

# MENTAL ILLNESS, CRIMINALIZATION AND IMMIGRATION LAW

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# What You Already Know

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- People with mental illness are coming in contact with the law at an increasing and disproportionate rate
- Often, the offence in question can be linked back to the individuals' illness or related factors
- Some individuals with mental illness are successfully diverted, others are not
- A criminal sentence can have a major impact on the individual with the mental illness

# What You May Not Know

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- Non-Citizens who are convicted of a certain level of offence in Canada can be subject to deportation
  - ▣ This includes Permanent Residents who have been here for many years
- Some individuals will have no right to appeal their deportation order
- There are many issues with the deportation process which negatively impact persons with mental illness
- There are steps that can be taken at the criminal proceedings stage to prevent a deportation order

# Agenda

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- Project Background
- Terminology
- Overview of Legislation
- Overview of the Deportation Process
- Issues
- Systemic Recommendations
- Information for Legal Professionals
- Information for Mental Health Professionals
- Questions

# Project Background

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- Initiated by SSO
  - ▣ History of advocating on a case-by-case basis
- No data available on mental illness and immigration
- Research study involving:
  - ▣ Literature review and review of legislation
  - ▣ Surveys
  - ▣ Key informant interviews
- Policy paper – *Double Jeopardy: Deportation of the Criminalized mentally ill*
- Committee on Mental Illness, Criminalization and Immigration

# Terminology

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- **Permanent Resident** - aka “landed immigrant”, is someone who is not a Canadian citizen but has the right to enter or remain in Canada.
- **Foreign National** - someone who is neither a Canadian citizen nor a permanent resident, e.g. visitors, people on work visas.
- **Humanitarian and compassionate grounds** - circumstances in which a person can be exempted from a removal order in Canada. Onus is on the individual to prove hardship and risk that would result from deportation.
- **CBSA (Canada Border Service Agency)** – has the responsibility of managing and controlling Canada’s borders, including removing people who are inadmissible to Canada and detaining people who pose a risk

- **IRB (Immigration and Refugee Board)** - An administrative tribunal which makes decisions on immigration and refugee matters.  
Consists of
  - ▣ Immigration Division (ID) – conducts admissibility hearings and detention reviews
  - ▣ Immigration Appeal Division (IAD) - hears appeals on immigration matters and decisions made by the ID
  - ▣ Refugee Protection Division (RPD) - decides refugee claims
- **Stay of removal** - A temporary suspension, or putting aside, of the removal order. Instead of allowing or dismissing the appeal, the IRB may ‘stay’ the order which enables the individual to remain in the country so long as they commit to certain conditions, as outlined by the IRB.

# Background on Legislation

- *Immigration and Refugee Protection Act* came into effect in 2002
- *IRPA* solidified several changes to respond to criminality and national security, first introduced in 1995
  - ▣ Bill C-44 – “Just Desserts” Act
  - ▣ Danger to the Public provision – deportation (no appeal) for convictions with possible sentence of 10 years
- Convergence between criminal and immigration law
- Security as the top priority

# Overview of Legislation – s.36

- **Section 36(1)** of *IRPA* allows for non-citizens to be deported from Canada if they are convicted of a certain level of offence. Both permanent residents and foreign nationals are deemed inadmissible on grounds of serious criminality if they have been convicted of an offence **punishable by a maximum term of imprisonment of 10 years**, or
- for which a **term of imprisonment of 6 months or more has been imposed**.

- **Section 36(2)** states that a foreign national is inadmissible if convicted of an offence that is **punishable by way of indictment**, or of **two summary offences not arising out of a single occurrence**.
- **Section 36(3)** goes on to specify that a **“hybrid”** offence is **deemed to be an indictable** offence for immigration purposes even if it has been prosecuted summarily.

# Issues with s.36

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- Does not distinguish between the maximum term of imprisonment for the offence and the actual sentence imposed
  - Ignores judge's interpretation of severity
- Wide range of offences punishable by a maximum term of imprisonment of ten years or more
  - E.g. commercial break and enter, robbery, theft of a credit card, assault with a weapon, trafficking in narcotic
- Deems even minor offences to be serious for immigration law purposes
  - Ignores Crown's discretion to proceed summarily on **hybrid offences**

# What is “serious criminality” under IRPA?





# “Assault with weapon” – s. 267 Criminal Code – **hybrid offence**, maximum 10 years

(a)...throwing a coffee cup  
at abusive partner

Accused is prosecuted  
summarily, pleads guilty and  
gets suspended sentence – she  
has been convicted of an  
offence “**punishable**” by 10  
years and is now “inadmissible”  
for **serious criminality**

(b)...throwing a box of nails at  
his landlord during argument

Accused is prosecuted  
summarily, pleads guilty and  
gets one day in jail – he has  
been convicted of an offence  
“**punishable**” by 10 years and  
is now “inadmissible” for **serious  
criminality**

# “Being unlawfully in a dwelling house” s. 349 – hybrid offence, 10 years indictable

...permanent resident with schizophrenia and alcohol addiction, enters neighbour's apartment, believing he was invited...charged under s. 349 and pleads guilty... conviction and suspended sentence **but now he is inadmissible for serious criminality and faces deportation proceedings**



# Overview of Legislation – s.64

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- Section 64(1) states that no appeal may be made to the Immigration Appeal Division for individuals found to be inadmissible on grounds of serious criminality
- Section 64(2) defines serious criminality as a crime that was punished in Canada by a term of imprisonment of at least two years.

# “Possession for purpose of trafficking” – hybrid, 10 years

Permanent resident who is a refugee from Iran and a torture victim, with PTSD and schizophrenia, and who is addicted to heroin, pleads guilty to trafficking in heroin:

2 packages worth

**\$60 and \$100**

Convicted and sentenced to 4 years in jail

Then ordered deported -

**NO APPEAL**



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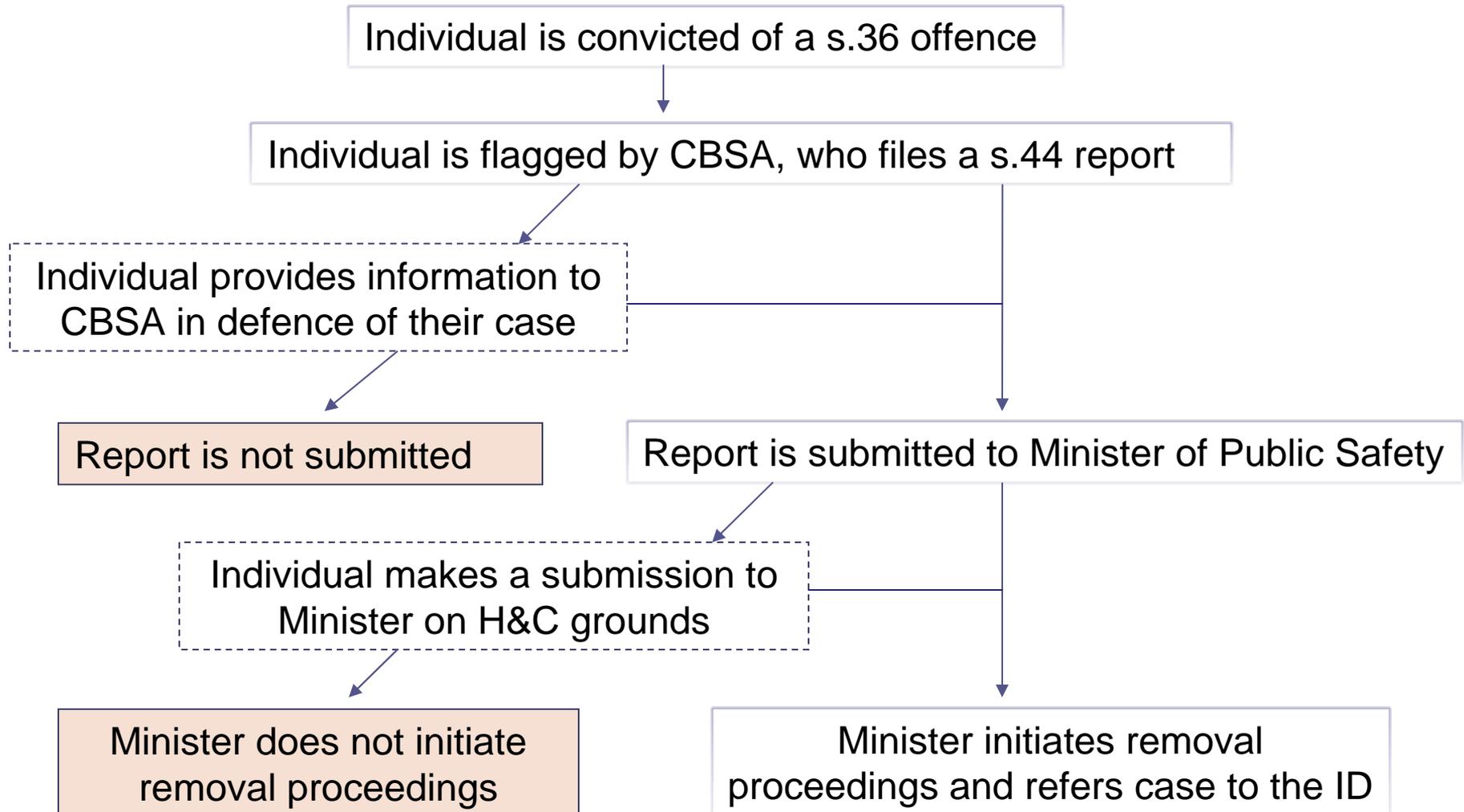
# Issues with s.64

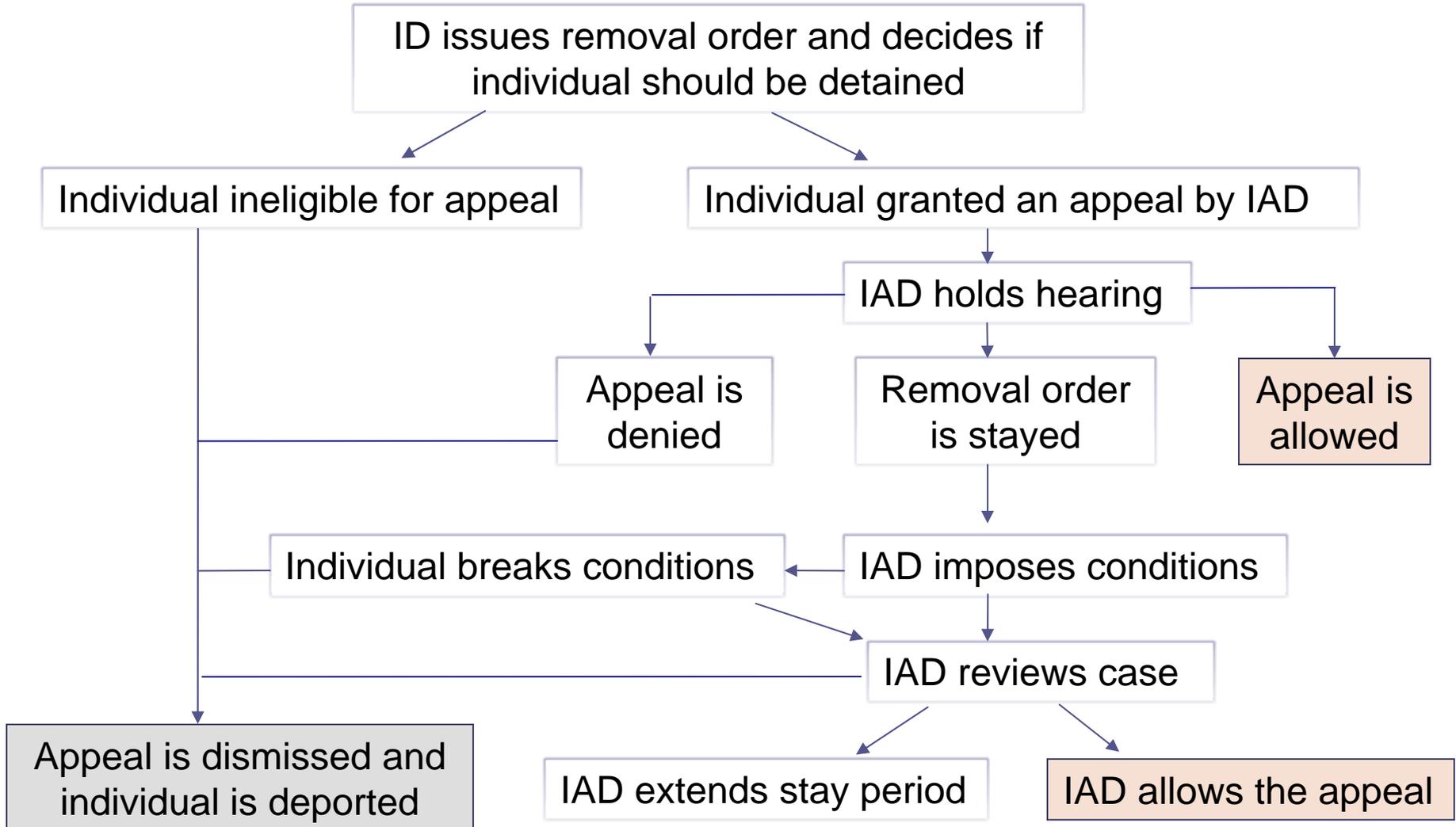
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- Eliminates the possibility of their deportation order being set aside by the IRB on humanitarian and compassionate grounds
- No consideration of:
  - seriousness of the offence
  - possibility of the appellant's rehabilitation
  - length of time the appellant has spent in Canada
  - degree of hardship that would be faced as a consequence of their removal
- People who have fallen through the cracks can be deported without the right of appeal

# Overview of Deportation Process

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# Issues: Access to Justice

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- Adequate representation
  - Right to counsel – having and understanding
  - Trained counsel
  - Income barriers
- Use of Designated Representatives and Vulnerable Persons Guidelines
- Access to psychiatric assessments and treatment plan
- Right to appeal or make final attempts to stay in Canada

# Issue: Mental Health Needs

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- Access to mental health care for detainees
  - Possible overuse of detention
  - MH care, solitary confinement in jails
- Stress of legal proceedings
  - Impact on mental health
- Access to mental health services and supports in country of origin

# Issue: Acknowledgment of Unique Needs and Challenges

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- Detention release conditions
  - Need for monitoring and philosophy of community agencies
- Stay conditions
  - Unrealistic conditions
  - Not enough support
- Two strikes you're out policy
  - No appeal if another s.36 offence
  - Re-offending has extreme consequences



# Issue: Knowledge and Practice Gaps

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- Knowledge about criminalization and deportation
  - Criminal lawyers
  - Community workers
  
- Knowledge about mental illness
  - Immigration officials

# Recommendations

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- ❑ Guidelines for IRB members with respect to persons with mental illness
- ❑ Additional protections to ensure right to counsel is protected
- ❑ Expand access to community-based mental health services to support people on detention releases and stays
- ❑ Reinstate right to appeal for individuals sentenced to two years or more
- ❑ Allow appeal for persons on stays who are convicted of another section 36(1) offence
- ❑ Training for immigration officials, criminal lawyers, and community mental health and settlement workers

# Info for Legal Professionals

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## **Tips for Criminal Lawyers (Peter Edelmann):**

- ❑ Ascertain the immigration status of the accused
- ❑ Avoid convictions for indictable or hybrid offences
- ❑ Avoid convictions where the maximum sentence is 10 years or more
- ❑ Avoid terms of imprisonment of 6 months or more – including conditional sentences.

- Avoid terms of imprisonment of 2 years or more – if necessary, try for consecutive sentences (including pre-sentence custody)
- Raise immigration consequences as an issue at sentencing
- Consult an immigration practitioner

## **Other**

- Pre-sentence custody counts towards term of imprisonment if explicitly stated

# Info for Mental Health Professionals

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- Ask your client simply whether they are a citizen
- Prior to a s.36 offence, inform your client of the consequences of ongoing criminality
- Discuss immigration consequences with your client and raise them with lawyer if possible
- Inform your client of the importance of an immigration lawyer

- Attend the first IRB hearing and offer your assistance as a Designated Representative
- Assist the lawyer in developing a treatment plan
  - ▣ Unique programs which meet the client's needs
- Try to keep the client engaged throughout the stay period
  - ▣ Change of address should be communicated to IRB
- Encourage your clients to obtain pardons for past offences

# Links

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- Immigration and Refugee Board: [www.irb-cisr.gc.ca](http://www.irb-cisr.gc.ca)
- Vulnerable Persons Guidelines: <http://www.irb-cisr.gc.ca/Eng/brdcom/references/pol/guidir/Pages/vulnerable.aspx>
- Community Legal Education Ontario Fact Sheets: <http://www.cleo.on.ca/english/pub/onpub/subject/refugee.htm>

# Questions