S.C.C. File No. 39855

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

EARL MASON

APPELLANT
(Respondent)

-and-

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)
(Continued)

FACTUM OF THE INTERVENER, COMMUNITY & LEGAL AID SERVICES PROGRAM

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

COMMUNITY & LEGAL AID SERVICES PROGRAM
York University, Osgoode Hall Law School
Ignat Kaneff Building, 4700 Keele Street
Toronto, ON M3J 1P3

Subodh Bharati
Tel: (416) 736-5029
Fax: (416) 736-5564
E-mail: sbharati@osgoode.yorku.ca

MAMANN, SANDALUK, & KINGWELL LLP
103 Church Street, Suite 200
Toronto, ON M5C 2G3

Amy Mayor
Tel: (647) 930-1518
Fax: (416) 862-0625
E-mail: amayor@migrationlaw.com

Counsel for the Intervener, Community & Legal Aid Services Program

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AND BETWEEN:

SEIFESLAM DLEIOW

APPELLANT
(Respondent)

-and-

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Appellant)

-and-

COMMUNITY & LEGAL AID SERVICES PROGRAM, ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF SASKATCHEWAN, CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, SOCIAL PLANNING COUNCIL OF WINNIPEG, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, AMNESTY INTERNATIONAL CANADIAN SECTION (ENGLISH SPEAKING), CANADIAN MUSLIM LAWYERS ASSOCIATION, ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE L'IMMIGRATION, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO)

INTERVENERS

ORIGINAL TO:

THE REGISTRAR
Supreme Court of Canada
301 Wellington Street
Ottawa, Ontario
K1A 0K1

COPIES TO:

EDELMANN & COMPANY LAW CORPORATION
905–207 West Hastings Street
Vancouver, BC V6B 1H7

Erica Olmstead
Molly Joeck
Aidan C. Campbell
Tel: (604) 646-4684
Fax: (604) 648-8043
E-mail: erica@edelmann.ca
molly@edelmann.ca
aidan@edelmann.ca

Counsel for the Appellant, Earl Mason

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Agent for Counsel for the Appellant, Earl Mason

ROBERT J. KINCAID LAW CORPORATION
705–1190 Hornby Street
Vancouver, BC V6Z 2K5

Robert J. Kincaid
Tel: (604) 681-6193
Fax: (604) 681-1576
E-mail: rjklaw@telus.net

Counsel for the Appellant, Seifeslam Dleiow

MICHAEL J. SOBKIN
Barrister & Solicitor
331 Somerset Street West
Ottawa, ON K2P 0J8

Tel: (613) 282-1712
Fax: (613) 288-2896
E-mail: msobkin@sympatico.ca

Agent for Counsel for the Appellant, Seifeslam Dleiow

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Ontario Regional Office
400-120 Adelaide Street West,
Toronto, ON M5H 1T1

Michael H. Morris
Tel: (416) 471-4093
Fax: (416) 952-4518
E-mail: michael.morris@justice.gc.ca

BJ Wray
Tel: (604) 652-4034
Fax: (604) 666-6258
E-mail: bj.wray@justice.gc.ca

Counsel for the Respondent,
Minister of Citizenship and Immigration

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
50 O'Connor Street, 5th Floor
Ottawa, ON K1A 0H8

Christopher M. Rupar
Tel: (613) 941-2351
Fax: (613) 954-1920
E-mail: christopher.rupar@justice.gc.ca

Agent for Counsel for the Respondent,
Minister of Citizenship and Immigration

ATTORNEY GENERAL OF ONTARIO
Crown Law Office - Civil Law
720 Bay Street, 8th Floor
Toronto, ON M7A 2S9

Judie Im
Susan Keenan
Tel: (416) 326-3287
Fax: (416) 326-4015
E-mail: judie.im@ontario.ca

Counsel for the Intervener,
Attorney General of Ontario

BORDEN LADNER GERVAIS LLP
World Exchange Plaza
1300-100 Queen Street
Ottawa, ON K1P 1J9

Nadia Effendi
Tel: (613) 787-3562
Fax: (613) 230-8842
E-mail: neffendi@blg.com

Agent for Counsel for the Intervener,
Attorney General of Ontario

ATTORNEY GENERAL OF SASKATCHEWAN
Civil Law Branch, Legal Services Division
900-1874 Scarth Street
Regina, SK S4P 4B3

Johnna Van Parys
Laura Mazenc
Tel: (306) 787-6534
Fax: (306) 787-0581
E-mail: johnna.vanparys@gov.sk.ca

Counsel for the Intervener,
Attorney General of Saskatchewan

GOWLING WLG (CANADA) LLP
200-160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Agent for Counsel of the Intervener,
Attorney General of Saskatchewan

DOWNTOWN LEGAL SERVICES
655 Spadina Avenue
Toronto, ON M5S 2H9

Prasanna Balasundaram
Barbara Jackman
Asiya Hirji
Tel: (416) 934-4535
Fax: (416) 934-4536
E-mail: p.balasundaram@utoronto.ca

Counsel for the Intervener,
Canadian Council for Refugees

LANDINGS LLP
1414-25 Adelaide St. E
Toronto, ON M5C 3A1

Jacqueline Swaisland
Anthony Navaneelan
Paul Daly
Jonathan Porter
Tel: (416) 363-1696
Fax: (416) 352-5295
E-mail: jswaisland@landingslaw.com

Counsel for the Intervener,
Canadian Association of Refugee Lawyers

FILLMORE RILEY LLP
1700-360 Main Street
Winnipeg, MB R3C 3Z3

Brandon Barnes Trickett
David Thiessen
Tel: (204) 957-8300
Fax: (204) 954-0300
E-mail: bbarnes@fillmoreriley.com

Counsel for the Intervener,
Social Planning Council of Winnipeg

GOWLING WLG (CANADA) LLP
200-160 Elgin Street
Ottawa, ON K1P 1C3

D. Lynne Watt
Tel: (613) 786-8695
Fax: (613) 788-3509
E-mail: lynne.watt@gowlingwlg.com

Agent for Counsel of the Intervener,
Social Planning Council of Winnipeg

REFUGEE LAW OFFICE LEGAL AID ONTARIO
20 Dundas Street West
Toronto, ON M5G 2H1

Aviva Basman
Alyssa Manning
Tel: (416) 977-8111 Ext: 7163
Fax: (416) 977-5567
E-mail: basmana@lao.on.ca

Counsel for the Intervener,
United Nations High Commissioner for Refugees

OLTHUIS VAN ERT
66 Lisgar Street
Ottawa, ON K2P 0C1

Dahlia Shuhaibar
Tel: (613) 501-5350
Fax: (613) 651-0304
E-mail: dshuhaibar@ovcounsel.com

Counsel for the Intervener,
Amnesty International Canadian Section (English Speaking)

MITHOOWANI WALDMAN IMMIGRATION LAW GROUP
101-500 Eglinton Avenue East
Toronto, ON M4P 1N3

Naseem Mithoowani
Tel: (416) 792-6077
Fax: (416) 792-6177
E-mail: naseem@mwlawgroup.ca

BARTEUX LABOUR & EMPLOYMENT LAWYERS INC.
1701 Hollis Street, Suite L106
Halifax, NS B3J 3M8

Hanaa Al Sharief
Tel: (902) 536-3112
Fax: (902) 377-2234
E-mail: halsharief@barteauxlawyers.com

Counsel for the Intervener,
Canadian Muslim Lawyers Association

SUPREME ADVOCACY LLP
100-340 Gilmour Street
Ottawa, ON K2P 0R3

Marie-France Major
Tel: (613) 695-8855 Ext: 102
Fax: (613) 695-8580
E-mail: mfmajor@supremeadvocacy.ca

Agent for Counsel for the Intervener,
Canadian Muslim Lawyers Association

CLICHE-RIVARD AVOCATS ET AVOCATES
2330 rue Notre-Dame Ouest, Suite 302
Montréal, QC H3J 1N4

Guillaume Cliche-Rivard
Tel: (514) 316-0875
Fax: (514) 400-1163
E-mail: g.cliche.rivard@dmavocats.com

Counsel for the Intervener,
Association québécoise des avocats et avocates en droit de l'immigration

PENDER LITIGATION
1175-510 Burrard Street
Vancouver, BC V6C 3A8

Frances Mahon
Tel: (604) 669-6699
Fax: (604) 681-0652
E-mail: fdm@penderlitigation.com

Counsel for the Intervener,
Criminal Lawyers' Association (Ontario)

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PART I – OVERVIEW

1. Community & Legal Aid Services Program ["CLASP"] at Osgoode Hall Law School is student run community legal clinic that represents non-citizens in criminal and immigration law matters and prioritizes low-income individuals with mental health concerns. The interpretation and application of section 34 inadmissibility to include charges for ordinary criminality not related to national security is of particular concern to our community.

PART II – ISSUE

2. Contrary to the IAD and the Federal Court of Appeal, CLASP submits that interpreting and applying section 34(1)(e) to include inadmissibility for criminal charges without a conviction is inconsistent with section 11(d) of the *Charter* and contrary to the core principles and values that underpin it. Before dismissing the application of section 11, a tribunal or reviewing court must consider whether section 11 is engaged. In the context of section 34(1)(e) of the *IRPA*, this requires proper consideration of the harsh consequences of inadmissibility under section 34(1)(e) including the possibility of immigration detention during a section 34(1)(e) admissibility determination. Dismissing the application and importance of section 11 protections based on the statement that immigration consequences are not "criminal" sanctions serves to dilute the *Charte*r-protected interests in section 11(d) and stifles the application of the *Charter* in reviewing state's power over the rights of non-citizens.

3. Considering this, CLASP will submit that the interpretation and application of section 34(1)(e) to include charges for ordinary crimes that did not result in convictions will necessarily engage section 11 protections and violate section 11(d) as it will allow for the imprisonment of these individuals in maximum-security prisons without procedural safeguards and on a lower standard of proof.

PART III – ARGUMENT

1. Lower Decisions Dismissed s. 11 Without Examining Immigration Consequences

4. The presumption of innocence is expressly guaranteed by subsection 11(d) of the *Charter* and is an integral part of the guarantee of the right to life, liberty and security of the person

contained in section 7 of the *Charter.* Quoting *Oakes*, this Court in *Holmes* described the underlying purpose of and cardinal values embodied in this protected right:

> The purposes behind the presumption of innocence enshrined in s. 11(d) of the Charter, and its relationship to a democratic and free society, have been addressed in R. v. Oakes, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103, at pp. 119-20, as follows:
>
> The presumption of innocence is a hallowed principle lying at the very heart of criminal law. Although protected expressly in s. 11(d) of the Charter, the presumption of innocence is referable and integral to the general protection of life, liberty and security of the person contained in s. 7 of the Charter…. The presumption of innocence protects the fundamental liberty and human dignity of any and every person accused by the State of criminal conduct. An individual charged with a criminal offence faces grave social and personal consequences, including potential loss of physical liberty, subjection to social stigma and ostracism from the community, as well as other social, psychological and economic harms. In light of the gravity of these consequences, the presumption of innocence is crucial. It ensures that until the State proves an accused's guilt beyond all reasonable doubt, he or she is innocent. This is essential in a society committed to fairness and social justice. The presumption of innocence confirms our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise.
>
> Thus, the presumption of innocence is a value deeply embedded in the fabric of Canadian legal history and a manifestation of a social commitment to justice. The right to be presumed innocent until proven guilty when charged with a criminal offence accords the respect and concern due to individuals by virtue of their fundamental rights to life, liberty and security of the person. As such, it is simultaneously a legal articulation of the relationship between the individual and the community and a recognition of the necessity of the rule of law.[1] [citations omitted]

5. In the context of the *IRPA*, Justice Abella in *Chhina* stated that the *Charter* both guides the exercise of discretionary administrative decision making under *IRPA* and informs our interpretation of the scheme itself. The *IRPA* scheme must therefore be interpreted harmoniously with the *Charter* values that shape the contours of its application.[2] This is reflected in section 3(3) of *IRPA,* which requires that the *Act* be construed and applied in a manner that is consistent with the *Charter.*

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[1] *R. v. Holmes*, 1988 CanLII 84 (SCC), [1988] 1 S.C.R. 914 at para 37.

[2] *Canada (Public Safety and Emergency Preparedness) v. Chhina*, 2019 SCC 29 (CanLII), [2019] 2 SCR 467 at para 128 (dissenting, but not on this point).

6. As noted by the Immigration Division, section 19(1)(d)(i) of the former *Immigration Act* rendered persons inadmissible where there were reasonable grounds to believe they would commit an indictable offence in Canada. The Federal Court in *Taei*[3] determined that this provision offended the presumption of innocence in section 11(d). The IRPA did not create an equivalent class. Considering *Taei*, the Immigration Division noted that this omission was with good reason. [4]

7. As such, the IAD was correct in stating that the heart of the issue in this matter is as follows:

> [35] Is finding someone inadmissible for acts of violence that were arguably criminal, but which did not lead to a criminal conviction, contrary to Canadian values, the fundamental values of the Charter and our history as a parliamentary democracy?[5]

8. In answering this question, the IAD first paraphrased section 11(d), and then determined that such a finding of inadmissibility **<u>would not be</u>** contrary to Canadian values because immigration consequences are not criminal sanctions.

> [36] All reasonable Canadians agree that a person should not suffer criminal sanctions unless they have been proven guilty according to the law in a fair and public hearing by an independent and impartial tribunal. However, immigration consequences under the IRPA are not criminal sanctions.[6]

9. This finding was endorsed by the Federal Court of Appeal (FCA) which stated "that inadmissibility under section 34 is not governed by criminal law or contrary to section 11(d) of the *Charter*."[7]

10. This sweeping rejection of the applicability of s.11 of the *Charter* was done without <u>any</u> analysis. There was no consideration of s.11 jurisprudence or the consequences flowing from an inadmissibility finding. With respect, it is this wholesale rejection without any substantive reasoning, that is contrary to Canadian values.

11. The lower court's decisions unduly confine the relevance of s. 11(d) to inadmissibility findings under s. 34(1)(e). They fail to consider immigration detention and how interpreting

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[3] *Taei v. Canada (Min. of Employment and Immigration) (1993),* 19 Imm. L.R. (2d) 187
[4] X (Re), 2017 CanLII 146735 at paras 69-70.
[5] *Mason v Canada (Public Safety and Emergency Preparedness),* 2019 CanLII 55171 (CA IRB) at para 35.
[6] *Ibid* at 36.
[7] *Canada (Citizenship and Immigration) v. Mason*, 2021 FCA 156 at para 57.

s. 34(1)(e) to include charges not resulting in convictions violates s. 11 of the *Charter* because a true penal consequence flows despite a lower standard of proof.

12. CLASP submits that interpreting s. 34(1)(e) to include actions subject to criminal charges without any nexus to national security requires meaningful engagement with the law governing the application of section 11 principles and protections. It also requires consideration of all potential consequences that flow from its application including immigration detention and deportation.

13. As such, the IAD and FCA erred by not engaging with the following questions:

    A. Is immigration detention a true penal consequence analogous to a criminal sanction that flows from the applicability of section 34(1)(e)?

    B. Is deportation a true penal consequence?

A. Immigration Detention is a True Penal Consequence that flows from s.34(1)(e)

14. *Wigglesworth*[8] remains the seminal case on what constitutes a "penal matter" for the purpose of the applicability of s.11 of the *Charter*. This court determined that there are two categories of criminal or penal matters: a) those that are by their very nature a criminal proceeding or b) matters where a conviction in respect of the offence may lead to <u>a true penal consequence.</u> Where an administrative or regulatory offence may lead to imprisonment, section 11 applies. To clarify what constitutes a true penal consequence, Wilson J wrote:

> [24] In my opinion, a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.…If an individual is to be subject to penal consequences such as imprisonment--the most severe deprivation of liberty known to our law--then he or she, in my opinion, should be entitled to the highest procedural protection known to our law.[9]

15. In *Rowan*, which drew heavily from *Wigglesworth,* the Ontario Court of Appeal noted this court's disbelief that an administrative tribunal would ever be able to imprison an individual:

> [44] "The power to order imprisonment is so obviously penal in nature and so exceptional in the setting of administrative tribunals that the mere possibility of a

[8] *R v Wigglesworth,* 1987 CanLII 41 (SCC) 2 SCR 541 at paras 12-27 [*Wigglesworth*].

[9] *Ibid* at para 24.

> sentence of imprisonment was sufficient…to colour the proceedings as having "true penal consequences" and thereby to trigger the protection of s.11."[10]

16. The Immigration Division and the CBSA are administrative decision makers that can do exactly this. They have the power to order imprisonment in maximum security prisons pending admissibility determinations or removal from Canada. Pursuant to the *Immigration and Refugee Protection Act* (*IRPA*) and the *Immigration and Refugee Protection Regulations (IRPR)*, there are essentially three grounds that allow for the detention of a non-citizen:

    a) 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;

    b) a danger to the public; or

    c) unable to satisfy the CBSA of their identity;[11]

17. Of these three, as stated by the Federal Court in *Sahin*, danger to the public provides the strongest ground for immigration detention.[12] Accordingly, if the CBSA and/or the Immigration Division finds that an individual constitutes a danger to the Canadian public, they are *prima facie*, albeit not *per se*, subject to detention.

18. Inadmissibility under s. 34(1)(e) is premised on the determination that the person concerned is engaging in acts of violence that would or might endanger "lives or safety of persons in Canada." These individuals are considered such "high risk" that the *IRPA* mandates the imposition of prescribed conditions, including regular reporting to the CBSA, if detention is not ordered pending an admissibility determination or removal from Canada.[13] This express link between public safety and admissibility creates an immediate proximity to the grounds for detention. In other words, an individual caught under section 34(1)(e) for acts that endanger the "lives or safety of persons in Canada" would also be an individual who constitutes a present or future danger to the safety of persons in Canada necessitating

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[10] *Rowan v Ontario Securities Commission,* 2012 ONCA 208 at para 44.
[11] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, sections 55-58 [IRPA]; Immigration and Refugee Protection Regulations, SOR/2002-227, sections 244-248.
[12] *Sahin v Canada (Minister of Citizenship and Immigration) (T.D.)*, 1994 CanLII 3521 (FC), [1995] 1 FC 214.
[13] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 44(4), 56(3), 58(5), 58.1(4).

immigration detention. Instances where detention is not ordered, would be evidence in and of itself of the misuse of s. 34(1)(e). It would be inconsistent to seek the inadmissibility and removal of an individual for acts that endanger public safety yet not detain them for the same reason.

19. While the Respondent may argue that 'immigration consequences are not criminal' and therefore do not intrinsically attract s. 11 *Charter* protection, it is undeniable that immigration detention is imprisonment. This alone is sufficient to engage s. 11 of the *Charter* given that in *Guidon*, this Court found "Imprisonment is always a true penal consequence. A provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed…".[14]

20. Moreover, the determining factor of *Charter* application should be less about the nature of the proceeding (the difference between criminal and administrative law procedures), but more about the severity of the potential consequence. The Supreme Court wrote in *Charkaoui v Canada:*

> [53] But whether or not the constitutional guarantees of s. 7 of the *Charter* apply does not turn on a formal distinction between the different areas of law. Rather, it depends on the severity of the consequences of the state's actions for the individual's fundamental interests of liberty and security and, in some cases, the right to life.[15]

21. While reviewing the procedure by which the Federal Court issues security certificates, McLachlin C.J elaborated:

> [50] [...] the proceeding in which the Federal Court determines whether a security certificate is reasonable takes place in a context different from that of a criminal trial. No charges are laid against the person named in the certificate. Instead, the ministers seek to expel the named person from Canada on grounds of prevention or public safety. However, the serious consequences of the procedure on the liberty and security of the named person bring interests protected by s. 7 of the *Charter* into play.[16]

22. Put simply, an interpretation of s. 34(1)(e) devoid of a nexus with national security either mandates that a broader class of persons, including those found not guilty for ordinary

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[14] *Guindon v Canada*, 2015 SCC 41 at para 76 [*Guindon*].
[15] *Charkaoui v Canada (Citizenship and Immigration),* 2008 SCC 38 (CanLII), [2008] 2 SCR 326 at para 53 [*Charkaoui*].
[16] *Ibid* at para 50.

crimes, be incarcerated, or requires inconsistency between the application and the principles of *IRPA*. It allows for individuals to be incarcerated on a lower standard of proof, contrary to s. 11(d) of the Charter.

B. Deportation is a True Penal Consequence that Attracts Charter Protections

23. A finding under s. 34(1)(e) of inadmissibility to Canada, even if it leads to no other consequences, will ultimately result in the individual being deported from Canada. This is, in and of itself, a true penal consequence that attracts *Charter* protections.

24. Previous jurisprudence has treated deportation as a purely administrative sanction more analogous to a loss of license, employment, or the right to practice a profession. As the FCA wrote in *Hurd*:

> [25] The purpose of the deportation proceedings is not any larger-than-personal social purpose, but merely to remove from Canada an undesirable person. It is individual deterrence, as it were, not social deterrence. …
>
> ….Deportation is analogous, rather, to a loss of license or to dismissal from a police force, or to the forfeiture of a right to practice a profession.[17]

25. With all due respect, this position is outdated. If the Charter is a living tree that has the possibility of growth, then the 1980's public perception, that infused itself with decision making, of immigrants and non-Canadians as unequal to Canadian citizens and therefore less deserving of rights, is untenable today. Like immigration detention, irrespective of its purpose, the consequence of deportation in many cases is penal. Individuals may be stripped of their permanent residence status, separated from their family and forced to return to dangerous and violent circumstances or a county in which they have not lived since they were a young child.

26. In fact, this court in *Wong* noted that a collateral consequence such as deportation may be a relevant factor in determining the fitness of a criminal sentence. Such a consequence "could have a more significant impact on the accused than the criminal sanction itself."[18] In other words, deportation has penal consequences that should be considered in rendering a fit

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[17] *Hurd v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 594, [1988] FCJ No 945 at para 25.

[18] *R v Wong*, 2018 SCC 25 (CanLII), [2018] 1 SCR 696 at paras 68 and 72.

sentence for a guilty plea. Surely, if a fine by its magnitude can result in the engagement of s. 11, deportation must attract *Charter* protections as well.

2. Discretion does not protect Unconstitutional Provisions

27. In *Samji*, the BC Court of Appeal determined that the *Wigglesworth* test should be used prospectively, not retrospectively. Hunter J.A., with Bauman C.J.B.C. concurring, wrote: "If the statute authorizes the tribunal to impose a penalty that has a true penal consequence, s. 11 applies, regardless of what penalty the tribunal ultimately imposes."[19]

28. The *Wigglesworth* test does not allow for discretion in its *ex ante* method to determine whether the statutory jurisdiction allows for the imposition of a true penal consequence. The proceeding must be treated as warranting s. 11 protection from the outset, not after the penalty has been ordered.

29. In its recent decision in *Bissonnette* this court provided determined that "the exercise of discretion cannot save a provision that authorizes the imposition of a punishment that is cruel and unusual by nature."[20] It added that "the mere possibility that [a cruel and unusual punishment] may be imposed constitutes an infringement of s. 12 of the Charter"[21]

30. The ruling in *Bissonnette,* applies equally to s.11 *Charter* protections. The fact that a decision maker has the discretion to not order the detention of an individual on a lower standard of proof for the same criminal charges that did not result in a conviction on a higher standard of proof does not save it from attracting section 11 *Charter* protections.

31. In the criminal context, *Wigglesworth, Bissonnette,* and *Guindon* demonstrate that even if a judge has discretion to not impose a sentence that violates the *Charter*, *Charter* protections still apply. *Guindon* further clarifies that in an administrative context, "a provision that includes the possibility of imprisonment will be criminal no matter the actual sanction imposed."[22]

32. Given this, the *IRPA*, and s. 34(1)(e), despite underpinning an administrative decision, must still attract the same protections afforded in the criminal law. And so, because imprisonment,

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[19] *R v Samji* 2017 BCCA 415 at para 167 [*Samji*].
[20] *R v Bissonnette* 2022 SCC 23 at para 111.
[21] *Ibid* at para 111.
[22] *Guindon supra* note 14 at para 76.

as a true penal consequence, cannot be reduced to an administrative sanction, discretion has no ability to make it constitutional.

3. Considering Charter Values

33. Administrative decisions that engage the *Charter* are reviewed based on the framework set out by this court in *Doré v. Barreau du Québec*[23]and *Loyola High School v. Quebec*[24].The importance of engaging in *Charter* values and proportionate balancing of Charter rights was summarized by this Court in *Trinity Western University*:

> [35] Under the *Doré/Loyola* framework, an administrative decision which engages a *Charter* right will be reasonable if it reflects a proportionate balancing of the *Charter* protection with the statutory mandate (see *Doré*, at para. 7; *Loyola*, at para. 32). The reviewing court must be satisfied that the decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate" (*Loyola*, at para. 39). In other words, the *Charter* protection must be "affected as little as reasonably possible in light of the state's particular objectives" (*Loyola*, at para. 40). [...]
>
> [36] The reviewing court must consider whether there were other reasonable possibilities that would give effect to *Charter* protections more fully in light of the objectives, always asking whether the decision falls within a range of reasonable outcomes (*Doré*, at para. 57; *Loyola*, at para. 41, citing *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1995 CanLII 64 (SCC), [1995] 3 S.C.R. 199, at para. 160). If there was an option or avenue *reasonably* open to the decision-maker that would reduce the impact on the protected right while still permitting him or her to sufficiently further the relevant objectives, the decision would not fall within a range of reasonable outcomes. The reviewing court must also consider how substantial the limitation on the *Charter* protection was compared to the benefits to the furtherance of the statutory objectives in this context (*Doré*, at para. 56; *Loyola*, at para. 68).[25]

34. By their wholesale dismissal of the engagement of s. 11 *Charter,* both the FCA and the IAD erred. The IAD undertook no balancing exercise of the *Charter* protection with the statutory mandate. Similarly, the FCA failed to inquire "whether there were other reasonable possibilities that would give effect to Charter protections more fully in light of the objectives, always asking whether the decision falls within a range of reasonable outcomes".[26]

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[23] *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395
[24] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613.
[25] *Trinity Western University v Law Society of Upper Canada,* 2018 SCC 33 (CanLII), [2018] 2 SCR 453 at paras 35& 36 [*Trinity Western University*].
[26] *Trinity Western University*, *supra* note 23 at para 36.

35. There was no assessment of whether the IRPA's objective of *maintaining the security of Canadian society* and its objective of being applied in a manner *consistent with the Canadian Charter of Rights and Freedoms*, could be met with less *Charter* impairment.[27] Given that the Federal Court in *Taei* already determined that certain types of inadmissibility could contravene s. 11(d) and the IAD and FCA should have examined the potential s. 11(d) *Charter* infringement if s. 34(1)(e) did not require a national security nexus and whether an interpretation of s. 34(1)(e) that better complies with *Charter* protections would sufficiently further IRPA objectives.

36. Instead, the FCA's decision effectively endorses the unreasonable decision of the IAD. Authorizing administrative decision-makers to shirk their responsibility of balancing *Charter* values with statutory objectives by myopically framing the impact of legislation sets a dangerous precedent towards disregarding the *Charter* within public law. At this juncture, it bears repeating Justice Abella's words in *Doré*: "It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including Charter values".[28] Disregarding Charter implications must not be endorsed.

PART IV and V – COSTS AND ORDER SOUGHT

37. CLASP does not take a position on the outcome of the appeal nor does it seek costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 6th day of September, 2022

SUBODH BHARATI
Of Counsel for the Intervener, Community & Legal Aid Services Program

[27] *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, sections 2(g), 3(d).
[28] *Doré v. Barreau du Québec,* 2012 SCC 12 at para 24 [*Doré*].

PART VI – TABLE OF AUTHORITIES

LEGISLATION	**CITED AT PARAGRAPH(S)**
Immigration and Refugee Protection Act, S.C. 2001, c. 27 ss 44(4), 56(3), 58(5), 58.1(4), 55-58 *Loi sur l'immigration et la protection des réfugiés,* L.C. 2001, ch. 27 ss 44(4), 56(3), 58(5), 58.1(4), 55-58	16, 18
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R v Samji, 2017 BCCA 415	27
R v Wigglesworth, 1987 CanLII 41 (SCC) 2 SCR 541	14
R v Wong, 2018 SCC 25 (CanLII), [2018] 1 SCR 696	26

Sahin v Canada (Minister of Citizenship and Immigration) (T.D.), 1994 CanLII 3521 (FC), [1995] 1 FC 214	17
Taei v. Canada (Min. of Employment and Immigration) (1993), 19 Imm. L.R. (2d) 18	6
Trinity Western University v Law Society of Upper Canada, 2018 SCC 33 (CanLII), [2018] 2 SCR 453	33, 34
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