Date: 20081029

Docket: T-1049-08

Citation: 2008 FC 1212

Ottawa, Ontario, October 29, 2008

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

GHEORGE CAPRA

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for a declaration that subsection 128(4) of the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (CCRA) is invalid on the ground that it violates sections 7, 9 and 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 (Charter).

BACKGROUND

[2] The Applicant is a 47-year-old citizen of Romania who has been in Canada since August 7, 1991. He was granted Convention refugee status on March 12, 1992 and became a permanent resident of Canada on December 2, 1992.

[3] Shortly after his arrival in Canada, the Applicant was convicted of uttering threats on November 24, 1992 and personation on June 18, 1993. On June 29, 1993, Citizenship and Immigration Canada (CIC) sent a warning letter to the Applicant indicating that CIC had decided not to hold an inquiry as a result of the convictions, but that recidivism on the part of the Applicant could result in the strict enforcement of the previous *Immigration Act*, R.S.C. 1985, c.I-2 (*Immigration Act* or former Act).

[4] Despite the warning, the Applicant was convicted of 80 counts of fraud in connection with credit cards and automatic bank teller machines on October 1, 2001. He was sentenced to terms of imprisonment of 2 years less a day to be served concurrently. As a result of these convictions, a deportation order was issued against the Applicant on September 9, 2003 on the grounds of serious criminality. Both the Applicant's appeal of the deportation order to the Immigration Appeal Division of the Immigration and Refugee Board (Board) dated July 8, 2004, and his application for judicial review to the Federal Court dated September 27, 2005 were dismissed.

[5] When the Board dismissed the Applicant's appeal, the deportation order that was issued against him came into force and he lost his permanent resident status. However, because of his refugee status, he cannot be removed to Romania unless the Minister of Citizenship and Immigration issues an opinion that the Applicant constitutes a danger to the public.

[6] On October 20, 2007, the Applicant was arrested and charged with three offences, including fraud over $5000. A victim impact report prepared by a Fraud Investigation Officer for Royal Bank of Canada (RBC) indicated that the skimming operation in which the Applicant had been involved since 2005 had netted $183,891, with 415 clients being affected. The Applicant remained in custody until January 4, 2008, when he was convicted of one count of fraud over $5000 and sentenced to three months time served plus an additional 30 months incarceration.

[7] On April 8, 2008, the Applicant was notified of the CBSA's intent to seek the opinion of the Minister that he is a danger to the public in Canada. This means that the Applicant could be deported to Romania once he is granted parole.

[8] The Applicant was admitted to Stony Mountain Institution (SMI), a medium security federal correctional facility operated by the Correctional Service of Canada (CSC) on January 9, 2008. After arriving at SMI, the Applicant went through an Intake Assessment. A Correctional Plan was also developed which recommended the Alternatives, Associates and Attitudes (AAA) program, educational upgrading and employment training for the Applicant.

[9] As of August 8, 2008, the Applicant had successfully completed the AAA program and was attending Adult Basic Education level 1, which is the first of 3 levels required to obtain a high school diploma. The Applicant also started employment training in the SMI metal shop, but was unable to continue for health reasons. He will be able to pursue other employment training in SMI.

[10] The Applicant is eligible for accelerated parole review under the CCRA. He wishes to be released to the Montreal area, as his conditional plan was prepared by the CSC Parole Office in Laval, Quebec. The plan sees the Applicant residing in a community residential facility or a community correctional centre in the Montreal area if he is released on either day parole or full parole. The plan also recommends that the National Parole Board (NPB) apply certain conditions to the Applicant's parole.

[11] The Applicant was originally eligible for an Unescorted Temporary Absence (UTA) and day parole on July 4, 2008. The CBSA informed the sentence management office of the deportation order previously issued against the Applicant. As a result, by operation of subsection 128(4) of the CCRA, the Applicant is ineligible for release on a UTA or day parole until his full parole eligibility date. Accordingly, his release eligibility dates were adjusted to make his eligibility date for a UTA or day parole November 3, 2008.

[12] The Applicant feels that he is being treated differently in relation to day parole eligibility because he is not a Canadian citizen. He also believes that he is the subject of discrimination.

Whether the Applicant is allowed to stay in Canada or not, he perceives that he is being denied an opportunity to work towards his own rehabilitation simply because of his identity.

ISSUES

[13] The Applicant has submitted the following issue on this Application:

1) Does subsection 128(4) of the CCRA violate the Charter?

[14] The Respondent has elaborated on this issue and has broken it up into three sub issues:

1) Whether subsection 128(4) of the CCRA violates sections 7, 9, or 15 of the Charter;
2) If there is a Charter violation, whether it constitutes a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society pursuant to section 1;
3) If there is an unjustified Charter violation, whether the Appellant's proposed "reading-in" remedy is appropriate?

STATUTORY PROVISIONS

[15] The following are the principal statutory provisions applicable to this application:

A. *Constitution Act*, 1982 Part 1 *Canadian Charter of Rights and Freedoms*:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject	1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être

only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
…	…
6. (1) Every citizen of Canada has the right to enter, remain in, and leave Canada.	**6.** (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.
(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right	(2) Tout citoyen canadien et toute personne ayant le statut de résident permanent au Canada ont le droit :
(*a*) to move to and take up residence in any province; and	*a*) de se déplacer dans tout le pays et d'établir leur résidence dans toute province;
(*b*) to pursue the gaining of livelihood in any province.	*b*) de gagner leur vie dans toute province.
(3) The rights specified in subsection (2) are subject to	(3) Les droits mentionnés au paragraphe (2) sont subordonnés :
(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of present or previous residence; and	*a*) aux lois et usages d'application générale en vigueur dans une province donnée, s'ils n'établissent entre les personnes aucune distinction fondée principalement sur la province de résidence antérieure ou actuelle;
(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.	*b*) aux lois prévoyant de justes conditions de résidence en vue de l'obtention des services sociaux publics.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

(4) Les paragraphes (2) et (3) n'ont pas pour objet d'interdire les lois, programmes ou activités destinés à améliorer, dans une province, la situation d'individus défavorisés socialement ou économiquement, si le taux d'emploi dans la province est inférieur à la moyenne nationale.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

…

…

9. Everyone has the right not to be arbitrarily detained or imprisoned.

9. Chacun a droit à la protection contre la détention ou l'emprisonnement arbitraires.

…

…

15. (1) Every individual is equal before the 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.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions

(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation

of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.	d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.

B. *Corrections and Conditional Release Act*:

128. (1) An offender who is released on parole, statutory release or unescorted temporary absence continues, while entitled to be at large, to serve the sentence until its expiration according to law.	128. (1) Le délinquant qui bénéficie d'une libération conditionnelle ou d'office ou d'une permission de sortir sans escorte continue, tant qu'il a le droit d'être en liberté, de purger sa peine d'emprisonnement jusqu'à l'expiration légale de celle-ci.
(2) Except to the extent required by the conditions of any day parole, an offender who is released on parole, statutory release or unescorted temporary absence is entitled, subject to this Part, to remain at large in accordance with the conditions of the parole, statutory release or unescorted temporary absence and is not liable to be returned to custody by reason of the sentence unless the parole, statutory release or unescorted temporary absence is suspended, cancelled, terminated or revoked.	(2) Sauf dans la mesure permise par les modalités du régime de semi-liberté, il a le droit, sous réserve des autres dispositions de la présente partie, d'être en liberté aux conditions fixées et ne peut être réincarcéré au motif de la peine infligée à moins qu'il ne soit mis fin à la libération conditionnelle ou d'office ou à la permission de sortir ou que, le cas échéant, celle-ci ne soit suspendue, annulée ou révoquée.
(3) Despite subsection (1), for the purposes of paragraph 50(*b*) of the *Immigration and*	(3) Pour l'application de l'alinéa 50*b*) de la *Loi sur l'immigration et la protection*

Refugee Protection Act and section 40 of the *Extradition Act*, the sentence of an offender who has been released on parole, statutory release or an unescorted temporary absence is deemed to be completed unless the parole or statutory release has been suspended, terminated or revoked or the unescorted temporary absence is suspended or cancelled or the offender has returned to Canada before the expiration of the sentence according to law.

des réfugiés et de l'article 40 de la *Loi sur l'extradition*, la peine d'emprisonnement du délinquant qui bénéficie d'une libération conditionnelle d'office ou d'une permission de sortir sans escorte est, par dérogation au paragraphe (1), réputée être purgée sauf s'il y a eu révocation, suspension ou cessation de la libération ou de la permission de sortir sans escorte ou si le délinquant est revenu au Canada avant son expiration légale.

(4) Despite this Act or the *Prisons and Reformatories Act*, an offender against whom a removal order has been made under the *Immigration and Refugee Protection Act* is ineligible for day parole or an unescorted temporary absence until the offender is eligible for full parole.

(4) Malgré la présente loi ou la *Loi sur les prisons et les maisons de correction*, l'admissibilité à la libération conditionnelle totale de quiconque est visé par une mesure de renvoi au titre de la *Loi sur l'immigration et la protection des réfugiés* est préalable à l'admissibilité à la semi-liberté ou à l'absence temporaire sans escorte.

(5) If, before the full parole eligibility date, a removal order is made under the *Immigration and Refugee Protection Act* against an offender who has received day parole or an unescorted temporary absence, on the day that the removal order is made, the day parole or unescorted temporary absence becomes inoperative and the offender shall be reincarcerated.

(5) La libération conditionnelle du délinquant en semi-liberté ou en absence temporaire sans escorte devient ineffective s'il est visé, avant l'admissibilité à la libération conditionnelle totale, par une mesure de renvoi au titre de la *Loi sur l'immigration et la protection des réfugiés*; il doit alors être réincarcéré.

(6) An offender referred to in subsection (4) is eligible for day parole or an unescorted temporary absence if the removal order is stayed under paragraph 50(*a*), 66(*b*) or 114(1)(*b*) of the *Immigration and Refugee Protection Act*.

(6) Toutefois, le paragraphe (4) ne s'applique pas si l'intéressé est visé par un sursis au titre des alinéas 50*a*) ou 66*b*) ou du paragraphe 114(1) de la *Loi sur l'immigration et la protection des réfugiés*.

(7) Where the removal order of an offender referred to in subsection (5) is stayed under paragraph 50(*a*), 66(*b*) or 114(1)(*b*) of the *Immigration and Refugee Protection Act* on a day prior to the full parole eligibility of the offender, the unescorted temporary absence or day parole of that offender is resumed as of the day of the stay.

(7) La semi-liberté ou la permission de sortir sans escorte redevient effective à la date du sursis de la mesure de renvoi visant le délinquant pris, avant son admissibilité à la libération conditionnelle totale, au titre des alinéas 50*a*) ou 66*b*) ou du paragraphe 114(1) de la *Loi sur l'immigration et la protection des réfugiés*.

C. *Immigration and Refugee Protection Act*:

50. A removal order is stayed

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

(*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;

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;

(*b*) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;

b) tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger;

ANALYSIS

General

[16] The Applicant says that subsection 128(4) of the CCRA amounts to an arbitrary detention scheme that violates sections 7, 9 and 15 of the Charter. In fact, he says that, notwithstanding the legislative initiatives that followed the decision in *Chaudhry v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 297, Parliament has failed to avoid the pitfall's identified by Justice Evans in that case and has passed into law a scheme that, for non-citizens, is even more arbitrary and offensive to Charter rights than existed under the former *Immigration Act*.

[17] *Chaudhry* involved an application for judicial review of a decision of the Immigration and Refugee Board in which an adjudicator said he had no jurisdiction "unilaterally to order a detention review" under subsection 103(6) of the *Immigration Act* in the absence of a request by a senior immigration officer. Since no such request had been made, the adjudicator took the position that he could not review the reasons for the continuation of the applicant's detention.

[18] The applicant in *Chaudhry* had been convicted in Canada of trafficking in a narcotic and sentenced to 14 years in prison. He was then ordered deported and a warrant for his arrest and detention issued under subsection 103(1) of the *Immigration Act*.

[19] At the same time an order was made under subsection 105(1) of the *Immigration Act* directing the person in charge of the institution where the applicant was incarcerated to detain him

until the expiration of his sentence and then to deliver him into the custody of the immigration officer.

[20] Because the adjudicator in *Chaudhry* said he was unable to review the reasons for the continuation of the applicant's detention, the applicant sought an order from the Court requiring the Adjudication Division to conduct such a review (alleging that this was required by law), and an ancillary order requiring the Minister of Citizenship and Immigration to request the Adjudication Division to review the reasons for the applicant's continued detention. The applicant in *Chaudhry* maintained that such a review was mandated by either subsection 103(6) of the *Immigration Act* properly interpreted or, in the alternative, by sections 9 and 15 of the Charter.

[21] On the issue of statutory interpretation, Justice Evans concluded in *Chaudhry* that the applicant's view of subsection 103(6) of the *Immigration Act* was correct and he granted a declaration that a person against whom a subsection 105(1) order had been issued is detained pursuant to the *Immigration Act* within the meaning of subsection 103(6), and that the review provisions of that section apply to orders made under subsection 105(1).

[22] Because Justice Evans decided for the applicant in *Chaudhry* on the issue of statutory interpretation, it was not necessary for him to deal extensively with the alternative Charter arguments advanced by the applicant, but he did deal with them nevertheless.

[23] Those arguments were that, if subsection 105(1) orders were not subject to review under subsection 103(6), then such orders were invalid, in the absence of any kind of review of the reasons for their continuation, because they violated section 9 of the Charter (in the absence of review the detention was arbitrary) and section 15 of the Charter (because only non-citizens can be subject to a subsection 105(1) order, which means that the power to issue such an order discriminates on the ground of nationality, an "analogous ground").

[24] As regards the section 9 argument, Justice Evans found for the applicant in *Chaudhry* on the facts of that case. He concluded that a person subject to a subsection 105(1) order was "detained or imprisoned" for the purpose of section 9, and that the detention was arbitrary because it occurred without any review of the reasons for its continuation on the basis of a hearing before an independent tribunal.

[25] This is a significant finding for the application presently before me. The Applicant says that there is no essential difference (except that his detention is even more arbitrary) between the present scheme and the one declared unconstitutional by Justice Evans in *Chaudhry*, and he says that I am bound to follow Justice Evans on this issue.

[26] As regards section 15 of the Charter, Justice Evans found against the applicant in *Chaudhry* because he concluded that the function of subsection 105(1) of the former *Immigration Act* made it part of a "deportation scheme," so that it was not subject to section 15 review as a consequence of section 6 of the Charter.

[27] In the present application, the Applicant argues that the relevant statutory provisions under which he is detained are not part of a "deportation scheme," so that they must be examined against section 15 of the Charter and, if this is done, they will be found to be invalid.

[28] Justice Evans' decision in *Chaudhry* was considered an appeal by the Federal Court of Appeal. Essentially, the Federal Court of Appeal confirmed Justice Evans on the statutory interpretation issue but did not feel it necessary to deal with the Charter points.

[29] The Respondent in the present application says that subsection 128(4) of the CCRA works as part of a complete legislative scheme that ensures foreign nationals serve criminal sentences that are comparable to sentences served by Canadians. Without this section, foreign offenders would serve significantly shorter sentences than the norm. The subsection does this by balancing the reality of a foreign offender's deportation against both the offender's and society's interests in effective criminal sentencing.

[30] The Respondent also says that the current legislative scheme is Parliament's response to the decision in *Chaudhry*. After *Chaudhry* (and *Larsen v. National Parole Board* (1999), 178 F.T.R. 30) a foreign offender could be released into Canadian society under a UTA or on day parole and the CIC could not remove that offender until he/she was either granted full parole or had reached his/her statutory release date.

[31] Parliament did not feel that this situation represented an appropriate balance and so decided, through a collaborative effort with CIC, CSC, the NPB and the Department of Justice Canada, to develop policy and legislation to deal with foreign nationals serving sentences of imprisonment in Canada who are subject to a removal order.

[32] The outcome of that collaboration is the present scheme which, the Respondent says, achieves the appropriate balance between the objectives of Canadian immigration policy and the Canadian criminal justice system.

[33] The relevant immigration objectives are reflected in s. 3 of IRPA and include: s. 3(h) to protect the safety of Canadians and to maintain the security of Canadian society; and s. 3(i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks. Relevant criminal justice system objectives mandated concern for issues such as accountability and deterrence.

[34] The balancing of these objectives required Parliament to specifically consider two issues. First, when it would be an appropriate and fair time to allow a foreign national offender's release from the Canadian sentence of imprisonment to occur, having regard to the conditions placed upon Canadian offenders, the requirements of the CCRA, and Canada's commitments to persons lawfully in Canada. Second, Canada's international obligations, taking into account the fact that any foreign offender removed to another country is released from the Canadian term of imprisonment upon removal and is not subject to supervision by any Canadian authority. In the result, a deported

foreign national offender effectively serves a shorter sentence than a Canadian citizen offender. The full parole eligibility date was chosen as reflecting the appropriate balance.

[35] To further the immigration objectives, including the objective of denying access to Canadian territory to those who are a criminal or security risk, the legislative scheme ensures that a foreign national offender subject to a removal order is not eligible for either UTAs or day parole until he/she reaches his/her full parole eligibility date. At that time, if released, the foreign national's sentence is deemed completed for removal purposes so that the foreign national may be removed from Canada. However, the delayed eligibility for UTAs and day parole does not apply in cases where the foreign national is not subject to a removal order or in cases where the removal order, is stayed under s. 50(a), s. 66(b) or s. 114(1)(*b*) of the IRPA.

[36] In sum, the entire legislative scheme was developed to strike a balance between a number of policy objectives, including the need to:

- Maintain the message to the international community that foreign offenders convicted in Canada and under a removal order will serve the denunciatory portion (one-third) of their sentence of imprisonment. This is consistent with a change that was made in 1992 with the coming into force of the CCRA. Prior to that, foreign offenders could be paroled for deportation very early in the sentence. There was considerable criticism that some foreign offenders were receiving lengthy sentences for serious crimes, only to return to their home country after a matter of months, under no correctional restrictions.

- Allow CIC (now CBSA) to carry out its mandate of removing from Canada, in a timely manner, foreign offenders who have lost the right to remain here.
- Allow the NPB and the CSC to continue to fulfill their legislative mandate of reintegrating into Canadian society foreign offenders who will not or cannot be removed from Canada.

[37] Section 50(b) of IRPA stays the removal order in the case of a foreign national sentenced to a term of imprisonment in Canada until the sentence is completed.

[38] Subsection 128(3) of the CCRA provides that a sentence is deemed completed for the purposes or removal under IRPA when the foreign national is granted any form of unsupervised release, specifically, an UTA, day parole, full parole, or statutory release:

(3) Despite subsection (1), for the purposes of paragraph 50(*b*) of the *Immigration and Refugee Protection Act* and section 40 of the *Extradition Act*, the sentence of an offender who has been released on parole, statutory release or an unescorted temporary absence is deemed to be completed unless the parole or statutory release has been suspended, terminated or revoked or the unescorted temporary absence is suspended or cancelled or the offender has returned to Canada before the expiration of the sentence according to law.	(3) Pour l'application de l'alinéa 50*b*) de la *Loi sur l'immigration et la protection des réfugiés* et de l'article 40 de la *Loi sur l'extradition*, la peine d'emprisonnement du délinquant qui bénéficie d'une libération conditionnelle d'office ou d'une permission de sortir sans escorte est, par dérogation au paragraphe (1), réputée être purgée sauf s'il y a eu révocation, suspension ou cessation de la libération ou de la permission de sortir sans escorte ou si le délinquant est revenu au Canada avant son expiration légale.

[39] Subsection 128(4) of the CCRA sets out the UTA, day parole and full parole eligibility dates for a foreign national subject to a removal order, and provides :

(4) Despite this Act or the *Prisons and Reformatories Act*, an offender against whom a removal order has been made under the *Immigration and Refugee Protection Act* is ineligible for day parole or an unescorted temporary absence until the offender is eligible for full parole.	(4) Malgré la présente loi ou la *Loi sur les prisons et les maisons de correction*, l'admissibilité à la libération conditionnelle totale de quiconque est visé par une mesure de renvoi au titre de la *Loi sur l'immigration et la protection des réfugiés* est préalable à l'admissibilité à la semi-liberté ou à l'absence temporaire sans escorte.

[40] Pursuant to section 128(6) of the CCRA, s. 128(4) is inoperative where a removal order has been stayed under either s. 50(a) (removal order stayed as a result of judicial proceeding), s. 66(b) (removal order stayed for humanitarian and compassionate reasons) and s. 114(1)(*b*) (removal order stayed for person determined to be in need of protection):

128(6) An offender referred to in subsection (4) is eligible for day parole or an unescorted temporary absence if the removal order is stayed under paragraph 50(*a*), 66(*b*) or 114(1)(*b*) of the *Immigration and Refugee Protection Act*.	128(6) Toutefois, le paragraphe (4) ne s'applique pas si l'intéressé est visé par un sursis au titre des alinéas 50*a*) ou 66*b*) ou du paragraphe 114(1) de la *Loi sur l'immigration et la protection des réfugiés*.

[41] In summary:

- s. 50(b) of IRPA stays the execution of a Removal Order until the offender's sentence is deemed completed;
- CCRA s. 128(3) deems the sentence completed, for Removal Order purposes, as early as the grant of day parole/UTA (earlier than the former CCRA);

- CCRA s. 128(4) postpones day parole eligibility, for offenders subject to removal, until full parole eligibility. In doing so, it sets a minimum period of time that these offenders must spend in custody. Thereafter, it still allows for their removal at the earliest time of release into Canadian society;
- CCRA s. 128(6) limits the operation of s. 128(4), such that it does not apply where a removal order cannot be enforced due to a statutory stay arising for reasons other that the offender's existing criminal sentence.

[42] The fundamental purpose of the scheme created by CCRA s. 128(3) – (7) is to ensure the circumstances of impending removal are factored into how an offender's sentence is served. In particular, s. 128(4) prevents offenders subject to removal from serving sentences that are significantly shorter than the sentences of Canadians. In doing so, it preserves the deterrence factor that forms an essential part of the sentencing regime.

[43] At the same time, the scheme effectively denies the offender access to Canadian territory, a purpose explicitly enumerated by IRPA, in the period where his/her removal is statutorily stayed as a result of the criminal sentence. It prevents the offender from taking advantage of his/her criminal sentence, in conjunction with day parole, to gain access to Canadian society. Otherwise, this specific IRPA objective would be nullified. The offender would, as a result of his/her criminal sentence, have better access to Canadian society than foreign nationals who are not criminals, and who can be removed immediately.

[44] The Respondent says that the Applicant's extensive reliance upon the decision in *Chaudhry* is misplaced. The present legislative scheme is materially different from the previous scheme under which *Chaudhry* was decided.

[45] In *Chaudhry*, the applicant was subject to an immigration warrant, issued by an immigration officer, on the grounds of public danger or flight risk, and a s. 105 order which required that he be detained until his criminal sentence otherwise expired. In light of *Chaudhry*, it is clear that the s. 105 order resulted in a new detention, pursuant to the former *Immigration Act*, which was not as a result of his criminal sentence. This detention under the *Immigration Act* was thought to deprive Mr. Chaudhry of an existing statutory entitlement to day parole eligibility and, as such, required an immigration review mechanism to consider whether he was properly detained.

[46] In the instant case, Mr. Capra is not detained under the IRPA. His detention is pursuant to a valid warrant of committal issued under the criminal justice system. He is being held at SMI as a result of this criminal sentence and by the operation of the CCRA. Unlike the circumstances in *Chaudhry*, Mr. Capra is statutorily ineligible for parole. The dual detention through the criminal conviction sentence and the immigration detention identified in *Chaudhry* has been eliminated.

[47] The Respondent also says that the current legislative scheme does not offend section 15 of the Charter and, even if it did, it would be demonstrably justified under section 1 of the Charter.

Section 9

[48] There is no argument between the parties that, as regards section 9, a “detention” exists on the facts of this case. The disagreement is over whether that detention is arbitrary within the meaning of section 9.

[49] The Applicant argues that detention under the present scheme is even more arbitrary than it was in *Chaudhry* because ineligibility for day parole until full parole eligibility follows as a matter of course from a removal order without anyone, anywhere, forming a belief that the person poses a danger to the public or would not appear for removal.

[50] Section 128(4) of the CCRA deprives an offender against whom a removal order has been made under IRPA of eligibility for day parole or a UTA until the offender is eligible for full parole. In other words, Parliament has decided that day parole and a UTA will not be available to such offenders in the same way as they are available to Canadian citizens. Foreign offenders against whom a removal order has been made are required to serve the denunciatory portion of their sentence before they become eligible for full parole, at which time they are subject to removal under IRPA.

[51] In other words, Parliament has decreed that foreign offenders subject to removal must spend a minimum period of time in custody (which may be longer than citizen offenders who are not

subject to removal and so are entitled to be considered for day parole and unescorted temporary absence).

[52] The Applicant says this is arbitrary because there is no review. But review under IRPA to determine whether such persons are a danger to the public or pose a flight risk is not the point. The evidence before me shows a Parliamentary intent to postpone eligibility for day parole and unescorted release for such people in order to achieve specific policy objectives that are cogent and defensible. Specifically, Parliament wished to ensure that such persons do not serve sentences shorter than the sentences served by Canadians for the same crime (which would occur if they were removed at an earlier time), and that the offender should not be placed in a better position than a non-offending foreigner subject to removal by giving the offender access to Canadian society and Canadian territory through day parole and UTA.

[53] In *Chaudhry*, Justice Evans was dealing with detention resulting from a Deputy Minister's order issued under the former *Immigration Act* where, in the absence of a favorable statutory interpretation, the applicant's detention could be continued without any review "of the reasons for its continuation on the basis of a hearing before an independent tribunal." (paragraph 39)

[54] Justice Evans was not required to consider in *Chaudhry* a detention regime that removed eligibility to day parole and a UTA and that is clearly intended to ensure that foreign offenders subject to removal serve their sentences differently from Canadian citizens so that certain clear objectives can be attained. Such a scheme may be objectionable for other reasons but, in my view, it

cannot be called arbitrary. There might also be significant disagreement as to whether Parliament's objectives are actually achieved by the present impugned regime. But such disagreement does not render the detention arbitrary either. It is difficult to accommodate foreign offenders subject to removal within a detention regime that must also deal with Canadian citizens and others not subject to removal.

[55] *Chaudhry* dealt specifically with the effects of sections 103(6) and 105(1) of the former *Immigration Act*. In the present application, the Court is called upon to deal with CCRA provisions that factor impending removal into the way that an offender's sentence is served and which increase the time in custody for foreign offenders subject to removal. The Applicant says that the effect is the same: foreign offenders subject to removal are arbitrarily detained because the period they spend in custody without eligibility for day parole or unescorted temporary absence is not subject to review. On the facts of this case, however, it is clear that Parliament intended, for various policy reasons, to increase the time spent in custody by foreign offenders subject to removal, and, in my view, immigration review has no bearing upon this purpose.

[56] I agree with the Respondent on this point that section 128(4) of the CCRA is directed at inmates subject to removal. The operation of the subsection is triggered by the issuance of a removal order. A stay of that removal order suspends the section's effect. The application of the section is rationally tied to its purpose and cannot be called arbitrary in relation to the objectives sought to be attained. See *R. v. Lyons*, [1987] 2 S.C.R. 309 at paragraph 62. Those objectives are outlined in the evidence presented by the Respondent and I have referred to them in a summary way

above. The Applicant is not detained under IRPA. He is an inmate subject to a removal order and, by operation of the CCRA, he is not eligible for day parole or unescorted temporary absence until he reaches his full parole eligibility date. Parliament clearly intended that this was how he, and persons in his position, should serve their sentence and Parliament clearly intended that this manner of serving sentence should not be subject to immigration review. And that is because the objectives of immigration review (danger to the public and flight risk) are not relevant to the objectives behind the CCRA scheme. In my view, this is not arbitrary detention within the meaning of section 9.

[57] The Applicant also says that he does not fit into the scheme of the CCRA because, as a refugee, he is not removable without a danger opinion from the Minister, even though he has lost his permanent resident status.

[58] In fact, the Applicant argues that there are wide gaps in the impugned legislation because the specific exceptions contained in subsection 128(6) mean that circumstances may arise where foreign offenders will have lost their day parole and UTA eligibility even though they are not removable. He says there is an array of exceptions that are just not contemplated by the legislation, which is one of the reasons it is arbitrary. This means that section 128(4) will apply to everyone, even if they are not a danger to society.

[59] In my view, however, I can only deal with arbitrariness and fundamental justice principles on the facts of this case. The Court cannot speculate about conceptual anomalies that may never

arise, and do not arise on these facts. It is clear where the Applicant fits into the scheme. He is subject to a removal order and his removal is being actively pursued.

[60] The specific exemptions contained in subsection 128(6) make it clear that Parliament intended subsection 128(4) to apply in all other cases where an offender is subject to a removal order. This includes the Applicant who, on the facts before me, is both someone subject to a removal order and in relation to whom a danger opinion is being sought so that he can be deported at the time fixed by the legislation.

[61] In my view, in such circumstances, it would make no sense for the Applicant to have access to day parole and UTA. As regards the Applicant then, I do not think that the impugned legislation can be said to function in an arbitrary way, or in a way that is not in accordance with principles of fundamental justice. Other situations will have to be considered on their merits if and when they arise.

Section 7

[62] As with section 9, the parties do not dispute that the Applicant's liberty interest under section 7 of the Charter is sufficiently engaged by the removal of his eligibility for day parole and UTA under subsection 128(4) of CCRA. The point of contention between them is whether the Applicant's liberty has been deprived in accordance with the principles of fundamental justice.

[63] The Applicant argues that the detention review provisions in IRPA are in accordance with the principles of fundamental justice so that, if those review provisions do not apply – as is the case here – then the denial of his liberty has not occurred in accordance with the principles of fundamental justice. The Applicant says that fundamental justice requires that eligibility for day parole for him be subject to the scrutiny of the immigration detention review provisions.

[64] Once again, it seems to me that the Applicant is attempting to sidestep the fact that he is being detained as a result of his criminal convictions and is subject to the provisions of the CCRA. Immigration detention provisions and their purpose (danger to the public and flight risk) are simply not relevant to the form of the sentence he is serving. The form of that sentence may be triggered by a removal order but its rationale and legitimacy reside with the CCRA and the policy choices that Parliament has embodied in that statute.

[65] On the facts of the present case the principles of fundamental justice were observed when the Applicant was tried, convicted and sentenced for his offences. The form of sentence was fixed by the CCRA and automatically came into effect. As was pointed out in *Cooper v. Canada (Attorney General)* 2002 FCA 374 at paragraph 8, “there is no need for any hearing in these cases because the legislation operates automatically, there being no discretion to exercise.”

[66] The Supreme Court of Canada has also made it clear that a “change in the form in which a sentence is served, whether it be favorable or unfavorable to the prisoner, is not, in itself, contrary to

any principle of fundamental justice." See *Cunningham v. Canada*, [1993] 2 S.C.R. 143 at page 152.

[67] In effect, the Applicant is saying that, because he is a foreign national and subject to removal under IRPA, Parliament cannot change the day parole and unescorted temporary absence aspect of his sentence so as to increase the time he spends in custody and must afford him detention review under IRPA.

[68] In my view, this argument cannot be accepted. There is nothing in section 128(4) and the principles and policies it embodies that offends the principles of fundamental justice is either a procedural or substantive way. In addition, immigration review to determine danger to the public and flight risk has no relevance to the reasons why the Applicant has lost his eligibility for day parole and a UTA under subsection 128(4) of CCRA. Even if the Applicant is not a danger to the public or a flight risk, this does not mean his day parole eligibility should not be postponed until full parole in order to meet the objectives of CCRA and the policy considerations embodied in section 128(4).

Section 15

[69] In *Chaudhry*, Justice Evans rejected the applicant's arguments under section 15 of the Charter on the ground that the "function of subsection 105(1) [of the former *Immigration Act*] is to

ensure that those against whom orders are made appear for examination or inquiry that may lead to their removal from Canada, or for the removal itself":

> This provision is therefore a part of a "deportation scheme." It is accordingly not subject to section 15 review, even though a subsection 105(1) order can deprive only those penitentiary inmates who are non-citizens of the right to be considered for day parole or an unescorted temporary absence. (para. 49)

[70] In the present case, subsection 128(4) of CCRA deprives non-citizen offenders against whom a removal order has been made under IRPA of eligibility for day parole or a UTA until the offender is eligible for full parole.

[71] The rationale behind the rejection of section 15 in *Chaudhry* by Justice Evans is the well-recognized one that "since the right to enter, remain in and leave Canada is limited by section 6 of the Charter to Canadian citizens, courts have not subjected provisions of the *Immigration Act* to review under section 15 on the ground that they discriminate on account of nationality." (para. 48) Authority for this position can be found in the words of Justice Sopinka in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at page 736:

> There is … no discrimination contrary to s. 15 in a deportation scheme that applies to permanent residents, but not to citizens.

[72] In the present case, the Court is dealing, not with IRPA, but with subsection 128(4) of CCRA which, as the Respondent points out, is triggered by the issuance of a removal order and the purpose of which is to ensure that the circumstances of impending removal are factored into how an offender's sentence is served.

[73] Parliament has decided that offenders subject to removal should serve their sentences in different ways from other offenders, including Canadian citizens. This is to ensure that their status as offenders does not enhance their access to Canadian Society over that of non-offenders who face deportation; it is also intended to ensure that their removal status does not result in their serving shorter sentences than either Canadian citizens or non-citizens who are not subject to removal. Parliament has chosen to deal with these issues by suspending day parole and UTA for offenders who are subject to removal. It is possible to disagree with this approach and with whether it achieves the objectives it is intended to achieve, but that is not the issue before me in this application. What is relevant, in my view, is that the variation in the form of the sentence that comes about as a result of subsection 128(4) of CCRA is triggered by the existence of a removal order and whether this fact makes it part of a deportation scheme.

[74] The Respondent says that subsection 128(4) of the CCRA, together with the remainder of subsections 128(3) to 128(7) were enacted by IRPA and, in conjunction with section 50 of IRPA, control when a foreign offender subject to a removal order, who is serving a Canadian term of imprisonment, can be removed from Canada. This legislative scheme operates to set a specific time frame for the offender's removal, as soon as reasonably practicable, but only after the denunciatory portion of the criminal sentence has been served.

[75] In other words, the Respondent argues that subsection 128(4) is an integral part of a deportation scheme applicable to incarcerated offenders, and it exists for precisely this purpose.

[76] The Applicant points out that the process by which the Respondent issues, and the person concerned challenges, a removal order is unaffected by section 128(4). That process remains exactly the same, irrespective of whether the offender is subject to section 128(4).

[77] This means, says the Applicant, that through section 128(4) Parliament has differentiated between citizens and non-citizens otherwise than by determining the limits of the right of non-citizens to remain in Canada. The differentiation at issue is a difference in eligibility for day parole, not a difference in the right to remain in Canada. This means that section 15 of the Charter should apply.

[78] The Applicant draws upon the judgment of Justice Sopinka in *Chiarelli* and Justice Sopinka's reliance upon the reasons of Justice Pratte in the Federal Court of Appeal in the same case:

> The Charter impliedly recognizes the power of Parliament to differentiate between Canadian citizens and permanent residents by imposing limits on the right of the permanent residents to remain in Canada. In exercising that power, Parliament is not guilty of discrimination prohibited by section 15. The situation would be different if Parliament or a Legislature were to differentiate between permanent residents and citizens otherwise than by determining the limits of the residents' right to remain in the country.
>
> *Chiarelli v. Canada (Minister of Employment and Immigration)* (1990), 10 Imm. L.R. (2d) 137 at 147, 148.

[79] In the present case, the Applicant argues, the differentiation has become "otherwise."

[80] For purposes of section 6 of the Charter, it would seem clear from *Chiarelli* that a "deportation scheme" is legislation dealing with the rights of non-citizens to enter, remain, and leave Canada. Thus it seems to me that subsection 50(b) of IRPA (which stays the removal of a foreign national sentenced to a term of imprisonment in Canada until sentence is complete) is part of a deportation scheme.

[81] Likewise, I think that subsection 128(3) of CCRA (the deemed completion provision) is also part of a deportation scheme because it sets the limits to the stay of removal embodied in subsection 50(b) of IRPA.

[82] But subsection 128(4) does not deal with the removal of the offender from Canada. Rather, it legislates for an offender who is subject to removal a change in the way that offender's sentence must be served. And it does so by suspending eligibility for day parole and UTA for the duration of the stay or removal that comes about as a result of subsection 50(b) of IRPA and subsection 128(3) of CCRA.

[83] Subsection 128(4) of the CCRA is a sentencing and detention provision that is triggered by a removal order issued pursuant to a constitutionally valid deportation scheme, but its purpose, nevertheless, is to change the way a criminal sentence is served in Canada for a particular category of offender: those persons subject to a removal order.

[84] Subsection 128(4) is obviously part of a general legislative scheme for dealing with foreign offenders subject to removal but, in my view, its purpose and effect go beyond the strict confines of controlling the right to enter, remain and leave Canada.

[85] In this respect, then, I agree with the Applicant that the differentiation at issue here is a difference in eligibility for day parole and UTA, not a difference in the right to remain in Canada, and is therefore not immune from section 15 review by virtue of section 6 of the Charter.

[86] The complicating factor, however, is that if subsection 128(4) did not exist, the result would be differential treatment between incarcerated foreign offenders subject to removal and at least three other relevant groups:

a. Canadian offenders who have to serve the full extent of their sentence in Canada;
b. Foreign nationals subject to removal and who can be removed immediately because they are not offenders and are therefore not subject to a stay of their removal under subsection 50(a) of IRPA;
c. Incarcerated foreign offenders who are not subject to a removal order, who will also have to serve the full extent of their sentence in Canada.

[87] The removal of subsection 128(4) could result in a serious foreign offender subject to removal gaining access to the benefits of Canadian society through day parole and UTA while his law-abiding counterpart for whom there is no stay of removal will have no such advantage. And if the offender is removed from the country in order to prevent such an advantage then an offender is,

in effect, released from serving the sentence that a Canadian offender would serve for the same offence.

[88] As the Respondent points out, there are competing objectives here that are difficult, if not impossible, to reconcile. Parliament has attempted to strike a balance through subsection 128(4) of CCRA in order to offset the undesirable consequence of treating foreign offenders in the same way Canadian offenders are treated. Not everyone will agree that the end result is either effective or desirable. But, once again, in my view that is a matter for Parliament to decide.

[89] If sentences for foreign offenders who are subject to a removal order are made to match the sentences served by Canadian offenders, then criminal conduct will have conferred an advantage on such foreign offenders that is not enjoyed by other foreign nationals who are subject to removal. If Parliament deports foreign offenders before they have served the full extent of their sentences, this will mean that they are released from their sentences, and hence will serve less time than equivalent Canadian offenders. Parliament's solution to these problems is to suspend deportation until the time fixed for full parole for foreign offenders and to suspend day parole eligibility and UTA under section 128(4) until the time set for full parole eligibility. The question for the Court is whether the suspension of day parole and UTA eligibility in these circumstances is a breach of section 15 of the Charter.

[90] I accept the Applicant's position that the appropriate comparator group in this case is equivalent Canadian offenders who are not subject to deportation and so remain eligible for day

parole and UTA. I also accept that, based upon *Law Society British Columbia v. Andrews* (1989), 1 S.C.R. 143, the Applicant falls into an analogous category under section 15 because he is a non-citizen.

[91] In the *Andrews* case, the applicant was clearly disadvantaged by a law that differentiated between citizens and non-citizens because, as a non-citizen, it prevented him from becoming a lawyer in British Columbia and enjoying the benefits of that profession.

[92] In the present case, however, the particular disadvantage that section 128(4) imposes upon the Applicant is much more difficult to define. This is because the Applicant is subject to removal from Canada so that, unless his removal does not take place and he somehow continues to reside in this country, the rehabilitative and reintegrative purpose of day parole and UTA (or, more accurately, the chance to participate in that purpose) is not lost to the Applicant because he is due to be removed from Canada.

[93] In *Andrews*, Justice McIntyre said that, in order for a legislative distinction to amount to discrimination against an individual or a group, the distinction must be one "which has the effect of imposing burdens, obligations or disadvantages on such individual or group not imposed on others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society." (paragraph 174)

[94] As the Applicant points out, the purpose of parole under the CCRA is “to contribute to the protection of society by facilitating the reintegration of the offender into society as a law abiding citizen.” If the Applicant is subject to removal then, in accordance with that status, Canadian society will not lose by his non-eligibility for day parole, and the Applicant cannot be said to have lost an opportunity to further his reintegration into a society from which he is to be removed.

[95] The Applicant seeks to set this difficulty aside by pointing out that not every person subject to a removal order is removed from Canada, so that someone in his shoes, on expiry of his sentence, is not necessarily foreclosed from becoming a part of Canadian society. Because there is a possibility that he might, on the expiry of his sentence, remain in Canada, the Applicant says that the protection of Canadian society justifies keeping open the possibility of the rehabilitative remedy of day parole before full parole eligibility.

[96] I am not convinced that, if the purpose of parole is to protect society, that the loss of the possibility of that protection because of the loss of eligibility for day parole under subsection 128(4) is a disadvantage to the Applicant, whether or not he is removed from Canada. And if parole is a benefit to offenders, I am not convinced that the Applicant has been disadvantaged by the loss of any such benefit in a situation where the evidence shows his deportation is being actively pursued and he does not fall into one of the exceptions specifically provided for under subsection 128(6).

[97] In summary, then, the Applicant has not demonstrated how the differential treatment between citizens and non-citizens brought about by the suspension of day parole and UTA

eligibility under subsection 128(4) of the CCRA constitutes discrimination within section 15 of the Charter against people in his position who do not qualify as exceptions under subsection 128(6) and whose removal from Canada is being actively pursued by the immigration authorities.

Section 1

[98] In the event that I should be mistaken in my conclusions regarding any of sections 7, 9 or 15 of the Charger, I am satisfied that the Respondent has demonstrated that subsection 128(4) of the CCRA is a reasonable limit prescribed by law that can be demonstrably justified in accordance with section 1 of the Charter.

[99] Subsection 128(4) is triggered by a removal order made under IRPA in accordance with a constitutionally valid deportation scheme.

[100] Foreign offenders subject to removal present significant sentencing problems that Parliament has attempted to resolve under subsection 128(4) of CCRA and related statutory provisions already referred to in these reasons.

[101] I think it is important to acknowledge that the differential treatment over sentencing to which the Applicant has been subjected has not come about because he is a foreign national, or even because he is a foreign national offender. It has come about because he is a foreign national offender who is subject to a removal order. It is the removal order that makes all the difference. It triggers

subsection 128(4) and compels the adjustments to the form of sentence that is required to take into account the Applicant's special status as an offender who is subject to a removal order.

[102] The removal order is part of a constitutionally valid deportation scheme that does not offend the Charter. This constitutionally valid differential treatment of the Applicant has to be taken into account in sentencing. Subsection 128(4) is Parliament's attempt to deal with the adjustments to sentencing that are required as a result of the valid constitutional distinction that is made between the Applicant as a foreign national subject to removal and Canadian offenders and foreign national offenders who are not subject to removal. The change in the form of the sentence is a response to, and is consequential upon, a valid deportation scheme. This is why, I believe, the Respondent sees it as part of that deportation scheme. As I have already pointed out, that is a position I cannot accept because of my view of the jurisprudence as to what qualifies as a deportation scheme under section 6 of the Charter. However, I think it is accurate to say that the differential treatment embodied in subsection 128(4) of CCRA is a necessary consequence of a valid deportation scheme. Once a removal order enters the picture, it is difficult to see how foreign offenders could be treated in the same way as their Canadian equivalents. As I have said earlier, it is possible to argue and disagree with Parliament's response to the problem as embodied in section 128 of CCRA but, as Justice Linden pointed out in *Sauvé v. Canada (Chief Electoral Officer)*, [2000] 2 F.C.R. 117 (reversed on other grounds, [2002] 3 S.C.R. 519) at page 173, "Parliament is entitled to a great deal of deference when it makes choices regarding penal policy."

[103] Against this general background, I believe the Respondent has satisfied the necessary criteria under section 1 of the Charter. It is obvious that the impugned statutory provisions were enacted as part of comprehensive scheme that required the rationalizing of IRPA and the CCRA in order to achieve objectives that, even if difficult to reconcile, are pressing and substantive: deterrence; removal; denial of access to foreign offenders; reintegration.

[104] In accordance with *R. v. Oakes*, [1986] 1 S.C.R. 103, I am satisfied that the impugned legislation satisfies the rational connection test and advances clear, legitimate and important objectives. The scheme embodied in subsections 128(3) – 128(7) of CCRA preserves the deterrence principle by establishing a minimum period of incarceration and, at the same time, deals with the prompt removal of foreign offenders at the earliest grant of unsupervised release. The foreign offender's access to Canadian society is denied by suspending eligibility to day parole while removal is stayed. Thus Parliament has given practical effect to the termination of a foreign offender's right to remain in Canada when he/she is subject to removal. Its purpose is to prevent the illogical result of allowing a criminal sentence to provide access to Canada, when the same criminality necessitates removal from Canada.

[105] The legislation only affects foreign offenders where an operative removal order is in place and subsections 128(6) and 128(7) reinstate day parole eligibility where a removal order becomes inoperative. This means that foreign offenders who are not subject to removal can continue their reintegration back into Canadian society.

[106] As regards the suspension of day parole and UTA, the scheme only affects those who are subject to removal and thus achieves a minimum impairment on eligibility to parole. The fact that some removal orders will not be enforced does not undermine the scheme's legitimacy because perfect enforcement is not a requirement. See *R. v. Bryon*, [2007] 1 S.C.R. 527; 2007 SCC 12, at paragraph 40.

[107] As regards proportionality, the primary deleterious effect is denial of access to unsupervised release in the community until after the full parole eligibility date, at which time the offender can be removed from Canada.

[108] The impact is negligible, in my view, because the offender has no right of access to Canadian society. The intent expressed in the removal order is to remove him/her from Canada. Day parole and UTA are only one aspect of a reintegration process that begins immediately upon incarceration and continues until full release. The institutional programming to which the Applicant has access while incarcerated continues. No measure, short of postponing removal until the warrant expiry date, could avoid some kind of negative impact upon rehabilitation, and such a measure would completely negate the objective of removing offenders promptly.

[109] When looked at in context, I agree with the Respondent that any deleterious effects are minor when compared to the rational and legitimate positive objectives of the legislation and the need to accommodate impending removal within a sentencing system.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. For the foregoing reasons, the application is dismissed with costs to the Respondent.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

David Matas	FOR THE APPLICANT
Scott D. Farlinger Sharlene Telles-Langdon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

DAVID MATAS BARRISTER & SOLICITOR WINNIPEG, MANITOBA	FOR THE APPLICANT
DEPARTMENT OF JUSTICE CANADA WINNIPEG, MANITOBA	FOR THE RESPONDENT