

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

B E T W E E N:

HOANG ANH PHAM

Appellant (Appellant on appeal)

- and -

HER MAJESTY THE QUEEN

Respondent (Respondent on Appeal)

- and -

**THE CANADIAN CIVIL LIBERTIES ASSOCIATION, CANADIAN ASSOCIATION OF
REFUGEE LAWYERS, the CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO, the
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION and the CANADIAN
COUNSEL FOR REFUGEES**

Interveners

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PART I – OVERVIEW AND BRIEF STATEMENT OF FACTS

1. Sentencing requires a full assessment of the circumstances of the offender. For a non-citizen this includes the collateral immigration consequences arising from the imposition of a sentence. A criminal sentence of two years can result in removal from Canada with no effective appeal and no opportunity to consider the individual's family and personal circumstances.
2. The majority of the Court below held that citizens and non-citizens should receive the same sentence for the same offence, regardless of the collateral immigration consequences suffered by the non-citizen. If upheld, this approach would require the sentencing judge to ignore the circumstances of the non-citizen offender, which would actually result in the unequal treatment of the citizen and non-citizen offender. This is both unreasonable and wrong in law.
3. Immigration consequences are relevant considerations that allow the sentencing court to impose a sentence that fits the actual context of the offender and is proportionate to the offence. Substantive equality between citizen and non-citizen offenders requires consideration of the immigration consequences that flow from a sentence.
4. When review by the Immigration Appeal Division (IAD) is precluded because of the sentence imposed, the sentencing phase becomes the only opportunity to consider the type of balancing factors, known the "*Ribic* factors", applied by the IAD to ensure that collateral immigration consequences are not grossly disproportionate to the seriousness of the offence. In such cases, the principles of fundamental justice require the sentencing judge to engage in a balancing exercise that includes, at a minimum, a review of the *Ribic* factors.
5. Both the appellant and respondent agree that a sentencing judge may make *de minimus* adjustments to a sentence to ensure that collateral immigration consequences are not triggered unjustly. The *Ribic* analysis is a principled way to

assess the immigration consequences of a sentence and to ensure that these consequences do not offend the principles of fundamental justice.

Facts

6. The CCLA adopts the statement of facts as set out in Part I of the Appellant's factum.

PART II - ISSUES

7. Failure to consider the immigration consequences of a criminal sentence deprives non-citizen offenders of substantive equality and infringes the right to equality guaranteed in section 15 of the *Charter*.
8. Failure to balance the hardship caused by a removal order that flows from a criminal sentence against the severity of the offence is inconsistent with the principle of proportionality set out in section 718.1 of the *Criminal Code* and could result in the offender being deprived of life, liberty or security of the person in a way that is not in accordance with the principles of fundamental justice contrary to section 7 of the *Charter*.

PART III - ARGUMENT

Overview

9. Part XXIII of the *Criminal Code* guides the discretion exercised by a sentencing judge. This Part requires a sentencing judge to exercise discretion in a way that is consistent with the overarching principle of proportionality and with the fundamental rights of the offender guaranteed by the *Canadian Charter of Rights and Freedoms*.
10. The submissions of the CCLA focus on the unique considerations at play in sentencing decisions involving non-citizens. In particular, the submissions of the CCLA will deal with preserving the equality rights of non-citizen offenders during sentencing and how applying the *Ribic* factors at the sentencing stage can ensure that the sentencing decision respects both the principle of proportionality and the principles of fundamental justice.

Equality

11. Section 15(1) of the *Charter* guarantees equality before and under the law to every individual, as well as the equal protection and equal benefit of the law without discrimination.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 163

12. The purpose of section 15 is to ensure equality in the formulation and application of the law. The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 170

13. Uniform application of a rule to people in different situations is not the test for equality of treatment. Section 15(1) guarantees substantive equality. The principle of substantive equality states that equality should not be measured by whether those similarly situated receive similar treatment. Rather, the substantive equality guaranteed by section 15(1) may require that those similarly situated be treated differently in order to reach equality in result.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 164-169

Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497 at para 51

14. There is a two part test for assessing whether the guarantee of substantive equality has been infringed:
 - (a) Does the law create a distinction that is based on an enumerated or analogous ground?; and
 - (b) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?

R v Kapp, 2008 SCC 41 (CanLII), 2008 SCC 41, [2008] 2 SCR 483, at para 17

Withler v Canada (Attorney General), 2011 SCC 12, [2011] 1 SCR 396 at para 30

15. In *Andrews*, this Court recognized citizenship status as an analogous ground of discrimination.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 152

16. In this case, the majority of the Alberta Court of Appeal – in an ostensible attempt to treat both citizen and non-citizen offenders in the same way – refused to consider the potential immigration consequences to the appellant when deciding not to reduce the appellant's sentence by one day. The majority held that the appellant's sentence should not be reduced by a single day because a non-citizen should not expect to receive a lesser sentence than a citizen for the same offence.

Appeal Decision at para 23

17. Such an approach fails to respect the guarantee of substantive equality. Refusing to consider the immigration consequences for the non-citizen offender ignores a significant effect of that sentence on the non-citizen that would not be present for the citizen convicted of the same offence. In this case, treating non-citizens the same as citizens actually results in inequality.
18. As discussed in the appellant's factum, the principles of sentencing require the sentencing judge to consider the individual circumstances of the accused and to consider the effect of the proposed sentence on those circumstances of the accused. The types of consequences which sentencing judges routinely take into consideration when sentencing include matters such as parole ineligibility and forfeiture of personal property.

Appellant's factum at paras 34-37
R v Lyons, [1987] 2 SCR 309 at para 41

19. The totality of the circumstances of a non-citizen accused includes the immigration consequences attendant with a sentence. It is fundamental to sentencing that all relevant facts be considered. If immigration consequences are not considered, the sentencing judge will have failed to take account of the totality or complete circumstances of the non-citizen offender. In this way, treating the non-citizen the same as the citizen results in a distinction based on an analogous ground. Similar

treatment brings about unequal results by applying the totality principle of sentencing to citizens, but depriving non-citizens of the same.

20. This distinction creates a significant disadvantage for the non-citizen whose sentence – in the totality of the circumstances as stated above – may have harsher consequences than for a citizen.
21. Wilson J., for the majority in *Andrews*, has already confirmed that non-citizens are a disadvantaged group in need of the protection afforded by section 15(1). Non-citizens are a group lacking in political power and, as such, vulnerable to having their interests overlooked and their rights to equal concern and respect violated.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at 152

22. In this case, the Court of Appeal ignored a very real effect of the sentence. As a non-citizen, the potential consequences which flow to the appellant from a sentence of two years are much greater than those which would flow to a citizen in the same situation.
23. Both the appellant and respondent agree that both the original sentence (two years) and the proposed sentence on appeal (two years less a day) are within the reasonable range of fit sentence. In addition, the appellant and respondent agree that collateral immigration consequences are a relevant consideration on the sentencing of a non-citizen offender.

Appellant's Factum at paras 63-64
Respondent's Factum at para. 21

24. For the citizen offender, the reduction of the sentence by one day has some bearing on the severity of the total sentence. For the non-citizen, however, the additional day carries with it a host of additional and potentially harsher consequences. When these consequences are considered, the non-citizen receives a sentence that is potentially far more severe: loss of permanent resident

status and removal from Canada without a right of appeal (including the loss of consideration of humanitarian and compassionate grounds).

25. The CCLA submits that, in order to correct the perpetuation of disadvantage caused by sentencing of non-citizens, the immigration consequences for the non-citizen offender must be considered at the sentencing stage. The sentence may or may not be the same in the result, but a sentencing court cannot fail to apply the totality principle equally to both citizens and non-citizens alike.

Proportionality and the Principles of Fundamental Justice

26. Unless section 64 of the *Immigration and Refugee Protection Act* applies, a person who is the subject of a removal or exclusion order has the right to appeal to the IAD for a review of the order.
27. Access to an independent tribunal by permanent residents with removal orders issued because of criminality is a longstanding fixture of immigration law. The IAD process uses criteria designed to balance the need to protect Canadian society from further criminal behaviour and the consideration of all the circumstances of the permanent resident. For permanent residents facing deportation, the IAD is the this balance is considered.

Submission of Immigration Law Section of Canadian Bar Association on Bill C-43 at 7-8

28. The IAD jurisdiction to take all the circumstances of the case into account when deciding whether a deportation order should be enforced is especially significant for permanent residents who have been in Canada for many years. Many permanent residents have lived in Canada since early childhood. These permanent residents may have well-established social networks, employment, children and extended families in Canada. If their criminality is not sufficiently grave, then immediate deportation may be an overly harsh consequence, and entirely disproportionate to the offence. The harsh effects of deportation are amplified where the permanent resident is to be deported to a country where he has no family, no support, no linguistic ability nor employment opportunities.

Submission of Immigration Law Section of Canadian Bar Association on Bill C-43 at 8

29. IAD review is thorough and robust and the only forum that considers humanitarian and compassionate grounds for staying a removal order. IAD review is essential to preserve proportionality in the Canadian deportation regime.

Submission of Immigration Law Section of Canadian Bar Association on Bill C-43 at 11

30. When considering whether to allow or to dismiss an appeal from a removal order, the IAD applies the analytical framework set out in *Ribic v Canada (Minister of Employment and Immigration)*. The IAD routinely applies the *Ribic* analysis as part of its review of a removal order. This Court approved the *Ribic* analytical framework in *Chieu v Canada*, holding that the factors set out in *Ribic* remain the proper ones for the IAD to consider in exercising its statutory duty to have regard to “all the circumstances of the case.”

Ribic v Canada (Minister of Employment and Immigration), [1985] IABD No 4
Chieu v Canada (Minister of Citizenship and Immigration), 2002 SCC 3 at para 90

31. The factors considered in the *Ribic* analysis are:
- (a) the seriousness of the offence leading to the removal order;
 - (b) the possibility of rehabilitation;
 - (c) the length of time spent in Canada and the degree to which the appellant is established here;
 - (d) the family in Canada and the dislocation to the family that removal would cause;
 - (e) support available to the appellant, within the family and within the community;
 - (f) potential foreign hardship the appellant will face in the likely country of removal.
32. The CCLA submits that, for non-citizen offenders who are at risk of deportation without a right of appeal to the IAD, the sentencing judge must, at a minimum, conduct an analysis based on the *Ribic* factors. A review of these factors is

essential to fulfill the requirements of both the principle of proportionality as well as the principles of fundamental justice.

Proportionality

33. From a civil liberties perspective, it is desirable that the sentencing process be a case-specific and flexible one. Flexibility in sentencing is rooted in the notions of fairness and justice and accords with the principle of proportionality.
34. The principle of proportionality is the fundamental principle of sentencing set out in section 718.1 of the *Criminal Code*. Proportionality requires the sentencing judge to have an understanding of the severity imposed by the sentence on the particular offender being sentenced. Proportionality in sentencing is a principle of fundamental justice, as per section 7 of the *Charter*.

R v Ipeelee, 2012 SCC 13 at para 36

35. Without a full assessment of the severity of the sentence, it is impossible for the sentencing judge to determine whether a sentence is either unduly harsh or overly lenient.
36. In the course of sentencing, criminal courts take a comprehensive view of an offender's circumstances and the consequences of the sentence imposed. Where one of the consequences of a sentence is the possibility of deportation without a right of appeal, it is impossible to judge the severity of the sentence as a whole without considering the hardship imposed by deportation. The *Ribic* analysis is a well-established method for gauging the severity of a deportation order and balancing this against the state interest in removing non-citizen criminals from Canada.
37. A review of the *Ribic* factors is the minimum measure necessary to give the sentencing judge a full appreciation of the impact that the sentence will have on the permanent resident.

Principles of Fundamental Justice

38. The deportation process involves an imposition of the will of the state upon an individual. As such, it raises the distinct potential that the section 7 interests of the subject of the removal order will be engaged.
39. This Court has recognized that proceedings related to deportation in the immigration context are not immune from section 7 scrutiny. While the deportation of a non-citizen, in itself, may not implicate the liberty and security interests protected by section 7 of the *Charter*, some features associated with deportation may.

Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 SCR 350 at para 17

40. For example, the deportation process may involve detention, there may be the possibility of torture or capital punishment in the removal destination, or there may be hardship suffered by the subject of the order as a result of her dislocation from Canada which may amount to serious state-imposed psychological stress such that section 7 interests are engaged.
41. The principles of fundamental justice apply whenever one of the three protected interests is engaged. In determining whether section 7 applies, a court must look at the interests at stake rather than the legal label attached to the impugned legislation.

Charkaoui v Canada (Citizenship and Immigration), 2007 SCC 9, [2007] 1 SCR 350 at para 18

42. To this end, the *Ribic* factors serve two purposes. First, the analytical framework set out in *Ribic* assists in identifying cases where section 7 is engaged; often, the full extent of the impact of a removal order is not known until a tribunal engages in the *Ribic* analysis. Second, in cases that do engage section 7 interests, the *Ribic* framework operates as a check to ensure that the means taken to achieve the objective of protecting Canadians from serious criminality are not so disproportionate as to offend the principles of fundamental justice.

Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1, [2002] 1 SCR 3 at para 47
R v Malmo-Levine; R v Caine, 2003 SCC 74, [2003] 3 SCR 571 at paras 142-143

43. The seriousness of the offence may affect the balancing analysis but where there is the potential for section 7 interests to be engaged, the *Charter* requires that the reviewing body engage in the analysis.

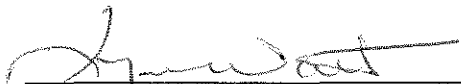
Canada (Citizenship and Immigration) v Williams, 2005 CanLII 56880 (IRB) at paras 10-13
Romans v Canada (Minister of Citizenship and Immigration), 2003 FC 1524

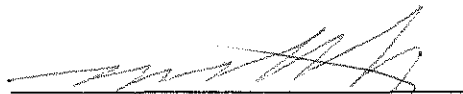
44. For these reasons, the CCLA submits that when imposing a sentence on a non-citizen that will preclude access to IAD review of any subsequent removal order, the sentencing judge must engage in a balancing exercise that includes, at a minimum, a review of the *Ribic* factors, since there is no other forum for these factors to be considered.
45. This balancing analysis is essential to the principle of proportionality set out in section 718.1 of the *Criminal Code*. In addition, where there is a possibility that the sentence will lead to a deportation order that may engage the offender's section 7 interests, a review of the *Ribic* factors ensures that the offender's removal does not offend the principles of fundamental justice.

PARTS IV & V - COSTS AND REQUEST TO MAKE ORAL ARGUMENT

46. The CCLA does not seek costs, and requests that no costs be awarded against it. The CCLA repeats its request for permission to address the Court orally at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED January 11, 2013


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PART VI – TABLE OF AUTHORITIES

Cases Cited	Factum Para.
<i>Andrews v. Law Society of British Columbia</i> , [1989] 1 SCR 143	11, 12, 13, 15, 21
<i>Canada (Citizenship and Immigration) v. Williams</i> , 2005 CanLII 56880 (IRB)	44
<i>Charkaoui v. Canada (Citizenship and Immigration)</i> , 2007 SCC 9, [2007] 1 SCR 350	40, 42
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Secondary Sources	Factum Para.
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