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Case Comment: The Effect of *Canada (Minister of Citizenship & Immigration) v. Davis* on Removal Orders for Permanent Residents of Canada[FN*]

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Introduction

This paper will consider the recent Immigration Appeal Division ("IAD") decision in *Canada (Minister of Citizenship & Immigration) v. Davis*[FN1] concerning whether pre-trial custody is punishment for the purpose of section 27(1)(d) of the *Immigration Act*[FN2] *and section 64(2) of the Immigration and Refugee Protection Act*.[FN3] It will begin by considering the decisions of the Adjudicator and the IAD and its relation to law. Laws are not a passive set of rules, which are amended from time to time by the legislature to reflect changing social norms and goals of the government. Laws act through its interpretation by the courts and administrative tribunals, and serves to legitimize certain legal values and enforce a certain worldview.

Background

Mr. Davis, age 26, is a citizen of Jamaica, having been born there. He became a permanent resident of Canada on June 21, 1986.[FN4]

Mr. Davis was convicted of one count of possession of narcotics for the purpose of trafficking contrary to section 4(1) of the *Narcotic Control Act*[FN5] and was sentenced to six months of imprisonment.[FN6] This term of imprisonment was in addition to his five months spent in pre-trial custody.[FN7] In her sentencing decision, Madam Justice Wein rendered the following reasons:

> There will be a conviction registered on both of these counts. The accused has a prior related record which, in the circumstances of the facts as read in to me, warrants the imposition of a significant reformatory sentence. However, in view of the submissions of the Crown and defense, which are reasonable and which are jointly put forward, and in view of pre-trial custody that has already been served in this matter, which I find to amount to approximately five months, I am imposing today an additional sentence of six months on each count, to be served concurrently. That is my sentence.[FN8]

The Minister initiated proceedings to have Mr. Davis removed from Canada. A report was prepared under section 27 of the *Act* and in the report an immigration officer alleges that Mr. Davis is a person described in paragraph 27(1)(d) of the *Act* in that the appellant had been convicted of trafficking in a narcotic and for possession of a narcotic, offences for which a term of imprisonment of five years may be imposed.

Adjudicator Decision

On November 07, 2001, the adjudicator found that Mr. Davis was not a person described in paragraph 27(1)(d) of the *Act* and therefore should not be ordered removed from Canada:

> Again the pre-trial custody is not incorporated as part of the sentence, even in the words she used there, rather credit for it is ascribed and the sentence is amended or reduced accordingly.
>
> [. . .] the pre-trial custody considered by the judge in Mr. Davis' case did not form part of the term of imprisonment or

> sentence imposed for his conviction for trafficking in narcotics. Rather, in imposing a term of imprisonment of six months the trial judge merely took into account his pre- trial custody, as was her prerogative to do so under subsection 719(3) of the Criminal Code.
>
> I have concluded therefore that the term of imprisonment imposed on Mr. Davis, in view of the pre-trial custody, was six months and no more than that. That term does not bring him within the ambid (sic) of paragraph 27(1)(d) of the Act and he is therefore not described in that section.[FN9]

Immigration Appeal Division Decision

The IAD upheld the decision of the adjudicator and dismissed the Minister's appeal, holding that a sentence or term of imprisonment commences at the time it is imposed:

> [10] [. . .] I find that the adjudicator correctly considered the cases of *McDonald*[FN10] and *W. (L.W.)*[FN11] in concluding that these cases do not establish that pre-sentence custody does form part of the a term of imprisonment or the sentence imposed, but rather reflects the principle that pre-sentence custody may be considered by the Court in rendering it sentence . . . .
>
> [11] I agree with the adjudicator that a sentence or a term of imprisonment commences at the time it is imposed and a Court cannot backdate a sentence or allow the sentence to take effect at some future time. A sentence commences on the day it is pronounced and I do not think that I should engage in the interpretative process advocated by the Minister for the sole purpose of narrowing paragraph 27(1)(d) of the *Act* as requested and making it less favourable to Mr. Davis. Minister's counsel submits that "a term of imprisonment of more than six months in paragraph 27(1)(d) of the *Act* ought to be interpreted to mean a term of imprisonment of more than six months unless the sentence was reduced in light of pre-sentence custody." In other words, the wording of the sentencing judge's reasons will determine or not determine if pre-sentence custody is part of a sentence or not. I disagree with that submission. If Parliament intended that a term of imprisonment includes pre- sentence custody, it would have clearly said so in the Statutes. I am of the view that a narrow interpretation of a term of imprisonment, which includes pre-sentence custody served by the appellant prior to be sentenced, will lead to unjust and unreasonable consequences that cannot have been intended by Parliament.

In his decision, Member Neron cited some instances of injustice that may occur if the Minister's interpretation was to be adopted by the Board:

> [14] If I was to conclude that pursuant to paragraph 27(1)(d) of the Act pre- sentence custody is part of a term of imprisonment, injustices might result. For example, permanent residents or Convention refugees might be subject to removal from Canada either because they were unable to meet the amount set for their bail or were unable to have someone suitable to act as surety for their release. Not all persons held in pre-sentence custody are held because they have been determined to be a danger to the public as alleged by the Minister's counsel. Furthermore, a sentence including time served in pre-sentence custody could exceed six months and might exceed a sentence that would have been imposed had there been no pre-sentence incarceration.
>
> [15] It is inconceivable for me to conclude that it is in the best interest of Canadian society to subject individuals to removal from Canada because they have spent time in pre-sentence custody while waiting for the disposition of their case.
>
> [16] Based on the foregoing, I find that, pursuant to paragraph 27(1)(d) of the *Act*, pre-sentence custody does not form part of a sentence of a term of custody, and it will be contrary to the intention of Parliament to conclude otherwise. If Parliament intended to retroactively alter the nature of a sentence, it would have done it explicitly and would have clearly said so given the nature and importance of the rights at stake.

A similar conclusion was reached by the IAD in *Atwal*:[FN12]

> I find that under section 64 of the *IRPA*, pre-sentence custody does not form part of a sentence of a term of custody and it will be contrary to the intention of Parliament to conclude otherwise. As I mentioned in *Davis*, if Parliament intended to retroactively alter the nature of a sentence, it would have done it explicitly and would have clearly said so given the nature and the importance of the rights at stake.

Bail and Race

The fact that Davis, a Black Jamaican male, was denied bail and held in pre- trial custody on his drug charges is no accident.[FN13] There is a substantial body of evidence that indicates that a major aspect of the criminal justice system machinery is determining whether or not a person is granted bail and what conditions will be attached if that person is released pending trial. The evidence indicates that taking into account what an accused person is charged with and their previous criminal history, Black accused persons are more likely to be detained before trial than Whites with similar charges. This has a major impact on the accused person, for he or she is deprived of freedom at the pre-trial stage, often having to wait many months before having a trial, and is more likely to be convicted or to accept a plea bargain in exchange for time served or what the Crown suggests is a lenient sentence.[FN14] The Commission on Systemic Racism in the Criminal Justice System found that "white accused without a criminal record were twice as likely to be released by the police as black accused without a record. Black accused with no previous convictions were twice as likely to be denied bail and imprisoned before trial as white accused with no convictions."[FN15] It found that the results are the same across these racial groups up to and including five prior convictions. As well, the Commission found that "for drug charges, race made a marked difference to imprisonment before trial. Indeed it appears to have had the strongest impact on differential outcomes of all of the factors considered." [FN16]. Professor David Tanovich[FN17] statistics were stark. He found that:

> In Ontario, the data reveals that the black admission rate to correctional facilities, primarily for drug offences, is two times higher than for aboriginal accused and six times higher than for white accused.[FN18]

If this is the case surely the people who are most likely to be affected by the harsh or negative impact of pre-trial detention on their immigration proceedings are Black people, who are not Canadian Citizens. While the disparate impact based on race was not argued in *Davis*, its manifestation in this case is inescapable. This race-conscious approach is important when a court or an administrative tribunal, such as the IAD, is considering the social context of a particular case involving Blacks and other racial minorities, and countering claims that the party bringing the social context argument is raising the "race card" or otherwise making claims to racism that are dubious. [FN19]

Conclusion

The decisions of the Adjudicator in *Davis*[FN20] and *Atwal*[FN21] represents "a liberal and more favourable interpretation" of the term imprisonment. In looking at the broader social context, particularly the disparate impact of pre-trial custody on Blacks in Ontario, these decisions will have a significant positive impact on those who are subjected to the brunt of racist treatment in the criminal justice system.

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FN1. *Canada (Minister of Citizenship & Immigration) v. Davis*, 2003 CarswellNat 1543, 29 Imm. L.R. (3d) 32 (Imm. & Ref. Bd. (App. Div.)) [hereinafter "*Davis*"].

FN2. Section 27(1) of the *Immigration Act* provides that:

> 27(1) An immigration officer or a peace officer shall forward a written report to the Deputy Minister setting out the details of any information in the possession of the immigration officer or peace officer indicating that a permanent resident is a person who . . .
>
> > (d) has been convicted of an offence under any Act of Parliament, other than an offence designated as a contravention under the *Contraventions Act*, for which a term of imprisonment of more than six months has been, or five years or more may be, imposed.

FN3. Section 64 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, provides that:

> 64. (1) No appeal may be made to the Immigration Appeal Division by a foreign national or their sponsor or by a permanent resident if the foreign national or permanent resident has been found to be inadmissible on grounds of

security, violating human or international rights, serious criminality or organized criminality.

(2) For the purpose of subsection (1), serious criminality must be with respect to a crime that was punished in Canada by a term of imprisonment of at least two years.

FN4. *Davis*, supra note 1, at para. 2.

FN5. *Narcotic Control Act*, R.S.C. 1985, c. N-1, ss. 4(1) and (2).

FN6. Section 719 of the *Criminal Code* provides that:

719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides.

(2) Any time during which a convicted person is unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed on the person.

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence.

(R.S.C. 1985, c. C-46, s. 719; R.S.C. 1985, c. 27 (1st Supp.), s. 157; 1995, c. 22, s. 6.)

FN7. The warrant of committal reads with respect to the sentence imposed as follows: 'Total: 6 months on each count concurrent (in addition to pretrial custody of approximately 5 months).

FN8. Sentence Judge's Reasons for Sentence.

FN9. Adjudicator's Reasons for decision, (November 1, 2001), Doc. 0003-A1- 00193, p. 29, lines 13-31.

FN10. *R. v. McDonald* (1998), 127 C.C.C. (3d) 57 (Ont. C.A.)

FN11. *R. v. W. (L.W.)*, [2000] S.C.J. No. 19, 2000 CarswellBC 749, 2000 CarswellBC 750 (S.C.C.)

FN12. *Atwal v. Canada (Minister of Citizenship & Immigration)*, 2003 CarswellNat 1867, 29 Imm. L.R. (3d) 45 (Imm. & Ref. Bd. (App. Div.)) [hereinafter "*Atwal*"].

FN13. Section 515(6)(d) of the Criminal Code provides that the onus is on the accused to show cause why he or she ought to be released. This reverse onus applies to situations where the accused is charged with having committed an offense punishable by sections 5(3) or 5(4) or 6(3) of the Controlled Drugs and Substances Act or the offense of conspiring to commit such an offense.

FN14. Kellough, Gail and Scot Wortley "Remand for Plea: Bail Decisions and Plea Bargaining as Commensurate Decisions" (2002), *Brit. J. Criminol.* 42: 186- 210. See also, Jim Rankin, Jennifer Quinn, Michelle Shepard, John Duncanson and Scott Simmie, "Police target black drivers" *The Toronto Star* (20 October 2002); "The story behind the numbers" *The Toronto Star* (19 October 2002) and "Our duty: Examine all issues" *The Toronto Star* (19 October 2002); Commission on Systemic Racism in the Ontario Criminal Justice System, Report of the Commission on Systemic Racism in the Ontario Criminal Justice System. Toronto: Queen's Printer, 1995.

FN15. Report of the Commission on Systemic Racism in the Ontario Criminal Justice System, supra note 14, at 130.

FN16. Ibid. at 143.

FN17. D.M. Tanovich, "Litigating Cases on Racial Profiling" University of Toronto Conference on Systemic Racism, November 29, 2002, online: <http:// www.law.utoronto.ca /documents/abstracts/systemicracism2002_paper_tanovich . wpd> (date acessed: July 02, 2003).

FN18. J.V. Roberts and A.N. Doob, "Race, Ethnicity, and Criminal Justice in Canada" in M. Tonry (ed.), *Ethnicity, Crime and Immigration* (Chicago: Univ. of Chicago Press, 1997) at 480- 481. See also, T. Williams, "Sentencing Black Offenders

In The Ontario Criminal Justice System" in J.V. Roberts and D.P. Cole (ed), *Making Sense Of Sentencing* (Toronto: University of Toronto Press, 1999) at 203-206.

FN19. See, Aylward, Carol. *Canadian Critical Race Theory: Racism and the Law*. Halifax, Nova Scotia: Fernwood, 1999 [hereinafter *Canadian Critical Race Theory*] at 183.

FN20. Supra note 1.

FN21. Supra note 12.

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