Court File No. IMM-8432-22

FEDERAL COURT

BETWEEN

JUDE UPALI GNANAPRAGASAM

THE CANADIAN COUNCIL FOR REFUGEES

Applicants

-and-

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MINISTER OF CITIZENSHIP AND IMMIGRATION

THE ATTORNEY GENERAL OF CANADA

Respondents

-and-

DAVID ASPER CENTER FOR CONSTITUTIONAL RIGHTS

CANADIAN CIVIL LIBERTIES ASSOCIATION

Intervenors

MEMORANDUM OF FACT AND LAW OF THE INTERVENER (CCLA)

Pursuant to the Order of Ahmed J. delivered on December 20, 2023

OVERVIEW

1. The Supreme Court of Canada in *Canadian Council for Refugees v. Canada (Citizenship and Immigration)*[1] clarified that in the immigration and refugee law context, section 7 of the *Charter* must be applied consistently with the established law on section 7 engagement. As demonstrated by examples from the extradition and criminal law context, this requires a finding that s. 7 permeates the entire removal process—from the initiation of cessation proceedings up until a person is ultimately removed from Canada. The fact that a particular process is just one step in a multi-tiered removal scheme, or that *Charter* rights can be assessed at a later step in that scheme, does not preclude *Charter* engagement earlier on in the removal process.

2. Any asserted "safety valves" must be considered in the assessment of whether an infringement is in accordance with the principles of fundamental justice, they too cannot preclude a finding that a person's s. 7 *Charter* rights are engaged. A purported safety valve may cure a *Charter* infringement if it is responsive to the identified deprivation, does not place undue reliance on discretionary measures to cure the constitutional infringement, prevents the deprivation from occurring, and can be accessed by the claimant. Only then can an infringement on a person's s. 7 *Charter* rights comply with the principles of fundamental justice.

PART I and II – THE FACTS AND THE ISSUES

3. The CCLA relies on the record filed herein and the facts set out in the Applicants' Memorandum of Fact and Law. The key issue raised by the parties that the CCLA will be addressing is whether the operation of the impugned provisions violate s. 7 of the *Charter.*

PART III – THE LAW AND ARGUMENT

Framework for Assessing Section 7 of the *Charter*

4. Section 7 of the *Charter* protects the right of everyone to not be deprived of their life, liberty or security of the person interests except where that deprivation is in accordance

[1] 2023 SCC 17 [*CCR*].

with the principles of fundamental justice.[2] Courts have found that determining whether a person's s. 7 *Charter* rights have been violated is a two-step process.[3] First, a determination must be made about whether the impugned legislation or state action infringes on a person's life, liberty or security of the person.[4] This first step is often referred to as an assessment of whether s. 7 of the *Charter* is "engaged". The second step requires the challenger/rights claimant to demonstrate that the deprivation is not in accordance with the principles of fundamental justice.[5]

5. The Supreme Court of Canada has made clear that these two steps must be kept distinct.[6] In particular, it has held that the assessment of potential safety valves should be considered only in an assessment of whether a deprivation is in accordance with the principles of fundamental justice, not when considering whether s. 7 of the *Charter* is engaged.[7] A finding that a potential safety valve prevents *Charter* engagement therefore constitutes a legal error.[8]

I. Determining Engagement under Section 7 of the *Charter*

6. The Supreme Court's decision in *CCR* confirmed that, at the engagement stage, a challenger must demonstrate two things. First, they must demonstrate that the effects of the legislation or state action fall within the scope of the interests protected by s. 7. The Supreme Court has noted that this first part of the engagement analysis asks broadly: "whether the legislation 'engage[s]' those interests, in the sense that it causes a limitation or negative impact on, an infringement of, or an interference with" those interests.[9]

[2] *Canadian Charter of Rights and Freedoms*, s. 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c11.
[3] See e.g., *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 57 [*Bedford*]; *Ontario (AG) v Bogaerts*, 2019 ONCA 876 at para 46; *R v JJ*, 2022 SCC 28 at para 360.
[4] *CCR* at para 56.
[5] *Bedford* at para 93;*)*, *CCR* at para 56.
[6] See e.g., *CCR* at para 56; *Bedford,* at paras 55, 70
[7] *CCR* at paras 71, 73
[8] While there are circumstances where a Court may find that there are preventative mechanisms within legislation which prevent the engagement of the *Charter,* the Supreme Court has specifically found that curative measures like those raised in this application, often referred to as "safety valves", cannot be considered at the stage of *Charter* engagement: CCR at paras 71, 73.
[9] *CCR* at para 56, citing *Carter,* at para 55 and *Bedford* at paras 57-58, 90, and 111.

7. For the second step of the engagement assessment, a challenger must demonstrate that the effects on the s. 7 protected interests are attributed to state action.[10] At this stage, all the rights claimant is required to show is a "sufficient causal connection" between the impugned state action and the effects on a person's s. 7 interests, or that the state action increases the risk that a s. 7 *Charter* violation will occur.[11]

B) Section 7 Engagement in Multi-Step Proceedings

8. Courts outside of the immigration context have repeatedly found that the protections that emanate from s. 7 of the *Charter* are engaged by state action even when that state action is just one part of a multi-step process that may ultimately encroach on a s. 7 interest. State action cannot be immunized from *Charter* scrutiny simply because it does not fall right at the end of a series of steps that may ultimately implicate *Charter* rights. It also cannot be immunized simply because there is another step in the scheme that takes the person's *Charter* rights into account. Instead, a Court must assess whether there exists a "sufficient causal connection" between the impugned government action at every step of a process that ultimately implicates a person's s. 7 interests.[12] Given the low causation threshold established in *Bedford,* it is likely that s. 7 will be engaged at each substantive step in a process that may result in a s. 7 *Charter* infringement.

9. It is appreciated that these established principles outside of the immigration law context may seem to run counter to findings in numerous cases in the immigration law context, such as *Tapambwa v. Canada (MCI)*[13] and *Kreishan v Canada (MCI),*[14] which have repeatedly found that *Charter* s. 7 is not engaged in the immigration context until just prior to a person's removal from Canada.[15] However, the Supreme Court in *CCR* clarified that

[10] *CCR* at para 109.
[11] *CCR* at para 60; *Bedford* at paras 75-76.
[12] *Bedford* at para 75.
[13] *Tapambwa v. Canada (MCI),* 2019 FCA 34 at paras 81-87, [*Tapambwa*].
[14] *Kreishan v Canada (MCI)*, 2019 FCA 223 at paras 116-120 124-125, 133.
[15] See also: *Revell v. Canada (Citizenship and Immigration),* 2019 FCA 262 at para 38; *Moretto v. Canada (Citizenship and Immigration),* 2019 FCA 261 at para 43 which also rely on the *dicta* from the Supreme Court's decisions in *B010 and Febles* to come to the conclusion that s. 7 is not engaged.

the *dicta* from the Court's decision in *B010*[16] and *Febles*[17] relied on in this line of cases does not stand for this principle.[18] Therefore, these cases can no longer be considered good law and should not be followed. As noted by Professor Gerald Heckman, as he then was, the threshold applied in this line of cases implies a "standard of causation more onerous than the 'sufficient causal connection' standard adopted by the Supreme Court in *Bedford.* It requires that state action be a foreseeable and necessary cause of the prejudice to the person's s. 7 interest – a standard expressly rejected in *Bedford.*"[19]

10. *CCR* clarified that, moving forward, an assessment of s. 7 engagement in the immigration law context must be undertaken in accordance with established law on s. 7.[20] This means that the assessment of a potential infringement should comply with established s. 7 jurisprudence[21] and that the *Bedford* principles of causation must be applied to determine if state action is responsible for any infringement that occurs throughout the cessation/removal process.[22]

11. A review of the application of s. 7 in other legal contexts, including extradition and criminal law, demonstrates that when the *Bedford* causation principles are properly applied to a multi-step process that may ultimately implicate a s. 7 *Charter* interest, s. 7 is engaged, throughout the entire process. As a result, the state action must comply with the principles of fundamental justice at each and every stage.

[16] *B010 v Canada (Citizenship and Immigration),* 2015 SCC 58.
[17] *Febles v Canada (Citizenship and Immigration),* 2014 SCC 68.
[18] *CCR*, at paras 72-73.
[19] Gerald Heckman, "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 UNBLJ 312 at 351.
[20] *CCR* at para 73.
[21] The Courts have also previously imposed a heightened threshold to determine whether the effects of deportation fall within the scope of interests protected by s. 7 that is not in line with established s. 7 jurisprudence including the Supreme Court's seminal case: *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 [*Blencoe*]. For example, drawing on commentary from Professors Hamish Stewart, Donald Galloway and Jamie Liew, Gerald Heckman sets out in "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 UNBLJ 312 how the jurisprudence on rights infringement in the immigration law context is out of step with the Supreme Court's decision in *Blencoe*. Specifically, see p. 335-337 for a discussion on how the assessment of liberty interests in the immigration law context is not in line with established s. 7 jurisprudence; and p. 346-347 for a discussion on how an assessment of security of the person in the immigration context could be read consistently with *Blencoe*—but has not been.
[22] *CCR* at para 60.

C) Section 7 of the Charter is Engaged Throughout Other Multi-Tiered Schemes

12. Extradition and criminal law both involve complex, multi-tiered schemes like the immigration removal process. Like in immigration, in both extradition and criminal law, there are multiple steps between the initial phases of the process and the action that can result in a potential *Charter* infringement (a person's ultimate extradition from Canada or imprisonment). Moreover, the final steps in both processes provide robust s. 7 protections from infringements on a person's *Charter* rights. Yet, in both processes, the Courts have clearly found that section 7 is not only engaged at the final stage, of these processes but throughout the entirety of the schemes.

i. Section 7 is Engaged Throughout the Entirety of the Extradition Process

13. For example, like the immigration context, the extradition process is made up of several stages where independent decisions are made by different decision makers before a person can ultimately be extradited from Canada. First, after a requesting state has sought a person's extradition from Canada, the Department of Justice must decide 1) whether the conduct for which extradition is sought is considered criminal in both Canada and the requesting state and 2) whether the offence involved could have resulted in a jail sentence of two years or more, had it taken place in Canada. If these requirements are met, the Department of Justice can commence extradition proceedings by issuing an "Authority to Proceed".[23]

14. If the Department of Justice decides to issue the Authority to Proceed, the next step is an extradition hearing, which takes place before a judge of the Superior Court.[24] At the hearing, the extradition judge examines the request for extradition from the requesting state and the supporting material to determine whether sufficient evidence exists for committal.[25] Typically, this will require the judge to determine if the evidence provided by the requesting state would be sufficient to commit the person for trial in Canada if the

[23] *Extradition Act*, SC 1999, c 18, ss 3(1),15; Canada, "General Overview of the Canadian Extradition Process", online: <https://www.justice.gc.ca/eng/cj-jp/emla-eej/extradition.html>.
[24] *Extradition Act,* s 24(1); Canada, "General Overview of the Canadian Extradition Process", online: <https://www.justice.gc.ca/eng/cj-jp/emla-eej/extradition.html>.
[25] *Extradition Act*, s 29(1).

conduct had occurred in Canada.[26] If the judge is not satisfied that the necessary requirements have been met, the person will not be extradited. [27]

15. Finally, if the extradition judge finds that there is sufficient evidence, the proceedings move to a final phase where the Minister of Justice must decide whether to order extradition.[28] Section 25 of the *Extradition Act*[29] creates a broad discretion that the Minister is able to exercise during this proceeding to determine whether to order a person's surrender and on what terms. In doing so, the Minister "must examine the desirability of surrendering the fugitive" and must consider "the need to respect the fugitive's constitutional rights."[30] It is important to note the robust nature of protections provided in this final stage. At this stage, the Minister of Justice is fully able to halt extradition. Indeed, the Minister must refuse to surrender where it would be contrary to the principles of fundamental justice under s. 7 of the *Charter*.[31]

16. As noted in *CCR,* the Courts have repeatedly found that a proper application of s. 7 of the *Charter* requires that it "permeate" the entire extradition scheme.[32] That is, the Courts have found that s. 7 of the *Charter* is engaged at each of the three phases of the extradition process and therefore each decision, not just the final one, must be made in accordance with the principles of fundamental justice.[33] This is despite the robust nature and mandated *Charter* compliance of the Minister's final determination.

ii. Section 7 is Engaged Throughout the Entirety of Criminal Proceedings

17. Similarly, the Courts have found that *Charter* s. 7 is engaged throughout the criminal law process, from the point that the police question an accused person to when a person is

[26] Canada, "General Overview of the Canadian Extradition Process", online: <https://www.justice.gc.ca/eng/cj-jp/emla-eej/extradition.html>.
[27] Canada, "General Overview of the Canadian Extradition Process", online: <https://www.justice.gc.ca/eng/cj-jp/emla-eej/extradition.html>.
[28] *Extradition Act*, ss 40 – 47; Canada, "General Overview of the Canadian Extradition Process", online: <https://www.justice.gc.ca/eng/cj-jp/emla-eej/extradition.html>.
[29] SC 1999, c 18.
[30] *United States of America v Cobb,* 2001 SCC 19 [*Cobb*] at para 34.
[31] *India v Badesha*, 2017 SCC 44 at para 38. See also: *United States v Burns,* 2001 SCC 7 at para 32.
[32] *CCR* at para 73.
[33] See e.g. *Cobb* at paras 30, 34.

sentenced by a judge.[34] As a result, the principles of fundamental justice require both procedural and substantive safeguards throughout the criminal law process.[35] The engagement of s. 7 throughout the process is required despite there being numerous steps in the process where an accused person can challenge the validity of the charges laid against them and the availability of an assessment of their *Charter* rights at the end stages prior to their liberty interests being ultimately infringed upon.

18. For example, s. 7 protects an accused person's right to silence when questioned by the police.[36] Specifically, upon arrest, s. 7 is engaged during police questioning as the results of this questioning may ultimately contribute to an individual's liberty being deprived by the state.[37] Similarly, trial procedures and safeguards are fundamentally shaped by s. 7. Given the liberty interest at stake, trials must be conducted in accordance with the principles of fundamental justice.[38] Finally, s. 7 is engaged when a person is ultimately sentenced by a judge.

19. Section 7 is consequently engaged throughout the criminal process because of the *potential* deprivation of liberty that would result from an accused person being found guilty. Section 7 is engaged at any given step of the process, even where the risk of a deprivation of liberty may not materialize due to subsequent stages in the process which can prevent the deprivation of liberty (e.g., the existence of prosecutorial discretion or ministerial discretion to not move forward with a charge, a non-carceral sentence, or an acquittal). Moreover, s. 7 is engaged despite robust *Charter* protections at the final sentencing stage where the judge will determine the nature of the sentence and whether a carceral sentence will be imposed that will ultimately infringe upon a person's liberty interest.[39]

[34] See e.g. *R v Singh,* 2007 SCC 48 at para 22; *R v Safarzadeh-Markhali,* 2016 SCC 14 at para 20.
[35] Examples of procedural guarantees of trial fairness can be found in *R v Crevier*, 2015 ONCA 619, at para 52; *R v Rose,* [1998] 3 SCR 262, at para 98; *R v RV*, 2019 SCC 41 at paras 38-39. The Supreme Court has also found that provisions of the *Criminal Code* must substantively accord with the principles of fundamental justice. See e.g. *R v Vaillancourt,* [1987] 2 SCR 636 at para 26.
[36] *R v Noble*, [1997] 1 SCR 874 at paras 70-71.
[37] See e.g. *R v Hebert,* [1990] 2 SCR 151 at p. 162; *R v Singh,* 2007 SCC 48 at para 22.
[38] See e.g. *R v Khelawon*, 2006 SCC 57 at para 48.
[39] See e.g. *R v Safarzadeh-Markhali,* 2016 SCC 14 at para 20.

D) Established Causation Principles Require Section 7 Engagement Where State Action Contributes to or Increases Risk of Deprivation

20. The engagement of s. 7 in these other contexts, namely in extradition and criminal law processes, demonstrates how to properly apply the *Bedford* causation standard. It establishes that state action that increases the risk of a deprivation of a s. 7 interest, engages s. 7 of the *Charter.*[40] The above case studies demonstrate that, even if there are intervening steps or other protections in place, if state action increases the risk of a deprivation, s. 7 of the *Charter* is engaged.

21. Intuitively, this makes sense. If the state engages in an action that makes it more likely that a person's s. 7 rights will be infringed, whether that be by issuing an authority to proceed, placing the person under arrest, or cessating their refugee status, those actions should be procedurally fair and not grossly disproportionate, overbroad or arbitrary. That is, they should be in accordance with the principles of fundamental justice.

22. Moreover, these principles should be adhered to irrespective of the *Charter* protections accorded to a person during later stages of the process. Where the outcome of one stage or procedure initiates or impacts the outcome of another, unfairness in an earlier stage will taint the outcome at a later stage.[41] The circumstances which occurred in *United States of America v. Cobb* are illustrative.[42]

23. In *Cobb,* the U.S. requested the extradition of the Appellants on the grounds that they had engaged in a telemarketing scheme that defrauded American residents from Canada.[43] After the extradition request had been made, the American judge that would likely hear the Appellants' case noted that, if the Appellants did not cooperate with the extradition process, they would get "the absolute maximum jail sentence."[44] The prosecuting attorney had also hinted on TV that, if the Appellants did not cooperate, they would be subjected to

[40] See the s. 7 engagement analysis in *Bedford* at paras 58-72. See also: *Charkaoui v Canada (Citizenship and Immigration),* 2007 SCC 9 at para 12.
[41] *Cobb* at para 44.
[42] *Cobb* at paras 3-10.
[43] *Cobb* at paras 3-4.
[44] *Cobb* at para 7.

homosexual rape in prison.[45]

24. Although the Minister of Justice would have had the discretion and ability to stop the extradition in the final stages of the proceedings because of these comments, the judge overseeing the committal phase stayed the proceedings pursuant to *Charter* s. 7 and the doctrine of abuse of process. The judge found that the statements were an attempt to improperly pressure the Appellants to stop their attempts at contesting the extradition request and therefore were an attempt to unduly influence the extradition proceedings.[46]

25. When assessing whether the judge erred in stopping the extradition from proceeding to the Ministerial phase, the Supreme Court found that "[n]othing the Minister could have done would address the unfairness which would taint a committal order obtained under the present circumstances."[47] The Supreme Court upheld the extradition judge's decision to apply s. 7 of the *Charter*, despite the availability in the final Ministerial phase of additional remedies to address the *Charter* breach at issue—including asking the requesting state for assurances.[48] The Court thereby demonstrated that where there is a multi-step process, the ability to rectify a s. 7 *Charter* infringement later in the process does not preclude engagement of s. 7 at an earlier stage.

E) Application of **Bedford** *Principles in the Immigration Context Results in Section 7 Engagement*

26. Applying the *Bedford* causation standard in the immigration context should result in a determination that s. 7 is engaged in cessation proceedings. That the immediate effects of a cessation proceeding are caused by state action will typically be obvious.[49] However, even demonstrating a sufficient causal connection to the longer-term effects of that proceeding, like the person's ultimate removal from Canada, should be straightforward in most cases.

[45] *Cobb* at paras 8-9.
[46] *Cobb* at para 14.
[47] *Cobb* at para 44.
[48] *Cobb* at paras 46, 48, 51.
[49] *CCR* at para 109.

27. The significant interconnectedness between decisions made by the Immigration and Refugee Board (IRB) with respect to admissibility and refugee protection and whether a person is ultimately removed from Canada weigh strongly in favour of a court finding a sufficient causal connection. This is the case even where there are multiple other steps that may impact whether a person is ultimately allowed to remain in Canada. Indeed, academic commentators positively referenced in *CCR* have noted that the significant downstream impacts of IRB proceedings on the outcome of a person's eventual removal make it unclear why those prior decisions would not have a "sufficient causal connection" to the potential rights infringements faced by a person upon removal to their home country.[50] This is particularly the case given the impact of factual findings made by the IRB on later decision makers, the necessary precondition that these decisions occur before removal takes place, and the joint interpretation of overlapping legislative provisions at different stages of the process.[51]

28. This holds true in the cessation context where the IRB cessation proceeding is a necessary precursor for the person's removal from Canada and is the proceeding which substantially lays the groundwork for a removal order to be issued.[52] Although it is the Minister's delegate who ultimately issues the removal order, they are essentially bound to do so as a result of the decision at the cessation hearing to remove a person's refugee status.[53]

29. Indeed, the link between cessation proceedings and removal is more proximate than the early steps in either the extradition or criminal law process with the final outcomes of those processes. Once a removal order is issued (which is a direct, essentially non-discretionary outcome of the cessation hearing)[54] there are no other mandated "steps" in the removal process. There is no equivalent to a sentencing hearing in the criminal law context or a

[50] Colin Grey, "Thinkable: The Charter and Refugee Law after Appulonappa and B010" (2016) 76 SCLR (2d) 111 at 137. See also: Gerald Heckman, "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017) 68 UNBLJ 312 at 351-352.
[51] Colin Grey, "Thinkable: The Charter and Refugee Law after Appulonappa and B010" (2016) 76 SCLR (2d) 111 at 136-137.
[52] Through the combined operation of ss. 40.1(1), 46(1)(c.1), and 108(3) of the *IRPA,* a successful application to cease refugee protection renders the person inadmissible to Canada, removes their permanent resident status, and deems their refugee claim to be rejected. Because they are rendered inadmissible, a removal order should be issued against them by a Minister's delegate pursuant to s. 228(1)(b.1) of the *Immigration and Refugee Protection Regulations.*
[53] See e.g. *Cha v Canada*, 2006 FCA 126 [*Cha*] at para. 35.
[54] *Cha* at para 35.

robust Ministerial Review in the extradition context that must take place before removal occurs. The removal order is the last step in the mandated process and the only meaningful opportunity that an Applicant may have to assert their *Charter* rights. As a result, cessation proceedings clearly increase the risk that the Applicant will be removed from Canada, thereby meeting the *Bedford* causation threshold.

F) Conclusion on Section 7 Engagement

30. The Supreme Court's decision in *CCR* has confirmed that there should be no barriers to a consideration of whether s. 7 of the *Charter* is engaged in a cessation proceeding. The fact that removal will not necessarily be immediately triggered after a cessation decision, or that there may be other avenues in which an Applicant can have their *Charter* rights considered, does not preclude a finding that s. 7 is engaged. Instead, as in the extradition and criminal law context, s. 7 should be found to permeate the entire removal process, including the Applicant's cessation proceedings.

II. The Principles of Fundamental Justice & Safety Valves

31. Where a rights claimant has demonstrated that s. 7 is engaged, the Court must assess whether the infringement of s. 7 interests accords with the principles of fundamental justice. This step requires (a) the identification of the relevant principle(s) of fundamental justice, and (b) a determination as to whether the deprivation has occurred in accordance with such principle(s).[55]

32. The remainder of CCLA's submissions focus on how the Court ought to assess the adequacy of the potential safety valves in cessation cases. Potential legislative "safety valve[s]" can in certain circumstances safeguard against an otherwise arbitrary, overbroad or grossly disproportionate s. 7 infringement, as demonstrated by the Supreme Court decisions in *PHS* and *CCR*.[56] A consideration of potential legislative safety valves is therefore germane to the assessment of the principles of fundamental justice.[57]

[55] *Malmo-Levine* at para 83; *R v White*, [1999] 2 S.C.R. 417 at para 38; *R v S(RJ)*, [1995] 1 SCR 451 at 479.
[56] *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para 113 [*PHS*]; *CCR* at para 10.
[57] *CCR* at para 148.

33. When assessing potential safety valves, this Court is to consider the impugned legislative provision(s) in their entire statutory context, taking into consideration the impugned provisions themselves and the broader legislative scheme to which the provision belongs.[58]

34. In this case, the following potential safety valves have been identified by the parties: 1) the s. 44 process, which allows the Minister to refer a matter to the Immigration Division for inadmissibility; 2) requests to the Minister "not to pursue cessation"; 3) administrative deferrals of removal (DRs); 4) Humanitarian and Compassionate (H&C) applications; and 5) Pre-Removal Risk Assessment (PRRA) processes.[59] The availability of judicial review has also been raised by the Respondents, however, the Supreme Court in *CCR* explicitly rejected judicial review as a form of safety valve or statutory safeguard.[60]

35. In *CCR,* the Court stated that the relevant inquiry when assessing proposed safety valves is whether these mechanisms are sufficient to ensure that "no deprivations" contrary to the principles of fundamental justice occur.[61] To be considered curative, a safety valve must be responsive, remedial, and accessible.[62] The Supreme Court decisions in *Appulonappa, Nur* and *Anderson* furthered a principled understanding of a fair and transparent approach to safety valves.[63] These cases demonstrate that an effective safety valve must be targeted to cure the specific deprivation in question and address the deprivation before it occurs. This Court must therefore carefully assess whether any proposed safety valve: (a) is responsive to the specifically identified deprivation(s), (b) places an undue reliance on discretionary measures to cure *Charter* infringements; (c) prevents the deprivation(s) from occurring, and (d) is actually accessible to the claimant.

[58] *CCR* at para 69.
[59] Respondent's Memorandum of Argument at paras 15-16.
[60] *CCR* at para 77.
[61] *CCR* at para 149, 169 [emphasis added].
[62] *CCR* at paras 76, 151, 158-159.
[63] *R v Appulonappa,* 2015 SCC 59 , [2015] 3 SCR 754 at paras 72-73; *R v Nur*, 2015 SCC 15, [2015] 1 SCR 773 at paras 85-97 [*Nur*]; *R v Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 17.

A) Safety Valves Must be Responsive to the Identified Deprivation(s)

36. To be effective – that is, to ensure that "no deprivations" contrary to the principles of fundamental justice occur – safety valves must be targeted at, and responsive to, the specific deprivations that are the subject of the *Charter* challenge.[64] In *CCR*, for instance, the appellants' liberty and security of the person interests were implicated in part by the risk of *refoulement* to their countries of origin, following their return to the United States, because of the barriers to claiming refugee protection there.[65]

37. In *CCR*, the Court suggested that the legislative provisions giving effect to the Safe Third Country Agreement ("STCA") survived constitutional scrutiny because the potential safety valves identified provided "curative relief" against the risk of *refoulement*.[66] The Supreme Court found that STCA claimants in Canada could be "exempted from return" to the United States, which would prevent the harms that flowed from that return. According to the Supreme Court, the potential safety valves could therefore be exercised "in order to address the specific deprivation at issue", namely, the risk of *refoulement* to a country of risk, set into motion by a return to the United States.[67]

38. In the present case, the Applicants have raised three categories of infringements: (1) those that result from the cessation proceedings themselves, (2) those that result from the automatic loss of PR status following a cessation decision and (3) those that result from removal.[68] As noted above, for any potential safety valves identified in this case, this Court must determine if they are directly responsive to the deprivations at issue.

B) Safety Valves Must Not Place an Undue Reliance on Discretionary Mechanisms

39. In *Nur*, the Supreme Court of Canada rejected prosecutorial discretion as a balm against unconstitutionality in part because "one cannot be certain that the discretion will always be

[64] *CCR* at para 76, 149, 169.
[65] *CCR* at para 85.
[66] *CCR* at paras 10, 151.
[67] *CCR* at paras 151-152.
[68] Applicants' Further Memorandum at paras 30, 87.

exercised in a way that would avoid an unconstitutional result."[69]

40. Indeed, in non-immigration jurisprudence, courts have found there to be an inherent issue with allowing discretion to safeguard an otherwise constitutionality infirm provision. In the context of mandatory minimum sentences, in particular, the Supreme Court has found that discretionary safety valves cannot be used to save an otherwise constitutionally infirm legislative provision. In *Smith,* for example, the Court rejected the Crown's argument that prosecutorial discretion can render valid a mandatory minimum sentence that otherwise violates section 12 of the *Charter.*[70] Relatedly, in *Nur,* the Supreme Court held that the Crown's discretion to proceed summarily and thereby avoid a mandatory minimum sentence could not cure a sentencing provision that otherwise violated s. 12 of the *Charter*.[71]

41. Similarly, in *Appulonappa,* then Chief Justice McLachlin held for a unanimous Supreme Court that a provision providing for ministerial discretion could not cure an otherwise overbroad provision.[72] In that case, the Court held that the proposed safety valve of prosecutorial or ministerial discretion was not responsive to the deprivations at issue (namely, the risk of prosecution, conviction, and imprisonment) because it was foreseeable that the discretion would not be exercised favourably to grant an exemption and there was no way to challenge the exercise of discretion.[73] The alleged curative provision before the Court in *Appulonappa* – s. 117(4) of the *Immigration and Refugee Protection Act*[74] – permitted the Attorney General to not authorize prosecution under s. 117(1), which could prosecute "those who provide humanitarian, mutual and family assistance to asylum-seekers coming to Canada."[75] The Court held, however, that "Ministerial discretion, whether conscientiously exercised or not, does not negate the fact that s. 117(1) criminalizes conduct beyond Parliament's object, and that people whom Parliament

[69] *Nur* at para 95 [*Nur*].
[70] *R v Smith (Edward Dewey),* 1987 CanLII 64 (SCC), [1987] 1 SCR 1045 [*Smith*].
[71] *Nur* at para 85.
[72] *Appulonappa* at paras 68-69, 74-75.
[73] *Appulonappa* at paras 68-69, 74-75.
[74] *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*].
[75] *Appulonappa* at para 72.

did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment."[76] The ruling concluded that, despite the existence of ministerial discretion, s. 117 of the IRPA was not in accordance with the principles of fundamental justice as it was overbroad.[77]

42. While in *PHS*, the Court allowed for discretionary safety valves to cure the *Charter* infringement, it did so in a particular context within which the discretion was targeted, premeditated and comprehensive.[78] *PHS* is therefore compatible with taking a cautionary approach to discretionary mechanisms as a cure for a s. 7 violation.

43. In *PHS*, Insite, a safe injection clinic, sought an exemption from *intra alia* s. 4(1) the *Controlled Drugs and Substances Act* ("*CDSA*") which contained a blanket criminalization of the possession of controlled substances. The *CDSA* framework provided Insite the ability to obtain a pre-emptive exemption from the application of the *CDSA*, at the discretion of the Minister of Health through s. 56 of the *CDSA*.[79] Section 56 of the *CDSA* held that:

> **56** The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

44. The Court found in *PHS* that the prohibition of possession in the *CDSA* engaged the claimants' s. 7 interests, but that these limitations did not run afoul of the principles of fundamental justice.[80] However, the discretionary mechanisms embodied in the *CDSA* — general prohibitions subject to targeted ministerial exemptions — specifically accounted for public health units like Insite.[81] The safety valve in *PHS* was *specifically designed* with a view to the promote Insite's public health mandate. Thus, the safety valve, while

[76] *Appulonappa* at para 74.
[77] *Appulonappa* at para 82.
[78] *PHS* at paras 1-2, 17-20, 111-112.
[79] *PHS* at paras 111-112.
[80] *PHS* at paras 90-92, 108, 112-113.
[81] *PHS* para 41.

discretionary, was targeted and could operate in a pre-emptory manner.

45. In the current case, there are several discretionary safety valves that have been identified which can allegedly cure *Charter* infringements in the cessation context such as a DR, H&C, and TRP. However, these discretionary safety valves are more akin to those found in *Nur, Smith,* and *Appulonappa*, because the discretion at issue may allow for the infringement on s. 7 rights without meaningful review. In the cessation context, where a decision maker improperly exercises their discretion, an individual can expect to wait for a prolonged period not only for the initial decision on the application of a discretionary safety valve to an individual's matter, but then also while the matter winds its way through the Courts on judicial review, and even longer while a new officer makes a redetermination. It is notable that, during this waiting period, the person concerned is usually removable and may be subject to the very harms the purported "safety valves" are to alleviate. Therefore, in the present context, this Court ought to exercise caution in relying on the proposed discretionary safety valves to cure an infringement of s. 7 interests.

C) Safety Valves must address deprivations before they occur

46. In accordance with the Supreme Court's finding in *PHS*, safety valves must also "address the specific deprivation at issue" before it occurs, and not at some time in the future.[82] When considering a safety valve's effectiveness, the Court must consequently be mindful of any time-bars to accessing the identified safety valves as well as processing or other delays that could prevent the claimant from meaningfully accessing the safety valves *before* experiencing the alleged harm.

47. In *PHS*, the arguments that the *CDSA* prohibition on possession was arbitrary, overbroad and disproportionate were dismissed on the grounds that the *CDSA* had a built-in safety valve that empowered the Minister to grant exemptions to the prohibition on possession for medical and scientific purposes *prior* to the claimants being subject to prosecution. According to the Supreme Court, the Minister's exemption in *PHS* therefore remedied the

[82] *Morgentaler* at 57, 59-61, 63, 65-66, 70-71, 73, 75, 85-86; *PHS* at para 113; *CCR* at paras 10, 66.

"specific harm that would have flowed from the application of the general rule".[83]

48. In *PHS*, it seems the Court found that the safety valves cured any s. 7 violation because it operated prior to the triggering of the s. 7 violation. Moreover, the discretionary carve-out under the *CDSA* against potential prosecution was deemed by the Supreme Court to be tailored and specifically designed to address instances where the possession of substances was necessary for a medical, scientific, or public interest purpose.[84] The Court determined that the precise stipulation allowing for Ministerial exemptions was intentionally crafted to alleviate instances of unconstitutional or unjust application of the *CDSA*, with Parliament having recognized in advance that the prohibition on drug possession might inadvertently capture activities it did not wish to criminalize, such as the possession of drugs for medical, scientific, or other purposes deemed to be in the public interest.[85] In *PHS*, then, the Court found there to be a premeditated understanding of the legislation's overbreadth and a corresponding tailored discretion under the *CDSA* against criminalizing conduct that ought not to have been caught. The Court found that by allowing facilities such as Insite to apply for the exemption in advance, the valve operated pre-emptively and in a targeted manner to cure any possible violation.[86] The Court held the regime was constitutional, but notably, the Minister's refusal to continue the exemption was not.[87]

49. As noted above, the context of the purported safety valves in the cessation context is quite distinct from the context considered in *PHS.* In cessation proceedings, an individual, despite decades of maintaining permanent residence and forming connections, could face the loss of their status. Subsequent to that loss, they may be removed from Canada and / or endure an extended period without any status as a result of statutory obstacles and processing timelines that limit their access to the identified safety valves. In particular, s. 108(3) of the *IRPA* stipulates that a successful cessation application is considered a denial of a protected person's claim, leading to additional consequences mandated by law for

[83] *PHS* at paras 109-114.
[84] *PHS* at paras 109-111.
[85] *PHS* at paras 109-114.
[86] *PHS* at paras 135-136.
[87] *PHS* at paras 135-136.

former refugees. By operation of this provision, former refugees are barred from applying for TRPs, PRRAs and H&Cs for one year—unless they fall within narrowly defined exceptions.[88]

50. Therefore, not only are the proposed safety valves not peremptory, but in most cases people who have had their refugee status cessated are time-barred from accessing them. In addition, even if they can be accessed, remedies through these processes commonly take many months, even years, to obtain.[89] Moreover, as set out above, erroneous exercises of discretion can compound the inability of individuals to access these safety valves for even longer periods of time. As a result, the safety valves do not prevent the *Charter* infringements from occurring.

D) Safety Valves Must be Practically Available and Not Illusory

51. Finally, to be effective, a safety valve cannot be practically unavailable or illusory. The Supreme Court has held that an exemption is merely "illusory" — and thus incapable of curing constitutional defects — if there is no possibility of accessing it.[90] In other words, a safety valve will be illusory if (1) it cannot be accessed legally or (2) it is practically unavailable.

52. The Supreme Court found in *Morgentaler* that, where an individual is practically barred from accessing a safety valve, that valve will not shield a constitutional violation.[91] In that case, the exemption mechanism itself produced difficulties for individuals seeking to access it, rendering the supposed curative relief it offered an "empty promise".[92] The Court showed particular concern about the challenges faced by individuals trying to access safety valves that resulted directly from the legislation.[93] The Court in *Morgentaler* held that the

[88] *IRPA*, s 24(4); Applicants' Further Memorandum at paras 110-111, citing Hassan Affidavit, supra note 38, p 525 at para 30; Aslam Affidavit, supra note 44, p. 572 at para 3; *IRPA*, s 112(2)(b.1); *IRPA*, s 25(1.21)
[89] *Oladele v Canada (Citizenship and Immigration)*, 2022 FC 1161; *Horrace v Canada (Citizenship and Immigration)*, 2015 FC 114; *Joseph v Canada (Citizenship and Immigration)*, 2013 FC 1101; *Dhondup v Canada (Citizenship and Immigration)*, 2011 FC 108.
[90] *CCR* at para 158.
[91] *Morgentaler* at 73-76.
[92] *Morgentaler* at 60-62, 73-76, per Dickson C.J., and at pp. 122-28, per Beetz J; *CCR* at para 158.
[93] *Morgentaler* at para 158.

alleged safeguards in place for women in need of abortions were meaningless if they were "manifestly unfair" and contained barriers that made them functionally unavailable to those seeking them. Specifically, the Court set out:

> […] if that structure is "so manifestly unfair, having regard to the decisions it is called upon to make, as to violate the principles of fundamental justice", that structure must be struck down. In the present case, the structure -- the system regulating access to therapeutic abortions -- is manifestly unfair. It contains so many potential barriers to its own operation that the defence it creates will in many circumstances be practically unavailable to women who would *prima facie* qualify for the defence, or at least would force such women to travel great distances at substantial expense and inconvenience in order to benefit from a defence that is held out to be generally available.[94]

53. In the cessation context, in addition to a person's removal from Canada, the harms identified may occur upon the commencement of cessation proceedings and the automatic loss of permanent residence following a cessation decision. Given the significant barriers that individuals face accessing the purported safety valves, including statutory bars contained in the regime itself,[95] and processing delays,[96] this Court must determine whether DRs, PRRAs, TRPs, and H&Cs are legally or practically accessible and not illusory mechanisms that are not in practice meaningfully available to those who need them.[97]

Conclusion on the Application of the Principles of Fundamental Justice and Purported Safety Valves in this Case

54. This guidance provided in the case law should inform this Court's assessment of the adequacy of the safety valves proposed, each of which is either discretionary,[98] or "very limited,"[99] time-barred, and lacking a built-in, specially targeted exemption from the

[94] *Morgentaler* at 72-73.
[95] *Singh* at paras 52, 96-97; *Blencoe* at para 57.
[96] *Oladele v. Canada (Citizenship and Immigration)*, 2022 FC 1161; *Horrace v. Canada (Citizenship and Immigration)*, 2015 FC 114; *Joseph v. Canada (Citizenship and Immigration)*, 2013 FC 1101; *Dhondup v. Canada (Citizenship and Immigration)*, 2011 FC 108.
[97] *Morgentaler* at 73-76 and 122-28, affirmed by *CCR* at para 159.
[98] Applicants' Further Memorandum at para 136; *Kanthasamy* at paras 14, 23; "Humanitarian and compassionate considerations: Assessment and processing," *Immigration, Refugees, and Citizenship Canada,* Online (August 11 2017).
[99] Applicants' Further Memorandum at para 138; *Simoes v Canada*, 2000 CanLII 15668 (FC), 187 FTR 219, [FCTD], at para 12; *Shpati v Canada*, 2011 FCA 286 at para 45.

application of the impugned provisions themselves.[100]

PART IV: ORDER REQUESTED

55. CCLA does not take a position on the outcome of this application. CCLA does not seek costs and respectfully requests that cost not be ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6TH DAY OF MARCH 2024

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[100] *PHS* at paras 109-114.

TABLE OF AUTHORITIES

Court File No.: IMM-8432-22

FEDERAL COURT

B E T W E E N:

JUDE UPALI GNANAPRAGASAM
THE CANADIAN COUNCIL FOR REFUGEES

Applicants

- and –

MINISTER OF PUBLIC SAFETY
MINISTER OF CITIZENSHIP AND IMMIGRATION
AND THE ATTORNEY GENERAL OF CANADA

Respondents

- and –

CANADIAN CIVIL LIBERTIES ASSOCIATION and
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS
Interveners

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