# Removal for Criminality:
# Balancing Safety and Compassion

The Honourable Justice Russel W. Zinn[1]

*The admission into Canada of a person is generally addressed by asking "Does the individual meet the relevant criteria or not?" It is a binary question answered by only one of two possible responses. Removal of a person from Canada who is legally in the country is far more complex, involving a tangle of interests, priorities and laws. This paper outlines the Canadian system for determining when criminality in Canada makes persons ineligible to remain in the country; a system, it is submitted, that balances safety and compassion.*

## INTRODUCTION

Canada welcomes between 240,000 and 265,000 new permanent residents each year. They come for economic reasons, family reunification, or as protected persons. At the same time, approximately 1,800 non-citizens are removed from Canada each year as a result of their criminal conduct.[2]

Canada is not unique in its removal of lawful residents for criminality. As was recently observed by the Supreme Court of the United Kingdom: "[S]tates are entitled to control the entry of aliens into their territory and their residence there."[3] Nonetheless, there are some who question whether the removal of non-citizen criminals who have spent their formative years in their adopted country is an appropriate solution to the problem of the non-citizen criminal when the identity – and accordingly behaviour – of the criminal was the product of a life spent largely, if not entirely, in the deporting state.

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[1] Justice of the Federal Court (Canada). My thanks to Neil Wilson, my Law Clerk from August 2010 to July 2011, for his research assistance and his insights in the writing of this paper.

[2] Canada, Parliament, Order/Address of the House of Commons, No. Q-283, May 29, 2009, by Mr. Harris (St. John's East).

[3] *ZH (Tanzania) v Secretary of State for the Home Department*, [2011] UKSC 4, at para 17.

In an article considering the legality of deporting long-term residents from Australia as a matter of international law, Michelle Foster observed that:

> Apart from the logistical impossibility of reinstituting 'transportation' as a form of criminal punishment, the fact that we punish the criminal behaviour of citizens not by banishment but by imprisonment followed by eventual reintegration into society reflects the fact that as a community we take responsibility for the behaviour of the individuals produced by our community. Given that many long-term residents could be said to be products of their life in Australia, particularly in the case of persons who immigrated to Australia under the age of criminal responsibility and have therefore spent their formative years in Australia, the better view is that they are 'member[s] of society who ha[ve] committed offences', and as such their banishment is best understood as an attempt to 'export [our] problems elsewhere.' [references omitted][4]

There is no such limitation in Canadian law. Canada has imposed on every non-citizen's right to remain in Canada a requirement that he or she not be convicted of certain criminal offences, regardless of how long he or she has been in Canada. In *Chiarelli v Canada (Minister of Employment and Immigration)*, Justice Sopinka made the following observation regarding this stipulation:

> This condition represents a legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country. The requirement that the offence be subject to a term of imprisonment of five years indicates Parliament's intention to limit this condition to more serious types of offences. It is true that the personal circumstances of individuals who breach this condition may vary widely. The offences which are referred to in s. 27(1)(d)(ii) also vary in gravity, as may the factual circumstances surrounding the commission of a particular offence. However there is one element common to all persons who fall within the class of permanent residents described in s. 27(1)(d)(ii). They have all deliberately violated an essential condition under which they were

[4] Michelle Foster, "An "Alien" By the Barest of Threads: The Legality of the Deportation of Long-Term Residents From Australia" [2009] MULR 18, (2009) 33(2) Melbourne University Law Review, 483-541. Many other academic critiques lament current restrictive practices for determining citizenship and suggest that citizenship itself should be reconceptualised: Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University, 2009), Yaffa Zilbershats, *The Human Right to Citizenship* (Ardsley, NY: Transnational Publishers, 2002).

> permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of a deliberate violation of the condition imposed by s. 27(1)(d)(ii) is sufficient to justify a deportation order. It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances.[5]

Despite this well-established starting point, Canadian law requires, in most circumstances, that decision-makers balance the interests of the state and its citizens in safety and crime prevention with the personal interests of the person subject to removal. It is a balance between safety and compassion.

## THE CANADIAN SCHEME

Canada's *Immigration and Refugee Protection Act* (*IRPA*)[6] sets out three classes of persons in Canada who may be subject to deportation: permanent residents, protected persons and foreign nationals.[7] *IRPA* also sets out a series of grounds upon which persons may be found "inadmissible" to Canada. Contrary to its plain meaning, "admissibility" refers not only to the right to be admitted to Canada, but also to the continuing right of non-citizens to remain in the country. Some of the inadmissibility provisions in *IRPA* relate to both foreign nationals and permanent residents, while some apply only to foreign nationals.

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[5] [1992] 1 SCR 711, at para. 27.
[6] SC 2001, c 27.
[7] A permanent resident is a person authorized to remain and work in Canada indefinitely. Other than the right to vote and a residency requirement (two of every five years must be spent in Canada), there few practical differences between permanent residents and citizens. A protected person is one on whom refugee protection has been conferred and who has not lost that status. A foreign national is a person who is neither a Canadian citizen nor a permanent resident, and includes stateless persons. Protected persons who have not become citizens are treated in the same manner as permanent residents even if they have not yet obtained permanent resident status.

*Inadmissibility*

*IRPA* describes categories of inadmissibility relating to criminality, organized criminality, security, human or international rights violations, health, finances, misrepresentation, non-compliance with the legislation, and inadmissible family members. When a permanent resident or foreign national who is otherwise legally in Canada is ordered to be removed from the country, criminality is most often the category of admissibility that is at play. Such crimes are usually crimes committed in Canada; however, criminality may also be found when the person has committed or commits an act or offence outside Canada that would run afoul of the criminality provisions of *IRPA* if it had been committed within Canada.

Criminality under *IRPA* is bifurcated into "serious criminality," which can lead to the inadmissibility of either a permanent resident or a foreign national, and simple "criminality," which can lead to the deportation of a foreign national but not a permanent resident. In making this distinction Canada has seen it fit to accord permanent residents slightly greater leniency than foreign nationals when it comes to criminal misconduct.

Serious criminality occurs when a person has been convicted of an offence that is punishable by a maximum term of imprisonment of at least 10 years or where he or she has been sentenced to a term of imprisonment of more than six months.[8] In contrast, criminality may generally be described as occurring when a person is convicted in Canada

[8] *IRPA*, s. 36(1)(a).

of an indictable offence[9] or two federal offences.[10]

The administrative procedure ultimately leading to the removal of a non-citizen from Canada is triggered by the issuance of the eponymous "s. 44 report." A s. 44 report "may" be issued by an immigration officer who is of the opinion that a permanent resident or foreign national is inadmissible.[11]

The next step is dependant on whether the non-citizen is a permanent resident or a foreign national. Again, Canada treats permanent residents preferentially. If the subject of the s. 44 report is a foreign national who has been found inadmissible because of criminality or serious criminality, and the Minister of Citizenship and Immigration (or, in practice, an immigration officer acting as a delegate of the Minister) believes the report is well-founded, then a deportation order is issued.

The Federal Court of Appeal in *Cha v Canada (Minister of Citizenship and Immigration*)[12] held that an immigration officer tasked with examining the inadmissibility of a foreign resident has no authority to go beyond simply examining whether the criminality requirements of the Act have been met. Personal circumstances such as the length of residence in Canada, family in Canada, and establishment in Canada are not relevant to the decision to deport. This provides for a substantial distinction between the foreign national

[9] Criminal offences in Canada are classified as being either summary conviction or indictable offences. Summary conviction offences encompass the more minor criminal offences, such as causing a disturbance or harassing a person. The more serious criminal offences, such as trafficking in narcotics, sexual assault and murder, are indictable offences.
[10] *IRPA*, s. 36(2)(a).
[11] *IRPA*, s. 44(1).
[12] 2006 FCA 126.

and the permanent resident, whose personal circumstances may be examined by the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. As is discussed below, in spite of this difference in treatment, foreign nationals are not without any opportunity to have humanitarian and compassionate considerations taken into account.

If the subject of the s. 44 report is a permanent resident, the Minister must refer the matter to the Immigration Division (ID) of the Immigration and Refugee Board as only it has the authority to issue the deportation order. Upon referral, the ID will conduct an "admissibility hearing" to determine whether the permanent resident is indeed inadmissible, and if so will make the applicable removal order against the permanent resident.[13] The removal order strips the person's permanent resident status.[14] The ID process is similar to the immigration officer's review of the inadmissible foreign national in that no personal circumstances of the individual are considered. One significant difference is that the ID, unlike the immigration officer, usually holds a hearing and the individual is provided with an opportunity to respond to the allegations of criminality.

*The Immigration Appeal Division*

A permanent resident may appeal to the Immigration Appeal Division (IAD) of the Board from a decision at an admissibility hearing to make a removal order against him or her.[15] However, there is one very important exception to the right to appeal: no appeal may be made by a permanent resident found inadmissible on grounds of serious criminality if he or

[13] *IRPA*, s. 45.
[14] *IRPA*, s. 46(1)(c).
[15] *IRPA*, s. 63(3).

she was punished in Canada by a term of imprisonment of at least two years.[16] As with the different treatment accorded foreign nationals and permanent residents, Canada has seen fit to create a scheme that differentiates in the treatment of permanent residents based on their criminal record.

Upon hearing an appeal of an admissibility hearing decision, the IAD may allow the appeal, dismiss the appeal, or stay the removal order.[17] To allow an appeal, the IAD must be satisfied that the ID decision was wrong in fact or law, that a principle of natural justice was not observed, or that "taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."[18] In order to stay a removal order, the IAD must be satisfied that the above-noted "special relief" is warranted.[19] Where the IAD stays a removal order, it may impose conditions that it considers necessary, may cancel the stay on application or on its own initiative, and may subsequently vary or cancel conditions.[20] Certain conditions are also automatically imposed.[21] Finally, if the IAD

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[16] *IRPA*, s. 64(2).
[17] *IRPA*, s. 66.
[18] *IRPA*, s. 67.
[19] *IRPA*, s. 68(1): "To stay a removal order, the Immigration Appeal Division must be satisfied, taking into account the best interests of a child directly affected by the decision, that sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case."
[20] *IRPA*, ss. 68(2)(a) and (d).
[21] Section 251 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, provides that "If the Immigration Appeal Division stays a removal order under paragraph 66(b) of the Act, that Division shall impose the following conditions on the person against whom the order was made:

(a) to inform the Department and the Immigration Appeal Division in writing in advance of any change in the person's address;
(b) to provide a copy of their passport or travel document to the Department or, if they do not hold a passport or travel document, to complete an application for a passport or a travel document and to provide the application to the Department;
(c) to apply for an extension of the validity period of any passport or travel document before it expires, and to provide a copy of the extended passport or document to the Department;
(d) to not commit any criminal offences;
(e) if they are charged with a criminal offence, to immediately report that fact in writing to the Department; and

stays the removal order of a permanent resident found inadmissible on grounds of serious criminality and the person is convicted of another offence, the stay of removal is automatically cancelled and the appeal terminated.[22]

As noted, where an appeal to the IAD is available, the IAD is tasked with determining whether, "taking into account the best interests of a child directly affected by the decision, sufficient humanitarian and compassionate considerations warrant special relief in light of all the circumstances of the case." The meaning of "special relief" in this context was examined and described in the decision of the Immigration Appeal Board, the predecessor to the IAD, in *Ribic v Canada (Minister of Employment and Immigration)*,[23] where the Board held, at para. 14, that:

> Whenever the Board exercises its equitable jurisdiction pursuant to paragraph 72(1)(b) it does so only after having found that the deportation order is valid in law. In each case the Board looks to the same general areas to determine if having regard to all the circumstances of the case, the person should not be removed from Canada. These circumstances include the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation or in the alternative, the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order. The Board looks to the length of time spent in Canada and the degree to which the appellant is established; family in Canada and the dislocation to that family that deportation of the appellant would cause; the support available for the appellant not only within the family but also within the community and the degree of hardship that would be caused to the appellant by his return to his country of nationality.

The six relevant considerations identified in *Ribic*[24] were reaffirmed by the Supreme Court

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(f) if they are convicted of a criminal offence, to immediately report that fact in writing to the Department and the Division."

[22] *IRPA*, s. 68(4).

[23] [1985] IABD No 4.

[24] For ease of reference:

1. the seriousness of the offence or offences leading to the deportation and the possibility of rehabilitation;

of Canada in *Chieu v Canada (Minister of Citizenship and Immigration),*[25] and now represent an authoritative set of factors that are considered by the IAD in virtually all of its decisions on appeals from admissibility hearings.[26] As noted above, a finding by the IAD that special relief is warranted may support either allowing the appeal or staying the appellant's removal from Canada. Where an appellant asks for a stay as a possible remedy, the Board must consider the request and, if it declines to grant a stay, provide reasons for so doing; however, the IAD's analysis with respect to the appeal may be applied to the stay decision.[27] Where a removal order is stayed, the IAD may reconsider the appeal at a later time, in which case it will reweigh the *Ribic* factors.[28]

The "special relief" the IAD is authorized to provide is where the real balancing occurs. The *Ribic* factors breathe life into the statutory language and accomplish the essential goal of equitable relief: filling the gap between legislative language and human experience. The IAD will weigh the *Ribic* factors and determine whether to grant the appellant a stay of removal, and it is in this analysis where the potential deportee's roots in Canada will come

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2. the circumstances surrounding the failure to meet the conditions of admission which led to the deportation order;
3. the length of time spent in Canada and the degree to which the appellant is established;
4. the existence of family in Canada and the dislocation to that family that deportation of the appellant would cause;
5. the support available for the appellant not only within the family but also within the community; and
6. the degree of hardship that would be caused to the appellant by his return to his country of nationality.

[25] 2002 SCC 3.

[26] The decision in *Chieu* focused on whether potential foreign hardship could be considered in deciding whether to uphold a removal order. The Court concluded that it could be, and held, at para. 90, that: "… the I.A.D. is entitled to consider potential foreign hardship when exercising its discretionary jurisdiction under s. 70(1)(b) of the Act, provided that the likely country of removal has been established by the individual being removed on a balance of probabilities. …"

[27] *Lewis v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1227 (TD). In *Rajagopal v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 523, at para. 34, Justice Mosley suggested that one special relief analysis will be sufficient where it is clear that the IAD's analysis was meant to apply to its decisions with respect to both ss. 67(1)(c) (allowing an appeal) and 68(1) (staying a removal order).

[28] Section 68(3) of *IRPA* provides that "(3) If the Immigration Appeal Division has stayed a removal order, it

into play, with factors such as the length of time spent in Canada, establishment in Canada, family ties, and hardship of return potentially weighing in the appellant's favour.

The application of the *Ribic* factors is not optional; as explained by the Federal Court of Appeal in *Ivanov v Canada (Minister of Citizenship and Immigration)*:

> … once there is evidence that relates to a *Ribic* factor, the IAD must consider that *Ribic* factor in its reasons. This is not tantamount to an obligation to elicit evidence, as the appellant suggests. The evidentiary burden to demonstrate why a stay ought not to be cancelled remains on the permanent resident facing deportation.[29]

However, although the IAD must consider all of the relevant evidence and accordingly any of the applicable *Ribic* factors, it is not required to scrupulously structure its analysis along the lines of the *Ribic* factors, although this often happens in practice.[30]

For long-term residents, establishment in Canada and the hardship that would be caused by removal from Canada are two of the *Ribic* factors which will often be of significant importance. While these two factors are often linked through considerations such as the presence of family, friends, and employment relationships in Canada, for the longest of long-term residents – those who have been in Canada since they were young children – removal will often cause hardship even absent such ties. This, of course, is the natural result of the often complete assimilation of long-term permanent residents into Canadian society. Consider, for example, *Varone v Canada (Minister of Citizenship and*

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may at any time, on application or on its own initiative, reconsider the appeal under this Division."

[29] *Ivanov v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 315, at para. 9.

[30] See, for example, the recent decision in *Iamkhong v Canada (Minister of Citizenship and Immigration)*, 2011 FC 355, where the Court held, at para. 43, that "the IAD's obligation to address the relevant evidence and the *Ribic* factors does not mean that the IAD is required to draft a point-by-point analysis of all the *Ribic* factors. … [T]his analysis cannot, as per the principles of administrative law, require undue formalism on the part of the IAD in terms of how it drafts its reasons."

*Immigration)*, where Justice Simon Noël wrote that:

> Although accepting the hardship that the applicant will have if he were to be removed from Canada, the Appeal Division minimized the hardship by stating that he has no spouse or children and that his parents can be taken care of by his siblings. The applicant claims that he hasn't left Canada since the age of 3, he was educated here, he does not have relatives or friends in France, and he does not speak, read, or understand the French language.[31]

Justice Noël ultimately concluded that the IAD erred by failing to fully address the issue of hardship, instead emphasizing the seriousness of the offence and the possibility of the applicant re-offending. Likewise, in *Archibald v Canada (Minister of Citizenship and Immigration)*[32] the IAD considered a situation where the appellant had been in Canada since he was eleven and had a spouse and a child in Canada, but nonetheless concluded that he had not demonstrated establishment because he had not accumulated property in Canada. Justice Reed set aside the IAD's decision and criticized the IAD for relying solely on the fact that the applicant had not accumulated property in Canada to support a finding that he had not achieved establishment. At para. 10, Justice Reed noted a series of factors relevant in determining establishment:

> These include factors such as: length of residence in Canada; the age at which one comes to Canada; length of residence elsewhere; frequency of trips abroad and the quality of contacts with people there; where one is educated, particularly during the teen and later years; the location of one's immediate family; the location of one's nuclear family and the ties which the members thereof have with the local community; where the individual is located; where his friends are located; the existence of professional or employment qualifications which tie one to a place; the existence of employment contacts.

Of course, the balancing undertaken by the IAD when applying the *Ribic* factors also looks at the broader concerns of public safety underlying the criminality provisions of *IRPA*. The

[31] 2002 FCT 1214, at para. 28.

seriousness of the offences and possibility of rehabilitation are important considerations, and the Board may take a broad approach to assessing the context of the crime underlying the inadmissibility. For example, in *Huang v Canada (Minister of Employment and Immigration)*, the IAD considered the vulnerability of the community affected by the appellant's criminality:

> The Appeal Division is mindful of its responsibility to maintain and protect the health, safety and good order of Canadian society. The appellant is involved in ongoing activity with the Viet Ching gang. He is one of the leaders of a faction of this gang. The gang is involved in various criminal enterprises. The appellant has been convicted of two serious offences which involved known gang members or associates. After the procuring conviction, the key crown witness had to be relocated by the police to ensure her safety against reprisal from the gang. Asian gangs such as the Viet Ching prey on recent immigrants who are unsure of the effectiveness of the Canadian judicial system. The evidence from the respondent's witnesses has shown that it is difficult to get witnesses from the Asian community to come forward to assist the police in combatting these gangs. It is, therefore, important that individuals such as the appellant be removed from Canada not only to protect Canadian society but also to show victims of Asian gangs such as the Viet Ching that the judicial system can work to protect them. In summary, there are few positive factors in the appellant's favour. He has family support and he will probably experience some hardship if returned to China.[33]

Nonetheless, it is clear that the mere fact of the commission of the offence rendering the appellant inadmissible will not be sufficient, in and of itself, to dismiss an appeal, given that such an analysis would not take account of "all the circumstances of the case."[34]

The weighing to be conducted by the IAD is truly weighing, and does not merely amount to counting the number of factors militating in the appellant's favour. In *Canada (Minister of*

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[32] [1995] FCJ No 747 (TD).
[33] 13 Imm LR (2d) 226 (IAD).
[34] *Pushpanathan v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 380 (TD), at paras. 11-15, *Brar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 691, at para. 19.

*Public Safety and Emergency Preparedness) v Allen*[35] Justice Heneghan dismissed an application for judicial review by the Minister where the IAD had allowed an appeal based on only one of the six *Ribic* factors, the possibility of rehabilitation. As noted by the IAD, the possibility of rehabilitation was a factor which "saved the day" for the Mr. Allen.

As noted, where the IAD stays a removal order, it may reconsider its decision at any point in the future on application by either the person affected or the Minister, or of its own accord.[36] This is logical given that a stay is a temporary measure which does not ultimately resolve a person's status in Canada. The IAD will periodically engage in reconsiderations with an eye to resolving the appeal permanently. In many cases, the IAD will grant a stay for a specified period of time, after which time the case will be reviewed. Where the IAD reconsiders the appeal, it will reweigh the *Ribic* factors.[37] A stay and subsequent reconsideration will often occur where there are concerns of criminal recidivism, and in such cases ongoing criminal behaviour may alter the balance of the *Ribic* factors which had originally been determined in the appellant's favour.

*Hardware v Canada (Minister of Citizenship and Immigration)*[38] was such a case. Mr. Hardware was a Jamaican man who had been a permanent resident of Canada for over 20 years and had a daughter and stepson in Canada. Based on these positive considerations, the IAD had granted him a stay of removal; however, Mr. Hardware was subsequently convicted of assaulting his wife and impaired driving, and upon reconsideration and

[35] 2011 FC 124.
[36] *IRPA*, s. 68(3).
[37] In *Canada (Minister of Citizenship and Immigration) v Stephenson*, 2008 FC 82, at para. 25, the Federal Court confirmed that where the IAD reconsiders a decision, the *Ribic* factors continue to be the factors it is required to consider.

reweighing of the *Ribic* factors in light of these circumstances the IAD set aside the stay of the removal order and dismissed the appeal, thus clearing the way for Mr. Hardware's deportation. In dismissing an application for judicial review of this decision, Justice Russell wrote that:

> It had been made clear to the Applicant that the positive factors in his case warranted giving him a chance to stay in Canada, but only if he fulfilled the stated conditions and, in particular, avoided further criminality. The Applicant subsequently breached the conditions upon which the stay was based and engaged in serious criminal conduct. The IAD reviewed the stay and all of the Ribic factors and decided that the positive factors, including Olivia's [the daughter's] interests, could no longer be used by the Applicant to shield him from the consequences of his continued criminality.
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> In this context, I do not think that anything further in the way of reasons was required. The Applicant fully understood that the stay he was granted was conditional upon his fulfilling the conditions. He understood that the positive factors, fully identified and assessed, could not be used to shield him a second time. The Decision re-examines the Ribic factors but it must be obvious to the Applicant that he has been given his chance and that he cannot remain in Canada and behave the way he has chosen to behave, even if that means that his daughter's interests, if considered in isolation, are a positive factor to keep him here. [emphasis added][39]

However, not all problematic behaviour while a stay of removal is in force will necessarily lead to a dismissal of the appeal. In *Canada (Minister of Public Safety and Emergency Preparedness) v Ali*,[40] the IAD had granted a stay and the applicant had subsequently been convicted of a number of driving offences. When the applicant's case came up for review, the Minister took the position that the stay should automatically be cancelled and the appeal dismissed because of these offences. The IAD came to the opposite conclusion and allowed the appeal, noting that the offences were of a "relatively minor nature." The Minister sought to judicially review this determination but was unsuccessful.

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[38] 2009 FC 338.
[39] *Hardware*, at paras. 54-55.

*Barring of Appeals*

*IRPA* bars appeals to the IAD where a person has been found inadmissible due to serious criminality relating to an offence punished by a term of imprisonment of over two years. As a result, persons convicted of more serious offences will most often be unable to benefit from the special relief provided by the IAD applying the *Ribic* factors, relief that would have been available pre-*IRPA*. As explained by the Supreme Court in *Medovarski v Canada (Minister of Citizenship and Immigration), IRPA* is intended to prioritize security:

> The objectives as expressed in the IRPA indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security … Viewed collectively, the objectives of the IRPA and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.
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> In keeping with these objectives, the IRPA creates a new scheme whereby persons sentenced to more than six months in prison are inadmissible: IRPA, s. 36(1)(a). If they have been sentenced to a prison term of more than two years then they are denied a right to appeal their removal order: IRPA, s. 64. Provisions allowing judicial review mitigate the finality of these provisions, as do appeals under humanitarian and compassionate grounds and pre-removal risk assessments. However, the Act is clear: a prison term of over six months will bar entry to Canada; a prison term of over two years bans an appeal.
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> In introducing the IRPA, the Minister emphasized that the purpose of provisions such as s. 64 was to remove the right to appeal by serious criminals. She voiced the concern that "those who pose a security risk to Canada be removed from our country as quickly as possible".[41]

Under the current system, long-term residents inadmissible for serious criminality

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[40] 2008 FC 431.
[41] 2005 SCC 51, at paras. 9-12.

sentenced to more than two years imprisonment and foreign nationals who have no access to the IAD do have other options; they may make a "humanitarian and compassionate" application under s. 25 of *IRPA*, they will be entitled to a Pre-Removal Risk Assessment to ensure they will not be removed to a country where they face risk of harm,[42] and they may seek judicial review of decisions leading to their removal, such as the decision to refer an individual to an admissibility hearing before the ID.[43] However, the barring of an appeal to the IAD is a significant loss given that the person affected will have effectively lost the opportunity to benefit from the equitable "special relief" the IAD is authorized to grant; this feature of *IRPA* has attracted criticism from the Canadian immigration bar.[44]

The loss of the right to appeal to the IAD is of such importance that it may be considered in the context of criminal sentencing, and indeed it is generally accepted that a criminal sentence may be structured in a way that preserves a person's right of appeal to the IAD. This was done in *R v Hennessey*,[45] where the Ontario Court of Appeal varied the appellant's sentence in order that no single offence was punished by more than two years' imprisonment. The Court held that:

> In *R. v. Hamilton and Mason* (2004), 186 C.C.C. (3d) 129, this court stated that the risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender. However, this court cautioned that the sentencing process cannot be used to circumvent the provisions and policies of the *Immigration and Refugee Protection Act*.

[42] *IRPA*, ss. 112(1), 113(d), and 114(1)(b).
[43] *IRPA, s. 72.*
[44] The immigration bar had a number of concerns regarding the change; Colin R. Singer, on behalf of the Canadian Bar Association, National Immigration and Citizenship Law Section, suggested that "The denial of a right to appeal based on an arbitrary rule that does not distinguish between permanent residents who arrived six months ago, and those who arrived 20 years ago, or as children, is fundamentally flawed and unfair"; see Anna Pratt, *Securing Borders: Detention and Deportation in Canada* (Vancouver: UBC Press, 2005) at 61.
[45] 2007 ONCA 581, paras. 3-4.

> On the facts of this case, the Crown acknowledges that a sentence of 23 months imprisonment, inclusive of pre-sentence custody, would not have been outside the range for any single count of the robbery offences. Both the Crown and the defence agree that the 35-month sentence imposed in addition to pre-sentence custody was appropriate in terms of totality. On these particular facts, given the Crown's concession, in our view, it would not circumvent the provisions and policies of the *Immigration and Refugee Protection Act* to impose sentences of 23 months on individual counts but a global sentence equivalent to that imposed by the trial judge.

Similarly, in *R v Abouabdellah*[46] the Quebec Court of Appeal reduced a sentence of a fine for shoplifting to a conditional discharge so that a foreign student would not be deported, as that would be a "disproportionate" response to her rather minor crime.

Before a decision is made to prepare a s. 44 admissibility report and to refer the report to the ID, the Canada Border Services Agency will typically provide the person affected with a "fairness letter" informing him or her of the inadmissibility process and inviting written submissions. The procedural fairness obligations under s. 44 have been characterized as "relaxed"[47] and the scope of the discretion afforded to the officers has been described as "very limited,"[48] reflecting the reality that the procedure under ss. 44(1) and (2) is a formality primarily intended to establish the facts of inadmissibility rather than to consider broader considerations relating to establishment in Canada or the hardship of leaving. As

[46] (1996), 109 CCC (3d) 477 (QCA).

[47] The duty of fairness essentially comprises the right to make submissions and to be provided with a copy of the s. 44 report: *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429, *Richter v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 73, *Tran v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1078.

[48] See *Awed v Canada (Minister of Citizenship and Immigration)*, 2006 FC 469, at paras. 16-18, where Justice Mosley found that the purpose of an interview under s. 44(1) is "simply to confirm the facts that may support the formation of an opinion by the officer that a permanent resident or foreign national present in Canada is inadmissible." However, there is at least some discretion under s. 44(2) with respect to the decision to refer the report to the Immigration Division: see *Richter v Canada (Minister of Citizenship and Immigration)*, 2008 FC 806, aff'd 2009 FCA 73, at paras. 12-14. There does appear to be some conflict in the jurisprudence regarding the extent of an officer's discretion when dealing with a permanent resident potentially inadmissible for serious criminality under s. 44: see *Monge Monge v Canada (Minister of Public Safety and*

per *Awed v Canada (Minister of Citizenship and Immigration)*:

> … where criminality is alleged, the scope of the discretion afforded the officer and the Minister is very limited, reflecting Parliament's intention that non-citizens who commit certain types of crimes are not to remain in Canada.[49]

While the precise scope of the relevant considerations under s. 44(2) is unsettled in the jurisprudence, Justice Russell's assessment in the recent decision of *Faci v Canada (Minister of Public Safety and Emergency Preparedness)* makes it clear that the venue for considering compassionate relief is not s. 44; he wrote that "The general consensus seems to be that the Act provides opportunities elsewhere for the applicant to raise H&C [humanitarian and compassionate] issues."[50]

As a result, barring concerns of risk to life in a long-term resident's home country, the primary way for a long-term permanent resident convicted of an offence and sentenced to over two years of imprisonment to avoid deportation will be a humanitarian and compassionate (H&C) application under s. 25 of *IRPA*, which provides that:

> The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign national outside Canada, 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.[51]

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*Emergency Preparedness)*, 2009 FC 809, at paras. 20-32, where Justice Harrington reviews the divergence in the case law.

[49] 2006 FC 469, at para. 16.

[50] 2011 FC 693, at para. 25.

[51] Once a removal order is made by the Immigration Division, the subject of the removal order will lose their permanent resident status: *IRPA*, ss. 45(d) and 46(1)(c); this will result in them becoming a foreign national eligible to make a humanitarian and compassionate application under s. 25.

Humanitarian and compassionate applications for permanent residence will be granted where it is determined that a person would suffer unusual and undeserved or disproportionate hardship if they were to be removed from Canada. There is no exhaustive list of the factors that may be considered in an H&C application, but relevant considerations include establishment in and ties to Canada, potential hardship in the country of origin such as discrimination or harassment, separation from relatives in Canada and the impact on those relatives, and the best interests of any children involved. The facts surrounding an H&C applicant's serious criminality will also be weighed by the officer considering the application, as the officer may consider the nature of the offence, the sentence, time elapsed since the conviction, or whether the conviction was isolated or part of a pattern of recidivism. Assessed as a whole, these H&C factors bear a striking similarity to the six *Ribic* factors. There are, however, significant differences between an H&C and a hearing before the IAD. An H&C will normally be considered based on written submissions and evidence, whereas an appeal before the IAD will typically involve an oral hearing with live evidence. Even more importantly, filing an H&C application will not automatically prevent an applicant's removal from Canada, whereas an appeal to the IAD will.[52]

As with decisions of the IAD and decisions under s. 44, H&C decisions may be subject to judicial review before the Federal Court. There is a rich base of case law surrounding H&C applications, jurisprudence confirming that H&Cs are intended to capture circumstances not anticipated by the Act and to provide relief where warranted. Like a

[52] Under s. 233 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227, a removal order is stayed "if the Minister is of the opinion that the stay is justified by humanitarian and compassionate considerations …" Conversely, as per s. 49(1)(c) of *IRPA,* a removal order will not come into force until the

hearing before the IAD, an H&C application allows for the recognition of compelling factors relating to establishment in Canada and hardship when removing a long-term resident from Canada, even where he or she is guilty of serious crimes. As noted by the Supreme Court in *Medovarski*, the availability of an H&C application mitigates the finality of the provisions relating to inadmissibility for serious criminality. It provides, even in cases of the most serious of crimes, the opportunity for an individualized assessment which balances all of the interests affected by deportation.

## INTERNATIONAL COMPARISONS

The source and nature of potential relief from deportation for criminal non-citizens are different in other jurisdictions.

In the United Kingdom, domestic courts apply provisions of and jurisprudence relating to the protections of an international human rights convention, the *European Convention on Human Rights* (ECHR), and in particular s. 8, which provides protection for private and family life.[53] The UK Supreme Court in *ZH (Tanzania) v Secretary of State for the Home Department*, noted a series of factors identified by the European Court of Human Rights in Strasbourg as relevant to evaluating the proportionality of the interference with the right to family life occasioned by deportation of long-term residents for criminality, namely,

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;

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final determination of the appeal.

[53] *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, [1950] COETS 1.

- the time elapsed since the offence was committed and the applicant's conduct during that period; the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled;
- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.[54]

In Australia, an executive guideline, Ministerial Direction No. 41, "Visa refusal and cancellation under s. 501," is used to structure the determinations of an administrative tribunal.[55] The Direction divides the listed considerations into primary considerations, which include protection from serious criminal or other harmful conduct, particularly crimes involving violence; whether the person was a minor when they began living in Australia; the length of time the person has been resident in Australia; and the best interests of the child. Secondary considerations include family ties, and the nature and extent of any

[54] [2011] UKSC 4, at para. 17.
[55] Australia, Minister for Immigration and Citizenship, "Direction [no.41] – Visa refusal and cancellation under section 501," signed into force June 2009.

relationships; the person's age, health and education; links to the country to which they would be removed; hardship likely to be experienced by the person or their immediate family members lawfully resident in Australia; and whether the person was previously advised that his or her conduct could result in deportation.

Perhaps unsurprisingly, there is significant overlap between the factors to be weighed in the three very different decision-making processes used in Canada, the UK, and Australia; *Ribic*, the ECHR jurisprudence, and Direction No. 41 all mandate similar considerations. In each country the process attempts to balance safety and compassion.

The deportation of long-term residents is also regulated by international human rights treaties, in particular the *International Covenant on Civil and Political Rights* (ICCPR).[56] Under the ICCPR, the Human Rights Committee (HRC) monitors compliance with the ICCPR's provisions by parties to the ICCPR. The Optional Protocol to the ICCPR enables individuals to bring complaints directly against countries they allege are violating the ICCPR after having exhausted all available domestic remedies.[57] The ICCPR provides a number of protections relevant in the context of the deportation of long-term residents.[58]

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[56] 19 December 1966, [1976] UNTSer 141; 999 UNTS 171.

[57] Canada and Australia have both signed on to the Optional Protocol; the United States and United Kingdom have not.

[58] Some relevant provisions are as follows:

> Article 12
> 1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
> 2. Everyone shall be free to leave any country, including his own.
> 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
> 4. No one shall be arbitrarily deprived of the right to enter his own country.
> Article 13
> An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom

Despite these robust protections, the HRC, and accordingly the ICCPR, is of limited practical use to parties in Canada alleging a breach of the ICCPR. This was demonstrated by the case of Mansour Ahani, an Iranian citizen recognized as a Convention refugee by Canada, but who was to be deported on terrorism grounds. Mr. Ahani had argued his case all the way to the Supreme Court of Canada, where the Court determined that deportation to Iran would not violate his right to life, liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms*[59] and otherwise dismissed his appeal, thus clearing the way for his deportation. Mr. Ahani then brought a communication to the HRC requesting relief under the ICCPR. The HRC requested that Canada stay Mr. Ahani's deportation until the HRC had considered his communication. Canada refused, and Mr. Ahani applied for an injunction restraining his deportation pending the HRC's consideration of his communication. The injunction application was dismissed, as was his appeal to the Ontario Court of Appeal.[60] While the facts of *Ahani* and the ICCPR rights at stake were different than those related to the deportation of long-term residents for criminality, the Court of Appeal's decision provided important guidance regarding the enforceability of rights under the ICCPR. The Court essentially found that, standing alone,

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> only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.
> Article 17
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
> 2. Everyone has the right to the protection of the law against such interference or attacks.
> Article 23
> 1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
> 2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
> …

[59] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

the ICCPR did not guarantee Mr. Ahani any domestic rights in Canada. As the Court emphatically explained:

> The principle that international treaties and conventions not incorporated into Canadian law have no domestic legal consequences has been affirmed by a long line of authority in the Supreme Court of Canada.[61]

Canada has ratified the Optional Protocol to the ICCPR, which governs individual complaints, but has not incorporated it into its domestic law. With respect to the effect of Canada signing on to the ICCPR and its protocols, the Court explained that:

> By signing the Protocol, Canada did provide an individual like Ahani an opportunity to seek the Committee's views. But it qualified that right in two important ways. In any given case, Canada first reserved the right to reject the Committee's views, and, second, reserved the right to enforce its own laws before the Committee gave its views.[62]

What remedy, then, would Mr. Ahani have for Canada's decision to sign on to a procedure but then choose not to follow it? The Court concluded that Canada's alleged bad faith was to be judged as a matter of public opinion, not enforced as a matter of Canadian law:

> If, however, Canada has not acted in good faith, then it may justifiably be open to public criticism. If it falls short of the laudable goal of a full commitment to human rights conventions and treaties, other states may take it to task. … What Ahani complains about is a matter for the court of public or international opinion, not for a court of law.[63]

In the court of public opinion, or at least academic opinion, it has been suggested that the deportation of long-term residents does violate international human rights law in a number of ways.[64] Whether this translates into meaningful pressure on elected representatives is

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[60] *Ahani v Canada (Minister of Citizenship and Immigration)*, (2002), 58 OR (3d) 107 (CA).
[61] *Ahani*, at para. 34.
[62] *Ahani*, at para. 42.
[63] *Ahani*, at para. 47.
[64] Michelle Foster argues a series of violations arise from current Australian practice, including violations of the right to one's own country, the right to life and protection from cruel, inhuman or degrading punishment,

another question.

Some of the Commonwealth countries treat the international obligations engaged by the deportation of non-citizens differently than Canada does. Australia, for one, has seen it fit to make specific mention of its "relevant international obligations," including the ICCPR, as a "primary consideration" when examining the deportation of a non-citizen for criminality. In the UK, the *Human Rights Act 1998*[65] gives further national effect to the provisions of the ECHR.

Despite the apparent ineffectiveness of the HRC in Canada, its decisions do provide insightful analysis of the difficult issues raised by the deportation of long-term residents for criminality. In *Stewart v Canada*,[66] the HRC considered a communication from a permanent resident of Canada who faced deportation due to a long history of criminality. Mr. Stewart had immigrated to Canada with his family at the age of seven, but failed to apply for citizenship. Almost all of Mr. Stewart's family also lived in Canada. He had unsuccessfully appealed his deportation order to the predecessor to the IAD and unsuccessfully sought review of this decision at the Federal Court of Appeal. Having exhausted his domestic remedies, he brought a complaint to the HRC alleging that his rights under articles 7, 9, 12, 13, 17 and 23 of the ICCPR had been violated. The HRC determined that none of his rights had been violated.

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the right not to be punished twice for the same offence, and the right to family life: "An "Alien" By the Barest of Threads: The Legality of the Deportation of Long-Term Residents From Australia" [2009] MULR 18, (2009) 33(2) Melbourne University Law Review, 483-541.

[65] 1998 c. 42.

[66] Communication No 538/1993, CCPR/C/58/D/538/1993 (HRC).

Interestingly, the HRC in *Stewart* left open the possibility that the guarantee in article 12 that "No one shall be deprived of the right to his own country" could apply more broadly than just to citizens; as explained by Lorne Waldman, "The Committee accepted that in circumstances where countries unreasonably denied a person access to nationality, a person might be able to successfully argue that a country was his own country even though he had not acquired nationality."[67] The HRC nonetheless found that in Mr. Stewart's case, the denial of Canadian nationality was the result of his own actions and that he had accordingly not been deprived of the right to "his own country." According to the HRC, the interference with Mr. Stewart's family life occasioned by his deportation would be neither unlawful nor arbitrary given the proceedings before the predecessor to the IAD available to him. The HRC explained that:

> The language of article 12, paragraph 4, permits a broader interpretation, moreover, that might embrace other categories of long-term residents, particularly stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.
>
> The question in the present case is whether a person who enters a given State under that State's immigration laws, and subject to the conditions of those laws, can regard that State as his own country when he has not acquired its nationality and continues to retain the nationality of his country of origin. The answer could possibly be positive were the country of immigration to place unreasonable impediments on the acquiring of nationality by new immigrants. But when, as in the present case, the country of immigration facilitates acquiring its nationality, and the immigrant refrains from doing so, either by choice or by committing acts that will disqualify him from acquiring that nationality, the country of immigration does not become "his own country" within the meaning of article 12, paragraph 4, of the Covenant. In this regard it is to be noted that while in the drafting of article 12, paragraph 4, of the Covenant the term "country of nationality" was rejected, so was the suggestion to refer to the country of one's permanent home.
>
> Mr. Stewart is a British national both by birth and by virtue of the nationality of his parents. While he has lived in Canada for most of his life

[67] Lorne Waldman, *Immigration Law and Practice*, 2nd ed, looseleaf (Markham: LexisNexis, 2005) at 10.160.

> he never applied for Canadian nationality. It is true that his criminal record might have kept him from acquiring Canadian nationality by the time he was old enough to do so on his own. The fact is, however, that he never attempted to acquire such nationality. Furthermore, even had he applied and been denied nationality because of his criminal record, this disability was of his own making. It cannot be said that Canada's immigration legislation is arbitrary or unreasonable in denying Canadian nationality to individuals who have criminal records.
>
> …
>
> Countries like Canada, which enable immigrants to become nationals after a reasonable period of residence, have a right to expect that such immigrants will in due course acquire all the rights and assume all the obligations that nationality entails. Individuals who do not take advantage of this opportunity and thus escape the obligations nationality imposes can be deemed to have opted to remain aliens in Canada. They have every right to do so, but must also bear the consequences. The fact that Mr. Stewart's criminal record disqualified him from becoming a Canadian national cannot confer on him greater rights than would be enjoyed by any other alien who, for whatever reasons, opted not to become a Canadian national. Individuals in these situations must be distinguished from the categories of persons described in paragraph 12.4 above.[68]

Accordingly, *Stewart* would appear to foreclose the possibility that Canada's deportation of a long-term resident for criminality could violate the ICCPR. However, *Stewart* was decided in the context of the former *Immigration Act* and on the basis that Mr. Stewart was given "ample opportunity" to present evidence of his family connections to the IAD. The fact that the current Act bars appeals to the IAD where the person has been imprisoned for over two years suggests that a different result could be a possibility today.[69]

[68] *Stewart*, at 12.4 to 12.6 and 12.8.
[69] Lorne Waldman, *Immigration Law and Practice*, 2nd ed, looseleaf (Markham: LexisNexis, 2005) at 10.160.

A significant difference between the Canadian approach and that taken by some other states is with respect to the weight to be given to the best interests of a child affected by the deportation when weighing humanitarian and compassionate considerations.

As noted earlier, Australia accords the interests of an affected child the status of "primary consideration," while the UK has taken what might be argued is an even stronger position. A unanimous UK Supreme Court in *ZH (Tanzania)* held that the best interest of an affected child is to be given greater weight than other factors. As Lord Kerr wrote at para. 46:

> It is a universal theme of the various international and domestic instruments to which Lady Hale has referred that, in reaching decisions that will affect a child, a primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them. It is not necessary to express this in terms of a presumption but the primacy of this consideration needs to be made clear in emphatic terms. What is determined to be in a child's best interests should customarily dictate the outcome of cases such as the present, therefore, and it will require considerations of substantial moment to permit a different result." [Emphasis added]

This is to be contrasted with the Canadian approach. Canadian courts have stated that the decision-maker, whether it be in the context of a deportation or in the context of an H&C application, must be "alert, alive, and sensitive" to, and must not minimize, the interests of any children who may be adversely affected by a parent's deportation.[70] However, our courts have also stated that a child's interest is but one consideration and that, while it is important, it is not entitled to greater weight than other factors. The Federal Court of

[70] See, for example, *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, at para.

Appeal in *Kisana v Canada (Minister of Citizenship and Immigration)*[71] recently surveyed the Canadian jurisprudence and stated that: "[A]n applicant is not entitled to an affirmative result on an H&C application simply because the best interests of a child favour that result. It will more often than not be in the best interests of the child to reside with his or her parents in Canada, but this is but one factor that must be weighed together with all other relevant factors."

## CONCLUSION

Canada has implemented a system of deportation for criminality which offers relief based on a multi-faceted analysis rather than a rigid numerical or categorical rule. The advantage of such a system is that it avoids applying bright-line rules doomed to have an element of arbitrariness and impossible to calibrate according to individual circumstances. Nothing magical happens after spending a precisely identified number of years in a country; establishment is something which is inevitably variable and will be based on questions such as language, family, culture, and employment. The hardship of leaving a country will always depend on individual experience and circumstances, and it is only a system which provides some element of individual evaluation that can truly find the appropriate balance. The challenge of reconciling the many interests affected by deportation – including public safety – is best met by true balancing, which requires recognition that each situation is unique.

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85.
[71] 2009 FCA 189, at para 24.