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Les questions de droit pénal et l'immigration

Criminal Law Issues and Immigration

ICAJ Conférence annuelle 2023: Le droit des frontières

CIAJ 2023 Annual Conference: The Law of Borders

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

- **January 2017**: A inflicted multiple stab wounds on a neighbour. He was arrested and criminally charged.
- **February 2017**: a removal order was issued against A for non-compliance with his student visa as he had not been attending school.
- **January 2018**: A was found not criminally responsible for aggravated assault on account of a mental disorder. His case was referred to the BC Review Board for disposition.
- **February 2018**: Review Board released A from the Forensic Psychiatric Hospital ("FPH") on a conditional discharge, including a term that he "not be detained or removed from BC by any authority without prior notice to, and a hearing of, the British Columbia Review Board".
- **March 2018**: A returned to custody at FPH following an altercation. He detention was continued at successive annual review hearings.
- **April 2022**: Review Board ordered that A be conditionally discharged. The Board declined to include as part of the conditional discharge a term similar to the one that had been imposed in February 2018.

Criminal Code/Code Criminel s. 672.54

[T]aking into account the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused, [Board may order]:

(a) absolute discharge

(b) conditional discharge; or

(c) detention in a hospital

[P]renant en considération, d'une part, la sécurité du public qui est le facteur prépondérant et, d'autre part, l'état mental de l'accusé, sa réinsertion sociale et ses autres besoins [le tribunal peut ordonner]:

(a) libération inconditionnelle;

(b) libération conditionnelle; ou

(c) détention dans un hôpital

Définitions - Definitions

Loi sur l'immigration et la protection des réfugiés - s.2

Immigration and Refugee Protection Act - s.2

étranger Personne autre qu'un citoyen canadien ou un résident permanent; la présente définition vise également les apatrides.

foreign national means a person who is not a Canadian citizen or a permanent resident, and includes a stateless person.

résident permanent Personne qui a le statut de résident permanent et n'a pas perdu ce statut …

permanent resident means a person who has acquired permanent resident status and has not subsequently lost that status ...

Loi sur l'immigration et le statut des réfugiés (LIPR)
Immigration and Refugee Protection Act (IRPA)

48 (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

48 (1) A removal order is enforceable if it has come into force and is not stayed.

50 Il y a sursis de la mesure de renvoi dans les cas suivants :

a) une décision judiciaire a pour effet direct d'en empêcher l'exécution, le ministre ayant toutefois le droit de présenter ses observations à l'instance;

50 A removal order is stayed

(a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order …

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

Comments from Banafsheh Sokhansanj (no slides)
Legislation and Cases Cited with Pinpoints:

- *Immigration and Refugee Protection Act*, SC 2001, c 27, s 3(1)
- *Corrections and Conditional Release Act*, SC 1992, c 20, ss 3-3.1, 128(4)
- *Criminal Code*, RSC1985, c C-46, ss 672.53, 718
- *Agraira v. Canada (PSEP)*, 2013 SCC 36 at para 78
- *Alexander v. Canada(Solicitor General)* 2005 FC 1147 at para 35
- *Canada (PSEP) v. Chhina*, 2019 SCC 29 at para 5
- *Perez v. Canada (MCI)*, 2005 FC 1317 at para 24
- *Collins v. Canada (AG)*, 2012 FC 268 at para 39

Anthony Navaneelan's comments on *Agbakoba* follow on slides 8-15

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

- The question in *Agbakoba* – whether the Review Board could impose a non-removal condition as part of conditional discharge order – arose because a conditional discharge order on its own does not trigger a stay of removal under s.50(1)(a) of the IRPA. And this is unexpected given the language of the provision:

> **50** A removal order is stayed **(a)** if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order.

- In *Agbakoba,* the Minister was given an opportunity to make submissions.

- And most conditional discharges require the NCR accused to (i) remain under the supervision of the Director; (ii) reside at a location in the province approved by the Director and (iii) regularly report to the Adult Forensic Psychiatric Clinic. Hard to see how the NCR accused could comply with such an order if he is removed.

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

- BCCA relied on *Perez* 2005 FC 1317 at para. 19, which held: "For the direct contravention principle to apply, express language prohibiting the deportation of an inadmissible person from Canada would have to be used by a decision maker in a judicial proceeding."

- But there is nothing in a Review Board's detention order that expressly prohibits the deportation of an inadmissible person from Canada and it is accepted that detention orders trigger an IRPA s.50(1)(a) stay. Why are conditional discharge orders different?

- Also, there are plenty of other orders that do not include "express language prohibiting the deportation of an inadmissible person from Canada" that nonetheless trigger an IRPA s.50(1)(a) stay: bail orders, criminal and civil subpoenas, etc.

- See: CBSA Manual ENF 10 – Removals, at s.12.1

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

The fact a Review Board's conditional discharge order does not trigger a statutory stay of removal makes sense when one examines other types of criminal law orders that do and do not trigger a stay – and what that says about IRPA's treatment of non-citizens with criminality.

Does trigger a stay under IRPA	**Does <u>not</u> trigger a stay under IRPA**
Term of imprisonment (IRPA, s.50(b))	Parole order
Review Board detention order	Probation order
Criminal bail order	Review Board conditional discharge
Criminal summons	

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

- Prior to their convictions, both citizens and non-citizens will be living in Canada, working in jobs, raising families, and being part of their communities.

- The criminal law understands that, at the end of their sentences, citizens will be returning to their communities and so there is a strong interest – alongside deterrence and denunciation – to also focus on rehabilitation and reintegration.

- **The IRPA inserts itself and effectively removes rehabilitation and reintegration as an interest in respect of non-citizens subject to removal orders. For permanent residents, a criminal deportation order converts you from a member of the community into a foreigner. The rehabilitation of such persons is not a concern of Canada. Nor is the danger that they may pose to the public in their country of removal.**

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

- ***Corrections and Conditional Release Act,* s. 128(4):** non-citizens subject to removal orders are not eligible for day parole or an unescorted temporary absence until they are eligible for full parole.

- ***Corrections and Conditional Release Act,* s. 128(4) + IRPA, s.50(1)(a):** a non-citizen released on parole, statutory release or an unescorted temporary absence can be deported during the parole period and before the warrant expiry date.

- **IRPA, s.58(1)(a):** when a non-citizen is detained as being a danger to the public, the Immigration and Refugee Board cannot simply defer to the Parole Board's conditions since the latter are based on rehabilitation and reintegration whereas immigration detention is not concerned with those objectives: *Salinas-Mendoza*, [1995] 1 FC 251

- There is no rehabilitative programming for non-citizens held in immigration detention in provincial jails since the purpose of detention is not rehabilitation and reintegration: *Ali*, 2017 ONSC 2660

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

- In this context, the outcome in *Agbokoba* fits comfortably.

- While the non-citizen is detained in a psychiatric hospital – which, although not punitive, can certainly feel so to the person concerned – they benefit from a s.50(1)(a) stay and cannot be removed.

- But once the Review Board's disposition skews towards rehabilitation and reintegration – i.e. conditional discharge into the community – the s.50(1)(a) stay no longer applies and the non-citizen is removable. This is true even if the Review Board concludes that removal would be dangerous to the public in the country of removal.

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

- The threshold to deport a permanent resident for criminality in Canada (with no right of appeal) is a conviction that resulted in a sentence of +6 months: IRPA, s. 36(1)(a), 64(2).

- Once you pass that threshold, CBSA can refer an admissibility report to the Immigration and Refugee Board and, if the report is correct, the Board **must** issue a deportation order. There is no right for humanitarian and compassionate factors to be considered.

- The deportation of permanent residents in this context raises a host of ethical questions:

Agbakoba v. British Columbia (Adult Forensic Psychiatric Services), 2022 BCCA 394

1. Permanent residents may have lived in Canada for decades, may have been brought to Canada as children, and may now have children of their own. Moreover, their criminality may be uniquely the product of their lives in Canada, including neglect they suffered in this country; addictions they developed in this country; criminal gangs to which they were exposed in this country.

2. Since non-citizens subject to removal orders are denied access to many aspects rehabilitative programming, we are exporting back to countries individuals who may pose an increased danger.

3. There is no provision of the IRPA to consider danger to the public ***abroad*** as a reason to stop removal. Where the IRPA requires a decision-maker to consider danger to the public in the context of removal, the statute refers to "danger to the public ***in Canada***": IRPA, s. 113(d)(i), 115(2)(a).

Mason

- **Mason a été inculpé de deux chefs de tentative de meurtre et de deux chefs d'accusation lui reprochant d'avoir déchargé une arme à feu après une dispute avec un homme dans un bar durant laquelle il a tiré des coups de feu. Éventuellement, un arrêt des procédures a été ordonné pour cause de délai.**
- Mason was charged with two counts of attempted murder and two counts of discharging a firearm following an argument with a man in a bar during which he fired a gun. The charges were eventually stayed because of delay.

- **Il a été allégué que Dleiow a été l'auteur d'actes de violence contre des partenaires intimes et d'autres personnes. Certaines des accusations criminelles découlant de ces incidents ont été suspendues, et il a plaidé coupable à trois accusations et a obtenu une absolution conditionnelle.**
- Dleiow was alleged to have engaged in acts of violence against intimate partners and other persons. Some of the criminal charges flowing from these incidents were stayed and he pled guilty to three charges and received a conditional discharge.

Loi sur l'immigration et le statut des réfugiés (LIPR)
Immigration and Refugee Protection Act (IRPA)

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

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

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

Sécurité/Security – LIPR/IRPA s.34

34 (1) Emportent interdiction de territoire pour raison de sécurité les faits suivants :
34 (1) [a non-citizen] is inadmissible on security grounds for

(a) […]espionnage […] contraire aux intérêts du Canada;
(a) engaging in an act of espionage […] contrary to Canada's interests;

(b) […] renversement d'un gouvernement par la force;
(b) […]subversion by force of any government;

(b.1) […]subversion contre toute institution démocratique, […];
(b.1) […] subversion against a democratic government, institution or process […];

(c) se livrer au terrorisme; *(c) engaging in terrorism;*

(f) être membre d'une organisation [auteur de] a), b), b.1) ou c).
(f) being a member of an organization [engaged in] (a), (b), (b.1) or (c).

Sécurité/Security – LIPR/IRPA s.34

(d) constituer un danger pour la sécurité du Canada;

(d) being a danger to the security of Canada;

(e) être l'auteur de tout acte de violence susceptible de mettre en danger la vie ou la sécurité d'autrui au Canada;

(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada;

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

La SAI n'a pas pris en compte:
(1) deux éléments relatifs au contexte législatif:
- **les exemptions disponibles**
- **Les critères lors de *l'Examen de risque avant renvoi* (ERAR)**

(2) les conséquences importantes de sa décision.
(3) les contraintes imposées par le droit international

The IAD did not consider:
(1) two points of statutory context:
- Available relief
- Criteria applicable on a pre-removal risk assessment (PRRA)

(2) the broad consequences of its decision
(3) constraints imposed by international law

Exemption – s.34
Relief – s.34

42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, […] n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

6 (3) Ne peuvent toutefois être déléguées les attributions conférées par le paragraphe […] 42.1(1)

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, […] do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

6 (3) [T]he Minister may not delegate the power conferred by […] 42.1(1)

Exemption – s.36(1)(a)
Relief – s.36(1)(a)

Exemptions à l'inadmissibilité s.36(1)(a):

- **Demande pour motif d'ordre humanitaire (s.25)**
- **Section d'appel de l'immigration (SAI) si peine de moins de six mois**
- **Suspension du casier judiciaire (pardon)**

Exemptions to inadmissibility under s.36(1)(a):

- Humanitarian and compassionate relief (s.25)
- Immigration Appeal Division (IAD) if sentence less than six months
- Record suspension (pardon)

Examen de risque avant renvoi (ERAR)
Pre removal risk assessment (PRRA)

36 (1)(a):

113 (d)(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

113 (d) (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada,

34:

113 (d)(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

113 (d)(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and

Conséquences

- **Étendue des actes visés (querelles conjugales, bagarres dans un bar ou une cour d'école**
- **s.34 assujetti à un critère beaucoup moins exigeant, à savoir l'existence de « faits [. . .] appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir » (*LIPR*, art. 33).**
- **Impact pour les jeunes contrevenants (exemptés sous s.36(3)(e))**

- Scope of application (bar fights, schoolyard violence, domestic altercations)
- s. 34 are subject to the much lower standard of "facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur" (*IRPA*, s. 33).
- Implications for youth offenders (otherwise exempted under s.36(3)(e))

Convention relative aux réfugiés
Refugee Convention

Article 33

Défense d'expulsion et de refoulement

1. Aucun des États Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

Article 33
Prohibition of Expulsion or Return ("Refoulement")

1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

Comments from Banafsheh Sokhansanj (no slides)
Legislation and Cases Cited with Pinpoints:

- *Tran v. Canada (PSEP),* 2017 SCC 50 at para 40
- *Canada (MCI) v. Solmaz*, 2020 FCA 126 at para 2, 123-124, 147)
- *Revell v. Canada (MCI),* 2019 FCA 262 at para 46-52, 114-116

Anthony Navaneelan's comments on *Mason* follow on slides 27-34

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

Citizens in Canada are largely subject to a single regime to decide whether they had engaged in acts dangerous to public safety in Canada and to impose punishments for those acts: the criminal justice system.

Prior to *Mason,* it was understood that non-citizens were also largely subject to this same single regime to decide whether they had engaged in acts dangerous to public safety in Canada and to impose punishments for those acts.

While the IRPA could impose additional consequences for non-citizens who engaged in acts dangerous to public safety (e.g., deportation), the IRPA always deferred to the criminal justice system to first make that determination. Additional consequences for non-citizens under the IRPA followed from a conviction and were relieved by a record suspension.

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

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

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

[…]

(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;

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

There are three exceptions to this under the IRPA:

- Section 34: Inadmissibility for security reasons
- Section 35: Inadmissibility for war crimes and human rights violations
- Section 37: Inadmissibility for organized criminality

For these types of wrongs, the IRPA allows immigration authorities to decide for themselves – without the need for a criminal conviction – whether a non-citizen had engaged in acts dangerous to public safety. This determination takes place through an admissibility hearing.

Permitting s.34 and 35 inadmissibilities to proceed this way reflects that the wrongs often took place overseas – meaning Canada may lack jurisdiction to criminally prosecute – or the evidence may be classified or otherwise not amenable to criminal rules of evidence.

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

Section 34(e) of the IRPA renders a permanent resident or a foreign national inadmissible (deportable) from Canada for:

> "engaging in acts of violence that would or might endanger the lives or safety of persons in Canada"

Where the danger is required to have a nexus to national security, the exception to the standard rule – that inadmissibility for endangering public safety in Canada must follow from a conviction – is a limited one. And it remains tied to the some of the reasons for the exception: the evidence may be classified or otherwise not amenable to criminal rules of evidence.

But where there is no nexus to national security – as the FCA had read s.34(e) of the IRPA – the provision fundamentally alters the entire admissibility scheme of the IRPA – creating a means to deport a non-citizen for certain regular public wrongs without any conviction.

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

Criminal trial	Admissibility hearing
The rules of evidence apply	The rules of evidence do not apply
The standard is proof beyond a reasonable doubt	The standard is reasonable grounds to believe
Evidence is normally *viva voce* with the right to cross-ex	Most evidence is documentary with no right to cross-ex
The trier of law is a judge	The trier of law may not even be a lawyer
Sections 7 and 11 of the *Charter* apply	Sections 7 and 11 of the *Charter* do not apply.

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

The initial concern was that individuals whose criminal charges were withdrawn or stayed – or resulted in a discharge – would be subject to inadmissibility (deportation) proceedings on the same allegations.

Then a larger concern was individuals who were acquitted in their criminal proceedings would be subject to inadmissibility (deportation) proceedings on the same allegations.

But then this begs the question – when dealing with allegations of violence committed by a non-citizen, why even engage the criminal justice system at all?

Once the police arrive on the scene of a violent event, citizens and non-citizens can be separated. Citizens would then be processed into the criminal justice system and non-citizens into admissibility (deportation) proceedings.

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

34 (1) A permanent resident or a foreign national is inadmissible on security grounds for […]
(e) engaging in acts of violence that would or might endanger the lives or safety of persons in Canada

55 (1) An officer may issue a warrant for the arrest and detention of a permanent resident or a foreign national who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for examination, for an admissibility hearing, for removal from Canada or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2).

58 (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that (a) they are a danger to the public.

Mason c. MCI 2023 CSC 21
Mason v. MCI 2023 SCC 21

This kind of overreach is an unfortunately common feature of how the IRPA's inadmissibility provisions have been interpreted.

To recall, s.37 of the IRPA sets out inadmissibility for organized crime, without the need for a conviction. Originally it was intended to target the leadership of criminal organizations who, based on the structure of the group, may insulate themselves from a criminal conviction.

But the provision has been interpreted so broadly that there is very little difference between a criminal organization and a conspiracy under the s.37 of the IRPA. In *Stojkova*, 2021 FC 368, the Immigration Board found three family members who stole groceries from supermarkets constituted a criminal organization.

B010 (2015), *Tran* (2017) and *Mason* (2023) all involved unanimous judgments from the SCC overturning expansive and especially unforgiving interpretations of IRPA's criminal inadmissibility provisions.