IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

File No.: 35388

BETWEEN:

B010

Appellant

AND

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

File No.: 35677

AND BETWEEN:

JESUS RODRIGUEZ HERNANDEZ

Appellant

AND

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

File No.: 35685

AND BETWEEN:

B306

Appellant

AND

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

File No.: 35688

AND BETWEEN:

J.P. and G.J.

Appellants

AND

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

FACTUM OF THE INTERVENER IN ALL 4 APPEALS
ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

Court File No.: 35388

AND BETWEEN:

B010

Appellant
(Respondent in Federal Court of Appeal)

AND

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent
(Appellant in Federal Court of Appeal)

AND

ATTORNEY GENERAL OF ONTARIO, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, AMNESTY INTERNATONAL (CANADIAN SECTION, ENGLISH BRANCH), DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

Court File No.: 35677

AND BETWEEN:

JESUS RODRIGUEZ HERNANDEZ

Appellant
(Respondent in Federal Court of Appeal)

AND

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent
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AND

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Interveners

IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

Court File No.: 35685

AND BETWEEN:

B306

Appellant
(Respondent in Federal Court of Appeal)

AND

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent
(Appellant in Federal Court of Appeal)

AND

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Interveners

Court File No.: 35688

BETWEEN:

J.P. and G.J.

Appellants
(Respondents in Federal Court of Appeal)

AND

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent
(Appellant in Federal Court of Appeal)

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Part I: Ontario's Response to the Constitutional Question

1. Legal tests should provide clarity and a substantial degree of certainty and predictability. They afford helpful guidance to lower courts, counsel advising clients, government departments, regulatory agencies and members of the public. The importance of clarity and predictability has been stressed by this Court on a number of occasions, in the context of both constitutional and non-constitutional legal issues.[1] This role is particularly salient when the Court is required to interpret the abstract language of the *Charter*.[2]

2. The Court's prior jurisprudence for determining where there has been a deprivation of liberty or security of the person under section 7 of the *Charter* has, to date, achieved this goal. In contrast, the proposed "cumulative" approach advanced by the Appellants would introduce tremendous uncertainty, constitutionalize ordinary civil and regulatory proceedings and, in doing so, vastly overshoot section 7's purpose. Such a test would provide no guidance regarding which factors are to be combined, and which excluded, the weight to be given to each factor nor how to measure the impact of the cumulative factors on a reasonable person in the *Charter* claimant's circumstances. Accordingly, Ontario submits that the Constitutional Question should be answered in the negative. Section 37(1)(b) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27, (IRPA) does not engage, let alone infringe, section 7 of the *Charter*.

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[1] *R. v. Gardiner*, [1982] 2 S.C.R. 368 at 397 per Dickson J. (as he then was); *Minister of Indian Affairs v. Ranville et al.*, [1982] 2 S.C.R. 518 at 527-528; *R. v. Bernard*, [1988] 2 S.C.R. 833 at 858; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 at 1061-1062; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.),* [1997] 3 S.C.R. 925 at para. 134; *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para. 53.

[2] Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), ch. 4 “Hard Cases” at 81- 130; Frederick Schauer, “Easy Cases” (1989) 58 S. Cal. L. Rev. 399 at 412-413. See also: Henry M. Hart, Jr., “The Supreme Court 1958 Term” (1959) 73 Harv. L. Rev. 84 at 96.

Part II: Ontario's Response to the Questions Raised by the Appellants

3. The "cumulative" approach proposed by the Appellants for determining whether there has been a deprivation of liberty or security of the person under section 7 of the *Charter* should be rejected by this Honourable Court. Ontario makes four main points:

- The cumulative approach would markedly expand the ambit of the security of the person protection. It would encompass all civil and administrative proceedings where, at a later stage, there may be penal or severe outcomes. To permit potential future consequences to be infused into and become part of current proceedings provides a gateway for corporate, commercial and economic interests to gain constitutional protection.

- Dignity and reputation are not themselves self-standing *Charter* rights, as this Court held in *Blencoe*.[3] The fact that foreign nationals may experience stigma or indignity from a finding that they have engaged in people smuggling is an insufficient basis to ground a security of the person claim.

- Neither *Charkoui I* or *II* stand for the proposition that every aspect of the IRPA engages section 7. Only those statutory provisions (or the particular exercise of a statutory discretion) that directly engage liberty or security of the person interests, such as interim detention/release or a pre-removal risk assessment decision under the IRPA, should be directly challenged and considered under section 7.

- The threshold of serious state-imposed psychological stress should be established through objective evidence led at first instance. The analytical framework of a reasonable person in the claimant's circumstances should be employed. Applying that test a reasonable foreign national, fully apprised of the ability to seek further protection from removal after a section 37(1)(b) inadmissibility finding would not meet the objective threshold of having a sufficiently serious and profound effect on psychological integrity.

4. Ontario takes no position with respect to the facts of these cases.

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[3] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at para. 80.

Part III: Statement of Argument

A. The Current Clear Tests for Determining Whether "Security of the Person" Has Been Infringed or Denied

5. This Court has set clear and accessible legal tests to address the two dimensions to the right to security of the person: the physical and the psychological. The physical dimension is engaged when state action may lead to bodily harm. For example, in *R. v. Morgentaler* restrictions and hurdles created by the state for access to abortion services for women placed the health of those women at grave risk.[4] In *Chaoulli v. Quebec* the risk to health arising from delayed surgery due in part to the government's prohibition on private health insurance was held to engage the the right to security of the person.[5] In *Insite,* the Court held that preventing access to health care by removing authority to supply a safe injection site also constitutes a deprivation of security of the person.[6]

6. The psychological dimension has also been clearly defined. In *Blencoe,* the Court held that stress and anxiety could meet the threshold for the physical dimension, but only if two requirements were met: (a) the stress was serious, and (b) it was imposed by the state.[7] In deciding whether the stress is "serious" the Court has imposed an objective test. The stress must have a serious and profound effect on a reasonable person's psychological integrity. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety. Indeed, in the seminal case setting out this test this Court gave a particular warning that the level not be set so as to encompass a wide range of civil and regulatory conduct. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, Lamer J., as he then was, stated:

> It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, **countless government initiatives** could be challenged on

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[4] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at 59, 105-106.
[5] *Chaoulli v. Quebec (Attorney General),* 2005 SCC 35 at para. 123.
[6] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 91-93 [*Insite*].
[7] *Blencoe, supra* at para. 57.

> the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected.[8] [emphasis added]

Ontario submits that the "countless government initiatives" referred to in this paragraph includes most administrative and civil legal regimes. The initial determination of one's ability to remain in Canada should also be counted as such a "government initiative".

7. Despite their significance to the individual as well as the resultant stresses and anxieties, courts have consistently excluded from the scope of section 7 most administrative, civil, professional discipline, and regulatory proceedings (or measures that impact on one's job or ability to make a living). In part, this is due to the recognition that to do so would effectively permit property or economic rights to come within the protection of section 7 under the guise of psychological tension, stress and anxiety inherent in such proceedings. In *Irwin Toy v. Québec (Attorney General)* this Court noted that property rights were deliberately excluded from section 7 of the *Charter*.[9] As Professor Hogg commented, to allow rights to earn income, pursue business interests, practice a profession, trade or calling to obtain protection would be contrary to the specific rejection of the property rights amendment during the negotiations leading up to the *Charter*'s passage: "[p]roperty, having been shut out of the front door, would enter by the back".[10]

8. In this respect, a long line of cases have held that corporate and commercial rights, including the right to practice a profession, do not qualify for protection under section 7. This is demonstrative of the high degree of predictability provided to lower courts by this Court's guidance in setting a clear security of the person threshold.[11]

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[8] *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46 at para. 59.
[9] *Irwin Toy v. Québec (Attorney General),* [1989] 1 S.C.R. 927 at 1003.
[10] Peter W. Hogg, *Constitutional Law of Canada*, 5th ed. Supp. (loose-leaf) (Scarborough, Ont: Carswell, 1997), at p. 47-17 to 47-19, cited in *Blencoe, supra* at para. 53.
[11] *Clitheroe v. Hydro One Inc.,* [2009] O.J. No. 2689 at para. 77 (Ont. Sup. Ct. J.).) aff'd 2010 ONCA 458; *Tadros v. Peel (Police Services Board),* 2009 ONCA 442 at para. 51; *Mussani v. College of Physicians and Surgeons of Ontario*, [2004] O.J. No. 5176 at paras. 42-44 (C.A.); *Siemans v. Manitoba (Attorney General)*, 2003 SCC 3 at paras. 45-46; *British Columbia Teachers' Federation v. Vancouver School District No. 39,* 2003 BCCA 100 at paras. 201-206; *Assn. of Professional Engineers of Ontario v. Karmash*, [1998] O.J. No. 2161 at para. 4 (Ont. Ct. J. (Gen. Div.)); *A & L Investments Limited et al. v. The Queen*, [1997] O.J. 4199 at paras. 34-35 (C.A.); *Reclamations Systems Inc. v. Rae*, [1996] O.J. No. 133

9. In *G.(J.)* by contrast, the objective test was met by the state imposed psychological stress inherent in Crown wardship proceedings seeking the removal of a child from parental custody. The Court held that this constituted a serious interference with the parent's psychological integrity. First, it involved a gross intrusion into a private and intimate sphere through the severing of the bond between parent and child. Second, the parent is stigmatized as "unfit" when relieved of custody by the state.[12]

B. The Lack of Clarity and Inherent Problems with the Appellants' Proposed "Cumulative Approach"

10. The Appellants (and interveners) advance the argument that the Court should not look, in isolation, at the constitutional validity of the inadmissibility provision found in section 37(1)(b) of the IRPA. This provision deems a person inadmissible to Canada on grounds of organized criminality for engaging in people smuggling. The section 37(1)(b) process, in and of itself, only determines a person's legal status in Canada. In this regard it is nominally unremarkable. Numerous civil proceedings determine a person's eligibility for, or status regarding, a benefit, service, program, occupation, calling or trade. The Appellants argue, however, that the Court should look at the potential consequences of this ineligibility finding, i.e., that it is the "cumulative impact" on the Appellants of the state's actions, "when considered as a whole".[13]

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at paras. 78-80 (Ont. Ct. J. (Gen. Div.)); *Walker v. Prince Edward Island,* [1993] P.E.I.J. No. 111 at para. 16 (P.E.I.S.C. (A.D.)), aff'd [1995] 2 S.C.R. 407; *Markandey v. Board of Ophthalmic Dispensers*, [1994] O.J. No. 484 at para. 33 (Ont. Ct. J. (Gen. Div.)); *Kopyto v. Law Society of Upper Canada*, [1993] O.J. No. 2550 (QL) at 12 (Ont. Ct. J. (Gen. Div.)); *Cosyns v. Canada (Attorney General)*, [1992] O.J. No. 91 at paras. 10-17 (Ont. Ct. J. (Div. Ct)); *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.),* [1990] 1 S.C.R. 1123 at 1179, per Lamer J.; *Biscotti v. Ontario Securities Commission,* [1990] O.J. No. 1323 at para. 13 (Ont. Div. Ct.), aff'd [1991] O.J. No. 35 (C.A.), leave to appeal to S.C.C. refused, [1991] S.C.C.A. No. 88; *Belhumeur v. Barreau du Québec (Comité de Discipline),* [1988] J.Q. No. 905 at 13 (QL) (Que. C.A.); *R. v. Miles of Music Ltd*., [1989] O.J. No. 391 at para. 21 (C.A.); *Charboneau v. College of Physicians & Surgeons of Ontario,* [1985] O.J. No. 2673 at para. 22 (Ont. H. Ct. J.)

[12] This threshold is sufficiently high that even in the fundamentally important context of the parent-child relationship, not all state actions will rise to the level of compromising psychological integrity; Justice Lamer explicitly held in *G.(J.)*, that neither the negligent killing of a child, or conscripting a child into military service met the standard to engage a parent's security of the person (*G.(J.)*, *supra* at para 63).

[13] Appellant J.P.'s factum, para. 97. On the one hand the Appellants claim that the deprivation of their rights to security of the person "are *all* direct consequences of the inadmissibility determination made under s. 37(1)(b)". Yet, they also appear to concede that some of the consequences are, in fact, unconnected. For example, they recognize that "many of these consequences also flowed from the pre-hearing (i.e., prior to the section 37(1)(b) determination) investigations (see para. 99 of Appellant J.P.'s factum).

11. Ontario takes issue with the Appellant's cumulative approach. If adopted by this Court it would be applicable to a number of other regulatory and administrative contexts. It would serve to constitutionalize regulatory processes that were not intended to be subject to *Charter* review under section 7. It would, in short, permit entry through the back door the type of economic and commercial interests that were intended to be excluded at the front door.

12. For example, it is now well recognized that a discipline hearing before a professional regulatory body does not engage liberty or security of the person interests. A professional like a physician may face as a consequence of a discipline proceeding loss of his or her livelihood and serious damage to his or her reputation and standing in the community. In some instances, the alleged misconduct, such as having sexually assaulted a patient, may well result in subsequent criminal proceedings and loss of liberty. The discipline proceedings coupled with contemplation of the potential penal consequences down the line will invariably engender considerable stress and anxiety. Nevertheless, this Court has rejected finding that a section 7 interest is engaged. It is the discipline process itself that is the subject of the examination. Excluded from consideration is the potential criminal sanctions which may arise at another time.

13. In the discipline process the determination of whether the professional is, in a sense, no longer "admissible" to practice her calling is at issue. The high "serious" threshold required for the psychological component of security of the person is not reached. A finding that the person is no longer eligible to practice, the change to her professional status, is recognized as part of the ordinary "stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action". As Blair J.A. noted in *Mussani*:

> It is self-evident that the revocation of a health professional's certificate of registration is a serious - even a draconian - measure. Nonetheless, all serious disciplinary measures, even draconian ones, are not prohibited by the *Charter*. For instance, the courts have held that the removal of a driver's licence, no matter the economic hardship it may cause, is not a violation of the liberty interest under s. 7 because it does not interfere with a fundamental right.[14]

[14] *Mussani*, *supra* at para. 40.

14. As the Respondent sets out in its *J.P.* factum at para. 102, a long line of cases in the Federal Court have rejected the proposed cumulative approach in the immigration context. As Rothstein J.A. (as he then was) recognized in *Poshteh v. Canada,* a finding of inadmissibility does not engage section 7 of the *Charter* as "all that is being determined" at an admissibility hearing is whether the person is inadmissible to Canada and a number of proceedings may yet take place before the person reaches the stage of actually being deported".[15]

15. If the potential consequences at a later step in a legal process are permitted to colour or inform the substantive content of the earlier step, then numerous regulatory, administrative, and civil proceedings would now be subject to section 7 scrutiny. For example, in addition to the physician facing discipline for sexual misconduct or the lawyer facing disbarment for fraud, the Appellants' position would expand section 7's scope to any instance in which a person might, at a later date in a separate, ancillary, proceeding face jail, removal from Canada, separation from his or her children, or serious health risks.

16. Similarly, the substantive content of regulatory offences that do not include imprisonment as a sanction do not engage life, liberty or security of the person.[16] This is so even in situations where there are statutory provisions authorizing separate proceedings for non-payment at a later stage in which jail is a possible consequence.[17] That is because it is only at that later stage where the person's liberty is actually at stake. The narrow possibility of a regulatory offender being jailed in default of payment

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[15] *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para. 63; *Arica v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 670 at para. 14 (F.C.A.), leave to appeal to the S.C.C. refused [1995] S.C.C.A. No. 347; *Segasayo v. Canada (Citizenship and Immigration*), 2010 FC 173 at paras. 27-31 aff'd 2010 FCA 296; *Stables v. Canada (Citizenship and Immigration),* 2011 FC 1319 at para. 40; *Laidlow v. Canada (Citizenship and Immigration),* 2012 FCA 256 at paras. 14-15; *El Maghraoui v. Canada (Citizenship and Immigration)*, 2013 FC 883 at para. 21; *Canada (Minister of Citizenship and Immigration) v. Toledo,* 2013 FCA 226 at para. 69; *Romero v. Canada (Citizenship and Immigration),* 2014 FC 671 at para. 116; *Barrera v. Canada (Minister of Employment and Immigration),* [1993] 2 F.C. 3 at para. 11 (C.A.)

[16] *R. v. Pontes,* [1995] 3 S.C.R. 44 at para. 47.

[17] *R. v. Schmidt,* 2014 ONCA 188 at paras. 43-44, leave to appeal to S.C.C. refused [2014] S.C.C.A. No. 208; *R. v. Polewsky*, [2005] O.J. No. 4500 at para. 4 (C.A.); *Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176 at paras. 62-67, 81; *R. v. Assante-Messah*, [1996] O.J. No. 1821 at para. 137 (Ont. J. (Gen. Div.)), rev'd on other grounds [2001] O.J. No. 3819 (C.A.), rev'd on other grounds 2003 SCC 38.

of fines (after a separate hearing) is too remote to engage rights under section 7 of the *Charter*.

17. The Appellant B306 also argues at para. 115 of his factum that a finding of inadmissibility under section 37(1)(b) strips a foreign national of the protection of non-refoulement. Instead, it is claimed, he can only receive protection from removal if the high threshold is met of deportation to death, torture or cruel and unusual treatment or punishment (but not deportation to persecution). However, here too the question of whether or not the legal test for the pre-removal risk assessment under Part 2 of the IRPA is consistent with the *Charter* will arise in that separate proceeding, or in a judicial review of that distinct decision.[18] It has no bearing on the *vires* of the section 37(1)(b) admissibility criteria.

18. Further, even if the potential consequences in later proceedings (or, as the Appellants assert, the potential restrictions on liberty at earlier stages such as interim release at the port of entry) were not themselves determinative, but mere "factors" to be balanced, the Appellants' approach provides no guidance as to how to measure or weigh these factors or how to do so in a consistent and objective manner. For example, would the person initially detained at a port of entry for a few days have less of a "cumulative" impact on security of the person interests than someone held for 4 months? Should the person whose relatives are required to post a high bond have a greater security of the person interest than the person released on a recognizance? Should the grounds of potential inadmissibility inform the weight to be given such that ordinary criminality or medical inadmissibility attracts less stress or stigma than allegations of human smuggling? And, if the mere possibility of detention at a port of entry (or, for an unsuccessful applicant a requirement to surrender to authorities for deportation at the end of the immigration process) is itself always sufficiently weighty to trigger the "cumulative" approach, then all foreign nationals seeking entry into Canada would be able to claim that their security of the person was infringed or denied.

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[18] Indeed, it may be that just such a case may make its way to this Court. See the recent decision in *Peter v. Minister of Public Safety and Emergency Preparedness,* 2014 FC 1073.

19. There may be instances in which the determination at one stage of an administrative or regulatory proceeding will inevitably or necessarily lead to a deprivation of liberty or security of the person at a later stage. An analogy may usefully be made to this Court's observations in *Eldridge v. British Columbia* and *Little Sisters Book and Art Emporium v. Canada* that some grants of discretion will necessarily infringe *Charter* rights notwithstanding that they do not expressly authorize that result.[19] However, that is clearly not the case with a finding of inadmissibility under section 37(1)(b). The foreign national still has at least two further opportunities to demonstrate why she should not be deported from Canada.

C. The Proper Interpretation of *Charkaoui I and II*

20. Against this the Appellant J.P. relies on this Court's decision in *Charkaoui I*.[20] *Charkaoui I*, he implies at para. 106 of his factum, effectively embraces the cumulative approach. Ontario disagrees. These cases involved the security certificate process. A positive finding that a certificate should issue (as with a positive finding that a person is inadmissible in the case at bar) does *not* result in immediate removal from Canada. However, unlike the instant case, a security certificate does require the immediate detention of the person. A careful review of this Court's reasons does not support the Appellants' reliance on this case.

21. First, at para. 13 of *Charkaoui I* the Court recognized that in security certificate proceedings (unlike the impugned admissibility proceedings in this case) there is an *immediate* detention of a person upon the issuance of a security certificate. The loss of liberty of a foreign national was automatic upon the finding that the person posed a threat to the security of Canada. Further, as this Court emphasized, the automatic loss of liberty lasts for at least until 120 days *after* the certificate is deemed reasonable. That is not the case here.

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[19] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 30; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at para. 125.

[20] *Charkaoui v. Canada (Citizenship and Immigration*), 2007 SCC 9 [*Charkaoui I*].

22. Second, at para. 14 of *Charkaoui I* this Court stated that the person's security[21] ***may*** be affected in various ways in that the certificate process may lead to eventual removal from Canada and a certificate brings with it the accusation that the person is a terrorist which could cause irreparable harm if eventually deported and the person loses protection against non-refoulement. In this paragraph, the Court was acknowledging or noting the possible negative consequences that could occur further on down the road. However, this is not tantamount to the adoption of the Appellant's "cumulative" approach whereby those potential future consequences were held to be infused into, or became a part of, the security certificate process itself.

23. This is made clear when read in context with the next paragraph of the decision. Paragraph 15 looks at another potential outcome of the certificate process, the fact that a foreign national may eventually be deported to torture. Here, this Court effectively recognized Rothstein J.A.'s observation in *Poshteh* that this outcome had yet to occur and that there is another intervening proceeding that takes place before such an outcome happens. The Court wrote:

> The appellants claim that they would be at risk of torture if deported to their countries of origin. **But in each of their cases, this remains to be proven as part of an application for protection under the provisions of Part 2 of the *IRPA* .** The issue of deportation to torture is consequently not before us here. [emphasis and double emphasis added]

24. Part 2 of the IRPA, of course, includes the separate and distinct protection of the Pre-Removal Risk Assessment provided under sections 97 and 112 of the *IRPA* available for persons that would face torture, a risk to life, or to cruel and unusual treatment or punishment (which is the same protection available to these Appellants). Accordingly, the *Charkaoui I* Court's recognition that there is a separate process before removal actually occurs indicates a rejection, rather than an adoption, of the Appellant's cumulative approach.[22]

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[21] Notably, the Court uses the term "security" and not "security of the person". In context, the Court appears to be discussing physical security not, as suggested in the Appellants' J.P.'s factum at para 106, the psychological impact of these proceedings on an individual.

[22] It is also worth noting that the protection against removal afforded by section 97 and 112 also addresses, in whole or in part, two of the three potential consequences noted by the *Charkaoui I* Court at para. 14, i.e., the eventual removal from Canada and, related to removal, the replacement of the formal or

25. Nor does this Court's analysis in *Charkaoui II* change this outcome. The Appellants also rely on this Court's comments in *Charkaoui II* that consideration be given to the "severity of the consequences of the state's actions".[23] However, this is simply a reaffirmation of the earlier decision, not an expansion of its terms. Part of that severity was, as noted, the immediate detention of the person found subject to the security certificate, a feature not present on a section 37(1)(b) inadmissibility finding.

26. The failure to adopt a "cumulative approach" is further reinforced by this Court's recent decision in *Febles v. Canada (Citizenship and Immigration)*.[24] At issue in that case was section 98 of the IRPA which (like the instant scheme and the one in *Charkaouii I* and *II*) rendered a foreign national ineligible for refugee protection where he had committed a serious non-political crime outside the country of refuge. The Chief Justice, writing for the majority at para. 67 of her reasons, agreed with the Federal Court of Appeal that section 98 was consistent with the *Charter*. The Federal Court had held that Mr. Febles, like the Appellants in the case at bar, would be subject to a pre-removal risk assessment before being subject to removal. That Court further held that at that later point in time the discretionary decision made as to whether to remove Mr. Febles, not the statutory provision granting that discretion, would have to be made in a manner consistent with section 7. The majority of this Court agreed stating at para. 67:

> As stated at para. 10 of these reasons, even if excluded from refugee protection, **the appellant is able to apply for a stay of removal** to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place (ss. 97, 112, 113 (*d*)(i) and 114(1) (*b*) of the *IRPA*). On such an application, the Minister would be required to balance the risks faced by the appellant if removed against the danger the appellant would present to the Canadian public if not removed (s. 113 (*d*) of the *IRPA*). Section 7 of the *Charter* may also prevent the Minister from issuing a removal order to a country where *Charter* -protected rights may be in jeopardy: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 58. [emphasis added]

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official non-refoulement protection under the Refugee Convention with a statutory protection against removal.

[23] *Charkaoui v. Canada (Citizenship and Immigration),* 2008 SCC 38 at para. 53 [*Charkaoui II*].

[24] *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68.

Here, as well, the Court was recognizing that section 7 comes into play at the ultimate removal stage and not, as the Appellant is attempting to submit again in the case at bar, at the earlier admissibility determination stage.

D. "Stigma" in the Security of the Person Analysis

27. This leaves the Appellants' reliance on "stigma". The Appellants argue that the stigmatization in being labelled a "human smuggler" will elevate the psychological stress from the ordinary to the "serious" level required to trigger a deprivation of security of the person.[25]

28. The Appellants' reliance on stigma would, once again, radically expand the scope of the right to security of the person and constitutionalize a wide range of conduct that has, until now, been kept out of the ambit of section 7's reach. If a person labeled inadmissible to Canada experiences extra-ordinary psychological stress, then what is to stop similar claims being advanced by the teacher labeled a sexual harasser by a disciplinary College, a lawyer labeled an embezzler by her Law Society or a broker labeled a dishonest inside trader by a Securities Commission? Even in the immigration context, why should the "stigma" of being labeled a human smuggler necessarily elevate the stress into the serious range anymore than the other grounds of inadmissibility, such as on health grounds, financial reasons or other forms of criminality? Indeed, the reputation or perception of the "Good Samaritan" who is found to have acted for humanitarian or religious reasons may be enhanced, not diminished, by the immigration finding. The Appellants' position has no clear limits yet far reaching implications.

29. At para. 110 of his factum the Appellant J.P. relies on this Court's discussion in *Blencoe* concerning the notion of "dignity" as an "underlying value of the *Charter* that can elevate the deprivation of security of the person to the level required". Ontario has two responses. First, in *Blencoe* itself this Court clarified at para. 80, that "[d]ignity and

[25] Appellant J.P.'s factum at para. 111.

reputation are not self-standing rights. Neither is freedom from stigma." Rather, the Court endorsed Lamer J's caution in the *Prostitution Reference* that:

> If liberty or security of the person under s. 7 of the *Charter* were defined in terms of attributes such as dignity, self-worth and emotional well-being, it seems that liberty under s. 7 would be all inclusive. In such a state of affairs there would be serious reason to question the independent existence in the *Charter* of other rights and freedoms such as freedom of religion and conscience or freedom of expression.[26]

30. Second, since *Blencoe* this Court has recognized in *Kapp*, albeit in the context of section 15 of the *Charter*, that the concept of "dignity" as "an abstract and subjective notion is confusing and difficult to apply".[27] Indeed, as Abella J. noted in *Quebec (Attorney General) v. A* at para. 341, this Court rejected reliance on dignity in *Kapp* as a required component in the section 15 analysis.[28] For similar reasons a number of courts have also rejected recognizing reputation interests, without more, as falling within the scope of security of the person.[29]

31. The Appellants also seek to analogize to the psychological stress caused by the loss of child custody to the state in *G.(J.)*. In that case however, the same proceeding that stigmatized the parent as "unfit" was also one that *at the same time* resulted in a loss of custody. The Appellant J.P. submits at para. 113 of his factum that because custody might have been regained after 6 months this somehow demonstrates that "the court was willing to look to the impact of the one step in the process on the ultimate result as opposed to limiting the section 7 analysis to only immediate outcomes of the proceedings". With respect, this Court found just the opposite. It was the fact that the loss of custody over the child and the severing of the parental bond[30] was immediate[31],

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[26] *Blencoe, supra* at para. 80 citing *Reference re ss. 193 and 195.1(1)(c) of the criminal code, supra*. It is worth observing that even in the criminal context "stigma" most often plays a role under the principles of fundamental justice and not at step 1 of the section 7 analysis. See: *R. v. Creighton,* [1993] 3 S.C.R. 3 at 19-23*; R. v. Darrach*, [1998] O.J. No. 397 at paras. 85-87 (C.A.), aff'd on other grounds 2000 SCC 46.

[27] *R. v. Kapp*, 2008 SCC 41 at para. 22.

[28] *Quebec (Attorney General) v. A,* 2013 SCC 5 at para. 341.

[29] *Starr v. Houlden*, [1990] 1 S.C.R. 1366 at 1441-1442 per L'Heureux-Dubé J. (dissenting, but writing alone on the issue of s. 7); *MacBain v. Canadian Human Rights Commission,* [1984] F.C.J. No. 62 (QL) at 11 (F.C.) rev'd on other grounds [1985] F.C.J. No. 907 (F.C.A.), fllwd in *Mehta v. MacKinnon et al.*, [1985] N.S.J. No. 7 at para. 38 (N.S.S.C.) aff'd on other grounds [1985] N.S.J. No. 8 (N.S.C.A.)

[30] Which this Court described, at para. 61, as a "gross intrusion into a private and intimate sphere".

coupled with the stigma of being deemed unfit,[32] that in combination created sufficiently serious state imposed psychological stress to engage security of the person.

E. Interim Release, Detention and Attending at Mandatory Interviews: The Impact on Liberty Interests in Ancillary Proceedings

32. The Appellants next rely upon the requirement that a foreign national is subject to detention and, even if released, is subject to conditions imposing restrictions on his or her liberty. These ancillary matters, the Appellants claim, looked at in tandem with the admissibility determination, combine to interfere with liberty. There are three flaws with the Appellants' argument.

33. First, any restrictions on liberty are the result of a discretionary decision not by the Act itself. Whether or not a person is released pending their immigration hearing occurs after the flight risk and dangerousness factors set out in section 58(1) of the IRPA are weighed and considered.[33] This Court has repeatedly recognized that it is not the statutory provision itself, but the particular exercise of discretion, or state conduct, that should be subject to *Charter* scrutiny.[34] The fact that a particular Board Member may exercise his or her discretion in a manner inconsistent with the *Charter* does not affect the validity of the detention provisions in section 58(1), let alone taint the separate and distinct grounds for finding inadmissibility in the impugned section 37(1) of the IRPA.

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[31] Contrast with a situation where there is no immediate loss. For example, in *Rutherford v. Ontario (Deputy Registrar General)* (2006), 81 O.R. (3d) 81 at paras. 267-268 (Sup. Ct. J.) the Court held that because parenting rights were not lost, and the applicant continued to enjoy co-parenting rights as a lesbian mother, the principle in *G.(J.)* had no application.

[32] Indeed, Lamer J, as he then was, cautioned against the application of the principle in *G.(J.)* to unrelated contexts, stating at para. 113: "I hasten to add that I am limiting my comments here to child protection proceedings, and need not and should not comment as to other kinds of proceedings."

[33] For example, in the case relied on at para. 100 of the Appellants' J.P.'s factum the restrictions on liberty were not mandated by IRPA itself but arose out of an official's exercise of discretion in considering, and later granting, interim release. *G.J. v. Canada (Minister of Public Safety and Emergency Preparedness),* 2012 FC 1489 at para. 4. It is important to note that the Federal Court regularly considers whether these discretionary decisions are contrary to *Charter* section 7: e.g.: *Canada (Minister of Citizenship and Immigration) v. Li,* 2009 FCA 85.

[34] *Eldridge*, *supra* at para. 29; *Little Sisters, supra* at paras. 125-139; *Suresh v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 1 at para. 5; *Insite, supra* at para. *116; R. v. Conception*, 2014 SCC 60 at para. 41; *Febles, supra* at para. 67. See: Kent Roach, *Constitutional Remedies in Canada*, 2d ed. Supp. (looseleaf) (Toronto: Thomson Reuters, 2013) at para. 14.260.

34. Indeed, detention is by no means automatic or mandated under the statute. Therefore, as in *Little Sisters*, *Charter* scrutiny should be focused on the exercise of discretion itself.[35] This is equally true with respect to the imposition of conditions on any form of interim release. Further, as noted at para. 17 above, the loss of the protection of non-refoulement, following a section 37(1)(b) inadmissibility determination, is properly raised in a challenge to the legal test for the pre-removal risk assessment under Part 2 of the IRPA. As such, all of these ancillary proceedings should be divorced from any analysis of the constitutionality of section 37(1)(b).

35. Second, the Appellants' position ignores the different functions pursuant to distinct statutory mandates that inferior courts or tribunals can be called upon to perform at various stages. Even in the criminal context this Court has recognized these differences. For example, at a preliminary inquiry it is not the role of a provincial court to make determinations as to whether an accused's rights under the *Charter* have been infringed or denied so as to exclude evidence under *Charter* section 24(1).[36] Nor does a bail hearing ascribe moral blameworthiness to an accused person or make a determination as to his or her guilt or innocence.[37] Even though the same court may, at a later point in time, rule on these matters this does not inform or colour the separate functions performed for different purposes at the initial stages of a proceeding.

36. Finally, the Appellant relies on this Court's decisions in *R. v. Beare* and *Thomson Newspaper Ltd. v. Canada* for the proposition that because they are allegedly forced to attend examinations and interviews with Canada Border Services Agency officials, despite their objections, their section 7 liberty interests are engaged. In this regard, section 16(1) of the IRPA does require that: "[a] person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably

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[35] *Little Sisters, supra* at paras. 125 and 133-136.
[36] *Mills v. The Queen*, [1986] 1 S.C.R. 863 at 954-955, reaffirmed in *R. v. Hynes*, [2001] 3 S.C.R. 623 at para. 4.
[37] *R. v. Pearson*, [1992] 3 S.C.R. 665 at 687-688.

requires." Under section 124(1) of the IRPA the failure to comply with this obligation could result in a person being charged with an offence.

37. However, in *Beare* and *Thomson Newspapers Ltd.* the constitutional challenge was to the statutory provisions that themselves imposed the requirement to attend for fingerprinting or to answer an investigator's questions.[38] If the Appellants in this case wished to challenge the constitutional validity of sections 16(1) and 124(1) of the IRPA then these cases might provide a basis to do so. The inadmissibility criteria in section 37(1)(b), however, do not impose a requirement to attend at a specific place and time on pain of criminal sanctions. The Appellant should not be permitted to bootstrap an attack on section 37(1)(b) onto challenges to other provisions.

38. Indeed, parties and witnesses can be summoned or subpoenaed to appear in civil proceedings, answer questions on discovery, or produce and disclose documents. This does not serve, however, to render the substantive area of law addressed in the civil proceeding (e.g., contract, tort, property, family) automatically susceptible to a challenge under section 7 of the *Charter*.[39]

39. In any event, the immigration context, it is submitted, is *sui generis*. In an immigration setting an individual, who has no constitutional or statutory right to enter or remain in Canada, is seeking a benefit, the ability to enter the country for protection or other purposes. She is seeking an exception from the ordinary requirement of applying from outside the country and before arriving at a port of entry.[40] Unlike *Beare* and *Thomson,* where the state itself has triggered or initiated a criminal or regulatory investigation, it is the foreign national him or herself, who is approaching the government for an exception to the general rule that "non-citizens do not have an

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[38] *R. v. Beare; R. v. Higgins,* [1988] 2 S.C.R. 387 at 392, 397, and 402. Similarly, in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission*), [1990] 1 S.C.R. 425 the constitutional challenge was directly to the validity of section 17 of the *Combines Investigation Act.*

[39] See, for example: *Manuel v. Head,* [1988] N.J. No. 233 (QL) at 5-6 (Nfld. S.C.).

[40] As set out in paras. 11-12 of the Respondent's Factum in *J.P.*

unqualified right to enter or remain in Canada".[41] In this respect, the requirement to attend at an interview and answer questions serves to enhance the individual's liberty and mobility, by permitting the authorities to determine whether it is appropriate to permit that person to enter and proceed with the various immigration processes. Indeed, it would otherwise be impossible for immigration officials to make a determination as to whether such a person can be admitted to Canada unless the individual voluntarily provides the necessary information.

40. Canadian Courts have recognized that in a situation where an individual is seeking the benefit of an exception it is entirely appropriate to require the individual to provide the required information. For instance, in the context of seeking a Sabbatarian exemption to permit one's retail store to close on a Saturday but remain open on Sunday, Dubin C.J.O. noted:

> In my opinion, it can hardly be said that the religious freedom of a retailer, who seeks to take the benefit of a provision of an Act expressly designed to accommodate such retailer for his or her religious beliefs, is significantly infringed if that retailer is required, if called upon, to state why he or she is entitled to the exemption.[42]

F. Proposed Approaches for Finding that the Psychological Threshold for a Security of the Person Infringement Has Been Met

41. At the end of the day how is a Court to determine whether the stress and anxiety caused by proceedings initiated by the state have a serious and profound impact on a reasonable person's psychological integrity? Ontario submits that there are two possible approaches, one evidentiary and the other analytical.

42. With respect to the evidentiary requirement, this Court has recently commented that it is preferable that a violation of psychological integrity be proven by evidence through properly qualified experts, at first instance[43]: While this Court has being willing

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[41] *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at 733; *Medovarski v. Canada (Minister of Employment and Immigration),* 2005 SCC 51 at para. 46.
[42] *Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.,* [1991] O.J. No. 378 at para. 30 (C.A.).
[43] *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para. 128.

to presume psychological impacts in extreme cases, Ontario submits that in the normal course, psychological integrity should be considered only based on properly admissible and objective evidence. Such evidence should be led at first instance where it can be subject to proper cross-examination. In the absence of such evidence, the presumption should be that state actions which cause some degree of stress are not, without more, an infringement of security of the person. In short, severe psychological impacts (no more than severe physical, social, economic or personal impacts) should not be assumed without adequate proof.

43. With respect to the analytical requirement, this Court has emphasized that determining whether stress is sufficiently serious and profound requires an objective test. In this regard the objective test set out in this Court's section 15 jurisprudence provides useful guidance. That inquiry has been undertaken from the point of view of a reasonable person in the claimant's position, dispassionate, and fully apprised of all the circumstances and the context of the legislation.[44]

44. Applying this objective test Ontario submits that a reasonable, dispassionate, foreign national, apprised of all of the circumstances and the context of the legislation, would be aware that the admissibility determination does not mean immediate deportation. Rather, she would also be aware of the full opportunity to seek protection from removal under ss. 97 and 112 of the IRPA, and even were that application to fail, a further application could be made under section 42.1. While an individual would no doubt be deeply aggrieved by a finding of inadmissibility, the fact that removal was neither imminent nor automatic should not, objectively considered, result in serious and profound psychological harm.

[44] See, for example, *Law v. Canada (Ministry of Employment and Immigration),* [1999] 1 S.C.R. 497 at para. 60; *Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para. 28; *Quebec v. A., supra* at paras. 154 and 419.

Part IV & V: Costs and Request for Oral Argument

45. Ontario does not seek costs. Ontario requests permission to present oral argument at the hearing of the appeal.

All of which is respectfully submitted this 22nd day of December, 2014.

Hart Schwartz

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Part VI – Table of Authorities

	Cases	Paragraph Reference in Factum
1.	*A & L Investments Limited et al. v. The Queen*, [1997] O.J. 4199 at paras. 34-35 (C.A.)	8
2.	*Arica v. Canada (Minister of Employment and Immigration),* [1995] F.C.J. No. 670 at para. 14 (F.C.A.), leave to appeal to the S.C.C. refused [1995] S.C.C.A. No. 347	14
3.	*Assn. of Professional Engineers of Ontario v. Karmash*, [1998] O.J. No. 2161 at para. 4 (Ont. Ct. J. (Gen. Div.))	8
4.	*Barrera v. Canada (Minister of Employment and Immigration),* [1993] 2 F.C. 3 at para. 11 (C.A.)	14
5.	*Belhumeur v. Barreau du Québec (Comité de Discipline),* [1988] J.Q. No. 905 (QL) at 13 (Que. C.A.)	8
6.	*Biscotti v. Ontario Securities Commission,* [1990] O.J. No. 1323 (Ont. Div. Ct.), aff'd [1991] O.J. No. 35 at para. 13 (C.A.), leave to appeal to S.C.C. refused, [1991] S.C.C.A. No. 88	8
7.	*Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at paras. 57, 80	3, 29
8.	*Canada (Attorney General) v. United States Steel Corp.*, 2011 FCA 176 at paras. 62-67, 81	16
9.	*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at paras. 91-93, 116 [*Insite*]	5, 33
10.	*Canada (Minister of Citizenship and Immigration) v. Li,* 2009 FCA 85	33
11.	*Canada (Minister of Citizenship and Immigration) v. Toledo,* 2013 FCA 226 at para. 69	14
12.	*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711 at 733	39
13.	*Chaoulli v. Quebec (Attorney General),* 2005 SCC 35 at para. 123	5

14.	*Charboneau v. College of Physicians & Surgeons of Ontario,* [1985] O.J. No. 2673 at para. 22 (Ont. H.Ct. J)	8
15.	*Charkaoui v. Canada (Citizenship and Immigration*), 2007 SCC 9 at paras. 13, 14 [*Charkaoui I*]	20
16.	*Charkaoui v. Canada (Citizenship and Immigration),* 2008 SCC 38 at para. 53 [*Charkaoui II*]	25
17.	*Clitheroe v. Hydro One Inc.,* [2009] O.J. No. 2689 at para. 77 (Ont. Sup. Ct. J.) aff'd 2010 ONCA 458	8
18.	*Cosyns v. Canada* (Attorney General), [1992] O.J. No. 91 at paras. 10-17 (Ont. Ct. J. (Div. Ct))	8
19.	*El Maghraoui v. Canada (Citizenship and Immigration)*, 2013 FC 883 at para. 21	14
20.	*Eldridge v. British Columbia (A.G.)*, [1997] 3 S.C.R. 624 at paras. 29-30	19, 33, 34
21.	*Febles v. Canada (Citizenship and Immigration),* 2014 SCC 68 at para. 67	33
22.	*G.J. v. Canada (Minister of Public Safety and Emergency Preparedness),* 2012 FC 1489	33
23.	*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84 at para. 28	43
24.	*Irwin Toy v. Québec (Attorney General),* [1989] 1 S.C.R. 927 at 1003	7
25.	*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62 at para. 128	42
26.	*Laidlow v. Canada (Minister of Citizenship and Immigration),* 2012 FCA 256 at paras 14-15	14
27.	*Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497 at para. 60	43
28.	*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69 at paras. 125-139	19, 33, 34
29.	*MacBain v. Canadian Human Rights Commission,* [1984] F.C.J. No. 62 (QL) at 11 (F.C.) rev'd on other grounds [1985] F.C.J. No. 907 (F.C.A.)	30

30.	*Manuel et al v. Head,* [1988] N.J. No. 233 (QL) at 5-6 (Nfld. S.C.)	38
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37.	*Peel (Regional Municipality) v. Great Atlantic & Pacific Co. of Canada Ltd.,* [1991] O.J. No. 378 at para. 30 (C.A.)	40
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42.	*R. v. Beare; R. v. Higgins,* [1988] 2 S.C.R. 387 at 392, 397, and 402	37
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Part VII Legislation

Immigration and Refugee Protection Act, ss. 16(1), 37, 58(1), 97, 112, 124(1)

Immigration and Refugee Protection Act

S.C. 2001, c. 27

Assented to 2001-11-01

Obligation — answer truthfully

16. (1) A person who makes an application must answer truthfully all questions put to them for the purpose of the examination and must produce a visa and all relevant evidence and documents that the officer reasonably requires.

Organized criminality

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(*a*) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

Marginal note: Application

(2) Paragraph (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

Release — Immigration Division

58. (1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied, taking into account prescribed factors, that

(*a*) they are a danger to the public;

(*b*) they are unlikely to appear for examination, an admissibility hearing, removal from Canada, or at a proceeding that could lead to the making of a removal order by the Minister under subsection 44(2);

(*c*) the Minister is taking necessary steps to inquire into a reasonable suspicion that they are inadmissible on grounds of security, violating human or international rights, serious criminality, criminality or organized criminality;

(*d*) the Minister is of the opinion that the identity of the foreign national — other than a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question — has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity; or

(*e*) the Minister is of the opinion that the identity of the foreign national who is a designated foreign national and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question has not been established.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Marginal note: Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Application for protection

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

Marginal note: Exception

(2) Despite subsection (1), a person may not apply for protection if

(*a*) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*;

(*b*) they have made a claim to refugee protection that has been determined under paragraph 101(1)(*e*) to be ineligible;

(*b.1*) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division;

(*c*) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than 36 months, have passed since their last application for protection was rejected or determined to be withdrawn or abandoned by the Refugee Protection Division or the Minister.

(*d*) [Repealed, 2012, c. 17, s. 38]

Marginal note: Exemption

(2.1) The Minister may exempt from the application of paragraph (2)(*b.1*) or (*c*)

(*a*) the nationals — or, in the case of persons who do not have a country of nationality, the former habitual residents — of a country;

(*b*) the nationals or former habitual residents of a country who, before they left the country, lived in a given part of that country; and

(*c*) a class of nationals or former habitual residents of a country.

Marginal note: Application

(2.2) However, an exemption made under subsection (2.1) does not apply to persons in respect of whom, after the day on which the exemption comes into force, a decision is made respecting their claim for refugee protection by the Refugee Protection Division or, if an appeal is made, by the Refugee Appeal Division.

Marginal note: Regulations

(2.3) The regulations may govern any matter relating to the application of subsection (2.1) or (2.2) and may include provisions establishing the criteria to be considered when an exemption is made.

Marginal note: Restriction

(3) Refugee protection may not result from an application for protection if the person

(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

(*b*) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(*c*) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(*d*) is named in a certificate referred to in subsection 77(1).

Contravention of Act

124. (1) Every person commits an offence who

(*a*) contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act;

(*b*) escapes or attempts to escape from lawful custody or detention under this Act; or

(*c*) employs a foreign national in a capacity in which the foreign national is not authorized under this Act to be employed.