

removal pending a review, even when requested by the United Nations Committee Against Torture.⁸⁵

A third factor is that the individual who is at risk of torture must substantiate the claim with evidence concerning the human rights record in their country of nationality and their personal risk. This is a difficult burden to bear, especially for those who may be in detention or otherwise lack the resources to retain counsel. The deference accorded to the minister's opinion on whether the person has established a substantial risk of torture also makes it difficult to challenge. The Federal Court will only intervene if the opinion is unreasonable.

Among suggestions for reform are ensuring greater disclosure of evidence to the person concerned in inadmissibility proceedings, refugee determination hearings, and detention reviews. This could be through more consistent use of the special advocate system. Another aspect to reconsider is the level of judicial deference granted to ministerial discretion in determining whether an individual has demonstrated that deportation would expose them to a credible risk of torture.⁸⁶

Proportionality: Towards a More Balanced Approach

Deportation has always been a component of Canadian immigration policy. It is a part of the sovereign right of the state to control who is allowed to enter, remain, and become a full citizen. For most of Canada's immigration history, immigrants admitted to the country and wishing to remain permanently had to acquire domicile, that is, continued residence for several years. Prior to this,

85 The UN Committee against Torture (CAT) is the body of ten independent experts that monitors implementation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* by its states parties. According to Hudson, "As Good as it Gets?," in "three cases Canada deported persons despite the fact that the UN CAT found there to be a substantial risk of torture" (27).

86 Hudson, "As Good as it Gets?," 26–7.

they could be deported for a wide range of reasons and with few due process protections. Deportation grounds were biased along political, social, and moral lines. Removals were carried out without regard for the consequences upon the person concerned.

The *Immigration Act, 1967* was a major watershed moment in the history of deportation from Canada. For the first time deportation orders could be reviewed by an independent appeal tribunal on questions of law and fact and on humanitarian and compassionate grounds. This helped to address the many unduly harsh consequences of previous deportation practice.

Further changes to immigration law in the 1970s specified in more detail the conduct that could lead to deportation via making a person inadmissible. The concept of domicile was removed from the *Immigration Act, 1976*, which meant that permanent residents could be deported from Canada regardless of how long they had lived in the country. The potential harshness of this open-ended vulnerability was tempered by the ability to appeal a removal order based on legal or factual errors as well on humanitarian and compassionate grounds. This enabled the consideration of mitigating factors and the ability to balance the consequences to the individual against the public interest in their removal.

Since the *Immigration and Refugee Protection Act 2001* came into force, the progressive evolution of deportation measures has been largely halted and even regressed in several respects. The grounds have been widened considerably, capturing those that pose a serious risk to others, as well as those whose removal seems to be more punitive in nature.

Today, deportation is more likely to amount to a disproportionate response than it was forty years ago, with the elimination of the jurisdiction of the Immigration Appeal Division to review a wide range of deportation orders. The change has been largely supported by jurisprudence at the Supreme Court of Canada. In the post-9/11 world, significant deference has been given to the government to determine who should be removed for constituting a security threat and a danger to the public. The individuals concerned have a reduced ability to contest the basis of such assessment, or to have the risks of harm that they face considered.

Scholars have noted that while the Supreme Court of Canada has been guided by international law in detention and removal cases involving citizens, it has been less inclined to follow it for decisions concerning foreigners and permanent residents.⁸⁷ This is noteworthy as Canada is a signatory to treaties for the protection of human rights, including some which prohibit arbitrary and indefinite detention, as well as some that prohibit removal to countries where a person faces a serious risk of torture or other forms of ill-treatment.⁸⁸

Academics and legal advocates have also noted the ways the Supreme Court has limited the application of the *Canadian Charter of Rights and Freedoms* to non-citizens. This is evident in cases where the Court has been clear that deportation may not trigger the person's *Charter* right not to be "deprived of liberty or security of the person unless in accordance with fundamental justice." Even in situations where the right is triggered, the Court has tended to define the requirements of fundamental justice in a manner that does not guarantee the person access to full details over the case they must answer, especially if based on privileged information.

Deportation serves a valid purpose. But over the past decades, the grounds for it have been widened so far that they can now cover relatively minor infractions as well as serious violations of the law. Most importantly, the changes over the past twenty years have severely limited the scope to consider whether deportation is a proportionate response in the individual case. A person who

87 Dauvergne, "How the Charter Has Failed," 724. According to Dauvergne's examination spanning over thirty years of Supreme Court of Canada jurisprudence, the Court has not rendered "a single ruling in the *Charter* era that directly applies an international human rights norm to a non-citizen in Canada," with the exception of the *International Refugee Convention* (724).

88 Dauvergne, "How the Charter Has Failed," 696. Dauvergne notes that non-citizens are "required to make their arguments first and foremost in Charter terms and only secondarily in international human rights terms." She further observes that this puts non-citizens in Canada "in a different position than those in England, Australia, New Zealand, and even in some circumstances, the United States. This different position has become a worse position over time" (675).

has lived in Canada all their life, who was convicted of a criminal offence sometime in their past and has strong ties to Canada is not the same as a terrorist operative who has come to Canada to commit an act of terrorism. Provisions in deportation laws should distinguish between them.

We are of the view that deportation provisions and their associated detention practices require an in-depth, independent, and transparent review, as with many other areas of immigration policy. And for that, comprehensive data are required. The data should include specifics such as the annual count of individuals deported, the percentage of permanent residents among them, the duration of their residency in Canada, and the reasons for their removal.

Additionally, a thorough review ought to focus on rectifying the delays associated with individuals subject to enforceable removal orders, considering the Auditor General's 2020 recommendations aimed at enhancing the removal process.