Court File No.: IMM-28-18

FEDERAL COURT

BETWEEN:

ABDOULKADER ABDI

Applicant

- and -

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

- and -

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervener

- and -

JUSTICE FOR CHILDREN AND YOUTH

Intervener

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, CANADIAN CIVIL LIBERTIES ASSOCIATION

OVERVIEW

1. Youth in care face inherent vulnerabilities and pre-existing disadvantage, including barriers to obtaining citizenship. For Black youth in care, these challenges are even more significant. When a Minister's delegate exercises their discretion under s. 44(2) of the *Immigration and Refugee Protection Act* ("*IRPA*") with respect to a non-citizen who was a former Crown ward, that decision must proportionately balance the *Charter* value of equality in order to be reasonable. The decision of the Minister's delegate must not result in substantive inequality for the Applicant.

PART I – FACTS

2. This application for judicial review arises from a decision of a Minister's delegate dated January 3, 2018 to refer a report of inadmissibility to the Immigration Division for a hearing, pursuant to s. 44(2) of the *Immigration and Refugee Protection Act* ("*IRPA*").[1] The Applicant alleges numerous reviewable errors under four broad procedural and substantive grounds of review.

3. Among the grounds of review raised in the application is whether the exercise of discretion by the Minister's delegate under s. 44(2) of *IRPA* was unreasonable because it failed to balance Mr. Abdi's right to equality under s. 15(1) of the *Charter*, proportionately with the statutory objectives of the *IRPA*.[2] The Applicant has also alleged that the Minister's delegate's decision breached his *Charter* rights, including his s. 15 right to equal treatment under the law, seeking declaratory relief and *mandamus.*[3]

PART II – POINTS IN ISSUE

4. The Canadian Civil Liberties Association ("CCLA") has been granted leave to intervene to assist the Court in determining whether and how the Minister's delegate is required to weigh *Charter* rights, values and international law when exercising discretion under s. 44(2) of the *IRPA*, particularly respecting s. 15 of the *Charter*.[4]

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[1] *Immigration and Refugee Protection Act*, SC 2001, c 27, s 44(2) ["*IRPA*"].
[2] Notice of Application, Application Record at 2, 144-48.
[3] Further Memorandum of Argument of the Applicant, para 19, 51, 72.
[4] Order Granting Leave to Intervene, June 1, 2018, para 3.

PART III – SUBMISSIONS

A. The Minister's delegate must exercise their discretion in accordance with the *Charter*.

5. All discretionary governmental decision-making is required to be consistent with the *Charter*.[5] In the context of the *IRPA,* this principle is made explicit in s. 3(3)(d), which requires the Act "to be construed and applied in a manner that (…) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada".[6]

6. The *IRPA* must also be construed and applied in a manner that "complies with international human rights instruments to which Canada is signatory", in accordance with s. 3(3)(f) of the *IRPA*. Those instruments include the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child. The CCLA will defer to the comments of the intervener JFCY on the application of international law to the case at bar.

7. The Minister's delegate has discretion under s. 44(2) of the *IRPA* to decline to refer a report concerning a permanent resident to an admissibility hearing, even if the Minister's delegate is of the opinion that the inadmissibility report is well-founded. The language of the statutory provision is permissive ("may") and not mandatory ("shall"), and permits more than one possible outcome on the facts.[7]

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[5] *Doré v Barreau du Quebec, 2012 SCC 12* [*"Doré"*]; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 ["*Loyola*"].

[6] *Tabingo v. Canada (Citizenship and Immigration)*, 2014 FCA 191 at para 15-16, leave to appeal to SCC refused, [2014] SCCA No 540. ["*Tabingo*"]; *Tran v Canada (Public Safety and Emergency Preparedness),* 2017 SCC 50 at para 6.

[7] *Tabingo*, *supra* at para 61. See for example the facts of *Revell v. Canada (Minister of Citizenship and Immigration),* 2017 FC 905 which details a decision by the CBSA not to refer the applicant to an admissibility hearing after a finding of serious criminality, at para 17 and 23.

8. The Minister's delegate must therefore exercise this discretion in accordance with the *Charter*, including the *Charter* value of equality. As set out in more detail below, this means that the Minister's delegate (a) must proportionately balance the *Charter* value of equality with the statutory objectives of the *IRPA* in their exercise of discretion under s. 44(2); and (b) may not make any decision under s. 44(2) which results in a breach of the individual's equality rights under s. 15 of the *Charter*.

B. The *Charter* section 15 equality guarantee is engaged by a s. 44(2) referral decision for a non-citizen former Crown ward

a. Section 15 of the *Charter* guarantees substantive equality

9. Section 15(1) of the *Charter* guarantees that "every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination". The enumerated and analogous grounds of discrimination under s. 15 include age,[8] race or ethnic origin, citizenship[9] and family status.[10]

10. The Supreme Court of Canada describes discrimination as perpetuating or promoting "the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration".[11]

11. The inquiry into whether s. 15(1) of the *Charter* is engaged is flexible and contextual. The question for the Court is whether a decision "has the effect of perpetuating arbitrary disadvantage on the claimant" based on the individual's membership in an enumerated or analogous group.[12] In order to do so, a s. 15(1) inquiry must focus on the social and economic context

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[8] *JS v Nunavut (Minister of Health and Social Services),* 2006 NUCJ 20, para 47-50.
[9] *Law Society of British Columbia v Andrews*, [1989] 1 SCR 143 at para 3.
[10] *Inglis v. British Columbia (Minister of Public Safety),* 2013 BCSC at para 563-567.
[11] *Quebec (Attorney General) v A*, 2013 SCC 5 at para 136 ["*Quebec v A*"].
[12] Kahkewistahaw First Nation v. Taypotat, 2015 SCC 30 at para 16-17 ["*Kahkewistahaw*"], citing *Quebec v A*, *supra* at para 331.

of an equality claim, and on the effects of the impugned government action on the claimant.[13]

12. This approach is intended to protect substantive equality, which recognizes that "persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages".[14]

13. In order to establish discrimination under s. 15(1), an Applicant must first show that the impact of a government action creates a distinction on the basis of one or more enumerated or analogous grounds, i.e. that the action has a differential impact on a protected group. Then, the Applicant must show that government action had the impact of "reinforcing, perpetuating or exacerbating their disadvantage".[15] In other words, "if the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory".[16]

b. Charter issues are not premature at the s. 44(2) referral decision stage as it is the only exercise of discretion in the inadmissibility process

14. The only exercise of discretion in the inadmissibility removal regime occurs at the s. 44(2) decision to refer to an admissibility hearing. For this reason, it is appropriate and necessary the Minister's delegate to consider the *Charter,* and for this Court to carefully review the exercise of the Minister's delegate's discretion for *Charter* compliance, when revieiwing a decision under s. 44(2).

15. According to the terms of s. 36(1)(a) of the *IRPA*, there is no discretion in the determination, under s. 44(1), of whether an individual is inadmissible

[13] *Kahkewistahaw*, *supra* at para 18.
[14] *Khakewistahaw, supra* at para 17.
[15] *Ibid*, at para 20.
[16] *Quebec v A*, *supra* at para 332.

for “serious criminality”. The finding of “serious criminality” is made strictly on the basis of the length of incarceration and category of offence.

16. Though s. 44(1) of the *IRPA* describes the “opinion” of an officer as to inadmissibility, this involves no more discretion than identifying the “relevant facts” which establish “serious criminality” under s. 36(1) or another basis for inadmissibility.

17. After a decision is made to refer to an admissibility hearing under s. 44(2), a removal order will necessarily issue without any right of appeal, and loss of permanent resident status. There is no discretion available to the Immigration Division under s. 45(d) of the *IRPA* flowing from a s. 44(2) referral.

18. Section 45(d) mandates the Immigration Division “shall…make the applicable removal order against…a permanent resident, if it is satisfied that…the permanent resident is inadmissible.” The Federal Court of Appeal has held that because the permanent resident was already determined to be inadmissible under s. 44(1) and (2), under s. 45(d), “the ID appears to have no other option than to make a removal order against the foreign national or the permanent resident if he or she is inadmissible according to the Act”.[17] Where a law permits a government decision-maker only one possible outcome on the facts, there is no element of discretion in the decision.[18]

19. There is also no right of appeal from a decision for a permanent resident who has been found inadmissible on the grounds of serious criminality, under s. 64 of the *IRPA*.

20. A removal order under s. 45(d) on the basis of inadmissibility for serious criminality takes immediate effect. One result of a removal order is the loss

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[17] *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para 19.
[18] *Tabingo, supra* at para 61.

of permanent resident status, under s. 46(1)(c) of the *IRPA*. Consequent to the loss of permanent resident status is the loss of social benefits including heath care coverage, the ability to work or study in Canada, protection under Canadian law including the *Charter* and the ability to apply for Canadian citizenship.[19]

21. The other result of a removal order is the requirement that the foreign national against whom it was made must leave Canada immediately, i.e. they will be deported under s. 48(2). In some cases, the circumstances of the deportation will trigger additional *Charter* issues.

22. Accordingly, the Minister's delegate as well as the reviewing court must consider the impact of a referral decision to be the loss of the Applicant's permanent resident status and the protections and benefits that flow from that status, and a removal order. Section 15 *Charter* rights and values are engaged where these consequences have a disproportionate adverse impact on an Applicant because of their membership in a protected group.

C. Youth in care face pre-existing disadvantage on the grounds of age, family status and race; Black youth are at greater disadvantage

23. Youth in the custody and care of the Crown, including those who are non-citizens, face pre-existing disadvantage due to their age and family status.

24. Section 15 *Charter* rights are engaged where the inherent vulnerability of youth in care is exacerbated by systemic barriers that (a) contribute to a Crown ward's inability to obtain Canadian citizenship, and (b) make them more likely to be considered inadmissible under *IRPA* for "serious criminality".

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[19] *Hassouna v Canada (Minister of Citizenship and Immigration)*, 2017 FC 473 at para 78.

a. Children and youth in care face pre-existing disadvantage due to age and family status

25. Children and youth in care face "a foundation of vulnerability" and pre-existing disadvantage owing first to the core reasons that they may become Crown wards in the first place, including physical, sexual and emotional abuse, chronic neglect, or abandonment.[20]

26. On top of this, individual factors can increase their vulnerability and disadvantage. For Crown wards who came to Canada as refugees in particular, these factors can include "geographic displacement, traumatic experiences in conflict zones, abrupt change of cultural and language context, as well as the severity of abuse or neglect to which the child was exposed prior to coming into care."[21]

27. After coming to into care, a lack of stability in the care environment provided by the provincial child protection agency has been shown to further contribute to the vulnerability and disadvantage of Crown wards.[22] A lack of placement stability, including a lack of family-based care and stability in the child's care worker relationship, further increases risk for substance use, mental illness and severe attachment issues and self-harm and suicidal ideation,[23] as well as incarceration and school failure.[24]

28. As a group, children and youth in care experience greater and more intense adversity than other Canadian children and youth. These pre-existing disadvantages include higher rates of developmental disability, poverty and the underlying reasons for coming into care. Significantly, when compared to other children with similar underlying disadvantages, children and youth in care experience measurably worse outcomes than other Canadian

[20] Affidavit of Kiaras Gharabaghi, aff'd April 4, 2018 ["Gharabaghi Affidavit"], para 10.
[21] *Ibid*, para 10, 14-23.
[22] *RA (Re)*, 2002 YKTC 28 at para 90, 181.
[23] Gharabaghi Affidavit, para 11a-c, 13c.
[24] Gharabaghi Affidavit, para 24.

children due to poverty as well as racism and other forms of systemic discrimination against children in care.[25]

29. Children and youth in care are less than half as likely than other Canadian children to complete a high school education (40%), and have only a 4% chance of attending post-secondary education. They experience higher rates of social isolation and limited safety nets that could facilitate security in housing or employment after "aging out" of care.[26]

b. Youth in care are more likely to "cross-over" to the criminal justice system and be seen as dangerous

30. Youth in care have been found to be more likely to end up incarcerated than to end up finishing high school.[27] Their disproportionate criminalization can be attributed to their history of trauma, as well as lack of safe or appropriate placement environments provided by provincial child protection agencies, and higher likelihood of police involvement due to their institutionalization.[28]

31. Once charged with a criminal offence, youth in care are disproportionately likely to face conviction and incarceration due to a lack of underlying stability and support networks. These early interactions with the criminal justice system can have cascading effects, and "youths who accumulate large numbers of minor charges for disciplinary infractions and incidents that take place 'in care' can appear in official juridical records to be serious or dangerous criminals when in fact what they have actually done are only very minor acts of disobedience or unruliness".[29]

32. Against this backdrop, the threshold in the *IRPA* for "serious criminality" is particularly low. Under s. 36(1)(a) of the *IRPA,* a foreign national or

[25] Gharabaghi Affidavit, para 12.
[26] Gharabaghi Affidavit, para 13a, 13g.
[27] Affidavit of Rebecca Bromwich, aff'd April 1, 2018, ["Bromwich Affidavit"] at para 15.
[28] Bromwich Aff, para 16.
[29] Bromwich Aff, para 18-19.

permanent resident will be found inadmissible on the grounds of serious criminality after a term of imprisonment of only six months or more has been imposed, in relation to an offence punishable by a maximum term of imprisonment of at least 10 years.

c. Racialized, Black and Indigenous youth face additional vulnerability and disadvantage

33. Indigenous and Black children and youth in Canada are more likely to be involved with child protective services than other children in Canada.[30]

34. Racialized youth, and in particular Indigenous and Black youth, experience far greater vulnerability than white youth once in the child protection system, owing to systemic discrimination on the basis of race, including processes and practices. This systemic discrimination in turn contributes to higher rates of criminal charges, incarceration, school suspensions and expulsions, substance use and placement instability.[31]

35. African Canadians are incarcerated at a rate three times higher than their general representation in society.[32] A growing body of evidence shows that African Canadians face harsher treatment by the police, higher rates of incarceration including pre-trial detention, and are more likely to have mandatory minimum sentences imposed on them that other people in Canada. Once incarcerated, Black or African Canadians are more likely to face systemic discrimination while in custody including by incurring institutional charges.[33]

36. In criminal sentencing decisions, courts have taken judicial notice of these systemic factors in sentencing decisions, including "the history of colonialism (in Canada and elsewhere), slavery, policies and practices of segregation, intergenerational trauma, and racism both overt and systemic

[30] Bromwich, para 20-28.
[31] *Ibid,* para 11d, 19.
[32] *R v Jackson*, 2018 ONSC 2527 at para 40.
[33] *Ibid*, at para 53.

as they related to African Canadians and how that has translated into socio-economic ills and higher levels of incarceration".[34]

37. The CCLA submits, particularly where systemic barriers have been raised before the Minister's delegate, it is incumbent on the Minister's delegate to consider whether and how their decision would exacerbate the pre-existing disadvantage of Black youth in care. It is also appropriate for this Court to acknowledge the systemic barriers affecting African Canadian youth, in assessing the reasonableness of the Minister's delegate's decision on judicial review.

d. Youth in care face barriers to obtaining Canadian citizenship

38. When non-citizen youth come into the care of the Crown, they face significant barriers to obtaining citizenship arising from both their personal disadvantage and the systemic barriers within the immigration and child protection systems.

39. Canada's citizenship regime included systemic barriers to citizenship for youth in care. Until 2017, the *Citizenship Act* prohibited minors from who did not have a Canadian parent from obtaining citizenship, unless they received a compassionate waiver from the Minister to permit them to apply on their own behalf.[35] Since 2017, the age requirement for a citizenship application has been repealed, and instead s. 5(1.04) of the *Citizenship Act* has provided that only a person with custody of a minor can make a citizenship application on their behalf.[36] For youth in care, this still means that they do not have any control over their citizenship status as only the Crown agency with custody of them could apply for citizenship.

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[34] *Ibid* at para 82.
[35] *Citizenship Act*, RSC 1985, c. C-29, ss. 5(1)(b), 5(2)(a), 5(3)(b)(i) (as at June 18, 2017).
[36] *Citizenship Act*, RSC 1985, c. C-29, s. 5(1.04), as amended by 2017, c 14, s. 1.

40. Children in care are vulnerable to failing to obtain citizenship (even where entitled to do so) owing to an absence of policies, procedures, or resources within provincial child welfare agencies as well as the federal Ministry of Citizenship and Immigration.[37] The lack of placement stability provided by provincial child protection agencies, poor education outcomes, and insufficient social resources experienced by youth in care contribute to their inability to independently navigate a complex immigration regime.

41. Finally, higher rates of involvement in the youth criminal justice system can be a legal barrier to obtaining citizenship. Where the pre-existing disadvantage of a youth in care has contributed to their likelihood of charges, conviction or incarceration,[38] it becomes even less likely that they will be able to successfully complete a citizenship application.

42. This constellation of factors means that youth in care face significant systemic barriers to citizenship, and are less likely to be able to obtain Canadian citizenship than other permanent resident youth who have the benefit of a more secure family status. In turn, this precariousness in their immigration status makes them more vulnerable.[39]

D. The Minister's delegate is required to proportionately balance the *Charter* value of equality with the statutory objectives of the IRPA.

43. Where an Applicant's s. 15 *Charter* rights are engaged by the exercise of the Minster's delegate's discretion under s. 44(2), the decision-maker is required to balance the severity of the interference with the *Charter* equality guarantee or its underlying values, with the statutory objectives of the *IRPA*.[40]

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[37] See for example, the absence of policy at the Nova Scotia Department of Community Services, Application Record, Affidavit of A. Abdi affirmed November 6, 2017, Exhibit D, p 106-107.
[38] Gharabaghi Affidavit, para 24.
[39] Bromwich Affidavit, para 23.
[40] *Doré, supra* at para 56.

44. As explained by the Supreme Court of Canada in *Loyola High School v Quebec (Attorney General*):

> Under *Doré*, where a discretionary administrative decision engages the protections enumerated in the *Charter* - both the *Charter's* guarantees and the foundational values they reflect - the discretionary decision-maker is required to proportionately balance the *Charter* protections to ensure that they are limited no more than is necessary given the applicable statutory objectives that she or he is obliged to pursue.[41]

45. This is a different question than whether the Applicant can establish before the reviewing Court that the decision of the Minister's delegate resulted in a breach of the Applicant's rights, as will be discussed below. All exercises of statutory discretion must comply with *Charter* values, whether or not the Applicant can show that their *Charter* rights have been directly breached by the outcome of the decision.[42]

46. Accordingly, where the Minister's delegate has failed to balance *Charter* equality values proportionately with the statutory objectives underlying s. 44(2) of *IRPA*, their decision cannot be reasonable. Abella J., writing for the majority in *Loyola*, expressed the proper approach on judicial review as follows:

> On judicial review, the task of the reviewing court applying the *Doré* framework is to assess whether the decision is reasonable because it reflects a proportionate balance between the *Charter* protections at stake and the relevant statutory mandate. Reasonableness is a contextual inquiry. In the context of decisions that implicate the *Charter*, to be defensible, a decision must accord with the fundamental values protected by the *Charter.*[43]

47. Failure to consider and proportionately balance the *Charter* value of equality with the statutory objectives of *IRPA* will render the decision of the Minister's delegate unreasonable.[44]

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[41] *Loyola, supra* at para 4.
[42] *Loyola, supra* at para 34.
[43] *Loyola, supra* at para 37.
[44] *Doré, supra* at para 57.

a. The balancing exercise

48. First, the Court must determine whether the decision by the Minister's delegate to refer an individual to an admissibility hearing under s. 44(2) – a decision that will result in a removal order and loss of permanent resident status – "engages the *Charter* by limiting its protections".[45] If so, the Court must determine "whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play".[46]

49. The purpose of s. 15 is "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society".[47] For the reasons discussed above, a s. 44(2) referral decision involving a non-citizen youth who is a former Crown ward will necessarily implicate the *Charter* value of equality because this protected group is more likely to be found inadmissible due to "serious criminality" and to be adversely affected by the citizenship and immigration regime due to their inherent vulnerability and pre-existing disadvantage.

50. The statutory objectives of the *IRPA* with respect to immigration are set out in s. 3(1). The objectives relevant to the decision to refer an individual to an admissibility hearing include:

> (e) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society; […]
>
> (h) to protect public health and safety and to maintain the security of Canadian society; [and]

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[45] *Loyola, supra* at para 39.
[46] *Doré, supra* at para 57, adopted in Loyola at para 39.
[47] *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 35 ["*Withler*"].

> (i) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;[48]

51. With specific reference to refugees, the objectives of the *IRPA* set out at s. 3(2) also include:

> (a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;
>
> (b) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;
>
> (e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings.

52. The Minister's delegate was obliged not only to consider the statutory objective of "public safety", but also the *IRPA*'s explicit commitment to Canada's international and domestic human rights obligations, and to balance these statutory objectives proportionately with the *Charter* value of equality as it relates to the Applicant.

53. In particular, where the Crown bears responsibility for the systemic inequality faced by the Applicant, as a non-citizen former Crown ward, the perpetuation of this disadvantage by the Minister's delegate's decision would be particularly unreasonable and offensive to the *Charter* value of equality.

> b. <u>In the absence of proportionate balancing of the *Charter* right to equality with the *IRPA* statutory objectives, the decision cannot be reasonable.</u>

54. In order to satisfy a reasonableness standard of review, the decision of the Minister's delegate must transparently and intelligibly engage with the

[48] *IRPA,* s. 3(1)(e), (h), (i).

reconciliation or balancing of Charter values with competing statutory objectives or public interests.[49]

55. A decision by a Minister's delegate which considers only the presence of "humanitarian and compassionate" factors is not sufficient to discharge the obligation to consider *Charter* values. As has been found by this Court in the past, it is an error to conflate s. 15 *Charter* considerations with humanitarian and compassionate considerations.[50]

56. A decision which is entirely silent on the *Charter* issues raised before the Minister's delegate will accordingly not be reasonable.

E. A referral decision under s. 44(2) that will result in substantive inequality under s. 15 is invalid.

57. When dealing with a non-citizen youth who is a former Crown ward, the Minister's delegate must also consider whether a referral decision under s. 44(2) of the *IRPA* will result in a breach s. 15 of the *Charter*. The decision will do so if it exacerbates that individual's pre-existing disadvantage, or perpetuates stereotypes about the "danger" of youth in care and their value in Canadian society.

58. This obligation to uphold the *Charter* is not limited to administrative decision-makers with the authority to consider questions of law. Further, for a breach to be established, it is not necessary for the Applicant to allege or for the Court to find that s. 44(2) of the *IRPA* itself offends the *Charter*. The exercise of the Minister's delegate's discretion in applying s. 44(2) infringes the *Charter* if the decision results in the breach of a *Charter* right.

59. The following explanation by Professor Hogg was endorsed by the Supreme Court of Canada in *Eldridge*:

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[49] *Thompson v Canada (Attorney General),* 2015 FC 985 at para 41.
[50] *Begum v Canada (Minister of Citizenship and Immigration)*, 2017 FC 409 at para 67.

> Action taken under statutory authority is valid only if it is within the scope of that authority. Since neither Parliament nor a Legislature can itself pass a law in breach of the *Charter*, neither body can authorize action which would be in breach of the *Charter*. Thus, the limitations on statutory authority which are imposed by the *Charter* will flow down the chain of statutory authority and apply to regulations, by-laws, orders, decisions and all other action (whether legislative, administrative or judicial) which depends for its validity on statutory authority.[51]

60. When exercising delegated powers, an administrative decision-maker may not make an order that would result in an infringement of the *Charter* right to equality, because it would exceed their jurisdiction and therefore be invalid.[52]

a. <u>This court can consider whether the Minister's delegate's decision breached the *Charter*</u>

61. This Court is empowered to consider whether the decision of the Minister's delegate to make a referral to an admissibility hearing under s. 44(2) of the *IRPA* results in substantive inequality for the Applicant, and thus breaches s. 15 of the *Charter*.

62. The Minister's delegate may not make a referral to an admissibility hearing under s. 44(2) where that decision will result in substantive inequality, including by perpetuating the pre-existing disadvantage faced by former Crown wards who are non-citizens because they faced barriers to obtaining citizenship while in care.

63. The onus of proving a breach of *Charter* rights rests with the party asserting the breach. Whether a discretionary decision resulted in the denial of substantive equality rights "is a question of mixed fact and law within the

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[51] *Eldridge v British Columbia (Attorney General)*, [1997] 3 SCR 624 at para 21, citing Hogg, Peter, *Constitutional Law of Canada* (3rd ed. 1992 (loose-leaf)), vol 1 at pp 34-8.3 and 34-9.

[52] *Canada (Attorney General) v PHS Community Services*, SCC 2011 44, at para 117 ["*PHS Community Services*"]; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at para 87.

jurisdiction of the reviewing Court to be established on a balance of probabilities".[53]

64. In considering whether a breach of s. 15(1) has occurred, the Court ought to consider evidence that seeks to establish a claimant's historical position of disadvantage on enumerated or analogous grounds.[54] As the first judicial body empowered to consider whether there has been a breach of the Applicant's *Charter* rights as a result of the s. 44(2) decision, it is proper for such evidence to be received on an application for judicial review of the decision of the Minister's delegate. The evidentiary threshold "need not be onerous, but the evidence must amount to more than a web of instinct".[55]

65. Where the breach of a *Charter* right has been established, the Court must determine whether the government has been able to establish that the breach was minimally impairing and therefore justified under s. 1 of the *Charter*.[56] Remedies are available under s. 24(1) of the *Charter* where a breach has been established that is not justified under s. 1.

b. <u>A referral decision under s. 44(2) has a differential impact</u>

66. A Minister's delegate's decision under s. 44(2) to refer an individual to an admissibility hearing has a differential impact on non-citizen youth who are former Crown wards on the protected and intersecting grounds of race, age, family status and citizenship.

67. For the reasons set out above, these individuals are at a greater risk of being found to be inadmissible for serious criminality than other foreign

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[53] *Reis v. Canada (Minister of Citizenship and Immigration)* 2012 FC 179, at para 22
[54] *Kahewistahaw, supra* at para 21, citing *Withler, supra* at para 38 and *Quebec v A, supra* at para 327.
[55] *Kahewistahaw, supra* at para 34.
[56] This was the approach taken in the minority decision in *Loyola*, *supra* which finds that Loyola's *Charter* right to religious freedom was breached, and that the infringement was not minimally impairing (see para 88). See also *PHS Community Services, supra* at paras 127-135.

nationals or permanent residents, with a particularly disproportionate effect on Black youth who were formerly in care.

c. A referral decision under s. 44(2) perpetuates disadvantage

68. The inevitable consequence of a referral decision under s. 44(2) against a non-citizen youth who is a former Crown ward under the *IRPA* regime is that a removal order will issue, which immediately deprives an individual of permanent resident status and all associated rights and benefits.

69. An inadmissibility referral under s. 44(2) therefore exacerbates the vulnerability of a group that experiences pre-existing disadvantage, in a manner which violates the *Charter* guarantee of substantive inequality.

70. It also perpetuates the discriminatory stereotype that youth in care, and especially Black youth in care, are more "dangerous" or less deserving of concern, respect and consideration than other people in Canada, including a chance at rehabilitation after incarceration.

71. The decision of the Minister's delegate to refer a non-citizen youth who is a former Crown ward to an admissibility hearing impacts that individual in a manner that does not correspond with their actual characteristics or circumstances, or reflect the actual risk these individuals pose to Canadian public safety.[57] This government action compromises the essential human dignity of the protected group, contrary to the purpose of s. 15(1).[58]

d. The Minister's delegate's decision is not saved by s. 1

72. It is the government's burden under s. 1 of the *Charter* to justify a breach of rights under s. 15(1) as a "reasonable limit" on a balance of probabilities, within the factual and social context of the case.[59]

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[57] *Withler*, *supra* para 36.
[58] *Quebec v A, supra* at para 164.
[59] *R v Oakes*, [1986] 1 SCR 103.

73. Though the statutory objectives of the *IRPA* may be pressing and substantial, there is no proportionality between these objectives and the means used to achieve them. As set out above, public safety is only one objective of the *IRPA* regime, which also seeks to uphold Canada's "respect for the human rights and fundamental freedoms of all human beings" and "offering protection to the displaced and persecuted".[60]

74. The CCLA submits that the exercise of discretion under s. 44(2) to refer a non-citizen youth who is a former Crown ward to an admissibility hearing:

    a. is not rationally connected to the actual risk posed by an individual owing to the threshold of "serious criminality", or the balance of statutory objectives under the *IRPA*;

    b. is not minimally impairing to the governmental objective of Canadian public safety, which could be achieved by other less onerous means, including ameliorative measures for former youth in care; and

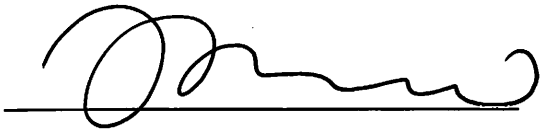
    c. is not proportionate to the harm caused by the decision.

PART IV – ORDER SOUGHT

75. The CCLA offers these submissions to assist the Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at Halifax, Nova Scotia, this 8th day of June, 2018.



Nasha Nijhawan
Kelly McMillan
Counsel for the Intervener, CCLA

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[60] IRPA s. 3(1)(h), 3(2)(a), (b), and (e).

PART V - AUTHORITIES

Statutes and Regulations

1. Canadian Charter of Rights and Freedoms, Constitution Act, 1982, ss. 1, 15, 24(1)
2. *Citizenship Act*, R.S.C., 1985, c. C-29, ss. 5
3. *Citizenship Act*, R.S.C., 1985, c. C-29 as amended by 2017, c.14, ss. 5
4. *Immigration and Refugee Protection Act,* SC 2001, c 27, ss. 3,

Case Law

5. *Begum v Canada (Minister of Citizenship and Immigration)*, 2017 FC 409
6. *Canada (Attorney General) v PHS Community Services,* 2011 SCC 44
7. *Doré v. Barreau du Quebec,* 2012 SCC 12
8. *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624
9. *Inglis v. British Columbia (Minister of Public Safety),* 2013 BCSC
10. *JS v Nunavut (Minister of Health and* Social Services), 2006 NUCJ 20
11. *Kahkewistahaw First Nation v. Taypotat,* 2015 SCC 2 S.C.R.
12. *Law Society of British Columbia v Andrews,* [1989] 1 SCR 143
13. *Loyola High School v Quebec (Attorney General*), 2015 SCC 12
14. *Quebec (Attorney General) v A,* 2013 SCC 5
15. *R v Jackson*, 2018 ONSC 2527
16. *R v Oakes,* [1986] 1 SCR 103
17. *R.A. (Re), 2002 YKTC 28*
18. *Reis v. Canada (Minister of Citizenship and Immigration)* 2012 FC 179
19. *Revell v. Canada (Minister of Citizenship and Immigration),* 2017 FC 905
20. *Sharma v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 319
21. *Slaight Communications Inc v Davidson,* [1989] 1 SCR 1038

22. *Tabingo v. Canada (Citizenship and Immigration)*, 2014 FCA 191

23. *Thomson v Canada (Attorney General),* 2015 FC 985

24. *Tran v Canada (Public Safety and Emergency Preparedness),* 2017 SCC 50

25. *Withler v Canada (Attorney General),* 2011 SCC 12 Thompson v Canada (Attorney General), 2015 FC 985