severity of deportation—"the equivalent of banishment or exile," [...] only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the "mercies of incompetent counsel." [...] To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation.

U.S. Supreme Court

Padilla v. Kentucky, 130 S. Ct. 1473 – 2010.

Padilla v. Kentucky (continued)

Immigration law can be complex, and it is a legal specialty of its own… There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice Alito), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

R. v. PHAM (2013 SCC 15)

- In Canada, the SCC Pham decision recognized that in addition to principles of proportionality and parity, individualization also informs sentencing.

- A judge must consider immigration consequences arising from sentence and "exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender."

Immigration Status

- **Canadian citizen** (CC) the most secure status, the person has a constitutional right to enter, remain in and leave Canada (*Charter* s.6)
- **Permanent Resident** (PR) a person who has acquired permanent resident status and has not subsequently lost that status
- **Foreign national** a person who is not a Canadian citizen or a permanent resident
- **Protected Person/Convention refugee**: a person found to be at risk if returned to their country of nationality and cannot be removed from Canada to that country*, they may also be a PR or CC.

Inadmissibility: Criminality and "Serious Criminality"

Criminality in Canada

36 (2) A **foreign national** is inadmissible on grounds of criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by way of indictment, or of two offences under any Act of Parliament not arising out of a single occurrence;

Inadmissibility: Serious Criminality in Canada

36 (1) A **permanent resident or a foreign national** is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of **at least 10 years**, **or** […] for which a term of imprisonment of **more than six months** has been imposed;

Hybrids deemed indictable

36.(3) (a) an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily;

- *A conviction for only one, pure summary conviction offence would not result in immigration inadmissibility.*

Convictions

- To trigger immigration inadmissibility and the major immigration consequences, must be a **conviction**, hence, does **not** apply to:

  - acquittals, stays, withdrawals;
  - discharges (conditional or absolute);
  - peace bonds (s.810, etc.);
  - NCRMD findings

S. 36(3)- specific **exceptions** to Inadmissibility in IRPA

- Convictions must be under an "Act of Parliament", and do *not* include convictions for:
  - provincial offences
  - contempt of Court
  - offences under the Contraventions Act

  AND ALSO, exceptions for:
  - YCJA offences- only for youth sentences;
  - YOA offences, finding of guilt under YOA;
  - Offence for which a record suspension has been ordered under CRA;
  - Offence on appeal for which an acquittal is finally determined

Removal Order Appeals

Bill C-43 – change to legislation (bar to removal order appeals for inadmissible PRs and protected persons, **changed from two years to six months**)

- No appeal if a crime was punished by a term of imprisonment of **at least six months**
- Coming into force – June 19, 2013
- New provision could impact any case that was not referred to the Immigration and Refugee Board before coming into force
  - *Retrospective application of this change to those sentenced prior to June 19, 2013 before the Courts.*

CAREFUL! If client is a PR on an IAD Stay:

- In removal order appeals, the Immigration Appeal Division (IAD) may give the appellant a "Stay" which includes a list of conditions, for a certain number of years;
- This Stay is reconsidered at the end of that period, or at a mid-point if there are problems noted by CBSA. At this final reconsideration, the appeal can be dismissed, allowed or the Stay extended by a certain length of time with any new conditions;
- While on this Stay, and includes up until the IAD's final reconsideration of the appeal where the appeal is "allowed" and the removal order is quashed), **any conviction for a** 36(1)offence will cancel the Stay by operation of law and the appeal will be terminated: s. 68(4) of IRPA
  - No opportunity to return to the IAD to explain mitigating factors;
  - Removal order becomes enforceable and they will face removal.

Factors considered on Removal order appeals (the "*Ribic*" factors)

- seriousness of the offence or offences leading to the deportation;
- remorse/ responsibility for criminal record;
- possibility of rehabilitation;
- length of time spent in Canada and the degree to which the appellant is established;
- family in Canada and the dislocation to that family that deportation of the appellant would cause;
- best interests of any child affected by the appellant's removal from Canada;
- support available for the appellant within the family and the community;
- degree of hardship that would be caused by return to country of nationality (lack of family there, country conditions).

Use of evidence from the criminal process by the CBSA

- At removal order appeals, and elsewhere in Detention Reviews, in reviewing a case for H&C considerations, police synopses and summaries for use in opposing release at bail hearings, used and presented as fact by CBSA.
- ***TIP***: Amend the facts. Review synopses with clients, amend where they disagree with them. Synopses become gospel later, unless there is a different version accepted by the Court.
- Take out all inflammatory language – particularly when relating to gangs, or not related to the particular offence. Have this clear and specific on the record.
- KEEP COPIES of disclosure– or advise the clients to do so. Advise them to get sentencing transcripts.

Sentencing: staying under the 6 month threshold

Calculating “terms of imprisonment” for immigration purposes: Pre-Trial Custody, Conditional Sentences and Apportioning sentences for multiple offences

"Term of imprisonment" for immigration purposes: **Pre-Trial Custody (PTC)**

- PTC taken into account by the Court is deemed to be part of the "term of imprisonment": *Brown,*2009 FC 660*, Atwal,* 2004 FC 7*;*
- Ask the judge to be explicit about PTC (to avoid issue in *Jamil v. MCI*, [2005] F.C.J. No. 955)
- Where a judge is silent on the ratio applied to PTC, PTC presumed to be 1:1 time; *Brown* and *Livermore v. MPSEP* [2007] I.A.D.D. No. 2411, No. TA2-25093
- ***TIP:*** *Where PTC is already over 6 months, ask the Judge to explicitly indicate on the record that this "dead time" is* ***not*** *forming part of the sentence.*

Conditional Sentence Orders (CSOs)

- Conditional sentence order not a "term of imprisonment" for immigration purposes:
  - *Tran v. Canada (MPSEP),* 2014 FC 1040
  - *2015 FCA 237 – Appeal Allowed*
  - *SCC granted Application for Leave – Awaiting outcome (scheduled for January 2017)*

  - ***TIP:*** If considering a CSO that is more than six months, critical to obtain immigration advice.

Apportioning Sentences Consecutively

- 6-month bar on appeals and inadmissibility findings related to criminality (section 36 of IRPA) apply to **individual** sentences. Multiple consecutive sentences are **not** viewed cumulatively.
  - *TIP:* Apportion smaller sentences consecutively, rather than a larger sentence concurrently
  - but remember nothing that has a 10 year max for a PR
  - OR any indictable (or hybrid) or two summary offences, in the case of anyone else

Other ways criminality impacts immigration rights/ applications/ status:

- Eligibility to make a refugee claim;
- Lifting the “suspension” on removals to certain dangerous countries;
- Ability to sponsor a family member;
- Citizenship applications;
- Danger Opinions (removal of a person recognized as a refugee to a country of persecution);
- Humanitarian and Compassionate (H&C) applicants- found inadmissible, cannot obtain PR status, required to leave Canada;
- Ability to return to Canada in the future

Eligibility to Make a Refugee Claim

- Any person convicted of an offence that is punishable by a max of 10 years (or more) is **ineligible** to make a refugee claim: s. 101 of IRPA

- If a person is charged with this kind of offence, their refugee claim will be suspended until criminal disposition.

Lifting the “suspension” on removals to certain dangerous countries

- Certain countries have been deemed to have such generalized risk for individuals that no person (even a failed refugee claimant) can be removed there…. Except persons with certain inadmissibilities, including **ANY criminality** (36(1) or 36(2) criminality). [s. 230(1)-(3) of Imm Regs] So any conviction for an indictable (includes hybrid) offence will lift this suspension on removals to:
  - Democratic Republic of Congo, Afghanistan and Iraq;
  - Burundi, Libya, Mali, Syria, Somalia (Middle Shabelle, Afgoye, and Mogadishu), Gaza, Central African Republic, South Sudan, Nepal, Yemen
  - *List is subject to change at the discretion of the Immigration Minister.*

Ability of a CC or PR to Sponsor a family member

- not detained in any penitentiary, jail, reformatory or prison;
- not been convicted under the *Criminal Code* of
  - an offence of a sexual nature, or an attempt or a threat to commit such an offence, against any person, or
  - an offence that results in bodily harm or threat of bodily harm against a relative of the sponsor or a relative of the sponsor's spouse
  - [sections 130-133 of the *Immigration and Refugee Protection Regulations*]

Citizenship Applications

- Must have resided in Canada for at least four years in the past six years before you apply for citizenship;
- Cannot apply for citizenship if convicted of an indictable offence in previous three years (hybrids not deemed indictable in *Citizenship Act*);
  - 3 year "in the clear" period starts from the completion of last sentence for an indictable offence (includes probation and payment of fines)

- Not included in residency calculation, times when a person is:
  - (a) under a probation order;
  - (b) a paroled inmate; or
  - (c) an inmate of any penitentiary, jail, reformatory or prison.

Danger Opinions: Deporting persons recognized as refugees/ protected persons

- If person found to be a protected person or a Convention refugee, they are protected from removal to their country of nationality;
- CBSA can apply to have the person removed if the individual's criminality is viewed as posing a "danger to the public", the person's danger to the Canadian public will be weighed against the risk(s) they will face if returned to their country, as well as Humanitarian and Compassionate factors. Minister's Delegate then makes a "Danger Opinion" decision.
- Typically done in cases with a pattern of multiple, dangerous offences. Could be with one serious (usually violence) conviction. Person would already be found "inadmissible" but cannot be removed because of their status as a protected person/ refugee.
- Long, paper-based process: individual has the right to make submissions about rehabilitation, risks they will face, establishment and family here, etc…

H&C applicants

- Foreign nationals who have applied, are applying or intend to apply for PR status in Canada based on humanitarian and compassionate (H&C) factors (hardship in their home country, establishment here, best interests of children, family in Canada, etc), have to pass all the admissibility checks, including in-Canada criminality (section 36(1)(a) and 36(2)(a)).
- H&C exemption can be sought from (nearly) any criteria in IRPA, including criminal inadmissibility pursuant to 36(1) and 36(2).
- A foreign national with criminal convictions who has made a H&C application needs to have detailed submissions made setting out why they should receive a waiver from the inadmissibility.
- Factors looked at by immigration when a waiver is sought from criminal inadmissibility:
  - Seriousness of the conviction(s), isolated incident or pattern of criminality, sentence(s) received, rehabilitation efforts, length of time since the conviction, any other factors about the offence (mental health, addiction, etc…)

Ability to return to Canada after deportation

- Criminal conviction here will impact the ability to return to Canada for foreign nationals (as well as PRs if their status is taken away and they are removed).
- If removed from Canada under a “deportation order”, require the written consent of Immigration to return to Canada, have to repay removal costs.
- Certain “criminal rehabilitation” applications can be made with Immigration from overseas.
- Some immigration lawyers specialize in these.
- See: http://www.cic.gc.ca/english/information/applications/rehabil.asp

Procedure: what happens when your client has a conviction for a section 36(1) or (2) offence

- CBSA will be in contact (via letter, phone call or visit), client asked to come in for an interview- in the GTA usually @ 6900 Airport Rd;
- There is a ***limited*** discretion for CBSA to hold off on the "referral" to an admissibility hearing. An officer considers H&C factors and decides whether to "refer" a "section 44 report" to admissibility hearing, or to only issue a "warning letter" = the client will not be referred to an admissibility hearing, provided no more criminality in the future;
- Client is given a chance to submit supporting documents/submissions outlining their H&C factors (incl. family relationships, establishment in Canada, hardship of return to country of origin, etc…)
- At this interview the client's statements are written down by the officer and can be used against them in subsequent proceedings (i.e. an IAD appeal, if the person has a right to it). Demonstrating remorse/ responsibility/ rehabilitation and speaking of family connections & hardship on return is important at this stage. Failure to mention important factors at this interview will be used against client's credibility later.
- Highly discretionary decision, some officers reasonable, others won't be

Strategies for helping the non-citizen client

- Ask for an immigration opinion letter from an immigration lawyer about the immigration consequences of a proposed disposition/sentence (even certain bail conditions/ probation conditions could have an impact on immigration status);
- Amend the facts. Review synopses with clients, amend where they disagree with them. Synopses become gospel later with CBSA, unless there is a different version accepted by the Court.
- Take out all inflammatory language – particularly when relating to gangs, or not related to the particular offence. Have this clear and specific on the record.
- Keep a copy of the disclosure– or advise the clients to do so. Advise them to get their sentencing transcripts. Obtaining these with immigration submissions deadlines at a later point can prove a big challenge.
- Advise client to seek further immigration advice from an immigration lawyer if in the future they receive any letter, call or visit from CBSA.

Questions

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