File Number: 34897

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA)

BETWEEN:

HOANG ANH PHAM

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

and

CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, CRIMINAL LAWYERS ASSOCIATION OF ONTARIO, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and THE CANADIAN CIVIL LIBERTIES ASSOCIATION

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United States

Immigration and Nationality Act of 1952: U.S.C., Title 8, Chap. 12, Sub. Chap II, Part IV, ss 1227, Deportable Aliens; 52

Immigration Act of 1990: U.S.C., Title 8, Chap. 12, Sub. Chap. II, Part V, ss 1252, Aliens and Nationality; 56

United Kingdom

UK Borders Act, 2007 Chapter 30, s.32(1) – (7) 58

Nationality, Immigration and Asylum Act 2002, c.41, part 4, s. 72 59

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RESPONDENT'S FACTUM

PART I: OVERVIEW AND STATEMENT OF FACTS

Overview

1. This case presents the issue of whether a sentence imposed on a non-citizen must be revised on appeal, despite the fact that the sentence is fit and resulted from a joint submission of counsel, simply because foreseeable consequences under the Immigration and Refugee Protection Act ("IRPA")[1] were not discussed during an abbreviated sentencing hearing.

2. The respondent accepts that it is generally[2] within the discretion of a sentencing court to take account of the added risk of deportation faced by a non-citizen so long as the ultimate sentence imposed remains proportionate to the gravity of the offence and the degree of responsibility of the offender. For example, in light of the serious immigration consequence faced by a long-time permanent resident, a sentence of two years less a day

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[1] R.S.C. 2001, c. 27
[2] This assumes there is no statutory minimum penalty

to be served in a provincial correctional facility might be imposed in place of a two year sentence to be served in a penitentiary, when either result would involve a fit sentence. But a sentencing judge is neither entitled nor obliged to reach an unprincipled result so as to either avoid or bring on the operation of a statutory provision such as s. 64 of the IRPA. Immigration consequences cannot be relied upon to impose a sentence that is less (or more) than a sentence within the appropriate range. Doing so would defeat the clear intention of Parliament to expeditiously remove non-citizens who commit serious crimes. The immigration process under the IRPA proceeds on the assumption that sentencing outcomes are a reliable indicator of whether a crime is serious or not.

3. Notwithstanding this limited discretion in the sentencing court, it is anathema to the orderly and efficient administration of justice to expand appellate sentence review to require appellate courts to minimally recalibrate sentences because a collateral consequence, even a serious one, was not highlighted in the court below. This is acutely the case in respect of dispositions, as in this case, following upon abbreviated sentencing hearings in which counsel present a joint submission that is accepted by the sentencing court. Sentence revision must be conditioned upon a showing of either principled error or substantial departure from that which is reasonable. Neither condition is met on this record.

4. The failure to consider immigration consequences as a basis for choosing the lesser of two fit sentences cannot be considered principled error when a sentencing judge is not only not asked to exercise that discretion but asked by the accused to impose the greater sentence. The appellant's status as a non-citizen was before the sentencing court in a presentence report prepared at the appellant's request. Both defense counsel and the sentencing judge are presumed to know that immigration consequences flowed as a matter of statutory law. It is significant that this foreseeable collateral consequence was not advanced as a basis for imposing a reformatory sentence; the trial judge was not asked to exercise that discretion. Rather, through a joint submission communicated by his counsel, the appellant sought a penitentiary sentence. And the record invites a logical explanation for that approach – to shorten the period of time before the appellant might be released on

parole and to provide the appellant with the opportunity to serve the sentence in another province, closer to loved ones.

5. Our adversarial system of criminal justice relies upon defence counsel to investigate the client's relevant personal facts and legitimate goals and to then advance circumstances and submissions that will support a sentencing disposition that is most favorable to the client's lawful interests and legitimate aspirations. We risk establishing a two-stage sentencing process if we treat sentences as ripe for revision every time an appellant complains that defence counsel did not press some relevant collateral consequence or personal objective in the court below. To justify sentencing afresh in the Court of Appeal on this foundation, a sentence appellant ought to be required to show that the sentence hearing was unfair by reason that counsel's representation was constitutionally deficient. In light of the absence of fresh evidence addressing these matters, there is no basis on this record for concluding that the sentence hearing was unfair. However, given the respondent's concession below, the appeal should be allowed to return this matter to the Court of Appeal in order to provide the appellant with the opportunity to address these factual deficiencies by an application to adduce relevant and credible fresh evidence.

Statement of Facts

6. This appeal is brought by leave from a decision of the Alberta Court of Appeal dismissing an appeal from a sentence of two years imprisonment that was imposed in accordance with a joint sentencing submission made by the Crown and counsel for the appellant before a trial judge in Provincial Court.[3] The appellant had been convicted, after a trial in the Provincial Court of Alberta,[4] on charges of producing cannabis marihuana and possessing it for the purposes of trafficking, contrary to s. 5(2) and s. 7 of the *Controlled Drugs and Substances Act.*[5]

[3] Decision of the Alberta Court of Appeal, Appellant's Record, Tab 4, p. 19, para. 27
[4] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 2 and 9, paras. 1 and 47
[5] S.C. 1996, c.19

The Offence

7. On 19 February 2009, the appellant and another man, Thai Quoc Ly, were found in apparent occupation of a Calgary residence when police executed a search warrant at those premises and discovered a sophisticated three-stage marihuana grow operation comprised of almost 600 marihuana plants in an unlocked basement.[6] The grow operation was being serviced by water and electricity that was being stolen from local utility providers.[7] The product of the marihuana plants had a wholesale value of $461,718 and a retail value of $738,750.[8] Both the appellant and Ly were in the house when the police arrived. The evidence gathered by police demonstrated their apparent occupation of the main floor of those premises.[9] An expert testified that the largest plants were approximately three months old and close to being harvested.[10] The police found documentation showing that both men had flown to Calgary from Ontario on 22 November 2008.[11]

8. The appellant did not testify in his own defense but his co-accused Ly offered testimony which described the involvement of both men.[12] Ly said that he and the appellant had come to Calgary in November of 2008 looking for construction work. He said they had stayed with a friend whose address he didn't remember,[13] when in January of 2009, they were recruited by two men named Duc and Minh, who offered them free rent and occasional snacks in return for house-sitting the premises where the grow operation was later found by police.[14] Ly said they were not told what was going on in the basement but were told not to allow anyone but Duc and Minh to access the premises and they were instructed not go down into the basement. While living in the house, they saw Duc and Minh coming and going from the basement with large bags of unknown materials.[15]

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[6] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 3, paras. 3 and 5
[7] Transcript of Trial Proceedings, Appellant's Record, Tab 14, p. 117 to p. 119
[8] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 4, para. 19
[9] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 4 and 5, paras.15, 24 and 25
[10] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 4, para. 17
[11] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 4 and 5, paras. 12, 20 and 21
[12] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 4, para. 20
[13] Transcript of Trial Proceedings, Appellant's Record, Tab 14, p. 170, lines 15 - 19
[14] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 5, para. 24
[15] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 5, paras. 25 and 26

9. At the conclusion of evidence and final argument, the trial judge reserved his decision.[16] The case was adjourned until 12 October 2010 for decision and sentencing. On 08 October 2010, the matter was brought forward at the request of the appellant's counsel to reschedule the date for delivery of the decision. At that time, the trial judge indicated that the decision had been completed and that there would be a sentencing. He indicated that the decision was available in his office and would be delivered to both the Crown and counsel for the appellant in due course. The date for delivery of the decision and sentencing was adjourned until 06 December 2010.[17]

10. On 06 December 2010, the trial judge formally delivered his reasons for judgment convicting both the appellant and his co-accused Ly of producing cannabis marihuana and possessing it for the purposes of trafficking.[18] The trial judge was skeptical of Ly's account. Mindful of this Court's teachings regarding the potential for even unconvincing evidence of an accused to afford a reasonable doubt, the trial judge stated: "While I do not necessarily believe the evidence of Ly, on all the evidence, I am not convinced beyond a reasonable doubt that the two accused were involved in the grow operation from November 2008, or that they were the only ones involved."[19] He therefore analyzed the case based upon the evidence of Ly and convicted both men on the basis of "overwhelming evidence of willful blindness."[20] At the same time, he acquitted both men on companion charges of theft of water and electricity.[21]

The Sentencing Hearing

11. It had been anticipated that sentencing would occur upon conviction on 06 December 2010. However, the sentence hearing was adjourned to permit the preparation of a pre-sentence report requested by counsel for the appellant. The adjournment for this purpose

[16] Transcript of Trial Proceedings, Appellant's Record, Tab 14, p. 234 to p. 236
[17] Transcript of Trial Proceedings, Appellant's Record, Tab 14, p. 240 to p. 243
[18] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 2 and 9, paras. 1 and 47
[19] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 5, paras. 28 and 29
[20] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 7 and 8, paras. 35, 39 and 40
[21] Reasons for Judgment of Barley J., Appellant's Record, Tab 2, p. 9, para. 48

was done over the Crown's objections.[22] The Crown provided the trial judge with a book of sentencing precedents to consider and the matter was adjourned until 08 March 2011.[23]

12. At the sentencing hearing on 08 March 2011, the requested pre-sentence report was entered as an exhibit.[24] Relative to the issues before this Court, it contained personal biographical information about the appellant's immigration history. Most notably, it identified the fact that he was a citizen of Vietnam.[25] It described the circumstances of his arrival in Canada at the age of 16 sponsored by his father.[26]

13. The Crown relied upon the pre-sentence report to establish a circumstance in aggravation of sentence. The appellant had been previously convicted for trafficking and possession for the purpose of trafficking in a controlled substance.[27] In December 2000, he had been sentenced to three months which he was allowed to serve in the community pursuant to a conditional sentence order. He told the probation officer who prepared the pre-sentence report that he had no recollection of that community-based disposition.[28] The author of the pre-sentence report opined that serving his first drug trafficking sentence in the community had had no impact upon the appellant.[29]

14. Ultimately, the sentencing hearing was much abbreviated by virtue of a joint submission made by the Crown and defence in the case of both the appellant and his co-accused Ly, who were represented by the same defence counsel.[30] The appellant's counsel offered to make submissions in support of the joint request but declined to advocate further when the sentencing judge advised that he was satisfied with the fitness of the sentence proposed.[31] However, the appellant's counsel did ask the sentencing judge to direct that

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[22] Transcript of Trial Proceedings, Appellant's Record, Tab 14, p. 246 to p. 248
[23] Transcript of Trial Proceedings, Appellant's Record, Tab 14, p. 250
[24] Transcript of Trial Proceedings, Appellant's Record, Tab 14, p. 256
[25] Pre-sentence Report, Appellant's Record, Tab 12, p. 81
[26] Pre-sentence Report, Appellant's Record, Tab 12, p. 82
[27] Criminal Record, Appellant's Record, Tab 13, p. 86, Transcript of Sentencing Proceedings, Appellant's Record, Tab 11, p. 64
[28] Pre-sentence Report, Appellant's Record, Tab 12, p. 84
[29] Pre-sentence Report, Appellant's Record, Tab 12, p. 85
[30] Transcript of Sentencing Proceedings, Appellant's Record, Tab 11, p. 64, lines 15 and 16
[31] Transcript of Sentencing Proceedings, Appellant's Record, Tab 11, p. 69 - 70. lines 36 – 40, 1 - 15

the sentence be served in Ontario so that the appellant could be closer to his loved ones.[32] The court indicated its willingness to endorse a recommendation to that effect.[33] In accordance with the joint submission, the appellant received concurrent sentences of two years imprisonment on both counts on which he had been convicted. The trial judge also made a life-time firearms prohibition order in his case.[34]

The Belated Appeal to the Alberta Court of Appeal

15. An appeal from conviction and sentence was not filed until 18 August 2011 pursuant to an order extending the time for filing the notice of appeal.[35] That order was made with the consent of the Crown.[36] The application for an extension of time was not supported by an affidavit of the appellant or counsel for the appellant as is the customary practice. Instead, it was supported by the affidavit of Esther Trung-Lam of Calgary, Alberta, the court-appointed interpreter/translator, who provided translation and interpretation of the evidence from English into the Vietnamese language in assistance of the appellant during part of the trial and at the sentencing hearing in this matter.[37] As is customary while in court, she also provided similar translation and interpretation services to assist defence counsel's communications with the appellant.

16. Esther Trung-Lam's affidavit deposed to the fact that counsel for the appellant advised him "that it would be best for him to be sentenced to two years in the federal penitentiary, because that would enable him to secure release on parole faster than in the provincial gaol system."[38] Esther Trung Lam's affidavit also discussed her knowledge of whether immigration consequences had been discussed with the appellant. In this connection, her affidavit states as follows:

> Mr. Pham advised me and I verily believe that he had moved to Canada from Vietnam but did not have Canadian citizenship at the time of trial or sentencing.

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[32] Transcript of Sentencing Proceedings, Appellant's Record, Tab 11, p. 70, lines 19 - 24
[33] Transcript of Sentencing Proceedings, Appellant's Record, Tab 11, p. 70, line 26
[34] Transcript of Sentencing Proceedings, Appellant's Record, Tab 11, p. 71, lines 6 - 13
[35] Notice of Appeal, Hong Anh Pham, Respondent's Record, Tab 3, pp. 4 - 6
[36] Consent Order, Appeal No. 1101-0206A, Respondent's Record, Tab 2, pp. 2 – 3
[37] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Respondent's Record, Tab 8, p. 40, para. 1
[38] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Respondent's Record, Tab 8, pp. 40, para. 2

> To the best of my recollection, Mr. Pham was not advised by his lawyer of the effect a two year sentence could have on his immigration status.[39]

17. Ester Trung-Lam's affidavit went on to describe difficulties that the appellant had experienced securing legal-aid coverage for an appeal to the Alberta Court of Appeal.[40] In that connection, she communicated the advice of appellate counsel handling the extension application that an initial request for legal-aid coverage had probably been denied because of an opinion about the merits of appealing that had been provided to the Legal Aid Society of Alberta by the appellant's trial counsel.[41] In that regard, it was noted that the appellant's trial counsel had failed to mention immigration consequences as a potential ground of sentence appeal. In support of that averment, the affidavit exhibited a copy of the opinion letter that had been prepared by trial counsel Austin Nguyen and forwarded to the Legal Aid Society of Alberta on 11 June 2011.[42]

18. Mr. Nguyen's letter of 11 June 2011 contained numerous factual errors. For example, it stated that the appellant had been convicted on 30 August 2010.[43] It stated that the appellant, rather than the co-accused Ly, had testified at trial.[44] It failed to mention that sentencing had proceeded on the basis of a joint submission. Instead, it said that a conditional sentence order was applied for and argued but was rejected by the Court.[45] The letter ended with a sentence that read as follows:

> A shorter sentenced, [sic] for example 18 months, was contemplated, but was later abandoned as it would yield a longer period of incarceration in the provincial system.[46]

19. An order extending the time for filing a notice of appeal from both conviction and sentence was granted with the Crown's consent on August 18, 2011.[47] The appeal from

[39] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Respondent's Record, Tab 8, p. 40, para. 3
[40] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, and Exhibit A, Respondent's Record, Tab 8, pp. 40 – 41, paras. 4 - 6
[41] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, and Exhibit B, Respondent's Record, Tab 8, p. 41, para 5; p. 45
[42] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Exhibit C, Respondent's Record, Tab 8, pp. 46 - 48
[43] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Exhibit C, Respondent's Record, Tab 8, p. 46, para. 1
[44] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Exhibit C, Respondent's Record, Tab 8, p. 46, para. 4
[45] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Exhibit C, Respondent's Record, Tab 8, p. 48, para. 1
[46] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Exhibit C, Respondent's Record, Tab 8, p. 48, para. 4
[47] Consent Order, Appeal No. 1101-0206A, Respondent's Record, Tab 2, pp. 2 - 3

conviction ultimately did not proceed and was subsequently abandoned on 11 April 2012.[48]

The Appeal from Sentence

20. The appeal from sentence proceeded before the Alberta Court of Appeal. In the factum filed by the appellant, it was argued that the sentence imposed at trial was demonstrably unfit and that the trial judge had erred in principle by failing to reduce the sentence imposed on account of the immigration consequences faced by the appellant.[49] The appellant's factum filed in the court below did not advance any allegation of ineffective representation of counsel. It was not alleged that the appellant's agreement to the joint submission had been either uninformed or misinformed regarding collateral immigration consequences of a penitentiary sentence. There was no accompanying application to adduce fresh evidence of any kind.

21. In response to the appellant's factum, the Crown argued in its factum that the sentence imposed was fit but did not oppose a reduction of a single day on account of the consideration that a sentence of two years less a day to be served in a provincial correctional facility would also be a fit sentence in the circumstances of this case.[50]

22. At the hearing of the appeal, on 23 May 2012, counsel for the appellant and the respondent jointly requested that the appeal be allowed to the extent of reducing the sentence by a single day.[51] That proposal was met with resistance from the court below. Despite the joint request, the panel hearing the appeal reserved its decision.

23. It was common ground in the court below that the matter of immigration consequences had not been openly addressed at trial. However, beyond establishing the fact that the matter was neither argued by counsel nor patently considered by the trial judge, the record that was put before the Court of Appeal did not speak to the issue of whether the joint

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[48] Notice of Abandonment, Appeal No. 1101-0206-A, Respondent's Record, Tab 4, p. 8

[49] Sentence Factum of the Appellant, Appeal No. 1101-020-A, paragraph 22, Respondent's Record, Tab 5, pp. 15 - 26

[50] Sentence Factum of the Respondent, Appeal No. 1101-020-A, paragraphs 6 and 7, Respondent's Record, Tab 6, pp. 27 - 35

[51] Decision of the Alberta Court of Appeal, Appellants Record, Tab 4, paragraph 7

sentencing submission had taken collateral immigration consequences into account.[52] It was not alleged that the trial or sentencing had been unfair by reason of ineffective assistance of counsel. There was no evidence before the panel that heard this sentence appeal about whether the appellant or his counsel was aware of potential immigration consequences at the time of sentencing. There was likewise no evidence before the sentence appeal panel about whether the appellant had received any legal advice from either trial counsel or anyone else regarding potential immigration consequences of the joint request for a two year penitentiary sentence. The materials relied upon to support the filing extension application, which touched on the appellant's awareness of immigration consequences at the time when he was sentenced and hinted at ineffective legal representation, were not referenced in the appellant's factum or otherwise made a part of the record in respect of the sentence appeal in this case.

The Decision of the Alberta Court of Appeal

24. In a reserved judgment,[53] given on 28 June 2012 by McDonald J.A. writing on behalf of the majority, the Court of Appeal dismissed the appeal from sentence.[54] After rejecting the appellant's argument (not advanced before this Court) that the sentence imposed was demonstrably unfit, the majority refused to reduce the sentence by a single day on account of immigration consequences. The majority held that allowing the appeal would be inappropriate as it would "fly in the face of a proper and acceptable joint submission … in order to undermine the provisions of [the IRPA]."[55] The majority rejected the appellant's characterization of his loss of appeal from an order of deportation as "an unintended consequence."[56] In light of the appellant's prior record of related convictions, allowing the appeal even the "seemingly minor variation" that the Crown was prepared to concede, was not warranted.[57] The majority distinguished its prior precedents allowing a one day

[52] Sentence Factum of the Appellant, Appeal No. 1101-020-A, Respondent's Record, Tab 5, p. 22, para. 22; Sentence Factum of the Respondent, Appeal No. 1101-020-A, paragraphs15 and 17, Respondent's Record, Tab 6 pp. 6 – 7, para 15 - 17

[53] Formal Judgment of the Court, Appeal No. 1101-0206-A, Appellant's Record, Tab 3, p. 10

[54] Decision of the Alberta Court of Appeal, Appellant's Record, Tab 4, paragraph 27

[55] Decision of the Alberta Court of Appeal, Appellant's Record, Tab 4, paragraph 24

[56] Decision of the Alberta Court of Appeal, Appellant's Record, Tab 4, paragraphs 21 and 25

[57] Decision of the Alberta Court of Appeal, Appellant's Record, Tab 4, paragraph 25, p. 18

variation for this purpose on the basis that each of those appellants, unlike the appellant in this case, had no prior criminal record.[58]

The Dissenting Judgment of Martin J.A.

25. In dissent, Martin J.A. expressed his agreement with the policy described in the majority judgment.[59] He dissented with regard to the result, however, because this was the first time the Court had made this statement. He added:

> No doubt, the Crown's consent to this appeal was based, at least in part, on the prevailing practice, and the understanding that a joint submission of two years less one day would have been agreed to had trial counsel been aware of the collateral consequence flowing from a two year sentence. In other words, the Crown's concession before us is based on fairness, and therefore, I will be guided by that position.[60]

PART II: POINTS IN ISSUE AND POSITION OF THE RESPONDENT

26. The respondent would re-frame the issues raised by the appellant and state its position on those issues in the following terms.

I. What is the impact of collateral immigration consequences on the sentencing of a non-citizen offender?

27. The respondent accepts that other than where a statutory minimum punishment exists, a sentencing court has the discretion to take account of the added risk of deportation faced by a non-citizen, so long as the ultimate sentence imposed remains proportionate to the gravity of the offence and the degree of responsibility of the offender. But a sentencing judge is neither entitled nor obliged to reach an unprincipled result so as to either avoid or bring on the operation of a statutory provision such as s. 64 of the IRPA. Immigration consequences cannot be relied upon to impose a sentence that is less (or more) than a sentence within the appropriate range. Collateral immigration consequences do not

[58] Decision of the Alberta Court of Appeal, Appellant's Record, Tab 4, paragraphs 24, 25 and 26, pp. 18 - 19
[59] Decision of the Alberta Court of Appeal, Appellant's Record, Tab 4, paragraph 33, p. 21
[60] Decision of the Alberta Court of Appeal, Appellant's Record, Tab 4, paragraph 33, p. 21

mitigate sentence but it is relevant for a sentencing court to consider them, when asked to do so, to ensure that the sentence imposed does not trigger those consequences unnecessarily.

II. Did the Court of Appeal have authority to modify the appellant's sentence in the circumstances of this case?

28. On this record, the Court of Appeal had no statutory authority to revise the appellant's sentence by one day to attenuate collateral immigration consequences. An appellate court's authority to revise a sentence is entirely statutory in nature and is governed by s. 687 of the *Criminal Code*.[61] It arises only where the sentence imposed by the sentencing court is unfit. This Court's teachings hold that the power to sentence anew only arises in the case of either patent unreasonableness or an error in principle.

29. In this case, the sentence imposed is well within the range of fit dispositions and the trial judge made no error in principle in reaching that result. Moreover, it is significant that the sentence arose from a joint submission and that the trial judge was not asked to exercise discretion on account of immigration consequences. Thus, the Court of Appeal had no basis on which to revise the sentence.

30. The appellant's focus on "unintended consequences" does not impugn the fitness of the sentence imposed. In theory, "unintended consequences" could call into question the quality of the appellant's legal representation at trial and, thereby, potentially the fairness of the sentencing hearing itself. From the standpoint of an appellate court's authority to sentence afresh, the situation of a sentence stemming from a sentence hearing that was unfair by reason of inadequate legal representation ought to be treated in the same way as a sentence arrived at by principled error on the part of the sentencing judge. But that situation does not arise here, given the lack of fresh evidence establishing that the hearing was in fact unfair by reason of constitutionally deficient legal representation. However, as noted, the respondent acknowledges that in view of its concession in the court below, the appeal ought to be allowed to return this matter to the Alberta Court of Appeal, to permit

[61] R.S.C. 1985, c. C-46

the appellant a further opportunity to adduce any relevant and credible fresh evidence to establish that the sentencing hearing was unfair by reason of inadequate legal representation.

PART III: ARGUMENT

I. What is the impact of collateral immigration consequences on the sentencing of a non-citizen offender?

31. The respondent does not dispute the relevance of collateral immigration consequences on the sentencing of a non-citizen offender. The potential loss of immigration status is a personal circumstance of a non-citizen offender. It therefore has some relevance to the impact of a conviction and sentence on that person in the general manner explained by Doherty, J.A. in *R. v. Hamilton.*[62] The respondent's position differs from that of the appellant regarding the extent to which this consideration may impact upon the sentence imposed and concerning the justification for allowing a limited discretion for sentencing judges to reduce sentences on a *de minimis* basis.

32. As demonstrated in the appellant's factum, the weight of Canadian jurisprudence supports the conclusion that collateral immigration consequences are a relevant consideration on the sentencing of a non-citizen offender. The respondent agrees with the appellant that a court sentencing an offender should have the discretion as part of considering the personal circumstances of the offender to take account of a significant collateral consequence such as the increased risk of deportation faced by a long-time permanent resident.

33. However, the fact that an offender is facing immigration consequences should not be a determinative factor. Collateral immigration consequences should not be treated as a mitigating factor *per se*; their impact ought to be minimal within the range of fit dispositions called for by the gravity of the offence and the degree of responsibility of the offender. Even in the case of an offender facing the significant and highly undesirable consequence of likely deportation, sentencing courts should avoid reducing the sentence

[62] *R. v. Hamilton,* (2004) 186 C.C.C. (3d) 129 (Ont. C.A.).

imposed on account of this collateral consequence by more than a minimal amount. Limiting the sentence impact of collateral immigration consequences to a minimal discretion is mandated by the following considerations:

a) Sentencing judges must not defeat Parliament's intention that non-citizens committing serious crimes ought to be deported;
b) Loss of immigration status is not punishment; it does not engage the liberty or security interests of the offender;
c) Deportation is a contingency that may never come to pass;
d) Allowing more than minimal consideration risks devaluing the importance of attaining Canadian citizenship;
e) Loss of immigration status is a consequence that ought to be expected by non-citizen criminals;
f) Other common law jurisdictions treat collateral immigration consequences as irrelevant on sentencing.

A. Sentencing judges must not defeat the intention of Parliament to deport those convicted of serious crime.

34. Treating immigration consequences as a mitigating (or aggravating) circumstance based upon the sentencing judge's opinion about whether a non-citizen deserves to be deported or not, involves criminal courts usurping the role of the immigration system which operates pursuant to the IRPA. The IRPA establishes a carefully balanced scheme for determining the status of non-citizens and their right to remain in Canada. As the appellant acknowledges,[63] criminal courts have not been assigned a role in that process.[64]

35. The only link between the IRPA's scheme for the efficient removal of those who commit serious crimes and the work of sentencing courts is that the sentence imposed by criminal

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[63] See paragraph 68 of the Appellant's Factum

[64] For example, at one time, immigration legislation, in both the United Kingdom and in the United States, specifically assigned sentencing judges the discretionary power to decide whether a crime was a deportable offence. See: [U.S.A.] *Immigration and Nationality* Act of 1952: U.S.C., Title 8, Chap. 12, Sub. Chap II, Part IV, s. 1227, Deportable Aliens; See also [United Kingdom] *UK Borders* Act, 2007 Chapter 30, s. 32(1) – (7); *Nationality, Immigration and Asylum* Act 2002, c. 41, part 4, s. 72; Parliament has not made a similar policy choice in Canada.

courts is relied upon as a measure of the seriousness of criminality. In other words, the immigration process under the IRPA proceeds on the assumption that sentencing outcomes are a reliable indicator of whether a crime is serious or not. A crime is neither more nor less serious and no more or less deserving of punishment on the basis that the crime is committed by a permanent resident as opposed to a Canadian citizen. It would skew the immigration process if sentencing courts were to begin treating a serious crime as less deserving of punishment, based upon the sentencing judge's view that a particular offender should be allowed to remain in Canada. The same distortion would hold true if a sentencing court were to regard a crime as more deserving of punishment based upon the judge's opinion that a non-citizen offender had worn out his welcome in Canada. That sterner sentence could cause the immigration system to treat a crime as more serious than it truly is, resulting in consequences never intended by the legislation.

36. The appellant draws a distinction without a difference in trying to suggest that reducing a sentence for the purpose of preserving immigration appeal rights is any less determinative of immigration status than increasing a sentence to ensure that those rights are lost. The intention of s. 64 of the IRPA is to more efficiently remove from Canada those non-citizens whose crimes are sufficiently serious as to justify a two year term of imprisonment. That efficiency is just as surely lost by a sentence adjustment below the line as it is advanced by a sentence at or above that line of demarcation. Either decision will have an impact on the individual's prospects of being allowed to remain in Canada

37. A limited discretion in the sentencing court to allow a *de minimis* variation in the sentence that might otherwise be imposed, a difference of days as opposed to weeks or months, is in harmony with both the proper role of sentencing courts and the independent functioning of the immigration system. Sentences are generally not unfit on the basis of a difference of days as opposed to ranges of months. It is permissible for a sentencing court to recognize that serious immigration consequences flow from a specified threshold of sentence length and to then, rather than going above that line, impose another equally fit sentence (one that is minimally reduced) that ensures that the serious immigration consequence is not triggered unjustly. In other words, it is fit and proper that the sentence

imposed sends a clear message that the crime is not so serious that it cannot be sentenced below that line. On the other hand, when a sentencing court concludes that the crime clearly calls for a sentence in excess of the dividing line, that anything lower would be disproportionate, but further reduces the sentence to spare the accused serious immigration consequences that the sentencing court considers undeserved in that case, that court is exceeding its proper role. And, it is defeating Parliament's intention that persons who commit crimes that warrant significant sentences be subject to deportation.

B. Loss of immigration status is not punishment.

38. Central to the appellant's position that immigration consequences impact upon the proportionality of a sentence is the idea that immigration consequences involve additional punishment.[65] This idea is inconsistent with this Court's judgments holding that deportation is not imposed as punishment and does not engage a person's liberty and security of the person interests.

39. In *Medovarski v. Canada (Minister of Citizenship and Immigration)*[66] this Court confirmed that deportation in itself does not engage the liberty and security-of-the-person interests of a non-citizen. It is significant that the Court was considering this s. 7 challenge against a provision of the IRPA that retroactively eliminated s. 64 appeal rights for some non-citizens who had a right of appeal under the former *Immigration Act*. The loss of s. 64 appeal rights is the particular collateral consequence of the sentence imposed that the appellant has focused upon as involving extra punishment.

40. In *Chiarelli v. Canada (Minister of Employment and Immigration)*[67] it was specifically argued that legislation (the former *Immigration Act*) violated s. 7 of the *Charter* because it permitted permanent residents to be deported for crime without regard to the circumstances of the offence or the offender and because it authorized cruel or unusual

[65] See: Appellant's Factum at paras. 37-42, 44 and 45.
[66] *Medovarski* v. *Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 at paragraph 46
[67] *Canada (Minister of Employment and Immigration)* v. *Chiarelli*, [1992] 1 S.C.R. 711 at pages 731 – 736, paragraphs 19 – 31.

punishment or treatment contrary to s. 12 of the *Charter*. This Court rejected both challenges. In doing so, it was held that even a mandatory order of deportation did not infringe any principle of fundamental justice because permanent residents have no unqualified right to remain in Canada. In rejecting the s. 12 challenge, Sopinka J., writing for the unanimous (9-0) Court, noted that deportation is not imposed as punishment.

41. This Court has never explicitly decided the more fundamental questions of whether an order of deportation *per se* involves either a deprivation of liberty or a punishment. The leading decision on this specific question is *Hoang, v. Canada (Minister of Employment and Immigration)*[68]which decided that deportation for serious offences cannot be considered a deprivation of liberty. In *Chiarelli,*[69] Sopinka J., considered it unnecessary to address the question in that no principle of fundamental justice is engaged by the situation. This Court has subsequently held that automatic detention pending deportation involves a deprivation of liberty that engages s. 7 of the *Charter.*[70]

42. While deportation may be a most undesired result or consequence, particularly in the case of a long term permanent resident with substantial roots in this country, it cannot be considered a punishment. It is not imposed as such. It comes about not to punish a criminal act but rather because involvement in crime breaches the conditions under which a person is permitted to remain in Canada. It is also significant that it is not imposed as part of the sentencing of an offender as are many collateral consequences such as weapons prohibition orders, forfeiture of property or DNA data-banking orders. Indeed, in this connection it is important to note that the specific collateral impact that the appellant is asking this Court to consider as punishment is not deportation itself but rather the increased risk of that happening because of the loss of s. 64 appeal rights.

43. The appellant's main argument in support of the conclusion that increased risk of deportation should be treated as "an additional punitive element" revolves around the idea that if he were to be removed from Canada that extra consequence would involve undesired change, serious loss and real hurt. Many convicted criminals suffer extra

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[68] *Hoang v. Canada (Minister of Employment and Immigration)*, 13 Imm. L.R. (2d) 35, (F.C.A.) at page 4
[69] *Chiarelli, supra*, at p. 731(h) to p. 732(a)
[70] See: *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at paragraph 65

consequences that meet those criteria. But, the fact of such grief is not accepted as a sufficient basis for reducing their sentences. For example, a spouse and parent, sentenced to a lengthy penitentiary sentence, may lose the support of a previously supportive and loving spouse, and thereby lose contact with beloved minor children for the duration of a long prison sentence. Arguably that offender's situation is tougher than someone without similar family connections to lose, or an offender whose spouse is prepared to stand by them and faithfully bring the kids for weekly visits. The logic of the appellant's position requires that such collateral hurts and losses be treated as additional punishment, requiring differential sentencing based on differences in familial circumstances that have nothing whatsoever to do with either the gravity of the offense or the moral culpability of the offender.

44. In short, both leading jurisprudence and principled analysis undermine the appellant's thesis that immigration consequences involve "additional punishment" that must be factored into a sentencing court's calculation of the proportionality of the sentence imposed.

C. Deportation is a contingency not a certainty.

45. Treating collateral immigration consequences as a mitigating circumstance is unworkable because it is a contingency not a certainty. The appellant's approach treats deportation as a mitigating circumstance as if it is a certainty of being sentenced for serious crime. Receiving a sentence of two years or more, as in this case, makes deportation more likely by virtue of the loss of appeal rights pursuant to s. 64 of the IRPA, but some risk exists upon conviction for all serious crime and the IRPA provides other processes by which a permanent resident or foreign national may resist removal from Canada. It is not reasonable for sentencing courts to await the outcome of immigration proceedings before passing sentence. And it is not feasible for sentencing courts to either accurately forecast the outcome of that process or the relative risk of deportation that may apply in any given case. Consequently, treating immigration consequences as a mitigating circumstance that may justify more than a minimal consideration is an unworkable approach.

46. A risk of deportation arises for all non-citizen offenders convicted of crimes for which the maximum punishment is a sentence of 10 years imprisonment or more.[71] This applies regardless of what sentence is imposed for the crime. In addition, s. 36 of the IRPA also provides that a foreign national or permanent resident is inadmissible on grounds of serious criminality for being convicted in Canada for an offence and sentenced to a term of more than six months imprisonment. In the case at bar, the appellant is inadmissible for serious criminality on either basis, whether or not his sentence is reduced in the manner he seeks.

47. Deportation proceedings are not initiated in the case of every non-citizen convicted of serious criminality as defined by s. 36 of the IRPA, in spite of their statutory inadmissibility. When the Canadian Border Services Agency ("CBSA") becomes aware that a given permanent resident or foreign national has been convicted and sentenced for a serious crime, the matter is assessed, discretion is exercised and the matter may not proceed to an admissibility hearing; instead, a warning letter may be issued to the offender.[72]

48. Even a sentence of two years imprisonment does not result in automatic deportation. When the CBSA is made aware of the outcome, a decision is then made about whether to take the matter to an admissibility hearing. Admittedly, that is the likely outcome. And an order of deportation is non-discretionary upon the condition of serious criminality being established. But even then there are other avenues by which deportation may be resisted. A person in the situation of the appellant may apply for an exemption from a deportation order on human and compassionate considerations.[73] In addition, such relief is also available on the Minister's own initiative.[74] Moreover, the Ministerial decision on a s. 25

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[71] *IRPA*, s. 36

[72] *IRPA*, ss. 44(2), 112(1), see also Immigration and Refugee Board of Canada, Detention Review Process, Legal Policy Process website: http://www.irb-cisr.gc.ca/eng/brdcom/references/procedures/Pages/ProcessRevMot.aspx; *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2007] F.C.J. No. 965, which discusses the duty of fairness in this process.

[73] *IRPA*, s. 25

[74] *IRPA*, ss. 25.1, 25.2.

application is subject to judicial review in the Federal Court. Deportation has been successfully avoided by this process in exceptional cases.[75]

49. The situation of convention refugees and foreign nationals in need of protection involves a greater contingency. Persons facing persecution in the country to which they would be deported cannot be deported unless the Minister issues an opinion that the risk that they might suffer such harm is outweighed by the danger their criminality presents to Canada.[76] That danger opinion is subject to judicial review and potentially a limited appeal to the Federal Court of Appeal.[77]

50. The impact of s. 64, loss of appeal right, can also vary significantly from one offender to another. It is true that an appeal to the Immigration Appeal Division from an order of deportation is broader in scope than an appeal to the Minister under s. 25 of the IRPA but a loss of appeal right is only truly significant for those who have some viable grounds of appeal. The appellant asserts that such factors as having established roots in Canada, lack of meaningful connection to the foreign country to which they are to be deported and other similar considerations could form the basis for a successful appeal. But the situation of non-citizen offenders sentenced for serious crimes will involve myriad permutations and combinations of these considerations. Some offenders may be virtual Canadians, who were born abroad but have lived in Canada for almost all of their lives. Their loss of the appeal right would therefore be significant. Others may have arrived on these shores, in middle-age mere weeks before committing very serious crimes. It is difficult to imagine how an appeal in their case could be anything more than an empty formality pursued for the sole purpose of delaying the inevitable.

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[75] See for example: *White* v. *Canada (Minister of Citizenship and Immigration)*, [2011] F.C.J. No. 1299 at paragraphs 18 - 20; *Moretto* v. *Canada (Minister of Citizenship and Immigration)*, [2011] F.C.J. No. 132 at paragraph 12

[76] *IRPA* ss. 112(1), 112(3)(b), 113(d), 114(1)(b), 50(d); *Immigration and Refugee Protection* Act *Regulations* SOR/2002-227 [IRPA Regs.] ss. 160, 162, 232

[77] See for example: *Ragupathy* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1370, at paragraphs 17, 23, 24, 39 – 41; *Nagalingam v. Canada (Minister of Citizenship and Immigration)*, 2008 F.C.A. 153 (CanLii)

51. In light of these variables, properly weighing immigration consequences as a mitigating circumstance on sentencing would be a highly complicated exercise. When one adds into the equation the fact that the sentence imposed is going to be used by the immigration system as a measure of the seriousness of particular criminality, the task becomes well nigh impossible. Delaying sentencing to see what happens in the immigration process would not avoid this problem because the immigration consequences are a function of the sentence imposed. Delaying sentencing will only postpone the difficulty.

52. The difficulty of quantifying the contingencies related to immigration consequences is a significant factor against giving it more than minimal consideration. Accepting that immigration consequences must factor into the proportionality of sentence and be treated as a mitigating factor would require that the sentencing process account for these variables. To do it properly, sentencing courts would be required to verse themselves in the complexities of Canadian immigration law and procedure. Undoubtedly, evidence from immigration experts would have to be weighed in the balance. Otherwise, we run the very real risk that a non-citizen will be sentenced to a lesser punishment than a Canadian for the very same crime, when deportation is only a contingency that may never come to pass.

D. <u>The appellant's approach devalues attaining Canadian citizenship.</u>

53. The right to remain in Canada guaranteed to citizens by s. 6 of the *Charter* is one of the most significant rights of being a citizen of this country. To counter the argument that treating immigration consequences as a mitigating factor in sentencing non-citizens will result in Canadians being punished more severely for the identical crimes, the appellant argues that this differential treatment is fully accounted for by the fact that no Canadian faces the added consequence of being deported. While that is true, it is also true that treating immigration consequences as mitigating fails to give adequate weight to the importance of promoting the attainment of Canadian citizenship by permanent residents.

54. In considering how much weight to place on immigration consequences in the sentencing of non-citizens, it is important to keep in perspective the need to promote Canadian

citizenship as not only a desirable objective for non-citizens living in this country but as a necessary commitment to Canada and its future. Citizenship is important. Canada is a democracy and only citizens may fully participate in Canada's democratic system and processes. Non-citizens cannot fully contribute to Canadian society given the fact that they are not entitled to vote in federal and provincial elections[78] and may not hold most public offices.[79] Non-citizens are also exempt from jury service.[80] Only those who are Canadian citizens may undertake this shared responsibility for the perpetuation of our democracy.

55. At the same time, the pre-conditions for attaining Canadian citizenship are far from onerous. Permanent residents may apply for Canadian citizenship after at least three years of actual residency over the most recent four years, if they exhibit "adequate knowledge" of one of Canada's two official languages and can demonstrate some basic knowledge of Canada and its history.[81] The main group of permanent residents, who could otherwise qualify, that are barred from attaining Canadian citizenship are those who are serving sentences for crime, those convicted of indictable crimes in the past three years, and those currently charged with indictable offences. [82]

56. Treating potential deportation as a significant mitigating circumstance for those with strong roots in Canada glosses over the curious fact that the offender has not attained Canadian citizenship. Before requiring a significant sentence discount essentially on the basis that an offender faces potential deportation, it is relevant to consider why these offenders have failed to attain Canadian citizenship and thereby the right to remain in Canada. For permanent resident offenders of long tenure in this country, the more likely explanations for not attaining citizenship are either persistent criminality or insufficient commitment to this country to take the necessary steps to become a Canadian citizen. In either case, the harshness of the potential deportation consequence is greatly attenuated.

[78] See for example: *Canada Elections* Act, SC 2000, c 9, s. 3; *Election Act*, R.S.A. 2000, c. E-1, s. 16(a); *Election Act*, R.S.B.C. 1996, c. 106, s. 29(a); *Election Act*, R.S.O. 1990, c. E.6, s. 15(1)(b)
[79] See for example: *Canada Elections* Act, SC 2000, c 9, s. 65(a); *Election Act*, R.S.A. 2000, c. E-1, s. 56(a); *Election Act*, R.S.B.C. 1996, c. 106, s. 52(1)(a); *Election Act*, R.S.O. 1990, c. E.6, s. 26(1)(b)
[80] See for example: *Criminal Code*, RSC 1985, c C-46, s. 626.(1) ; *Jury* Act, R.S.A. 2000, c J-3, s. 3(b); *Jury* Act, R.S.B.C. 1996, c 242, s. 3(1)(a); *Juries* Act, R.S.O. 1990, c J.3, s. 2(b)
[81] *Citizenship Act*, R.S.C. 1985, c C-29, ss. 5(1)(c),(d) and (e).
[82] *Citizenship Act*, R.S.C. 1985, c C-29, ss. 22(1)(a) and (b)

E. Loss of immigration status is an inexorable consequence of committing serious crime.

57. In discussing the general approach of criminal sentencing law on the impact of collateral consequences, the appellant acknowledges that the law draws a distinction between those consequences that flow inexorably from the crime and those which exceed the reasonable expectations of a person in the position of the offender.[83] For example, a university student training to become a school teacher must reasonably expect that a conviction for sexually assaulting children will make it impossible to pursue that chosen vocation. Likewise a law student convicted of perpetrating a major fraud should expect grave difficulty securing articles of clerkship. That loss of a coveted profession or calling is a significant collateral consequence but the law does not consider it as a mitigating circumstance at the time of sentencing because the offender ought to have expected it given that entrance into those chosen vocations is conditioned upon expectations of good character and lawful behavior.

58. When a collateral consequence greatly exceeds what the offender could have reasonably expected, the law considers it mitigating in recognition of the fact that the offender has suffered that consequence to a substantially greater degree than others who are similarly situated. For example, the appellant cites the case of *R. v. Heatherington* in support of this point.[84] The circumstances of the case are highly instructive of the proper operation of the principle. In that case, the accused, a municipal councilor was convicted of public mischief for having falsely reported being stalked and sexually harassed. The accused was involved in politics and the circumstances of the crime were bizarre. The resulting media storm and public humiliation caused psychological harm to the councilor and members of her family. The Court of Appeal held that the trial judge was wrong to give no weight to this collateral impact because while widespread attention was to be expected given the position of the accused and the bizarre character of the crime, "the consequence of the ensuing humiliation in this case was inordinate."

[83] See paragraph 29 of the Appellant's Factum and the authorities discussed at note 31.
[84] *R. v. Heatherington*, 2005 ABCA 393 at paragraphs 14 and 16

59. In other words, the law takes a contextual approach to considering whether a collateral consequence should be treated as a mitigating factor. The consequence is assessed from the perspective of a person similarly situated to that of the offender and we ask whether the consequence significantly exceeds what that person should have reasonably expected given their situation.

60. Viewed in this light, it can be seen that collateral immigration consequences are the kind of inevitable consequences that are not considered as mitigating circumstances. In this connection it is important to emphasize that this Court has repeatedly affirmed that the most fundamental principle of immigration law is that a non-citizen does not have an unqualified right to enter and remain in Canada.[85] The appellant and all non-citizen offenders who commit serious crimes in this country have "deliberately violated an essential condition under which they were permitted to remain in Canada."[86] Therefore, potential deportation does not exceed what the appellant should have reasonably expected given the position he was in at the time he committed these crimes. Significant immigration consequences must be viewed as flowing inexorably from the fact that the appellant breached an essential condition of his right to remain in Canada. Thus, it is consistent with the law's general approach to collateral consequences that the impact upon the appellant's immigration status not be treated as mitigating.

F. Other common law jurisdictions treat collateral immigration consequences as irrelevant on sentencing.

61. None of the other major common law jurisdictions treat immigration consequences as a relevant sentencing consideration. An approach that refuses to treat immigration consequences as mitigating but allows minimal consideration on sentencing to ensure that immigration consequences are not triggered unnecessarily is less rigid than the approach followed in the United States, Great Britain and Australia.

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[85] For example : *Canada (Minister of Employment and Immigration) v. Chiarelli*, *supra*, at paragraph 24; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, *supra*, at paragraph 46; *R. v. Chiu*, [1984] M.J. No. 473 at paragraph 5; *Charkaoui v. Canada (Citizenship and Immigration)*, *supra*, at paragraph 16

[86] *Canada (Minister of Employment and Immigration) v. Chiarelli*, *supra*, at paragraph 27

62. Serious criminality is differently defined but invariably results in essentially automatic deportation in Great Britain, Australia and in the United States. The American approach is distinct in that deportation flows from the fact of conviction for a broad class of crimes.[87] The sentence imposed for those crimes is not a relevant consideration in the American immigration system. Recognizing that deportation can be a significant collateral consequence, particularly for those who are "virtual" Americans, the United States Supreme Court has recently held that the right to effective assistance of counsel encompasses a right to be warned about potential immigration consequences so that a decision to waive trial and plead guilty must be informed on this point.[88]

63. In both Great Britain and Australia, as in Canada, criminal inadmissibility is a function of the length of sentence imposed by a criminal court. In both countries, deportation is virtually automatic, where an offender has been convicted of a crime that is sentenced to imprisonment of 12 months or more.[89] The proper consideration of immigration consequences at the time of sentencing has been addressed by their highest criminal courts.

64. In *R. v. Mintchev,*[90]the England and Wales Court of Appeal, Criminal Division refused to reduce an otherwise fit sentence of 12 months imprisonment to spare the accused the consequence of automatic deportation under the *UK Borders Act*. The Court offered the following three reasons for this conclusion:

> 20. First, sentences are intended to be commensurate with the seriousness of the offence.
>
> 21. Secondly, when passing sentence a judge is neither entitled nor obliged to reach a contrived result so as to avoid the operation of a statutory provision.
>
> 22. Thirdly, the automatic deportation provisions are not a penalty included in the sentence.[91]

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[87] ***Immigration Act*** of 1990: U.S.C., Title 8, Chap. 12, Sub. Chap. II, Part V, s. 1252, Aliens and Nationality;
[88] *Padilla* v. *Kentucky*, 559 U.S. (2010) No. 08-651, at page 16
[89] *Supra* at FN 63, ***UK Borders* Act**, 2007 Chapter 30, s. 32 [Deportation of Criminals], See also Australia: *Migration Act 1958* (Cth) ("***Migration* Act 1958**"), at s. 201, s. 508
[90] *R. v. Mintchev*, [2011] EWCA Crim 499, U.K. Court of Appeal – Criminal Division
[91] *Ibid*, at para 20-22.

65. It is noteworthy that the same court had previously treated other statutory consequences as essentially irrelevant. In *Attorney General's Ref. No. 50 of 1997 (David Victor V),*[92] the court held that it was not appropriate for a sentence to be reduced to limit the extent of an offender's obligation to register under the *Sex Offenders Act 1997.* Speaking for the court, Rose L.J., stated that doing so could not "conceivably have been intended by Parliament because it would lead inevitably to a partial circumventing of the provisions of the Act itself."[93]

66. In Australia, deportation continues to be, at least in theory, a statutory consequence for those convicted of a crime sentenced to more than 12 months imprisonment who have been permanent residents of Australia for less than ten years.[94] However, this provision is now rarely relied upon because the Australian Minister of Citizenship and Immigration has the power to cancel a permanent resident's visa, no matter how long that person has resided in Australia, on grounds that the person fails to meet a character test.[95] The current reality is that removal from Australia upon completion of a prison sentence for offences like producing controlled substances is virtually a certainty in the vast majority of cases. Nevertheless, Australian appellate sentencing jurisprudence has consistently taken the view that liability for deportation is an irrelevant consideration in determining a fit sentence.[96]

67. In short, in comparison with other democracies with which we share the heritage of the common law, the respondent's approach, which would treat immigration consequences as minimally relevant to ensure that the sentence imposed does not trigger those

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[92] *Attorney General's Ref. No 50 of 1997 (David Victor V),* [1998] 2 Cr App R(S) 155, U.K. Court of Appeal – Criminal Division
[93] *Ibid.,* at p. 157.
[94] *Supra* at FN 88, *Migration Act* 1958 – s. 201
[95] *Migration Act 1958* – S. 501, (7)(A) – (e)
[96] See for example: *Reg. v. Chi Sun Tsui* (1985) 1 NSWLR 308 at page 310, s. E, F, and G; *R. v. Shrestha* [1991] HCA 26; (1991) 173 CLR 48 (20 June 1991), High Court of Australia at paragraph 15 and 16; *R. v* S. [2001] QCA 531 (17 August 2002) Supreme Court of Queensland – Court of Appeal at paragraph 5; *R. v.* Van Hong Pham [2005] NSWCCA 94 , Supreme Court of New South Wales: Criminal Court of Appeal at paragraph 13; *R. v. Dadash* [2012] NSWSC 1511 (7 December 2012) Supreme Court of New South Wales – Criminal Court of Appeal at paragraph 30; *DPP* v. *Hoang* [2012] VCC 1739 (7 November 2012), County Court of Victoria at paragraph 17.

consequences unnecessarily, is an approach that gives greater weight to this personal circumstance of the non-citizen offender. In the United States, deportation is a function of mere conviction, irrespective of sentence. In England and Wales, sentence cannot be reduced in consideration of immigration consequences as doing so would circumvent the intention of Parliament. Similarly, in Australia, immigration consequences are irrelevant in fixing sentence.

Summary of Argument re impact of collateral immigration consequences

68. All of the above considerations support the conclusion that immigration consequences should have only a very limited impact on the sentence imposed on a non-citizen offender. Beyond ensuring that a sentence does not trigger those consequences unnecessarily, when another equally fit sentence would suffice, using this personal circumstance as a basis for mitigating the sentence imposed is simply wrong in principle. Immigration consequences are determined by the Canadian immigration system when criminal courts judge crime as serious in accordance with the gravity of the offence and the culpability of the offender. That yardstick is distorted when sentencing judges adjust the sentence based on their own views about whether an offender deserves to be deported. To mitigate the sentence imposed on account of potential immigration consequences circumvents the intention of Parliament, usurps the role of the immigration system, treats immigration status as a matter of defined punishment rather than the uncertain contingency that it is, and utterly disregards the fact that the offender "deliberately violated an essential condition under which they were permitted to remain in Canada."[97]

II. Did the Court of Appeal have authority to modify the appellant's sentence in the circumstances of this case?

69. The respondent does not dispute that the trial judge had the discretion to consider whether it was necessary to impose a sentence of two years or more that would trigger immigration consequences against the appellant. Indeed, the Crown would not have opposed request for a gaol sentence of only one day less and there is no reason to think

[97] *Chiarelli, supra*, at p. 734 g

that the sentencing judge would not have acceded to it. But from the standpoint of appellate review, it is problematic that the trial judge was never asked to exercise that discretion and therefore could not be said to have made principled error. As the length of sentence was not excessive and not unfit on that basis, the Court of Appeal had no authority to sentence afresh. No fresh evidence was advanced on appeal. It was never shown that trial counsel had overlooked the immigration consequences let alone that the sentencing hearing was unfair to the appellant by reason of ineffective assistance of counsel. Therefore, on this record, the Court of Appeal was correct to dismiss the appeal.

Appellate authority to sentence afresh is contingent upon demonstration of unfitness.

70. It is trite that the jurisdiction of appellate courts is entirely statutory in nature. The power of a court of appeal to vary a sentence imposed at trial is contingent upon a demonstration that the sentence was unfit. The governing provision is s. 687 of the *Criminal Code*, which reads as follows:

> 687.(1) Where an appeal is taken against sentence the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,
>
> a. vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
> b. dismiss the appeal.

71. This Court's teachings have repeatedly affirmed that appellate courts have no power to vary sentence in the absence of a demonstration of unfitness.[98] In short, a sentence may be shown to be unfit by two means. A sentence is unfit if it is so lenient or so excessive, in other words, outside the appropriate range of fit dispositions, that it is patently unreasonable. A sentence may also be shown to be unfit if it is the product of an error in principle. The classic expression of this limitation is stated in this Court's judgment in *R. v. M (C.A.)*, as follows:

[98] *R. v. Shropshire*, [1995] 4 S.C.R. 227, *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, *R. v. McDonnell*, [1997] 1 S.C.R. 948.

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code.[99]

72. The appellant has not sought to argue that the sentence imposed was unfit. Indeed, it has been common ground that either a sentence of two years or a sentence of two years less a day are fit sentences having regard to the gravity of the crime and the appellant's degree of responsibility. The appellant has implicitly acknowledged the jurisdictional bar to relief in this case in that it is urged on the appellant's behalf that appellate courts have a residual discretion to grant *de minimis* relief as is sought in this case.[100]

73. While it is apparent that several provincial appellate courts have granted *de minimis* relief in cases where the matter of immigration consequences was raised for the first time on appeal, their jurisdiction to do so is questionable and has never been considered by this Court. The appellant's reliance upon this Court's decision in *R. v. Bunn*, as authority for the exercise of that power, is misplaced. The principle expressed in *Bunn* is that where there has been an intervening change in the law, the trial judge's failure to anticipate that change in the law and assess the evidence accordingly is equivalent to an error in principle. In light of that error, the Court of Appeal must reassess the evidence in light of the new law and re-sentence. *Bunn* did not involve *de minimis* relief. It involved determination of whether a conditional sentence order was inconsistent with the protection of the public in the circumstances of that case.[101] The principle expressed in *Bunn*, is not authority for grafting a residual discretion to grant *de minimis* relief, an additional substantive power, on appellate courts when there is no statutory basis for the exercise of that authority.

<u>There is no basis for finding that the sentencing judge committed any error in principle</u>

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[99] *R. v. M(C.A.), supra*, at para. 90.
[100] Appellant's Factum at paras. 57, 58 and 62.
[101] *R. v. Bunn,* 2000 SCC 9, [2000] 1 S.C.R. 183 at para. 25

<u>There is no basis for finding that the sentencing judge committed any error in principle</u>

74. Given that the sentence imposed is not patently unreasonable, appellate intervention would be contingent upon showing that the sentencing judge committed an error in principle. But even assuming for purposes of argument that a failure to consider the impact of statutorily imposed immigration consequences could involve such an error, this record does not justify the conclusion that immigration consequences were not considered. The fact of the appellant's citizenship was before the sentencing court in a pre-sentence report. The trial judge is presumed to know the law. The immigration consequence, loss of appeal rights under s. 64 of the IRPA is a matter of statutory law. As demonstrated by the appellant's factum, at the time of the sentencing in this case, there were numerous decisions of the Alberta Court of Appeal in which sentences had been modified by reason of immigration consequences that had not been considered at trial.

75. Trial judges are not required to demonstrate their knowledge of black letter law by running through a checklist that ticks off every relevant consideration. Demonstration of a failure to consider a relevant factor usually requires that the matter was pressed or highlighted in argument by one of the parties and then not discussed in the reasons for judgment. The other means of demonstrating failure to consider a relevant factor would be if the reasons omitted the information by category. An example is where the sentencing judge said there were no other relevant considerations but those she listed and a relevant matter was then omitted from the list. The reasons in this case are as brief as the sentencing hearing that preceded them. This was a sentencing that followed upon a joint submission of counsel. Nothing in the reasons for judgment in this case shows that such an error was made.

76. The appeal boils down to a request to have the Court of Appeal consider matters that were overlooked by defence counsel at trial. The essence of the appeal is that both the prosecutor and the sentencing judge should have been asked to exercise discretion to respectively agree to and impose a sentence of two year less a day on account of the consequential loss of appeal rights under s. 64 of the IRPA. In other words, the basis for

the appeal is not an unfit sentence or principled error on the part of the sentencing court but rather erroneous legal representation at trial.

The absence of fresh evidence precludes appellate intervention.

77. The sole basis for this appeal, the fact that immigration consequences were not appreciated and considered by trial counsel for the appellant, has not been demonstrated. The appellant has not advanced any application to adduce fresh evidence on appeal. Nothing in the appellant's factum filed in the court of appeal even goes so far as to allege that the appellant was unaware of the immigration consequences, so as to suggest that counsel was remiss in failing to discuss that circumstance before entering into a joint submission for a sentence of two years imprisonment. The appellant appears to have been asking the Alberta Court of Appeal and this Court to infer that the matter was unappreciated simply because immigration consequences were not openly discussed during the sentencing hearing. However, that is not a reasonable inference in these circumstances.

78. The record before the Alberta Court of Appeal broadly included materials filed by the appellant to obtain an order extending the time for filing the appeal. Importantly, that material did not contain any affidavit of either the appellant or his trial counsel. The material did not establish that the immigration consequences were not appreciated at the time of trial. The affidavit of the court-appointed translator-interpreter, Esther Trung Lam, who was witness to some of the discourse between the appellant and his trial counsel in court,[102] merely established at best that immigration consequences were not discussed with the appellant in her presence.

79. What is established by the complete record before the Alberta Court of Appeal is that the appellant was motivated to seek a federal sentence, one of two years or more, in order to secure earlier release from incarceration and to have a chance to serve his sentence in Ontario, closer to loved ones. The fact that earlier release under a federal sentence was

[102] Affidavit of Esther Trung-Lam, Appeal No. 1101-0206-A, Exhibit C, Respondent's Record, Tab 8, p. 40, paras. 1 - 3.

discussed with the appellant was explicitly mentioned in the affidavit of Esther Trung-Lam. In addition, the Trung-Lam affidavit also exhibited a letter from the appellant's trial counsel to the Legal Aid Society of Alberta in which he indicated that the joint submission for a penitentiary sentence was based on the consideration that even an 18-month sentence would involve a longer period of actual incarceration. Finally, the record of the sentence hearing itself includes a request for an order or recommendation that the appellant be allowed to serve the federal sentence in Ontario, in order to be close to family.[103]

80. It should be obvious that many offenders who are presented with a choice between a top-end reformatory sentence and a low-end penitentiary sentence may choose the latter option. There are at least three principal considerations which motivate the apparently illogical choice of a slightly longer sentence. First, the unavailability of any type of parole until at least one third of a reformatory sentence has been served compared with the availability of day parole after only one sixth of a federal sentence means that there is a practical benefit to the offender in agreeing to federal time instead of any provincial sentence longer than 12 months.[104] Second, as was the case with the appellant, the ability to serve the sentence in a geographic region proximate to friends and relatives may be an important consideration. Third, an offender's rehabilitation may in some cases be better served by the federal option in that certain occupational programs appealing to the offender are not available in the provincial system.

81. Against these benefits of the slightly longer sentence, a non-citizen, like the appellant, would have to balance potential immigration consequences. However, it does not necessarily follow that immigration consequences will always outweigh these other considerations. It is over-simplistic, paternalistic, and somewhat overly patriotic to assume that all permanent residents of Canada will consider return to their homeland as something akin to punishment, let alone as a consideration more significant than having to spend several extra months in prison thousands of miles away from family. Immigration

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[103] Transcript of Sentencing Proceedings, Appellant's Record, Tab 11, p. 171, lines 19 – 24.
[104] *Corrections and Conditional Release Act*, S.C. 1992, c. 20, s. 119(1)(c)

consequences may be a determinative consideration for many but making a new start by returning to a homeland where one speaks the language and has significant family contacts may not be an unpalatable prospect for a non-citizen whose Canadian adult experiences have mainly involved a struggle with poverty and crime and an inability to master an official language.

82. The point is that, on this record, we do not know what the appellant's relevant situation was at the time of trial. Immigration consequences are part of the personal circumstances of an offender but this record offers no information about how those consequences personally impacted the appellant. Did he care whether he remained in Canada? Was the loss of his s. 64 appeal rights meaningful in his case or a *pro forma* matter only? Was he advised against the longer sentence but chose to gamble on his immigration status? This record does not address any of these pertinent questions. In the face of the appellant's apparent choice for a longer sentence based on other rational considerations, there is simply no factual basis for overturning the result he requested through counsel. The lack of fresh evidence addressing these matters ought to be fatal to this appeal.

83. Although the rules of evidence are more flexible in the context of sentencing than during a trial *per se*, nevertheless, the record established in the sentencing court remains the basis on which an appeal must be decided. The pre-conditions for adducing fresh evidence as a basis for revising the outcome of a sentencing hearing are the same as those that apply when fresh evidence is relied upon to unseat a trial verdict.[105] Those criteria are the following:

> (1)The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases…
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[105] *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487

84. In *Levesque*, Gonthier J., writing for the majority, explained that the same criteria were necessary even though an appeal from a sentence could not lead to a new trial. The justification for this requirement was the effective and efficient administration of criminal justice, in particular, the following considerations:

> The integrity of the criminal process and the role of appeal courts could be jeopardized by the routine admission of fresh evidence on appeal, since this would create a two-tier sentencing system.[106]

85. Concern about creation of a two-tier sentencing system is even more profound where, as here, the fresh evidence involves the matter of which personal circumstances of the offender defence counsel opted not to highlight in a sentencing presentation. Within our adversarial system of criminal justice, a vitally important function of defence counsel is to make the sentencing court aware of the offender's legitimate goals and aspirations that have a bearing on the sentence to be imposed. In the absence of the screening mechanism provided by the fresh evidence rules, it would be open to every offender unhappy with the sentence imposed to insist on re-sentencing in the Court of Appeal by alleging that some personal circumstance was not highlighted by counsel in the court below. This two-tier sentencing system would arise irrespective of whether the failure to raise the matter arose from lack of due diligence or by tactical choice. Without the fresh evidence rules, re-sentencing would be necessitated just because something was not mentioned irrespective of how credible the information or whether it could have had any realistic impact on the sentence imposed.

86. In this case, the appellant relies upon immigration consequences that operated as a matter of statutory law and were therefore readily discoverable at the time of trial. Indeed, the fact which gave rise to this statutory consequence, the appellant's lack of Canadian citizenship, was before the sentencing judge. He seeks to be sentenced afresh not because any new information has come to light but rather on the basis that this information might have been emphasized as a basis for pursuing a slightly lesser sentence. However, as noted, the priority of emphasis on personal circumstances can be a matter of tactical

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[106] *Levesque*, *supra* at para. 20

choice. It would not be helpful to an offender trying to limit actual incarceration by requesting a federal sentence to highlight a circumstance that would invite a court to exercise discretion to impose a lesser term subject to lesser parole availability. Therefore, the first criterion for considering fresh evidence ought to weigh heavily against using this fact as a basis for resentencing. The fact that immigration status was before the court and the failure to emphasize this factor as a basis for a slightly shorter sentence arose either from a lack of due diligence or a tactical choice.

87. Sentencing will have to be redone in many cases if important personal circumstances require re-sentencing at the Court of Appeal every time an offender either changes perspective on a collateral consequence or gains a greater appreciation of the impact of that consequence. For example, such an approach would mean sentencing afresh because an accused did not fully appreciate that a conditional discharge would make it hard to get bonded, thereby limiting employment prospects, even though the offender was warned about that foreseeable outcome by defence counsel.

88. There is a strong societal interest in the finality of sentencing decisions. It is anathema to the effective and efficient administration of criminal justice to create a two-tier sentencing system based upon the shifting priorities or evolving awareness of offenders regarding collateral consequences of the sentence received at trial. Even in the case of a significant collateral consequence such as potential deportation, an appeal court ought to at least require credible evidence that the matter was in fact overlooked by counsel for the appellant.

89. The simple fact is that there is no credible evidence in this case establishing the fact that the immigration consequences were not factored into the decision to seek a two-year sentence. For example, defence counsel might have broadly warned the appellant to seek the advice of an immigration specialist regarding the implications of conviction and sentence on immigration status and then recommended a joint submission of two years to secure greater parole eligibility and the opportunity to serve the sentence in Ontario. Or counsel might have warned the appellant of the specific jeopardy to his immigration status

and the appellant might have still opted to take his chances with the immigration system by giving greater priority to getting out of jail sooner than increasing his chances of remaining in Canada. The fact is that this record does not inform about what transpired between the appellant and his trial counsel. Therefore, we cannot preclude an informed tactical choice to seek a two year sentence, which in principle ought to preclude any sentence appeal in these circumstances.

Is a resentencing required on the basis of ineffective assistance of counsel?

90. Beyond the key factual question of whether immigration consequences were simply overlooked or whether they were considered but not pressed because of a tactical choice to seek a penitentiary sentence, there is a further question of whether re-sentencing is nevertheless required on the basis that the sentencing hearing itself was unfair by reason of ineffective assistance of counsel.

91. In principle, given the potential significance of immigration consequences and the fact that they arise as a matter of statutory law, it is difficult to argue that a non-citizen offender subject to those consequences has received effective representation of counsel in the sentencing process if that counsel is unaware of that statutory law or has failed to discuss that consideration with the client before entering into a joint submission for a sentence that could seriously jeopardize the client's ability to remain in Canada. That view of the matter is supported by the decision of the Quebec Court of Appeal in *R. v. Guzman et al.*[107] In addition, it is consistent with the view expressed by the majority of the United States Supreme Court in *Padilla v. Kentucky*, in the context of advising non-citizens clients facing automatic deportation upon conviction for crime about whether to plead guilty or go to trial.[108]

92. However, there are many potential situations that may arise in the future or indeed may have taken place in this case, which are not so clear. Is it adequate to simply warn about possible immigration consequences? How detailed must the warning be? Is criminal

[107] *Guzman v. R.*, [2011] Q.J. No. 431 at paragraph 99
[108] *Padilla v. Kentucky*, *supra* at pages 11, 12

defence counsel expected to give affirmative advice about the relative wisdom of choosing between reduced incarceration and likely deportation or is it sufficient to recommend that the client seek advice from an immigration specialist? In *R. v. B. (G.D.)*,[109] this Court adopted the approach to judging ineffective assistance claims explained by the United States Supreme Court in *Strickland v. Washington*. That approach employs a reasonableness standard that involves considerable deference to the choices made by defence counsel without regard to the benefit of hindsight. In the context of advising a client about whether to choose a sentence of two years less a day that would attenuate immigration consequences or a one day longer sentence that has other advantages, there are a range of approaches that might be followed. If the issue was canvassed with the appellant in any fashion, it would be incumbent upon him to demonstrate that his counsel's approach to the issue was unreasonable.

93. In this case, no fresh evidence was adduced to establish the nature of legal assistance that the appellant received regarding the sentencing process. Therefore, there is no basis on this record to establish that the sentencing hearing was unfair by reason of ineffective assistance of counsel.

94. In light of these considerations, the record does not provide a basis for appellate intervention. Therefore, the Court of Appeal was correct to dismiss the appeal in this case. However, it is significant that the respondent took the position in the Court of Appeal that a minor variance should be allowed on the basis of the immigration consequences. The appeal proceeded on the basis of that concession. While that position flowed from the fact that the Court of Appeal had previously granted similar relief in like circumstances, it was inconsistent with the proper statutory authority and role of the Court of Appeal in sentencing matters and the lack of any fresh evidence. In light of this history, the respondent does not oppose the appeal being allowed to the extent of returning this matter to the Alberta Court of Appeal for further proceedings, including an application to adduce relevant and credible fresh evidence about whether the immigration consequences were

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[109] *R. v. B. (G.D.)*, 2000 SCC 22, [2000] 1 S.C.R. 520, at paragraphs 26 and 27

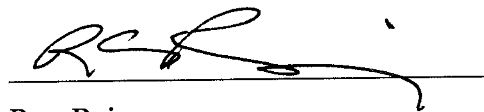
PART IV
COSTS

95. The respondent does not seek costs and makes no representation in that regard.

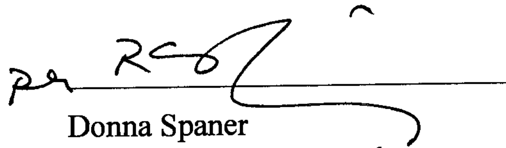
PART V
ORDER SOUGHT

96. The respondent requests that pursuant to s. 46.1 of the *Supreme Court* Act, the matter be returned to the Alberta Court of Appeal to address any further proceedings that would be just in the circumstances.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8th DAY OF JANUARY, 2013.



Ron Reimer
Counsel for the Respondent



Donna Spaner
Counsel for the Respondent

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PART VII
STATUTE / REGULATION / RULE

Canada Elections Act, SC 2000, c 9, s. 3

Persons qualified as electors

3. Every person who is a Canadian citizen and is 18 years of age or older on polling day is qualified as an elector.

Loi électorale du Canada, L.C. 2000, ch. 9, art. 3

Personnes qui ont qualité d'électeur

3. A qualité d'électeur toute personne qui, le jour du scrutin, est citoyen canadien et a atteint l'âge de dix-huit ans.

Canada Elections Act, SC 2000, c 9, s. 65(a)

Ineligible candidates

65. The following persons are not eligible to be a candidate:

(*a*) a person who is not qualified as an elector on the date on which his or her nomination paper is filed;

Loi électorale du Canada, L.C. 2000, ch. 9, art. 65(a)

Candidats inéligibles

65. Les personnes suivantes ne peuvent se porter candidat à une élection :

a) les personnes qui n'ont pas qualité d'électeur le jour où elles déposent leur acte de candidature;

Corrections and Conditional Release Act, SC 1992, c 20, s. 119(1)(c)

Time when eligible for day parole

119. (1) Subject to section 746.1 of the *Criminal Code*, subsection 140.3(2) of the *National Defence Act* and subsection 15(2) of the *Crimes Against Humanity and War Crimes Act*, the portion of a sentence that must be served before an offender may be released on day parole is

(*c*) where the offender is serving a sentence of two years or more, other than a sentence referred to in paragraph (*a*) or (*b*), the greater of

(i) the portion ending six months before the date on which full parole may be granted, and

(ii) six months; or

Loi sur le système correctionnel et la mise en liberté sous condition, L.C. 1992, ch. 20, art. 119(1)(c)

Temps d'épreuve pour la semi-liberté

119. (1) Sous réserve de l'article 746.1 du *Code criminel*, du paragraphe 140.3(2) de la *Loi sur la défense nationale* et du paragraphe 15(2) de la *Loi sur les crimes contre l'humanité et les crimes de guerre*, le temps d'épreuve pour l'admissibilité à la semi-liberté est :

c) dans le cas du délinquant qui purge une peine d'emprisonnement égale ou supérieure à deux ans, à l'exclusion des peines visées aux alinéas *a*) et *b*), six mois ou, si elle est plus longue, la période qui se termine six mois avant la date d'admissibilité à la libération conditionnelle totale;

Criminal Code, R.S.C. 1985, c. C-46, s. 626(1)

Qualification of jurors

626. (1) A person who is qualified as a juror according to, and summoned as a juror in accordance with, the laws of a province is qualified to serve as a juror in criminal proceedings in that

Code criminal, L.R.C. 1985, ch. C-46, art. 626(1)

Aptitude et assignation des jurés

626. (1) Sont aptes aux fonctions de juré dans des procédures criminelles engagées dans une province les personnes qui remplissent les conditions déterminées par la loi provinciale

province.
R.S.C. 1985, c. C-46, s. 626; R.S.C. 1985, c. 27 (1st Supp.), s. 128.

Criminal Code, R.S.C. 1985, c. C-46, s. 687

Powers of court on appeal against sentence
687. (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

- (a) vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
- (b) dismiss the appeal.

Effect of judgment
(2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court.
R.S.C. 1970, c. C-34, s. 614.

Controlled Drugs and Substances Act, SC 1996, c 19, s. 5(2); s. 7(1)

Possession for purpose of trafficking
5. (2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III or IV.
Production of substance
7. (1) Except as authorized under the regulations, no person shall produce a substance included in Schedule I, II, III or IV.

applicable et sont assignées en conformité avec celle-ci.
L.R.C. 1985, ch. C-46, art. 626; L.R.C. 1985, ch. 27 (1er suppl.), art. 128.

Code criminal, L.R.C. 1985, ch. C-46, art. 687

Pouvoirs de la cour concernant un appel d'une sentence
687. (1) S'il est interjeté appel d'une sentence, la cour d'appel considère, à moins que la sentence n'en soit une que détermine la loi, la justesse de la sentence dont appel est interjeté et peut, d'après la preuve, le cas échéant, qu'elle croit utile d'exiger ou de recevoir:

- a) soit modifier la sentence dans les limites prescrites par la loi pour l'infraction dont l'accusé a été déclaré coupable;
- b) soit rejeter l'appel.

Effet d'un jugement
(2) Un jugement d'une cour d'appel modifiant la sentence d'un accusé qui a été déclaré coupable a la même vigueur et le même effet que s'il était une sentence prononcée par le tribunal de première instance.
S.R., ch. C-34, art. 614.

Drogues et autres substances, Loi réglementant certaines, L.C. 1996, ch. 19, art. 5(2); art. 7(1)

Possession en vue du trafic
5. (2) Il est interdit d'avoir en sa possession, en vue d'en faire le trafic, toute substance inscrite aux annexes I, II, III ou IV.
Production
7. (1) Sauf dans les cas autorisés aux termes des règlements, la production de toute substance inscrite aux annexes I, II, III ou IV est interdite.

Election Act, R.S.A. 2000, c. E-1, s. 16(a)

Persons entitled to be listed as electors

16 Subject to section 45, a person is eligible to have the person's name included on a list of electors if that person as of a date fixed by the Chief Electoral Officer

(a) is a Canadian citizen,

Election Act, R.S.A. 2000, c. E-1, s. 56(a)

Eligibility

56 A person is eligible to be nominated as a candidate in an election if on the day the person's nomination paper is filed the person

(a) is a Canadian citizen,

Election Act, R.S.B.C. 1996, c. 106, s. 29(a)

Who may vote

29 In order to vote in an election for an electoral district, an individual must

(a) be a Canadian citizen,

Election Act, R.S.B.C. 1996, c. 106, s. 52(1)(a)

Who may be nominated

52 (1) To be qualified for nomination as a candidate for office as a member of the Legislative Assembly, an individual must

(a) be a Canadian citizen,

Election Act, R.S.O. 1990, c. E.6, s. 15(1)(b)

Electors

15. (1) In an electoral district in which an election to the Assembly is to be held, every person is entitled to vote who, on the general polling day,

(b) is a Canadian citizen;

Election Act, R.S.O. 1990, c. E.6, s. 26(1)(b)

Who may be candidate

26. (1) Every person is qualified to be a candidate who, at the time of signing the consent to nomination,

(b) is a Canadian citizen;

Immigration and Refugee Protection Act, SC 2001, c 27, s. 25

Humanitarian and compassionate considerations - request of foreign national

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may 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.

Humanitarian and compassionate considerations - Minister's own initiative

25.1 (1) The Minister may, on the Minister's own initiative, examine the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act and may 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.

Exemption

(2) The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1).

Immigration et la protection des réfugiés, Loi sur l' L.C. 2001, ch. 27, art. 25

Séjour pour motif d'ordre humanitaire à la demande de l'étranger

25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

25.1 (1) Le ministre peut, de sa propre initiative, étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Dispense

(2) Il peut dispenser l'étranger du paiement des frais afférents à l'étude de son cas au titre du paragraphe (1).

Critères provinciaux

(3) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères

Provincial criteria

(3) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.

2010, c. 8, s. 5.

de sélection de la province en cause qui lui sont applicables.

2010, ch. 8, art. 5.

Public policy considerations

25.2 (1) The Minister may, in examining the circumstances concerning a foreign national who is inadmissible or who does not meet the requirements of this Act, grant that person permanent resident status or an exemption from any applicable criteria or obligations of this Act if the foreign national complies with any conditions imposed by the Minister and the Minister is of the opinion that it is justified by public policy considerations.

Exemption

(2) The Minister may exempt the foreign national from the payment of any applicable fees in respect of the examination of their circumstances under subsection (1).

Provincial criteria

(3) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.

Conditions

(4) The conditions referred to in subsection (1) may include a requirement for the foreign national to obtain an undertaking or to obtain a determination of their eligibility from a third party that meets any criteria specified by the Minister.

2010, c. 8, s. 5;
2012, c. 17, s. 14.

Séjour dans l'intérêt public

25.2 (1) Le ministre peut étudier le cas de l'étranger qui est interdit de territoire ou qui ne se conforme pas à la présente loi et lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, si l'étranger remplit toute condition fixée par le ministre et que celui-ci estime que l'intérêt public le justifie.

Dispense

(2) Il peut dispenser l'étranger du paiement des frais afférents à l'étude de son cas au titre du paragraphe (1).

Critères provinciaux

(3) Le statut de résident permanent ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

Conditions

(4) Les conditions mentionnées au paragraphe (1) peuvent notamment inclure l'obligation pour l'étranger en cause d'obtenir d'une tierce partie une détermination de recevabilité qui répond aux critères précisés par le ministre ou d'obtenir un engagement.

2010, ch. 8, art. 5;
2012, ch. 17, art. 14.

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

36. (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au

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.

Criminality

(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;

(*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;

(*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 indictable offence under an Act of Parliament; or

(*d*) committing, on entering Canada, an offence under an Act of Parliament prescribed by regulations.

Referral or removal order

44. (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, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply

moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Criminalité

(2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants :

a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions à toute loi fédérale qui ne découlent pas des mêmes faits;

b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

c) commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation;

d) commettre, à son entrée au Canada, une infraction qui constitue une infraction à une loi fédérale précisée par règlement.

Rapport d'interdiction de territoire

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Suivi

with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

50. A removal order is stayed
(*d*) for the duration of a stay under paragraph 114(1)(*b*);

50. Il y a sursis de la mesure de renvoi dans les cas suivants :
d) pour la durée du sursis découlant du paragraphe 114(1);

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

(3) Refugee protection may not result from an application for protection if the person

(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two 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;

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d'au moins deux ans ou pour toute déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;

113. Consideration of an application for protection shall be as follows:
(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97

113. Il est disposé de la demande comme il suit :
d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

114. (1) A decision to allow the application for protection has

(*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a

114. (1) La décision accordant la demande de protection a pour effet de conférer l'asile au demandeur; toutefois, elle a pour effet, s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en

country or place in respect of which the applicant was determined to be in need of protection.

cause, à la mesure de renvoi le visant.

Immigration and Refugee Protection Act Regulations SOR/2002-227 [IRPA Regs.]

Application for protection

160. (1) Subject to subsection (2) and for the purposes of subsection 112(1) of the Act, a person may apply for protection after they are given notification to that effect by the Department.

No notification

(2) A person described in section 165 or 166 may apply for protection in accordance with that section without being given notification to that effect by the Department.

Application within 15-day period

162. An application received within 15 days after notification was given under section 160 shall not be decided until at least 30 days after notification was given. The removal order is stayed under section 232 until the earliest of the events referred to in paragraphs 232(*c*) to (*f*) occurs.

Règlement sur l'immigration et la protection des réfugiés DORS/2002-227

Demande de protection

160. (1) Sous réserve du paragraphe (2), pour l'application du paragraphe 112(1) de la Loi, toute personne peut faire une demande de protection après avoir reçu du ministère un avis à cet effet.

Demande sans avis

(2) La personne visée aux articles 165 ou 166 peut faire une demande de protection conformément à ces articles sans avoir reçu du ministère un avis à cet effet.

Demande dans un délai de quinze jours

162. La demande de protection reçue dans les quinze jours suivant la délivrance de l'avis visé à l'article 160 ne peut être tranchée avant l'expiration d'un délai de trente jours suivant la délivrance de l'avis. Le sursis de la mesure de renvoi aux termes de l'article 232 s'applique alors jusqu'au premier en date des événements visés aux alinéas *c*) à *f*) de cet article.

Jury Act, RSA 2000, c J-3, s. 3(b)

Qualifications of jurors

3 Every person who is

(a) resident in Alberta,

(b) a Canadian citizen, and

(c) 18 years of age or older,

is qualified to serve as a juror.

Jury Act, RSBC 1996, c 242, s. 3(1)(a)

Disqualification from serving as a juror

3 (1) A person is disqualified from serving as a juror who is

(a) not a Canadian citizen,

Juries Act, RSO 1990, c J.3, s. 2(b)

Eligible jurors

2. Subject to sections 3 and 4, every person who,

(a) resides in Ontario;

(b) is a Canadian citizen; …

is eligible and liable to serve as a juror on juries in the Superior Court of Justice in the county in which he or she resides.

Public Service Employment Act, SC 2003, c 22, s. 4(2)

Eligibility

4.(2) In order to be eligible to hold office as a Commissioner, a person must be a Canadian citizen within the meaning of the *Citizenship Act* or a permanent resident within the meaning of the *Immigration and Refugee Protection Act*.

Loi sur l'emploi dans la fonction publique L.C. 2003, ch. 22, art. 4(2)

Conditions

4(2) Il faut, pour être commissaire, être citoyen canadien au sens de la *Loi sur la citoyenneté* ou résident permanent au sens de la *Loi sur l'immigration et la protection des réfugiés.*

Public Service Employment Act, SC 2003, c 22, s.39(c),

Preference to veterans and Canadian citizens

39. (1) In an advertised external appointment process, subject to any priorities established under paragraph 22(2)(*a*) and by sections 40 and 41, any of the following who, in the Commission's opinion, meet the essential qualifications referred to in paragraph 30(2)(*a*) shall be appointed ahead of other candidates, in the following order:

(*c*) a Canadian citizen, within the meaning of the Citizenship Act, in any case where a person who is not a Canadian citizen is also a candidate

Loi sur l'emploi dans la fonction publique L.C. 2003, ch. 22, art. 39(c)

Préférence aux anciens combattants et aux citoyens canadiens

39. (1) Dans le cadre d'un processus de nomination externe annoncé, les personnes ci-après sont, sous réserve des priorités établies en vertu de l'alinéa 22(2)*a*) ou des articles 40 et 41, nommées avant les autres candidats, dans l'ordre suivant, pourvu que, selon la Commission, elles possèdent les qualifications essentielles visées à l'alinéa 30(2)*a*) :

c) les citoyens canadiens au sens de la *Loi sur la citoyenneté*, dans les cas où une personne qui n'est pas citoyen canadien est aussi candidat.

Public Service Employment Act, SC 2003, c 22, s.88(3)(a)

Tribunal continued

88. (1) The Public Service Staffing

Loi sur l'emploi dans la fonction publique L.C. 2003, ch. 22, art. 88(3)(a)

Maintien

88. (1) Est maintenu le Tribunal de la

Tribunal is continued, consisting of between five and seven permanent members appointed by the Governor in Council and any temporary members that are appointed under section 90.

...

Eligibility

(3) In order to be eligible to hold office as a member, a person must

(*a*) be a Canadian citizen within the meaning of the *Citizenship Act* or a permanent resident within the meaning of the *Immigration and Refugee Protection Act*; and

(*b*) have knowledge of or experience in employment matters in the public sector.

dotation de la fonction publique, composé de cinq à sept membres titulaires nommés par le gouverneur en conseil et des membres vacataires nommés en vertu de l'article 90.

Mission

(2) Le Tribunal a pour mission d'instruire les plaintes présentées en vertu du paragraphe 65(1) ou des articles 74, 77 ou 83 et de statuer sur elles.

Qualités requises

(3) Il faut, pour être membre du Tribunal :

a) être citoyen canadien au sens de la *Loi sur la citoyenneté* ou résident permanent au sens de la *Loi sur l'immigration et la protection des réfugiés*;

b) avoir de l'expérience ou des connaissances en matière d'emploi dans le secteur public.

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 8 - ALIENS AND NATIONALITY
CHAPTER 12 - IMMIGRATION AND NATIONALITY
SUBCHAPTER II - IMMIGRATION
Part IV - Inspection, Apprehension, Examination, Exclusion, and Removal

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(1) Inadmissible at time of entry or of adjustment of status or violates status

(A) Inadmissible aliens

Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable.

(B) Present in violation of law

Any alien who is present in the United States in violation of this chapter or any other law of the United States, or whose nonimmigrant visa (or other documentation authorizing admission into the United States as a nonimmigrant) has been revoked under section 1201 (i) of this title, is deportable.

(C) Violated nonimmigrant status or condition of entry

(i) Nonimmigrant status violators

Any alien who was admitted as a nonimmigrant and who has failed to maintain the nonimmigrant status in which the alien was admitted or to which it was changed under section 1258 of this title, or to comply with the conditions of any such status, is deportable.

(ii) Violators of conditions of entry

Any alien whom the Secretary of Health and Human Services certifies has failed to comply with terms, conditions, and controls that were imposed under section 1182 (g) of this title is deportable.

(D) Termination of conditional permanent residence

(i) In general

Any alien with permanent resident status on a conditional basis under section 1186a of this title (relating to conditional permanent resident status for certain alien spouses and sons and daughters) or under section 1186b of this title (relating to conditional permanent resident status for certain alien entrepreneurs, spouses, and children) who has had such status terminated under such respective section is deportable.

(ii) Exception

Clause (i) shall not apply in the cases described in section 1186a (c)(4) of this title (relating to certain hardship waivers).

(E) Smuggling

(i) In general

Any alien who (prior to the date of entry, at the time of any entry, or within 5 years of the date of any entry) knowingly has encouraged, induced, assisted, abetted, or aided any other alien to enter or to try to enter the United States in violation of law is deportable.

(ii) Special rule in the case of family reunification

Clause (i) shall not apply in the case of alien who is an eligible immigrant (as defined in section 301(b)(1) of the Immigration Act of 1990), was physically present in the United States on May 5, 1988, and is seeking admission as an immediate relative or under section 1153 (a)(2) of this title (including under section 112 of the Immigration Act of 1990) or benefits under section 301(a) of the Immigration Act of 1990 if the alien, before May 5, 1988, has encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(iii) Waiver authorized

The Attorney General may, in his discretion for humanitarian purposes, to assure family unity, or when it is otherwise in the public interest, waive application of clause (i) in the case of any alien lawfully admitted for permanent residence if the alien has encouraged, induced, assisted, abetted, or aided only an individual who at the time of the offense was the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in violation of law.

(F) Repealed. Pub. L. 104–208, div. C, title VI, § 671(d)(1)(C), Sept. 30, 1996, 110 Stat. 3009–723

(G) Marriage fraud

An alien shall be considered to be deportable as having procured a visa or other documentation by fraud (within the meaning of section 1182 (a)(6)(C)(i) of this title) and to be in the United States in violation of this chapter (within the meaning of subparagraph (B)) if—

(i) the alien obtains any admission into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than 2 years prior to such admission of the alien and which, within 2 years subsequent to any admission of the alien in the United States, shall be judicially annulled or terminated, unless the alien establishes to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws, or

(ii) it appears to the satisfaction of the Attorney General that the alien has failed or refused to fulfill the alien's marital agreement which in the opinion of the Attorney General was made for the purpose of procuring the alien's admission as an immigrant.

(H) Waiver authorized for certain misrepresentations

The provisions of this paragraph relating to the removal of aliens within the United States on the ground that they were inadmissible at the time of admission as aliens described in section 1182 (a)(6)(C)(i) of this title, whether willful or innocent, may, in the discretion of the Attorney General, be waived for any alien (other than an alien described in paragraph (4)(D)) who—

(i) **(I)** is the spouse, parent, son, or daughter of a citizen of the United States or of an alien lawfully admitted to the United States for permanent residence; and

(II) was in possession of an immigrant visa or equivalent document and was otherwise admissible to the United States at the time of such admission except for those grounds of inadmissibility specified under paragraphs (5)(A) and (7)(A) of section 1182 (a) of this title which were a direct result of that fraud or misrepresentation.

(ii) is a VAWA self-petitioner.

A waiver of removal for fraud or misrepresentation granted under this subparagraph shall also operate to waive removal based on the grounds of inadmissibility directly resulting from such fraud or misrepresentation.

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255 (j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

(ii) Multiple criminal convictions

Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable.

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

(iv) High speed flight

Any alien who is convicted of a violation of section 758 of title 18 (relating to high speed flight from an immigration checkpoint) is deportable.

(v) Failure to register as a sex offender

Any alien who is convicted under section 2250 of title 18 is deportable.

(vi) Waiver authorized

Clauses (i), (ii), (iii), and (iv) shall not apply in the case of an alien with respect to a criminal conviction if the alien subsequent to the criminal conviction has been granted a full and unconditional pardon by the President of the United States or by the Governor of any of the several States.

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts

Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.

(C) Certain firearm offenses

Any alien who at any time after admission is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921 (a) of title 18) in violation of any law is deportable.

(D) Miscellaneous crimes

Any alien who at any time has been convicted (the judgment on such conviction becoming final) of, or has been so convicted of a conspiracy or attempt to violate—

(i) any offense under chapter 37 (relating to espionage), chapter 105 (relating to sabotage), or chapter 115 (relating to treason and sedition) of title 18 for which a term of imprisonment of five or more years may be imposed;

(ii) any offense under section 871 or 960 of title 18;

(iii) a violation of any provision of the Military Selective Service Act (50 App. U.S.C. 451 et seq.) or the Trading With the Enemy Act (50 App. U.S.C. 1 et seq.); or

(iv) a violation of section 1185 or 1328 of this title,

is deportable.

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

(ii) Violators of protection orders

Any alien who at any time after admission is enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued is deportable. For purposes of this clause, the term "protection order" means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts (other than support or child custody orders or provisions) whether obtained by filing an independent action or as a pendente lite order in another proceeding.

(F) Trafficking

Any alien described in section 1182 (a)(2)(H) of this title is deportable.

(3) Failure to register and falsification of documents

(A) Change of address

An alien who has failed to comply with the provisions of section 1305 of this title is deportable, unless the alien establishes to the satisfaction of the Attorney General that such failure was reasonably excusable or was not willful.

(B) Failure to register or falsification of documents

Any alien who at any time has been convicted—

(i) under section 1306 (c) of this title or under section 36(c) of the Alien Registration Act, 1940,

(ii) of a violation of, or an attempt or a conspiracy to violate, any provision of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.), or

(iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18 (relating to fraud and misuse of visas, permits, and other entry documents),

NB: This unofficial compilation of the U.S. Code is current as of Jan. 4, 2012 (see http://www.law.cornell.edu/uscode/uscprint.html).

TITLE 8 - ALIENS AND NATIONALITY
CHAPTER 12 - IMMIGRATION AND NATIONALITY
SUBCHAPTER II - IMMIGRATION
Part V - Adjustment and Change of Status

§ 1252. Judicial review of orders of removal

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225 (b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225 (b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

(i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225 (b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225 (b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225 (b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182 (h), 1182 (i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158 (a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182 (a)(2) or 1227 (a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227 (a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227 (a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely on a certification described in section 1229a (c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and

United Kingdom

UK Borders Act, 2007 Chapter 30, s.32(1) – (7)

Deportation of criminals

32 Automatic deportation

(1) In this section "foreign criminal" means a person—

(a) who is not a British citizen,

(b) who is convicted in the United Kingdom of an offence, and

(c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that—

(a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c 41) (serious criminal), and

(b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).

(6) The Secretary of State may not revoke a deportation order made in accordance with subsection (5) unless—

(a) he thinks that an exception under section 33 applies,

(b) the application for revocation is made while the foreign criminal is outside the United Kingdom, or

(c) section 34(4) applies.

(7) Subsection (5) does not create a private right of action in respect of consequences of non-compliance by the Secretary of State.

Nationality, Immigration and Asylum Act 2002, c.41, part 4, s. 72
Removal

72 Serious criminal

(1) This section applies for the purpose of the construction and application of Article 33(2) of the Refugee Convention (exclusion from protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is—

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.

(3) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—

(a) he is convicted outside the United Kingdom of an offence,

(b) he is sentenced to a period of imprisonment of at least two years, and

(c) he could have been sentenced to a period of imprisonment of at least two years had his conviction been a conviction in the United Kingdom of a similar offence.

(4) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if—

(a) he is convicted of an offence specified by order of the Secretary of State, or

(b) he is convicted outside the United Kingdom of an offence and the Secretary of State certifies that in his opinion the offence is similar to an offence specified by order under paragraph (a).

(5) An order under subsection (4)—

(a) must be made by statutory instrument, and
(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.
(6) A presumption under subsection (2), (3) or (4) that a person constitutes a danger to the community is rebuttable by that person.
(7) A presumption under subsection (2), (3) or (4) does not apply while an appeal against conviction or sentence—
(a) is pending, or
(b) could be brought (disregarding the possibility of appeal out of time with leave).
(8) Section 34(1) of the Anti-terrorism, Crime and Security Act 2001 (c 24) (no need to consider gravity of fear or threat of persecution) applies for the purpose of considering whether a presumption mentioned in subsection (6) has been rebutted as it applies for the purpose of considering whether Article 33(2) of the Refugee Convention applies.
(9) Subsection (10) applies where—
(a) a person appeals under section 82, 83[, 83A] or 101 of this Act or under section 2 of the Special Immigration Appeals Commission Act 1997 (c 68) wholly or partly on the ground that to remove him from or to require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, and
(b) the Secretary of State issues a certificate that presumptions under subsection (2), (3) or (4) apply to the person (subject to rebuttal).
(10) The . . . Tribunal or Commission hearing the appeal—
(a) must begin substantive deliberation on the appeal by considering the certificate, and
(b) if in agreement that presumptions under subsection (2), (3) or (4) apply

(having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a).
[(10A) Subsection (10) also applies in relation to the Upper Tribunal when it acts under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.]
(11) For the purposes of this section—
(a) "the Refugee Convention" means the Convention relating to the Status of Refugees done at Geneva on 28th July 1951 and its Protocol, and
(b) a reference to a person who is sentenced to a period of imprisonment of at least two years—
(i) does not include a reference to a person who receives a suspended sentence *(unless at least two years of the sentence are not suspended)* [(unless a court subsequently orders that the sentence or any part of it is to take effect)],
[(ia) does not include a reference to a person who is sentenced to a period of imprisonment of at least two years only by virtue of being sentenced to consecutive sentences which amount in aggregate to more than two years,]
(ii) includes a reference to a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders), and
(iii) includes a reference to a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period (provided that it may last for two years).

Migration Act 1958

Act No. 62 of 1958 as amended

This compilation was prepared on 24 November 2012
taking into account amendments up to Act No. 125 of 2012

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on that date is appended in the Notes section

The operation of amendments that have been incorporated may be
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Prepared by the Office of Parliamentary Counsel, Canberra

Division 9—Deportation

200 Deportation of certain non-citizens

The Minister may order the deportation of a non-citizen to whom this Division applies.

201 Deportation of non-citizens in Australia for less than 10 years who are convicted of crimes

Where:

(a) a person who is a non-citizen has, either before or after the commencement of this section, been convicted in Australia of an offence;

(b) when the offence was committed the person was a non-citizen who:

(i) had been in Australia as a permanent resident:

(A) for a period of less than 10 years; or

(B) for periods that, when added together, total less than 10 years; or

(ii) was a citizen of New Zealand who had been in Australia as an exempt non-citizen or a special category visa holder:

(A) for a period of less than 10 years as an exempt non-citizen or a special category visa holder; or

(B) for periods that, when added together, total less than 10 years, as an exempt non-citizen or a special category visa holder or in any combination of those capacities; and

(c) the offence is an offence for which the person was sentenced to death or to imprisonment for life or for a period of not less than one year;

section 200 applies to the person.

202 Deportation of non-citizens upon security grounds

(1) Where:

(a) it appears to the Minister that the conduct (whether in Australia or elsewhere and either before or after the

Migration Act 1958

Act No. 62 of 1958 as amended

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immediate family member of the person. The immediate family member need not be notified of the refusal.

Automatic cancellation of immediate family member's visa

(13) If a person's temporary safe haven visa is cancelled under subsection (1) or (3), then a temporary safe haven visa held by each immediate family member of the person is also cancelled. The immediate family member need not be notified of the cancellation.

Definitions

(14) In this section:

court includes a court martial or similar military tribunal.

immediate family member of a person means another person who is a member of the immediate family of the person (within the meaning of the regulations).

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate—natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

Note: ***Character test*** is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister—natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).

Character test

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

(ab) the person has been convicted of an offence against section 197A; or

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the ***character test***.

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

Periodic detention

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) the person has been pardoned in relation to the conviction concerned.

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

Note 1: ***Visa*** is defined by section 5 and includes, but is not limited to, a protection visa.