Canada – Immigration Consequences of Criminal Sentences and Discharges

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This article will focus on criminal inadmissibility and the consequences that distinct types of sentences have on permanent residents convicted in Canada. Inadmissibility prevents certain individuals from entering or remaining in Canada. There are numerous grounds of inadmissibility under sections 34 to 37 of *Immigration and Refugee Protection Act* ("IRPA"), based on security,[1] human or international rights violations,[2] criminality[3] or organized criminality.[4]

Permanent residents convicted of an offence are deemed to be criminally inadmissible and run the risk of deportation. The two grounds of criminal inadmissibility under section 36 of IRPA are (1) serious criminality and, (2) criminality. A permanent resident can be found to be criminally inadmissible for serious criminality if convicted in Canada of an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years.[5]

Ordinarily, permanent residents have the right to appeal a removal order to the Immigration Appeal Division (IAD) of the Immigration and Refugee Board. However, they do not have the right to appeal if they have been found to be inadmissible on the grounds listed under sections 34 to 37 of IRPA.[6] This means that permanent residents do not have the right to appeal a removal order for serious criminality if a custodial sentence of six months or more has been imposed.[7]

Conditional Sentences

If a court imposes a conditional sentence the offender is allowed to serve it in the community subject to certain conditions.[8] Before the decision in *Tran v Canada,*[9] the Supreme Court of Canada held that conditional sentences of more than six months were custodial sentences, and therefore could cause a permanent resident to be inadmissible for serious criminality.[10] However, the Supreme Court in *Tran* reversed its previous stance and held that conditional sentences should not be considered when determining inadmissibility for serious criminality. In *Tran*, the appellant was a permanent resident who pleaded guilty to production of a controlled substance under the *Controlled Drugs and Substances Act*,[11] as a participant in an illegal marijuana growth operation. He received a one-year conditional sentence. Because the sentence was longer than six months, a Canada Border Services Agency officer prepared a report alleging that Mr. Tran was inadmissible under section 36(1)(a) of IRPA. The Minister of Public Safety and Emergency Preparedness agreed with the report, which resulted in an admissibility hearing and a removal order was issued. Mr. Tran filed an application for judicial review and argued that a one-year conditional sentence was not a "term of imprisonment" under section 36(1) of IRPA. The Supreme Court agreed and held that a conditional sentence was not a term of imprisonment. The Court held that a conditional sentence:

> "[…] will usually be more lenient than jail terms of equivalent duration, and generally indicate less serious criminality than jail terms. Since a conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders, interpreting "a term of imprisonment of more than six months" as including both prison sentences and conditional sentences undermines the efficacy of using length to evaluate the seriousness of criminality."[12]

This decision gives offenders with conditional sentences of more than six months the right to appeal their removal orders if they are found to be inadmissible on the grounds of serious criminality.

[1] *Immigration and Refugee Protection Act* S.C. 2001, c. 27, section 34 'Security'.
[2] *Ibid* at section 35 'Human or international violations'.
[3] *Ibid* at section 36 'Criminality'.
[4] *Ibid* at section 37 'Organized criminality'.
[5] *Ibid* at section 36(1)(a).
[6] *Ibid* at section 64(1).
[7] *Ibid* at section 64(2).
[8] *Criminal Code* R.S.C., 1985, c. C-46, section 742.7
[9] *Tran v. Canada (Public Safety and Emergency Preparedness)* 2017 SCC 50, 2017 CSC 50
[10] *R v Proulx* 2000 SCC 5
[11] *Controlled Drugs and Substances Act* S.C. 1996, c. 19
[12] *Supra note* 9 *Tran v Canada*

Suspended Sentences

Section 731(1)(a) of the *Criminal Code* allows a court to suspend the passing of a sentence. This means that the offender is released under a probation order with conditions for a period of up to three years. According to the Citizenship and Immigration Canada Manual guidance on evaluating inadmissibility, a suspended sentence is a conviction.[13]

In *Roman c. Canada,*[14] a permanent resident pleaded guilty to one count of fraud and received a one-year suspended sentence. A deportation order was issued against the appellant, for inadmissibility on grounds of serious criminality. The IAD of the Immigration and Refugee Board ordered the appellant to be removed from Canada and held that he had no right to appeal the removal order as he was inadmissible for serious criminality. The appellant argued that "a suspended sentence of more than six months was not equivalent to a prison sentence within the meaning of paragraph 36(1)(a) of the [IRPA]."[15] The panel held that a one-year suspended sentence was "considered a prison sentence,"[16] and:

> "[…] that the appellant has no right of appeal under subsections 64(1) and 64(2) of the Act because he is inadmissible on grounds of serious criminality under paragraph 36(1)(a) of the Act, and received a prison sentence of at least six months, i.e., a 12-month suspended prison sentence."[17]

Unlike conditional sentences which the Supreme Court has held are not equivalent to custodial sentences, the same guidance does not exist in relation to suspended sentences. The IAD held on various occasions that a suspended sentence makes permanent residents criminally inadmissible and subject to removal orders that they cannot appeal if convicted to six months or more.

Absolute and Conditional Discharges

Discharges are a way for courts to avoid imposing the full impact of a criminal conviction on an offender pursuant to section 730 of the *Criminal Code*. There are two types of discharges: (1) absolute discharges, and (2) conditional discharges. For absolute discharges, a conviction is not registered and there are no conditions imposed. However, a finding of guilt is made. A conditional discharge subjects the offender to a probation order with certain conditions attached for a period of up to three years.

A conviction does not exist when courts grant discharges[18] and therefore if a court imposes one on a permanent resident, they are not inadmissible for serious criminality.[19] For example, in *Ranger v Canada*, the IAD set aside a removal order made against an offender who was subject to a conditional discharge, stating that "he was not convicted of an offence reportable under section 36(1)(a) of IRPA."[20] The appellant, a permanent resident, had been ordered removed due to his conviction for possession of counterfeit currency. During the hearing, it was submitted by the appellant that "the removal order made against him was not valid in law, because he had not been convicted, but rather subject to a conditional discharge."[21] The IAD agreed.
Like conditional sentences, discharges also allow for the right of appeal in circumstances where a removal order is made against an offender.

Conclusion

Permanent residents convicted of an offence for which a discharge or conditional sentence is imposed will not be inadmissible for serious criminality and have the right to appeal to the IAD if a removal order is made against them. However, if a suspended sentence is imposed, permanent residents lose the right to appeal the removal order. They are limited to filing applications for judicial review at the Federal Court, and to filing applications to Immigration, Refugees and Citizenship Canada, for reasons involving humanitarian and compassionate grounds.

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[13] CIC Manual '*ENF 2 Evaluating Inadmissibility'* http://overseastudent.ca/migratetocanada/IMMGuide/CICManual/enf/enf02-eng.pdf
[14] *Roman c Canada (Ministre de la Sécurité publique et de la Protection civile)* 2016 CarswellNat 2467.
[15] *Ibid* at para 9.
[16] *Ibid* at para 16.
[17] *Ibid* at para 29.
[18] *Supra note* 12 CIC *Manual.*
[19] Government of Canada "*Rehabilitation for Persons Who Are Inadmissible to Canada Because of Past Criminal Activity"* https://www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-5312-rehabilitation-persons-inadmissible-canada-past-criminal-activity.html
[20] *Ranger v. Canada (Minister of Public Safety and Emergency Preparedness)* 2014 CarswellNat 7414 at para 8.
[21] *Ibid* at para 5.

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