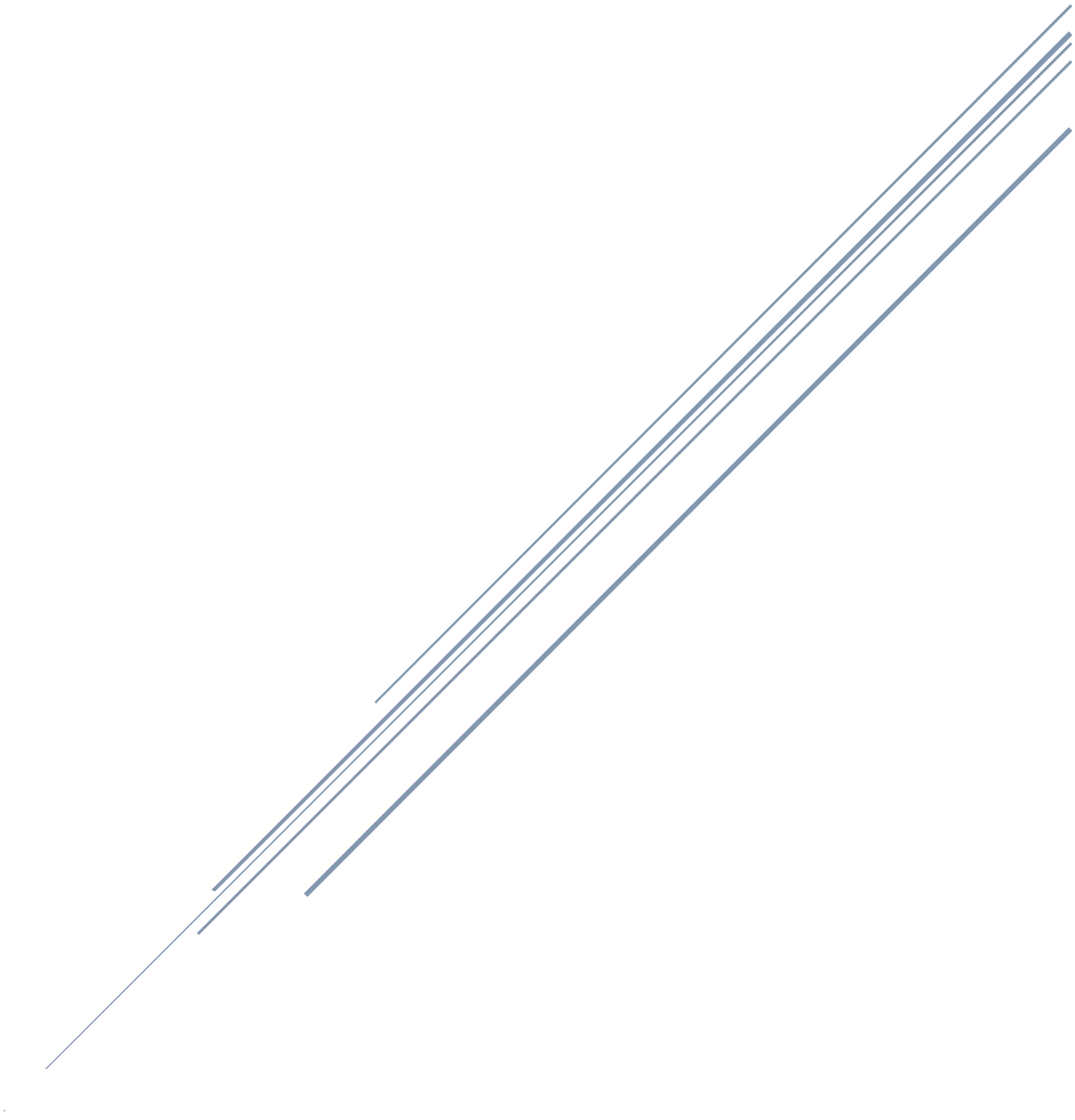
"Balancing Security and Rights: Re-evaluating IRPA’s Criminal Inadmissibility Provisions and Charter Compliance"



Abstract

This research paper examines the inadmissibility of permanent residents based on criminality and serious criminality as envisaged in Immigration and Refugee Protection Act.[1]. The criminal inadmissibility (hereafter written as inadmissibility for this research) provisions in the Immigration and Refugee Protection Act (IRPA) are meant to keep Canada safe. This objective is achieved by preventing the entry of inadmissible persons and by removing inadmissible individuals. The success of the inadmissibility regime remains questionable. The inadmissibility regime exposes a permanent resident to physical, emotional, psychological, and financial hazards inside and outside Canada. However, the impact of the inadmissibility regime is not confined to an individual's life. This inadmissibility regime has created dual standards in the criminal justice system. The paper argues that the IRPA's inadmissibility regime for permanent residents, which can lead to their removal from Canada for criminality, creates dual standards in the criminal justice system and violates the Charter. It suggests that the current judicial approach prioritizes security over Charter rights and calls for a re-evaluation of the regime to better protect the rights of permanent inadmissible residents in Canada.

[1]This paper has frequently used the terms potential citizens and residents. For this research, these phrases mean permanent resident.

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Introduction

The Immigration and Refugee Protection Act (IRPA) establishes the fundamental principles and frameworks guiding Canada's immigration and refugee protection measures. It encompasses regulations related to permanent residents, refugees, sponsorship programs, and deportation procedures.[2].

IRPA classifies individuals into three broad categories[3]. Citizens possess the most significant degree of security regarding their status, bolstered by the constitutional right to "enter, remain in and leave Canada," as affirmed by section 6(1) of the Charter[4] . In Canada. Federal Citizenship Act determines entitlement to citizenship and applications for citizenship.[5]. A citizen's status remains unaffected by criminal convictions, irrespective of the gravity of the offence and a citizen can be removed in extraordinary circumstances. These circumstances include revocation of citizenship and extradition from Canada.[6]. A permanent resident is the one who has obtained and maintained their permanent resident status as per the conditions mentioned in IRPA[7].

A foreign national is defined as someone who is neither a Canadian citizen nor a permanent resident. Such individuals must obtain proper authorization to enter and remain in Canada, particularly for work or study purposes.[8]. A broad spectrum of situations could result in the inadmissibility of a foreign national to Canada, particularly those related to criminality. Even a solitary conviction for a minor crime can lead to inadmissibility and potential deportation[9].

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[2] Canada, Immigration and Refugee Board of. Act, Rules and Regulations. 19 Feb. 2018, https://www.irb-cisr.gc.ca:443/en/legal-policy/act-rules-regulations/Pages/index.aspx.

[3] *ibid*

[4] Government of Canada, Department of Justice. Charterpedia - Section 6 – Mobility Rights. 9 Nov. 1999, https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art6.html.

[5] Citizenship Act (R.S.C., 1985, c. C-29)

[6] Extradition Act, SC 1999, c 18, has provisions mentioned for citizens removal.

[7] Tran v. Canada (Public Safety and Emergency Preparedness), 2017 SCC 50 (CanLII), [2017] 2 SCR 289, <https://canlii.ca/t/h6pmh>, retrieved on 2023-12-25.

[8] Immigration and Refugee Protection Act, SC 2001, c 27

[9] *ibid*

Citizens are thus the most potent legal entity in IRPA's criminal inadmissibility framework, whereas foreign nationals are the most vulnerable. The permanent residents, though, fall in the middle of these two extremes but are the ones who face the main brunt of inadmissibility. Permanent residents are a unique legal entity in the Canadian context, as they may not have formal legal citizenship. However, their long stay in Canada, family, integration, links, ties, and assimilation make them substantiative citizens. The permanent residents develop significant sociological attachment through familial, social, educational, employment, or other connections to the Canadian jurisdiction.[10].

Permanent residence is an immigration privilege that can be taken away, forcing an inadmissible individual to move to a distant land with which he may have no connection.[11]. The Canadian permanent residents' right to enter, remain and leave Canada, therefore, has been hotly contested in jurisprudence[12]. A permanent resident, having spent years in Canada, may be subjected to removal due to the outcome of the criminal case. The agony of a permanent resident does not end quickly after facing the consequences of their criminal actions. The permanent residents and their families may face the immigration authorities and go through a mosaic of administrative tribunals after an individual's wrongdoing. In the inadmissibility storybook, Chiarelli[13], Revell[14] , Moretto[15] are the true-life characters. These permanent residents came to Canada at a younger age and faced inadmissibility and removal due to their criminal sentence. Despite years of legal status connection

[10] Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3 (CanLII), [2002] 1 SCR 84, at para 40, <https://canlii.ca/t/51wk#par40>, retrieved on 2023-12-21

[11] "The Chiarelli Doctrine: Immigration Exceptionalism and the Canadian Charter of Rights and Freedoms," UBC Law Review: Vol. 54: Iss. 1, Article 1. Available at: https://commons.allard.ubc.ca/ubclawreview/vol54/iss1/1at 200

[12] Canada (Minister of Employment and Immigration) v. Chiarelli, 1992 CanLII 87 (SCC), [1992] 1 SCR 711, <https://canlii.ca/t/1fsf6>, retrieved on 2023-12-25

[13] *ibid*

[14] Revell v. Canada (Citizenship and Immigration), 2019 FCA 262 (CanLII), [2020] 2 FCR 355, <https://canlii.ca/t/j2xtn>, retrieved on 2023-12-16.

[15] Moretto v Canada (Citizenship and Immigration), 2018 FC 71

to Canada, they could not fight inadmissibility[16]. Mr. Revell lived in Canada for over forty years and faced separation from his family. Mr. Moretto lived in Canada for over fifty years, suffered from mental illness and had no help available in his country of birth[17].

This paper is structured to analyze the intersection of the criminal inadmissibility regime of IRPA and the criminal justice system. This paper argues that criminal inadmissibility has given rise to a dichotomy in the criminal justice system, and several provisions of IRPA do not pass the Charter scrutiny. Due to a state-centric judicial approach, these provisions have held their ground in IRPA. This approach is formulated around the Court's deference to Parliament in the immigration domain. The first part of the paper is a glance at the historical developments and raison d'être for the inclusion of the inadmissibility regime in IRPA. The second part of the paper analyses the side effects of the inadmissibility regime of IRPA when it intersects with criminal law. The second part delineates the efforts of the Court in Pham and Tran to mitigate the impact of collateral immigration consequences and thus remove the dichotomy in the system. The third part argues that inadmissibility is against the Charter and, hence, unconstitutional. The paper endeavours to compare the Court's approach in inadmissibility cases and the Court's stance in other non-immigrant rights cases. The paper strives to prove that the Court has relegated several Charter rights of permanent residents to the backburner. In the next part, the paper makes a global comparison and concludes with an alternative inadmissibility framework for permanent residents.

Part 1- Setting the Context

1.1 Historical Perspective

[16] Chiarelli came from Italy, whereas Moretto hailed from England, supra note 9 & 10
[17] *Supra* note 14 & 15

The immigration landscape in Canada has undergone a tremendous change over the years. The historical experiences, economic imperatives, demographic considerations, humanitarian values, and the desire for social cohesion and diversity were and are the few worth mentioning factors that drove Canada's immigration policies.[18]. However, the desire for a secure Canada is a recent addition to this list. A cursory glance at historical developments in the immigration domain is essential to understand the inadmissibility regime and unequal treatment of inadmissible permanent residents.

The developments in the Canadian immigration regime can be divided into three distinct phases. In the earlier part of the 20th century, immigration policies had racial overtones[19]. The Immigration Act of 1910 granted the Cabinet the authority to exclude immigrants based on racial considerations[20]. In 1919, the law empowered the Governor in Council to deny entry to immigrants deemed unsuitable due to their distinct customs and inability to assimilate into society[21]. The restrictive immigration policies continued till the second half of the century as Asians were given a restrictive chance, and Western nations got preferential treatment[22]. A significant shift occurred in 1978 when the Immigration Act enshrined the principle that admission criteria should not discriminate based on race, ethnicity, colour, religion, or gender, signalling a move away from explicitly racist laws and practices[23].

[18] Immigration Policy Primer.https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/202005E. Accessed 24 Dec. 2023.

[19] Bryan P Schwartz, The Preventative Function of Section 15 of the Charter and the Danger Certificate System Factum, 1999 27-1 Manitoba Law Journal 115, 1999 CanLIIDocs 128, <https://canlii.ca/t/sg8z>, retrieved on 2023-12-24 at 122.

[20] *ibid*

[21] *ibid*

[22] *Ibid* at 123

[23] *ibid*

June 1992 marked another turning point when anti-terrorism policies appeared on the inadmissibility canvas, particularly impacting the refugees[24]. This security-driven trend continued with the swift passage of Bill C-44 in 1995 following two homicides in Toronto, which led to the mandatory detention and deportation of refugees and permanent residents, along with the revocation of the right to appeal for those deemed a public danger[25]. These legislative changes reflected Canada's proactive stance on security threats and criminal conduct in the immigration context.

1.2. Existing Legal Framework

The Immigration and Refugee Protection Act (IRPA) was enacted on November 1, 2001. S.3 of IRPA spells out 27 discrete objectives[26]. IRPA was enacted immediately after the 9/11 attacks. The security of Canada was a key factor in the promulgation of this "framework" legislation. McLachlin J. has described IRPA's purpose: "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, removing applicants with such records from Canada, and emphasizing the obligation of permanent residents to behave lawfully while in Canada. Loss of appeal right marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security.[27].

Division 4 of the Act (sections 34 to 42) encompasses various grounds for permanent residents and foreign nationals (noncitizens) being inadmissible to Canada. These grounds include a range of

[24] Unequal Protection Under the Law: Re Charkaoui and the Security Certificate Process under the Immigration and Refugee Protection Act at 383
[25] *ibid*
[26] Catherine Dauvergne, "Immigration Law under the McLachlin Court" in Marcus Moore & Daniel Jutras, eds, Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership (LexisNexis Canada, 2018) 117.
[27] 2005 SCC 51 at Para 10

factors, such as security (section 34), human or international rights violations (section 35), serious criminality (sub-section 36.1), and organized criminality (section 37).[28]. Section 36 is the most relevant section of IRPA as it distinguishes between inadmissibility due to "criminality" and "serious criminality."

Section 36(1) of IRPA sets out the grounds of "serious criminality" for which both permanent residents and foreign nationals can be found inadmissible: 36 (1) states "that 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"[29]. Section 34 of IRPA holds a permanent resident inadmissible for being a danger to the security of Canada and for engagements in acts of violence that would or might endanger the lives or safety of persons in Canada. Section 35 of IRPA holds permanent residents inadmissible for involvement in crimes against humanity, whereas S. 37 of IRPA deals with inadmissibility if a permanent resident is part of organized criminality. [30]

The definition of "criminality" in IRPA is much broader and applies only to foreign nationals[31]. Serious criminality is defined as a conviction for an offence where the maximum sentence is at least ten years (regardless of the actual sentence) or a conviction for an offence where the sentence provided was more than six months. In other words, relatively minor offences are deemed "serious criminality" and lead to inadmissibility[32].

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[28] Horizontal Evaluation of the Immigration and Refugee Protection Act Division 9 / National Security Inadmissibility Initiative: Evaluation Report. Public Safety Canada = Sécurité publique Canada, 2020

[29] Immigration and Refugee Protection Act, *supra* note 8.

[30] *ibid*

[31] Sasha Baglay, Collateral Immigration Consequences in Sentencing: a Six-Year Review, 2019 82-1 Saskatchewan Law Review 47, 2019 CanLIIDocs 412, <https://canlii.ca/t/sg83>, retrieved on 2023-12-27 at 9

[32] Immigration and Refugee Protection Act, SC 2001, c 27

The right to appeal in inadmissibility cases has become more limited in successive years. IRPA's Division 7 (section 64) denies a permanent resident's right to appeal if held inadmissible for serious criminality. It is worth mentioning that under the 1976 Immigration Act, permanent residents, except those under security certificates, had a right to an IAD appeal.[33]. The Anti-terror Bill of 1995 (C-44) introduced a new limitation on access to the IAD for persons whom the Minister declared to be a danger to the public[34]. Since June 2013, Bill C-43, namely the Faster Removal of Foreigners Act, precludes permanent residents with sentences of "at least" six months of imprisonment from access to the IAD. Bill C-46 (section 320.19 (1)) amended the Canadian Criminal Code and introduced several changes. The change in access to appeal rights was one of the main determinatives of the Court's approach in Pham and Tran, where the Court endeavoured to mitigate the impact of inadmissibility.[35].

S.36 (2) of IRPA states that 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; As per s.36(3) of IRPA, hybrid offences are deemed to be indictable offences: S.36.(3) of IRPA states that the an offence that may be prosecuted either summarily or by way of indictment is deemed to be an indictable offence, even if it has been prosecuted summarily[36]. The immigration consequences for permanent residents and foreign nationals convicted of an impaired driving

[33] Refugees and the Immigration Act." McGill Law Journal, https://lawjournal.mcgill.ca/article/refugees-and-the-immigration-act/. Accessed 24 Dec. 2023 at 159
[34] *Supra* note 20 at 381
[35] Baglay, *supra* note 31 at 2
[36] *ibid* at 9-10

offence is a new addition to the regime. A sentence of up to ten years of imprisonment rather than up to five years renders it a "serious crime," which falls under section 36(1) of the IRPA[37].

The significance of these provisions is profound for noncitizens, including permanent residents and foreign nationals. Any conviction for a hybrid offence will lead to inadmissibility for a foreign national. For permanent residents, even a summary proceeding could lead to loss of permanent residence if the indictable version of the offence carries a maximum penalty of 10 years or more[38].

Part 2- Two Criminal Justice Systems

The discussion above indicates that over the past three decades, immigration law has lost its character as an area of purely regulatory law. The immigration law no longer handles the conditions of lawful entry and residency in Canada. Instead, many immigration regulations have been cast as severe criminal sanctions, the violation of which may result in very significant criminal penalties[39]. Criminal penalties and procedures- whether or not they are formally deemed to be "criminal"-are increasingly invoked to deal with matters that once were matters of ordinary administrative action. It is this merger of Criminal law and immigration law which Juliet Stumpf calls Crimmigration.[40].

2.1 Structural Problems

Theoretically, everyone is subject to the same criminal justice system (the system) governed by the same set of rules in Canada.[41]. Only certain defendants, such as young offenders and members

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[37] Tuttle, Myrna El Fakhry, Inadmissibility and Deportation of Permanent Residents in Canada. (2022, January 20). Alberta Civil Liberties Research Centre. https://www.aclrc.com/blog/2022/1/20/inadmissibility-and-deportation-of-permanent-residents-in-canada

[38] *ibid*

[39] Aiken, Sharryn J. and Lyon, David and Thorburn, Malcolm Bruce, Introduction: 'Crimmigration, Surveillance and Security Threats': A Multidisciplinary Dialogue (November 20, 2014). Queen's Law Journal, Vol. 40, No. 1, 2014, Queen's University Legal Research Paper No. 2014-014, Available at SSRN: https://ssrn.com/abstract=2530438 page *i-xii*

[40] *Ibid* at *i*

[41] Skolnik, Terry (2023). "Two Criminal Justice Systems," *UBC Law Review*: Vol. 56: Iss. 1, Article 7. Available at: https://commons.allard.ubc.ca/ubclawreview/vol56/iss1/7 at 286

of the Armed Forces, are subjected to different set of rules and procedures[42]. Aiken et al., however, point out that there are now two criminal laws at work. One is for noncitizens (which includes a host of crimmigration procedures) and another for citizens[43]. The Canadian criminal justice system diverges into two distinct systems when intersecting with immigration law at the sentencing stage. The consequences for an immigrant "charged with an offence" in Canada are twofold. A sentenced permanent resident first faces the consequences of his action in the criminal law domain. The inadmissibility process gets triggered for the sentenced individual if the sentence falls in the purview of IRPA's inadmissibility zone. The collateral immigration consequences increase the likelihood of an inadmissible person's contact with the coercive immigration enforcement authorities. At all other contact points with the criminal justice process, i.e., policing, bail, plea bargaining, trial, and punishment, inadmissible foreign nationals and permanent residents start getting differential treatment. The system starts looking towards them with the deportation lens. Skolnik points out that the presence of a previous criminal record and conviction influences decision-making in the criminal justice system[44]. This decision-making becomes stringently punitive for inadmissible immigrants in the presence of previous convictions. Inadmissible defendants with records are perceived as individuals with higher risks for absconding or evading consequences of crimmigration. These facts lead to stricter bail conditions or denial of bail[45]. This previous criminal record can push some offenders to accept worse plea deals to avoid harsher sanctions like deportation[46].

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[42] *ibid*
[43] *ibid*
[44] *ibid*
[45] *Ibid at 4*
[46] Barnes, A. (2007). Transnational dislocations: Using deportation as crime control (Order No. NR27903). Available from ProQuest. Dissertations & Theses Global; ProQuest Dissertations & Theses Global Closed Collection. (304758544). https://ezproxy.library.yorku.ca/login?url=https://www.proquest.com/dissertations-theses/transnational- dislocations-use-deportation- as/docview/304758544/se-2 at 155

Racial discrimination, anti-immigration bias, and stereotypes further sharpen the divide in the system. Skolnik and other legal scholars acknowledge the presence of direct bias and systemic racism within criminal justice systems[47]. In Canada, there is contentious intersection of crime, race, and immigration[48]. The stereotypes and racial discrimination in society further aggravate the differential treatment adopted towards inadmissible persons. Barnes points out the longstanding association between immigration and crime in Western countries, where immigrants, mainly from minority groups, are often stereotyped as criminals[49]. The chances of facing immigration authorities due to serious criminality become more pronounced for marginalized groups and racial minorities[50].

Immigrants often face challenges like low income, unemployment, and poor neighbourhoods, which are also factors associated with higher crime involvement. This intersectionality creates layers of discrimination within the criminal justice system, posing additional hazards for an inadmissible person[51]. Noncitizens looking to take their cases to the higher courts to fight inadmissibility encounter significant challenges in terms of time, financial resources, and the need to obtain permission to proceed[52]. Additionally, detention and deportation are increasingly used as forms of immigration control and punishment, particularly against undocumented immigrants and those with criminal convictions, leading to a vicious cycle of poverty and crime, leading to criminality and consequences[53.]

[47] Skolnik, supra note 43 at 286

[48] A more detailed discussion on race and inadmissibility was beyond the scope of my paper. This study did give me a chance to look at the related data.

[49] ibid

[50] *Barnes, supra note 45* at 18-27

[51] ibid

[52] Catherine Dauvergne, How the Charter Has Failed Noncitizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence, 2013 58-3 McGill Law Journal 663, 2013 CanLIIDocs 267, <https://canlii.ca/t/29tj>, retrieved on 2023-12-28 at 699

[53] Barnes, *supra* note 46 at 25-27

Dauvergne points out structural problems such as the requirement to obtain permission from the Federal Court and the Court for judicial reviews of most decisions made under the Immigration Act. The second obstacle involves an additional step for appeals: to move a judicial review from the Federal Court to the Federal Court of Appeal, as the Court must "certify" that the issue at hand is a severe matter of general importance.

Canada has taken several steps to eliminate bias against visible minorities in the criminal justice system[54]. Numerous scholars do not accept discrimination in the immigration system and point out the neutrality of the legal system[55]. These scholars point out that IRPA imposes a legal obligation upon permanent residents to remain free from severe criminality, and this imposed condition is colour blind. Section 3 of IRPA stipulates the objective to promote the successful integration of permanent residents into Canada while recognizing that integration involves mutual obligations for new immigrants and Canadian society.[56]. The Court in Tran, for instance, pointed out that "The security objective in the IRPA 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[57]".

However, another unanswered question is whether society is fulfilling its obligatory duty towards permanent residents by providing a discrimination-free life that needs to be answered.

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[54] Bryan P Schwartz, The Preventative Function of Section 15 of the Charter and the Danger Certificate System Factum, 1999 27-1 Manitoba Law Journal 115, 1999 CanLIIDocs 128, <https://canlii.ca/t/sg8z>, retrieved on 2023-12-15 at 116

[55] Barnes, *supra* note 46 at 26

[56] Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration), 2005 SCC 51 (CanLII), [2005] 2 SCR 539, at para 10, <https://canlii.ca/t/1lpk5#par10>, retrieved on 2023-12-27

[57] Tran v. Canada (Public Safety and Emergency Preparedness), 2017 SCC 50 (CanLII), [2017] 2 SCR 289, at para 40, <https://canlii.ca/t/h6pmh#par40>, retrieved on 2023-12-27.

2.2 Formal Divide-(Dis)Proportionality in Sentencing

S. 718.1 of the Criminal Code delineates the principle of proportionality by stating, "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.[58]. Proportionality is thus recognized as a central principle in modern sentencing systems[59]. This concept of proportionality is often seen as key to achieving fair and just outcomes in the justice system [60]. Conventionally, the Court has held that proportionality is the balance or equilibrium between the offence's gravity and the offender's blameworthiness level[61]. In Ipeelee, the Court departed from this stance and held that a judge could consider other factors while determining a fit sentence.[62]. It was in Pham, however, when the Court recognized the importance of collateral immigration consequences in the context of the proportionality of a sentence. Pham Court acknowledged that unintended or unknown collateral immigration consequences may make a sentence disproportionately harsh[63]. The collateral consequences have been defined as "any consequences arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence[64]. Subsequently, in Suter, the Court adopted a more expansive approach and held that collateral circumstances "matter because they may mean "that a particular sentence would have a more significant impact on the offender because of his or her circumstances[65]."

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[58] Berger, Benjamin, "Sentencing and the Salience of Pain and Hope" (2015).Osgoode Legal Studies Research Paper Series. 97. http://digitalcommons.osgoode.yorku.ca/olsrps/97 at 17

[59] *Ibid at 17*

[60] *Ibid at 17*

[61] Manikis, Marie. "The Principle of Proportionality in Sentencing: A Dynamic Evolution and Multiplication of Conceptions." Osgoode Hall Law Journal 59.3 (2022): 587-628. DOI: https://doi.org/10.60082/2817-5069.3812 https://digitalcommons.osgoode.yorku.ca/ohlj/vol59/iss3/2 at 615

[62] Criminal Code (R.S.C., 1985, c. C-46)

[63] Baglay, *supra* note 31 at 7

[64] R. v. Suter, 2018 SCC 34 (CanLII), [2018] 2 SCR 496, at para 47, <https://canlii.ca/t/hsrlt#par47>, retrieved on 2023-12-28

[65] R. v. Suter, 2018 SCC 34 (CanLII), [2018] 2 SCR 496, at para 48, <https://canlii.ca/t/hsrlt#par47>, retrieved on 2023-12-28

While proportionality is viewed as a fundamental tool in sentencing, its application is not without challenges in the immigration realm. I argue that the IRPA's criminal inadmissibility has created two different streams in sentencing. Firstly, the presence of collateral immigration consequences places an inadmissible person at a disadvantage compared to others sentenced for a similar offence in similar circumstances. The Court in Pham, therefore, was trying to ensure that "Like offenders should be treated alike, and collateral consequences may mean that an offender is no longer "like" the others, rendering a given sentence unfit[66]". Secondly, the element of discretion with a sentencing judge can leave an inadmissible person in receipt of a sentence that may expose him to ultra-hazards of inadmissibility. The discretion in Pham was left to the sentencing judges. Pham Court held that while judges can consider collateral consequences, they are not obligated to amend sentences to circumvent them.[67]. In some instances, reducing a sentence to prevent, for example, immigration repercussions might be fitting, but even a day's reduction might be unsuitable in other scenarios. Judges must ensure that.

the "sentence reflects the gravity of the offence, and the flexibility of the sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or other legislation, thus circumventing Parliament's will"[68].

Baglay hence identifies two methodological approaches in the wake of "Pham." One where immigration consequences directly influence the sentencing decision and another where they are considered alongside other factors[69]. Commentators have critiqued the guidance provided by the

[66] *ibid*

[67] R. v. Pham, (2013). SCC 15 (CanLII), [2013] 1 SCR 739, at para 15, <https://canlii.ca/t/fwhz1#par15>, retrieved on 2023-12-28

[68] *ibid*

[69] Ibid at 21-22

Court on collateral consequences, noting it to be inadequate[70]. Pham's emphasis on preserving the right to an Immigration Appeal Division (IAD) appeal has sometimes overshadowed its broader message about considering the proportionality of a sentence in light of collateral consequences. Monkman points out that the new framework for determining proportionality through variation in the sentence defeats the principle of proportionality and parity. A harsh sentence may be disproportionate, whereas a lenient sentence to avoid collateral immigration consequences may give offenders a legal edge and put society in danger.

Part III- Inadmissibility and Charter

The Canadian Charter has been enacted to honour human dignity across the board. It is a universalist text, where "personhood" typically grants protection of rights, not "citizenship with two notable exceptions[71]. Firstly, the right to vote, elaborated in section 3, is exclusively reserved for citizens. Secondly, section 6(1) bestows citizens the right to enter, stay in, and leave Canada. Conversely, the rights to life, liberty, and personal security under section 7 and safeguards against inhumane treatment in section 12 are granted to "everyone" within Canada. In subsection 15(1), the right to equality extends to "every individual.[72]." In Singh, it was established that "everyone" in section 7 encompasses noncitizens within the country's borders. To date, the Supreme Court has not deviated from this interpretation[73].

3.1 Six-Centric Court and Current Stance on Inadmissibility

[70] Suter, *supra* note 65 at para 48
[71] Joshua Blum, The Chiarelli Doctrine: Immigration Exceptionalism and the Canadian Charter of Rights and Freedoms, 2021 54-1 *UBC Law Review* 1, 2021 CanLIIDocs 13868, <https://canlii.ca/t/7n1tt>, retrieved on 2023-12-28 at 13
[72] *Ibid at 14*
[73] *Ibid at 14*

In the inadmissibility realm, the Court, however, has not followed the inclusive spirit of Singh[74]. The Court has formulated its stance on inadmissibility primarily based on S.6 of the Charter. Section 6(1) of the Canadian Charter of Rights and Freedoms distinguishes between citizens and noncitizens, depriving permanent residents of the unqualified right to enter or remain in the country. S.6 of the Charter grants exclusive rights to citizens to enter, remain in and leave Canada[75]. The constitutional recognition of this right to "remain" ensures that no legislation and state action can lead to the removal of citizens from Canadian soil[76]. However, it has become the basis for permanent citizens' inadmissibility and removal tools. In the following paragraphs, I argue that the Supreme Court of Canada's consistent reliance (or overreliance) on Section 6 has pushed permanent residents into a rigid legal classification, depriving them of Charter Protection. The immigration exceptionalism by the Court has exposed the "potential citizens" to inadmissibility, detention, displacement, family separation, and return to the country of birth[77]. Blum names this immigration doctrine as the Chiarelli doctrine. Chiarelli has lived as a permanent resident in Canada since childhood. He was born in Italy but was raised in Canada, and Italy was a foreign land for him for all the mundane purposes. A series of convictions brought him in front of immigration authorities for deportation, and ultimately brought the claim before the Court. The Court rejected the claim based on an analysis of S.6 of the Charter. Chiarelli challenged the proceedings based on s.7, s.12, and s.15 of the Charter.[78] Moreover, the Charter analysis was conducted entirely from the state's perspective and with the S.6 lens.

[74] *Ibid* at 14
[75] The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11
[76] *Supra* note 6
[77] Blum, supra note 73 at 1
[78] [1992] 1 SCR 711

The Court resorted to the S.6 of the Charter to distinguish between the rights of permanent residents and citizens. Sopinka J., writing for the Court in Chiarelli, called this power to exclude noncitizens as the most fundamental principle of immigration law[79]. The Court wanted Canada not to be a haven for criminals[80] and to keep unwanted people away whom "we legitimately do not wish to have among us[81]". In subsequent decisions, the doctrine became more entrenched in jurisprudence. La Forest J., for instance, in Kindler, called it a fundamental state duty to keep an alien known to have a severe criminal record out of Canada and remove him if he is inside the country[82]. Charkaoui McLachlin J asserted that differential treatment between citizens and noncitizens can be found in the Charter. She pointed out, "However, s. 6 of the Charter allows for differential treatment of citizens and noncitizens in deportation matters: only citizens are accorded the right to enter, remain in and leave Canada (s. 6(1)[83].

Chiarelli's doctrine has impacted the state's interaction with immigrants and refugees in the post-Charter era. The SCC approach has manipulated noncitizens' rights within the broader themes of sovereignty and national security while relying on section 6 of the Charter. Immigration authorities have used the doctrine to deprive people of their long-term residency in Canada.[84].

Inspired by the United States' Plenary Power doctrine, the Chiarelli doctrine has become a modified or Canadianized version of the Plenary Power doctrine. The Plenary Power Doctrine has been famous in the United States since its inception and has played a crucial role in shaping U.S. immigration policy. The plenary power doctrine asserts that Congress and the executive branch

[79] ibid
[80] Canada (Minister of Employment and Immigration) v. Chiarelli, 1992 CanLII 87 (SCC), [1992] 1 SCR 711, <https://canlii.ca/t/1fsf6>, retrieved on 2023-12-22 at para 24
[81] Ibid at para 25
[82] [1991] SCJ No 63 (QL)
[83] 2007 SCC 9 at para 4
[84] Blum, *supra* note 73 at 12

have supreme authority over immigration matters, with minimal judicial oversight.[85]. This doctrine recognizes the legislative power to formulate and enact potentially unjust or harsh laws affecting aliens without much accountability. SCOTUS has repeatedly endorsed the proposition that Congress may make rules "as to aliens that would be unacceptable if applied to citizens[86].

The foundation of the plenary power doctrine can be traced to 1889 when, in its (in)famous judgement to be called and remembered as the "Chinese Exclusion Case," the SCOTUS held that immigration power is "extra-constitutional and this plenary power is enshrined in state's absolute sovereignty[87]. Professor Shuck, therefore, points out, "There is no other area of American law [that] has been so radically insulated and divergent from those fundamental norms of a constitutional right, administrative procedure, and judicial role that animate the rest of our legal system[88].

Unfortunately, we, the Canadians, entered this exceptionalism mode 100 years later than our neighbours and that too in the era of the Charter and by relying on the Charter. Canadian "immigration exceptionalism" has been adopted by the Court despite the firm Canadian belief in the moral superiority of Canadian law and government over that of neighbouring countries.[89]. Dauvergne argues that this interpretation of Section 6 of the Charter significantly diverges from the original text of Section 6, which does not mention deportation but mainly addresses citizens' entry rights and mobility rights within provinces for citizens and permanent residents[90]. The SCC

[85] Blum, *supra* note 73 at 8
[86] ibid at 12
[87] *Ibid* at 6
[88] *ibid* at 12
[89] Ibid at 5
[90] Dauvergne, *supra* note 52 at 698.

has ignored permanent residents' familial, social, or economic ties to Canada in this debate on S.6 of the Charter.[91]

The Court's contradictory approach in Pham and Tran is also worth pointing out at this stage. In Chiarelli and subsequent jurisprudence, the Court gave due deference to the Parliament in the immigration realm. In Pham, however, the Court declared it was still being prepared to frustrate IRPA's objectives. However, the Court is going deliberately against the legislature's intent by varying the sentence. The sentencing regime frustrates the immigration scheme, which is meant to remove offenders from the country. The Court's balancing exercise in Chiarelli, i.e., individual circumstances of an offender versus the state's objectives of keeping Canada safe or not letting it be a haven for criminals, appears to have been ignored in Pham.

3.2 Inadmissibility, a violation of S.11 of the Charter

Section 11 of the Charter grants several rights to "any person charged with an offence." The S.11 rights include the right to a trial within a reasonable time, the presumption of innocence," the right to a jury trial, and the protection against double jeopardy[92]." S.11 of the Charter has not been applied widely in the immigration context, generally and specifically regarding the inadmissibility. Two main reasons restrict the use of S.11 of the Charter in inadmissibility cases.

- Inadmissibility is not considered equivalent to a "charge of an offence."
- The finding of inadmissibility and subsequent removal constitutes an administrative sanction, not a "true penal consequence" of wrongdoing.[93].

[91] Ibid at 699.
[92] Government of Canada, Department of Justice. Charterpedia - Section 11 – General: Legal Rights Apply to Those "Charged with an Offence." 9 Nov. 1999, https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art11.html.
[93] Kaushal, Asha. "The Webbing of Public Law: Looking Through Deportation Doctrine." Osgoode Hall Law Journal 59.2 (2022): https://digitalcommons.osgoode.yorku.ca/ohlj/vol59/iss2/11

The Wigglesworth test is a good starting point for looking into the framework of s.11. In R. v. Wigglesworth, the SCC spelled out a two-part test to determine whether a person subjected to a regulatory proceeding would constitute a "person charged with an offence." RCMP officer Wigglesworth was charged with a common assault, as envisaged in the Criminal Code of Canada. At the same time, he had to face proceedings for a "major service offence" as per RCMP Act. The central issue before the SCC was whether s.11h[94]."

The Charter was engaged, as the officer had already been convicted of a "major service offence" under the Royal Canadian Mounted Police Act. The appellant had argued that he could not be tried again under the Canadian Criminal Code.[95].

The SCC responded with a two-part test. The test delineates the different ways in which a person could be considered charged with an offence for section 11. The Court held that section 11 of the Charter applies when the effect of a regulatory proceeding is to impose "true penal consequences" upon a person charged[96].

- The first part of the Wigglesworth test focuses on the nature of the process, whereas,
- The second part, i.e., the actual penal consequences prong, focuses on the nature of the penalty[97].”

SCC held that a proceeding is "criminal by nature" when the purpose of the proceeding is to promote public order and welfare within a realm of the public sphere. For the second prong, the Court held that a "true penal consequence" will arise only when an individual is subjected to

[94] The Constitution Act*, supra* note 77. *S.11 h states, "if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again*

[95] R. v. Wigglesworth, (1987). CanLII 41 (SCC), [1987] 2 SCR 541, <https://canlii.ca/t/1ftkp>, retrieved on 2023-12-13.

[96] Ibid at para 19-20

[97] ibid

"imprisonment or a fine" to redress a wrong done to society at large. The actual penal consequence part thus does not protect the ambit of limited spheres like disciplinary proceedings.[98].

In Shubley and Martineau, SCC clarified the Wigglesworth test further. In Shubley, the Court held that the "criminal in nature" prong refers to the nature of the proceedings and not the "nature of the act which gave rise to the proceedings. Any non-criminal proceeding does not trigger Section 11 automatically.[99].The Court explicitly defined the proceedings by stressing the importance of conventional indicia of a criminal prosecution such as summons or arrest, laying information, or a trial in a court of criminal jurisdiction). For the SCC, any proceedings on the other side of the aisle, i.e., without these conventional methods, meant that they were administrative[100]. In Martineau, the Court elaborated on the actual penal consequence prong. Imprisonment can activate s.11. For the Court, any other financial sanctions or penalties should aim to remedy harm inflicted on society rather than merely to preserve the efficiency of a specific regulatory or disciplinary system[101].

This paper, therefore, argues that ID hearings are essentially criminal and quasi-criminal, and their outcome is similar to a penal consequence.[102]. In this broader legislative scheme, the issue of criminal inadmissibility is complex, particularly regarding the inadmissibility hearings before an Immigration Division. These proceedings are conducted before an administrative tribunal, but the proceedings and outcome have strong overtones of the criminal justice system.

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[98] Ibid at para 24-29

[99] Penney, Steven. "Chartering" in the Shadow of Lochner: Guindon, Goodwin and the Criminal-Administrative Distinction at the Supreme Court of Canada." The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference 76. (2016). DOI: https://doi.org/10.60082/2563-8505.1339 https://digitalcommons.osgoode.yorku.ca/sclr/vol76/iss1/14 at 318-320

[100] Penney, at 323

[101] ibid.

[102] Canada, Immigration and Refugee Board of. Admissibility Hearings. 6 Mar. 2018, https://www.irb-cisr.gc.ca:443/en/detention-hearings/Pages/hearings.aspx

The inadmissibility hearing process includes conventional criminal or quasi-criminal prosecution (e.g., notices, witness examination, expert evidence and even detentions). Inadmissibility and subsequent removal proceedings are initiated by a government enforcement agency closely resembling a police force and are directly based on the criminal conduct of a subject. There are growing parallels and intersections between these areas of law. The overlap between criminal and immigration law cannot be brushed away in the immigration realm. [103].

Moving to the second part of the test, the "true penal consequence" part of the Wigglesworth test may not be satisfied as inadmissibility is not considered a "true penal consequence" in the strictest sense, as discussed in the previous section. Criminal penalties are generally more severe and carry a more significant stigma than administrative ones. Legislatures increasingly put their trust in administrative and civil tribunal proceedings to decrease the burden on prosecution for wrongdoings traditionally handled by criminal law. The legislative intent is to decrease the impact of the harsh penal consequences like criminal record, imprisonment, and other harsh repercussions for individuals.[104]. However, the punitive measures within the inadmissibility frameworks can be severe, targeting average individuals, and are accompanied by fewer safeguards for procedural justice[105.]

Penney is thus correct when he says that the Supreme Court's construal of "charged with an offence" and "true penal consequence" is too restrictive.[106].

3.3 Double Jeopardy

[103] Kaushal, Asha. "The Webbing of Public Law: Looking Through Deportation Doctrine." Osgoode Hall Law Journal 59.2 (2022): https://digitalcommons.osgoode.yorku.ca/ohlj/vol59/iss2/11 at 7

[104] Penney, *supra* note 101 at 318

[105] Ibid at 326

[106] Penney, supra note 101 at 324

Legal scholars have often considered inadmissibility a punishment, not merely an administrative sanction. Cohen has challenged the traditional view of inadmissibility as merely an administrative sanction, highlighting its profound impact on immigrants and their families, akin to punishment.[107]. Barnes has quoted studies to emphasize the severity of inadmissibility, calling it equivalent to imprisonment. Barnes has underscored the harshness of banishment for immigrants who have established deep connections in their host country.

Barnes has conducted an in-depth study that reveals the profound impact of deportation on families, particularly those deported to Jamaica. Almost all respondents reported severe damage to family relationships, hardship for children, and feelings of social alienation following deportation. Notably, 45% of deportees to Jamaica stated they would have preferred additional prison time over deportation, highlighting the perception of deportation as a harsher punishment than incarceration. Inadmissibility affects both the individual and their loved ones. Barnes concludes that inadmissibility and deportation should be recognized as severe punishment, not just an administrative procedure.[108].

In the pre-charter era, Chief Justice Duff, in Reference to Effect of Exercise of Royal Prerogative of Mercy Upon Deportation Proceedings ("Prerogative of Mercy"), laid down the edifice of the arguments that confirmed that deportation was strictly an administrative proceeding[109]. Duff J. argued that deportation is not a form of punishment and should be kept separate from criminal proceedings. He noted that the consequences resulting from proceedings are not directly linked to the criminal offence[110]. The Federal Court of Appeal in Hurd v. Canada (Minister of Employment

[107] Cohen, Russell P.. "Fundamental (In)Justice: The Deportation of Long-Term Residents from Canada." Osgoode Hall Law Journal 32.3 (1994): 457-501.DOI: https://doi.org/10.60082/2817-5069.1666 https://digitalcommons.osgoode.yorku.ca/ohlj/vol32/iss3/2

[108] Barnes, *supra* note 46 at 18-27

[109] Kaushal, Supra note 105 at 6

[110] Cohen, *supra* note 109 at 467

and Immigration) echoed similar arguments, stating that deportation is merely a "grave, personal disadvantage" equivalent to losing a licence and not a criminal conviction.[111].

The inadmissibility and subsequent removal are more akin to traditional notions of punishment than administrative sanctions. There is a clear and direct relationship between the criminal conviction and deportation. The Immigration Act permits an individual's deportation "due to his conviction"; therefore, inadmissibility flows directly from the judicial finding of guilt. This inadmissibility can inflict more hardship than a conventional punishment can do to an individual and his family.

3.4 Inadmissibility with the lens of S.12 of the Charter

Section 12 of the Charter states, "Everyone has the right not to be subjected to cruel and unusual treatment or punishment. Much of the jurisprudence dealing with section 12 of the Charter deals with punishment by imprisonment. In Rodriguez, the Court expanded this scope and stated that. "Treatment or punishment might include treatment imposed by the state in contexts other than penal or quasi-penal nature. A review of the S.12 jurisprudence reveals that the threshold bar for "cruel and unusual treatment" is exceptionally high.[112]. The first prong of Smith's S.12 test prohibits treatments or punishments “whose effect is grossly disproportionate."[113] Smith's test's first prong is person-specific. An individual's circumstances are to be weighed while determining gross disproportionality, even if that same measure could be appropriate in some other person's situation.

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[111] Hurd v. Canada (Minister of Employment and Immigration), 1988 CanLII 9452 (FCA), [1989] 2 FC 594, <https://canlii.ca/t/jqrjl>, retrieved on 2023-12-14.

[112] Blum, supra note at 41

[113] Government of Canada, Department of Justice. Charterpedia - Section 12 – Cruel and Unusual Treatment or Punishment. 9 Nov. 1999, https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art12.html.

"What constitutes cruel and unusual treatment in immigration law has not had any fixed response by the Court. The Court has left this debate open in Chiarelli and Barrera [114] . The Court in Chiarelli has held that deportation falls within the scope of treatment under section 12. The Court in Chiarelli, however, has held that deportation falls within the scope of treatment under section 12. The Court, however, held that S.12 of the Charter may not be engaged until deportation is clear and visible apprehension[115]. Blum, however, argues that the Court's stance on the timing of the case, i.e., being premature at an earlier stage of inadmissibility proceedings, is devoid of any merit[116].

The inadmissibility trigger has a life-changing impact on them after the criminal sentencing, trial, and imprisonment process. The loss of family, income, home, reputation, and community becomes an immediate concern for a resident after the S.44 report by an immigration officer. The effect of "inadmissibility or treatment" is unusual compared to similarly placed citizens. An inadmissible permanent resident may not sponsor his family members as envisaged in S.42 of IRPA.[117]. Loss of appeal access to IAD in cases of inadmissibility due to serious criminality makes inadmissibility unusual and cruel treatment.

The Federal Court's expansive approach to the term "treatment" in Canadian Doctors for Refugee Care v. Canada (Attorney General), 2014 FC 651 is worth pointing out. The Court held that. "The

[114] Canepa v. Canada (Minister of Employment and Immigration) (C.A.), 1992 CanLII 8567 (FCA),[1992] 3 FC 270, <https://canlii.ca/t/g97xj>, retrieved on 2023-12-18 at 272

[115] Barrera v. Canada (Minister of Employment and Immigration), 1992 CanLII 2420 (FCA), [1993] 2 FC 3, <https://canlii.ca/t/4nq9>, retrieved on 2023-12-18

[116] Blum at 42

[117] IRPA S.42 (1) A foreign national, other than a protected person, is inadmissible on the grounds of an inadmissible family member if (a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible or (b) they are an accompanying family member of an inadmissible person.

withdrawal or limitation of health care funding for certain refugee claimants engaged section 12, because these individuals "are under immigration jurisdiction, and as such are effectively under the administrative control of the state": for example, through immigration detention, conditions of release, and limitations on their ability to work or receive social assistance benefit.

The Court's analysis in Smith and Canadian Doctors does point out that inadmissibility may be called cruel and unusual treatment. The approach of Canadian doctors is another way to look at inadmissibility in the future.

3.5 Inadmissibility Synonymous with Inequality

Section 15 (1) of the Charter provides that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[118]." The drafters of the Charter anticipated that Section 15 would exert considerable influence on existing and prospective legislation.[119]. They were proven wrong when the SCC adjudicated the inadmissibility issues and applied different standards in the domain of immigration.

The Supreme Court of Canada has indicated in numerous decisions that laws regulating the entry and removal of noncitizens are immune to the s.15 challenge except under exceptional circumstances[120]. Justice McLachlin, for instance, wrote in Charouki, A deportation scheme that

[118] Government of Canada, D. of J. (1999, November 9). Charterpedia—Section 15 – Equality rights. https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art15.html

[119] Research Publications. https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications. Accessed 16 Dec. 2023

[120] I am explicitly referring to Charkaoui v. Canada and Chia and Canada (Minister of Employment and Immigration) v. Chiarelli

applies to noncitizens but not to citizens does not, for that reason alone, violate s. 15 of the Charter[121]".

The S.15 jurisprudence started with Andrew's when citizenship was declared as a ground analogous to those enumerated in S.15. In Andrew's, the Supreme Court of Canada addressed a British lawyer's appeal to practice law in British Columbia. The lawyer was not allowed to practice because of his citizenship status in Canada. The Court was asked to interpret the scope of Section 15(1) 's rights, including what constitutes equality, and establish criteria for recognizing discrimination.[122]. The Court in Andrew was aware of the vulnerability of noncitizens compared to citizens, and therefore, Andrew Court held, "While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or reinforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others[123].

Andrew's spirit was lost down the road in Chiarelli and Charouki. In decisions like Chaudhry and Huynh, the courts have held that explicit section 6(1) of the Charter prevents the courts from reviewing immigration laws with S.15 scope[124]. The Court provided a s.6 shield to government differential treatment of citizens and noncitizens, thus explicitly permitting state officials and institutes to formulate discriminatory rules, procedures, and laws.

Justice McIntyre offered a comprehensive definition of discrimination in Andrews. For McIntyre J, discrimination is the imposition of burdens, obligations, or disadvantages on a group for their

[121] Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9 (CanLII), [2007] 1 SCR 350, at para 129, <https://canlii.ca/t/1qljj#par129>, retrieved on 2023-12-16

[122] [1989] 1 SCR 143

[123] *ibid*

[124] Huynh v R, [1996] 2 FC 976, 134 DLR (4th) 612 [Huynh] and Chaudhry v Canada (Minister of Citizenship and Immigration), [1999] 3 FC 3, [1999] FCJ No 297

traits and not borne by other members of society[125]. Justice McIntyre's approach centred on the consequences of discriminatory actions, dismissing the need to demonstrate the law's or state's discriminatory intention. Discrimination is thus the action's actual effect on those subjected to it[126]. In the inadmissibility context, discrimination based on criminality is visible in the inadmissibility regime. The equal protection afforded to the members of society under section 15 of the Charter is available to sentenced individuals, as S. 15's protection extends to "everyone." The Charter rights of persons are not taken away from criminals and convicts in Canada (Section 1 exceptions do apply). Inadmissibility based on criminal records and sentences is an additional burden on permanent residents. The criminality discriminates them in the scheme of things, where they are poorly placed compared to their counterpart citizens. Viewed in its social, political, and economic context, the inadmissibility procedure is an example of a governmental program that leaves an individual singled out and subjected to harsh treatment on account of national origin, race, and criminality.

Part IV- Criminal Inadmissibility at the Global Canvas and Conclusion

Citizenship concepts are evolving globally[127].Formal citizenship is obtained through birth, parenthood, and naturalization [128]. The social connection of a person to a given country, however, constitutes substantiative citizenship, and this is being recognized at the global level. In Warsame v. Canada, the United Nations Human Rights Committee (The committee) defines a person's "Own Country" as a place "where someone has lived his conscious life.[129]" In Warsame, the applicant

[125] *Andrews, supra* note 124.
[126] ibid
[127] *Perryman, Benjamin, Citizenship, Belonging, and Deportation (2023). Canadian Journal of Human Rights, Vol. 11, No. 1, 2023, Available at SSRN: https://ssrn.com/abstract=4482936 at 93*
[128] *Ibid at 93*
[129] *ibid*

was held inadmissible by Canadian authorities due to involvement in robbery and other crimes. The committee opined that "close and enduring connections between the person and a country constitutes connections which may even be more robust than those of nationality[130].

Dauvergne, in the seminal work "How the Charter has failed noncitizens in Canada," compares the approach of the SCC with Supreme courts in both the United States and the United Kingdom. The three Supreme Courts have tended to be highly deferential to the executive branch in immigration matters. The judicial approach followed by the three Courts differs from the global approach by international bodies and international instruments. Particularly in the American context, immigration is often viewed by the Supreme Court as a domain closely tied to national sovereignty. The Supreme Court of Canada's decisions mirror this judicial approach by the SCOTUS. The deference to executive decision-making and the security-oriented perspective contribute to understanding the trends in the Supreme Court of Canada's decisions[131].

Since the 2002 Immigration and Refugee Protection Act, permanent residents have been more vulnerable to criminal inadmissibility and subsequent deportation. Criminality has become a favourite tool for immigration authorities to remove potential citizens from the country after serving their sentences. The absence of appeal rights against inadmissibility in cases of serious criminality places noncitizens at the mercy of enforcement authorities. An inadmissibility finding may not necessarily lead to deportation, yet it shapes the lives of permanent residents and their families. Canadian immigration policies have always been inclusive, as evident in Singh. Canada's moral and legal obligation is to reconsider its policies towards inadmissible permanent residents. SCC should be more proactive in providing the Charter protection to noncitizens instead of leaving them in the discretionary hands of immigration officers.

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[130] *Ibid* at 112

[131] Dauvergne, *supra* note 52 at 720-725

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