CROWN COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

DAVID ROGER REVELL

APPELLANT

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

APPELLANT'S MEMORANDUM OF ARGUMENT

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Counsel for the Appellant

PART I: OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. An inadmissibility determination carries grave consequences, such as losing permanent resident status and allowing for deportation. Despite inadmissibility determinations being a significant causal factor for removal, Canadian courts have historically denied s. 7 protections at the admissibility hearing stage, citing the availability of "safety valves", or curative provisions, at later stages in the deportation process. While safety valves can guarantee the constitutionality of an otherwise unconstitutional scheme, they will be insufficient if access is restricted.

2. Individuals inadmissible for organized criminality are statute-barred from appealing their inadmissibility decisions to the Immigration Appeal Division ("**IAD**") and from accessing humanitarian and compassionate ("**H&C**") relief under s. 25(1) of the *Immigration and Refugee Protection Act* ("***IRPA***"). For these claimants, the *IRPA*'s safety valves do not provide sufficient opportunity to consider the risk of psychological injury resulting from deportation. This issue is exacerbated by the fact that Canadian courts have historically granted less force to s. 7 rights in the immigration law context compared to non-immigration proceedings.

3. David Revell ("**Appellant**") was found inadmissible to Canada after two criminal convictions and now faces deportation. He has lived in Canada for nearly half a century and has a long-term girlfriend, three children, and three grandchildren here. Due to his profound connection to Canada, he would suffer severe psychological injury resulting from removal.

4. Because the safety valves fail to address the threat to the Appellant's s. 7 rights, these interests ought to be considered at the admissibility hearing stage. Barring any consideration of his s. 7 rights there, this deportation amounts to a grossly disproportionate removal by way of an overbroad deportation scheme and is not justified in a free and democratic society.

B. SUMMARY OF THE FACTS AND HISTORY OF THE PROCEEDINGS

1) The Appellant's Personal Background

5. The Appellant immigrated to Canada from England in 1974 at the age of ten and has never received his Canadian citizenship. He is now 59 and has lived here for 49 years. He does not have any remaining family in England other than one elderly aunt and has only returned once, over 25 years ago. The Appellant lives with his girlfriend in Provost, Alberta, where he works as an oil well technician. He has three adult children and three grandchildren in Canada.[1] The deep and loving connection between Mr. Revell and his family is proven through testimonial evidence from Mr. Revell's psychologist, children, girlfriend, friend, and Mr. Revell himself.[2]

6. In March 2008, the Appellant was sentenced to five years in prison for possession for the purposes of trafficking and trafficking. He served his sentence and was released on parole. In 2013, he was convicted of assault with a weapon and assault causing bodily harm, receiving a suspended sentence with two years of probation.[3] He was a permanent resident of Canada until he was found inadmissible in 2015.[4]

2) The Inadmissibility Reports

7. After the Appellant's 2008 conviction, a Canada Border Services Agency ("**CBSA**") officer referred a s. 44(1) report to the Minister of Public Safety and Emergency Preparedness (the "**PS Minister**") alleging the Appellant's inadmissibility to Canada. Pursuant to s. 44(2), the Minister's Delegate ("**MD**") used their discretion not to refer this report to the Immigration

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[1] *Revell v Canada (Citizenship and Immigration)*, 2017 FC 905 at paras 27, 30 [*Revell FC*]; *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at paras 14, 76 [*Revell FCA*].
[2] *Canada (Minister of Public Safety and Emergency Preparedness) v Revell* (2016), [2016] IDD No 44 at paras 24-26 (Canada Immigration and Refugee Board, Immigration Division Decisions) [*ID Decision*].
[3] *Revell FC*, *supra* note 1 at paras 16, 19.
[4] *Revell FCA*, *supra* note 1 at paras 14, 16-27.

Division ("**ID**") for an admissibility hearing. The CBSA did not inform the Appellant that the 2008 conviction could be re-considered in a subsequent s. 44(1) report.[5]

8. Following the Appellant's 2013 conviction, the CBSA made a second s. 44(1) report to the PS Minister concerning both the 2008 and 2013 convictions, based on s. 37(1)(a) (organized criminality) and s. 36(1)(a) (serious criminality), respectively.[6]

9. The MD deemed the second report to be well-founded and referred it to the ID for an admissibility hearing. The Appellant requested a reconsideration of the MD's decision to refer but was denied. The Appellant sought leave to judicially review both the referral and the refusal of reconsideration but was also refused. In 2016, immediately prior to the Appellant's admissibility hearing, a CBSA officer again reported the Appellant's 2008 convictions, this time under serious criminality. The MD referred this third report to the ID.[7]

3) History of the Proceedings

a. Immigration Division

10. At the admissibility hearing, the Appellant argued that ss. 44 and 45 of the *IRPA* unjustifiably infringed his s. 7 rights to life, liberty, and security of the person under the *Canadian Charter of Rights and Freedoms* (the "***Charter***").[8] There, he adduced significant evidence of the disastrous psychological effects he would suffer as a result of deportation.[9]

11. The ID found the Appellant's s. 7 rights were engaged at this stage, and that deportation would deprive his liberty and security interests by preventing him from deciding where to live and

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[5] *Revell FC, supra* note 1 at para 17.
[6] *Ibid* at para 20; *Immigration and Refugee Protection Act,* SC 2001, c 27, ss 36(1)(a), 37(1)(a) [*IRPA*].
[7] *Revell FC, supra* note 1 at paras 21-23.
[8] *Ibid* at paras 27-28; *Revell FCA, supra* note 1 at para 23.
[9] *ID Decision*, *supra* note 2 at paras 21, 24-26.

causing significant emotional and psychological hardship. However, any deprivation was found to be in accordance with the principles of fundamental justice. Based on these findings, and relying solely on the Appellant's 2008 conviction, the ID found the Appellant inadmissible to Canada on the grounds of serious criminality and organized criminality and issued a removal order. [10] The Federal Court granted leave to judicially review this decision.

b. Federal Court

12. Overturning the ID's findings, the Federal Court found that s. 7 rights under the *Charter* could not be engaged at any point during the admissibility hearing stage, since it was too far removed from deportation itself.[11] Additionally, deportation in this case "fell short" of meeting the threshold for a security deprivation and would not deprive him of his liberty interest, since the inability to choose where to live is a "reality of deportation."[12] Lastly, any potential deprivation would nonetheless be in accordance with the principles of fundamental justice.[13]

c. Federal Court of Appeal

13. The Federal Court of Appeal upheld the Federal Court's decision, finding that a claimant's s. 7 rights can only be engaged at the removal or pre-removal detention stage.[14]

14. Despite making this finding, the Federal Court of Appeal contemplated whether deportation without persecution or torture could engage the Appellant's s. 7 rights. In his analysis, de Montigny J.A. noted that the psychological harm associated with uprooting a long-time permanent resident from their home and deporting them to somewhere with no family, friends, employment prospects, or hope of returning to Canada, likely surpassed the threshold for a s. 7

[10] *ID Decision*, *supra* note 2 at paras 29-35, 43-35.
[11] *Revell FC*, *supra* note 1 at para 114.
[12] *Ibid* at paras 99, 127-128; *Revell FCA, supra* note 1 at para 28.
[13] *Revell FC, supra* note 1 at para 143.
[14] *Revell FCA, supra* note 1 at paras 56-57.

deprivation.[15] Despite this, "with some reluctance" he upheld the Federal Court's decision finding that the Appellant's deportation could not alone engage a claimant's security interests, noting that he "[felt] bound by the Supreme Court of Canada decision of *Medovarski*".[16]

15. Even if the Appellant's security of the person was engaged, the Federal Court of Appeal found that this deprivation would be in accordance with the principles of fundamental justice.[17] The Court first found that the purpose of the removal scheme was to prevent Canada from becoming a safe haven for criminals and others whom we legitimately do not wish to have among us.[18] The Court went on to dismiss the Appellant's overbreadth argument, finding that the safety valves effectively narrowed the scope of otherwise unconstitutional provisions. The Court found that these safety valves allowed each person's individual characteristics to be considered, thus ensuring that only persons falling within the *IRPA*'s purpose would be deported.[19] Further, the Court found that the existence of discretion in these safety valves does not alone make the legislation unconstitutional.

16. The Federal Court of Appeal also rejected that the deportation was grossly disproportionate, finding that although it "may appear harsh, and perhaps slightly disproportionate," it did not meet the necessary threshold for a breach of fundamental justice.[20] Furthermore, any grossly disproportionate deportations could be prevented by safety valves.

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[15] *Revell FCA, supra* note 1 at paras 77-79.
[16] *Ibid* at paras 76, 78-79; *Medovarski v Canada (Minister of Citizenship and Immigration)*; *Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 [*Medovarski*].
[17] *Revell FCA, supra* note 1 at para 122.
[18] *Ibid* at para 93.
[19] *Ibid* at para 115.
[20] *Ibid* at para 120.

PART II: POINTS IN ISSUE

17. Section 7 of the *Charter* is engaged at the admissibility hearing stage.

18. The Appellant's deportation infringes his s. 7 *Charter* rights and is not in accordance with the principles of fundamental justice.

19. The s. 7 infringement is not justified under s. 1 of the *Charter*.

PART III: ARGUMENT

A. STANDARD OF REVIEW

20. The Appellant agrees that correctness is the appropriate standard of review for all issues raised in this appeal.[21]

B. LEGISLATIVE FRAMEWORK

1) Inadmissibility Determination

21. A finding of inadmissibility renders non-citizens of Canada vulnerable to deportation and can be made under various grounds. The material provisions in this appeal are ss. 37(1)(a) (organized criminality) and 36(1)(a) (serious criminality), as set out in Appendix A below.

22. The reporting stage precedes the admissibility hearing stage. Under the *IRPA*, if a CBSA officer believes that a permanent resident is inadmissible, they may prepare a s. 44(1) report for the PS Minister to review. Under s. 44(2), the MD may then refer the report to the ID for an admissibility hearing if they believe the report to be well-founded. Even if it is well-founded, the PS Minister retains some discretion not to refer the report.[22] If the MD does refer the report, the ID will hold an admissibility hearing for the permanent resident. Upon concluding, it will decide

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[21] *Northern Regional Health Authority v Horrocks,* 2021 SCC 42 at paras 10-12, citing *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at paras 45-47 [*Agraira*].
[22] *Revell FCA, supra* note 1 at para 6, citing *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 6.

if the person is admissible, inadmissible, or requires further examination.[23] Aside from *Charter* arguments, it cannot consider humanitarian and compassionate ("**H&C**") considerations.[24]

2) Appeals to the Immigration Appeal Division

23. Persons inadmissible for serious criminality or organized criminality are statute-barred from appealing to the Immigration Appeal Division (the "**IAD**").[25] The IAD may, under s. 67(1), allow an appeal based on H&C factors, including the best interests of a child ("**BIOC**"). Thus, the Appellant was statute-barred from a fulsome assessment of his H&C factors.

3) Removal Order

24. If a permanent resident is found inadmissible, the ID must make a removal order against that person.[26] If there is no right to appeal the decision to the IAD, as in this case, the removal order comes into force on the day that it is made. The person then loses their residency status and reverts to a foreign national.[27] If the removal order is not stayed, it becomes enforceable and the foreign national must leave or be removed from Canada as soon as possible.[28]

25. A judicial stay is available by application to stay removal until the final disposition of a judicial review. To obtain a stay, the applicant must establish a serious issue in the underlying decision, irreparable harm, and that the balance of inconvenience is in the applicant's favour.[29]

26. Persons subject to an enforceable removal order may also apply to the CBSA to temporarily defer their removal. The discretion to defer removal is limited to exceptional circumstances where

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[23] *Revell FCA, supra* note 1 at para 7 interpreting *IRPA*, ss 45(a), (c)-(d).
[24] *Lin v Canada (Public Safety and Emergency Preparedness),* 2019 FC 862 at para 12; *Torres Victoria v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1392 at para 38.
[25] *IRPA*, *supra* note 6, s 64(1).
[26] *Ibid*, s 45 (d).
[27] *Ibid*, ss 46 (1)(c), 49(1)(a).
[28] *Ibid*, ss 48(1)-(2).
[29] *RJR-MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 at 347-349 (SCC), citing *Manitoba (AG) v Metropolitan Stores Ltd*, 1987 CanLII 79 at paras 30-40.

the applicant is at risk of death, extreme sanction, or inhumane treatment.[30] A deferral does not confer permanent resident status.

4) Section 42.1(1) Ministerial Declaration

27. In a s. 42.1(1) application, the PS Minister can declare that organized criminality does not constitute inadmissibility in the applicant's case. This discretion is not limited to national security but includes a "broader array of […] considerations constituting the national interest."[31]

5) H&C Application

28. Section 25(1) allows persons found inadmissible to apply to the Minister of Citizenship and Immigration ("**IRCC Minister**") for a discretionary exemption from various requirements of the *IRPA*, including their inadmissibility, on H&C grounds.[32] The IRCC Minister may consider a range of personal circumstances of the foreign national, including the Appellant's establishment in Canada, ties to Canada, best interest of any children affected, consequences of separation from relative, and other relevant factors unrelated to physical risk.[33] Foreign nationals who are inadmissible on grounds of organized criminality cannot, by right, make an H&C application.[34]

6) Temporary Resident Permit

29. Section 24(1) allows an immigration officer to issue a temporary resident permit ("**TRP**") to foreign nationals found inadmissible, allowing them to remain in Canada for a finite period of

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[30] *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 51 [*Baron*].
[31] *Agraira, supra* note 21 at paras 69-70.
[32] *Revell FCA, supra* note 1 at para 9.
[33] Government of Canada, "Guide 5291 - Humanitarian and Compassionate Considerations" (last modified 6 June 2021), online (website): <www.canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides>.
[34] *IRPA*, *supra* note 6, s 25(1).

time.[35] TRPs are exceptionally granted if there are "compelling reasons" to allow a foreign national found inadmissible to remain in Canada.[36]

7) Restricted Pre-Removal Risk Assessment

30. Sections 112 and 113 sets out the pre-removal risk assessment ("**PRRA**"). This process allows persons to apply to the IRCC Minister for protection if they face risk in their home country if deported.[37] Persons inadmissible for serious criminality and organized criminality can only apply for a restricted PRRA, whereby the IRCC Minister will evaluate any risk of torture, cruel and unusual treatment or punishment, and risk to life in the country of deportation.[38] If risk is found, the IRCC Minister must then weigh these risk factors against the nature and severity of the acts committed and the danger the foreign national poses to the public and security of Canada.[39] A restricted PRRA can only result in a stay of removal and not refugee protection.[40]

C. THE SECTION 7 ANALYSIS

31. There are two steps to a s. 7 analysis. First, the claimant must show an initial deprivation or engagement of their rights to life, liberty, or security of the person. After s. 7 engagement is established, the claimant must then show that the deprivation is not in accordance with the principles of fundamental justice. A state action or law which is arbitrary or has an overbroad or grossly disproportionate effect on even one person is sufficient to establish a s. 7 breach.[41]

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[35] *Revell FCA*, *supra* note 1 at para 8.
[36] *Martin v Canada (Citizenship and Immigration)*, 2015 FC 422 at paras 23, 25-28, 33 [*Martin*].
[37] *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 93.
[38] *IRPA*, *supra* note 6, ss 113(d) and 97(1).
[39] *Ibid*, ss 113(d)(i)-(ii).
[40] *Ibid*, ss 112(3)(a)-(b), 114(1).
[41] *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 94, 123 [*Bedford*].

D. SECTION 7 IS ENGAGED AT THE ADMISSIBILITY HEARING STAGE

1) Curative measures do not automatically preclude s. 7 engagement

32. In *Canadian Council for Refugees* ("**CCR**"), the Supreme Court found that s. 101(1)(e) of the *IRPA* and s. 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, which collectively render some refugee claimants ineligible to apply for refugee status in Canada, engaged those claimants' liberty and the security of the person interests.[42] In that unanimous decision, Kasirer J. rejected the proposition that s. 7 cannot be engaged at the eligibility determination stage simply because curative measures could later offer protection, finding this proposition to be inconsistent with the Supreme Court's approach from *Bedford*.[43]

33. The modern approach to s. 7 engagement from *Bedford* requires only a "sufficient causal connection" between the impugned government action or law and the prejudice suffered, which allows for a more flexible standard that considers the circumstances of each particular case.[44] Moreover, the impugned government action or state-caused effect does not have to be the "only or the dominant cause" of the prejudice that the claimant suffered.[45]

34. By contrast, in the immigration law context, potentially curative measures have, until *CCR*, precluded the engagement of s. 7 at the stage of determining exclusion or inadmissibility.[46] This approach rests on two statements from the Supreme Court decisions of *B010* and *Febles*.[47]

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[42] *Canadian Council for Refugees v Canada (Minister of Citizenship and Immigration)*, 2023 SCC 17 [*CCR*].
[43] *Ibid* at para 7; *Bedford*, *supra* note 41.
[44] *Bedford*, supra note 41 at paras 75-76.
[45] *Ibid*.
[46] *Revell FCA, supra* note 1 at paras 38-41.
[47] *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 [*B010*]; *Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68 [*Febles*].

35. In *Febles*, the Supreme Court stated that "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place".[48] And then in *B010*, reading the statement from *Febles*, McLachlin C.J. stated in *obiter* that it is at the "subsequent pre-removal risk assessment stage of the *IRPA*'s refugee protection process that s. 7 is typically engaged".[49]

36. Kasirer J. clarified that this statement from *B010* was neither a formal statement of the law nor necessary to decide that case, and did not change the law on s. 7 engagement.[50] Further, the statement from *Febles* spoke to "the *Charter*-compliance of an exclusion provision in the *IRPA*", not s. 7 engagement.[51] Moreover, "*Febles* should not be read as conflating the engagement and the principles of fundamental justice stages of the s. 7 analysis", in line with *Bedford* and *PHS.*[52]

37. Accordingly, Kasirer J. noted in *CCR* that in the context of ineligibility determinations under s. 101(1)(e), curative measures are "best understood" as relevant to the principles of fundamental justice rather than the question of engagement.[53]

38. The Supreme Court in *CCR* thus had a different interpretation of *Febles* than the one relied on by the Federal Court of Appeal in the instant case. *CCR* suggests that curative measures do not automatically preclude engagement of s. 7 because they belong more properly in the second stage of the s. 7 analysis. In *Revell FCA*, however, de Montigny J.A. found that in *Febles*, the *Charter* had no role in the interpretation of the *IRPA* precisely because s. 7 could not be engaged at the exclusion stage due the availability of curative measures at later stages.[54]

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[48] *Febles, supra* note 47 at para 67.
[49] *B010, supra* note 47 at para 75.
[50] *CCR, supra* note 42 at paras 72-73.
[51] *Ibid*.
[52] *Ibid*; *Canada (Attorney General) v PHS Community Services Society,* 2011 SCC 44 [*PHS*].
[53] *CCR, supra* note 42 at para 73.
[54] *Revell FCA*, *supra* note 1 at paras 40-41.

2) *CCR* applies in the inadmissibility determination context

39. The application of the *CCR* decision should not be restricted to only cases involving the exclusion and removal of refugee claimants. Rather, using expansive language, Kasirer J. acknowledged the historical inconsistency between the modern approach from *Bedford* and the approach to s. 7 engagement in immigration law generally.[55] Furthermore, Kasirer J. reached his conclusions on engagement by referencing both the eligibility and inadmissibility determination processes, the latter of which is applicable to both persons seeking refugee protection and permanent residents facing deportation. If Kasirer J. had intended to qualify his findings in *CCR*, it is likely that he would have indicated this more clearly.

40. Moreover, since *B010*, lower-level courts have uniformly applied the aforementioned statement from *B010* to preclude engagement of s. 7 at the admissibility hearing stage across a broad range of contexts.[56] The Supreme Court's clarification that *B010* does not preclude s. 7 engagement should likewise have a broad application.

41. Thus, s. 7 could also be engaged at the admissibility hearing stage in some circumstances. In finding engagement, the Supreme Court in *CCR* found that a risk of deprivation of one of the s. 7 interests was sufficient.[57] Here, the general reasoning from *CCR* stands, which is that s. 7 engagement should depend on the circumstances of a case and not a blanket rule. Thus, the availability of potentially curative measures should no longer automatically preclude the engagement of s. 7 at the admissibility hearing stage.[58]

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[55] *CCR*, *supra* note 42 at paras 7, 72; Gerald Heckman, "Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection" (2017), 68 UNBLJ 312 [*Heckman*].
[56] For criminal inadmissibility, see: *Obazughanmwen v Canada (Public Safety and Emergency Preparedness)*, 2023 FCA 151 at para 54 [*Obazughanmwen*]; *Revell FCA*, *supra* note 1 at paras 38-41; *Brar v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1214 at para 21.
[57] *CCR*, *supra* note 42 at paras 56, 89.
[58] *Ibid* at paras 7, 72-73.

3) *CCR* brings section 7 engagement in immigration law in line with *Bedford*

42. In *Revell FCA*, de Montigny J.A. accepted that the modern approach to s. 7 engagement only requires a sufficient causal connection between deportation and the prejudice the Appellant suffers.[59] However, with inadmissibility adjudication being "but one step in a complex, multi-tiered inadmissibility determination and removal regime under the IRPA", de Montigny J.A. found that the Appellant's section 7 interests may only be engaged at a later step that is more proximate or the act of effecting deportation, relying in part on the *obiter* statement from *B010*.[60] The determinative issue, then, shifted from that of causation to the proximity between a particular step within the deportation regime and the deportation act.[61]

43. A broader reading of *CCR* suggests that it has brought the approach to s. 7 engagement in the immigration law context fully in line with the modern approach from *Bedford*. Together, *Bedford* and *CCR* suggest that what is required for s. 7 engagement is a non-speculative risk that the Appellant will be deprived of one or more of his s. 7 interests.

4) Section 7 ought to be engaged even with a narrow reading of *CCR*

44. In *CCR*, the ineligibility determination stage is inextricably linked to removal from Canada. This may suggest that the decision was fact-specific and arrived at on narrow grounds. Thus, it may be argued that it was the extraordinary circumstances of appellants in *CCR* that engaged s. 7 there, and that the Supreme Court was only refusing to apply *B010* in those specific circumstances. While, for reasons provided above, a broader interpretation of *CCR* is warranted, should this Court conclude otherwise, s. 7 nevertheless ought to be engaged at the inadmissibility stage in exceptional circumstances as well.

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[59] *Revell FCA, supra* note 1 at para 45.
[60] *Ibid* at paras 38-45.
[61] *Ibid* at para 45.

45. Relying on the mere existence of potential curative measures to preclude the engagement of s. 7 raises the risk of making the test into a categorical one. As Prof. Heckman (as he was then) remarked, this approach "artificially reduces the 'immigration context' to a set of discrete processes whose impact on non-citizens' liberty and security of the person can be analyzed independently and in isolation from the overarching regime of immigration control to which they are subjected under *IRPA*."[62] *Bedford*, by contrast, requires that the engagement analysis be attentive to the circumstances of a particular case. Thus, as evidenced in *CCR*, the general proposition for which *B010* stands ought not to apply without exception.

a) Engagement of s. 7 in the immigration law context

46. The assertion that a non-citizen's s. 7 rights can never be engaged at the admissibility hearing stage, rests on a concept of engagement long predating *Bedford*. Underpinning this conception are two Supreme Court decisions, one qualifying the other. Regarding the question of "whether s. 7 is engaged in proceedings leading to removal from Canada", legal scholars have observed the tension between *Medovarski* and *Charkaoui 1*.[63] These two cases recognize that because the circumstances of non-citizens are dynamic and changing, features of deportation may or may not engage s. 7, even at the moment of removal. This question turns on the foreseeability of deportation at a particular step and the likelihood of the risk materializing.[64]

47. Moreover, *Medovarski* is oft-cited for the proposition that deportation, without more, cannot implicate the liberty and security interests protected by s. 7.[65] In some cases, courts have

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[62] *Heckman*, *supra* note 55 at 351.
[63] *Ibid* at 329, referring to *Medovarski*, *supra* note 16 at para 46; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 17 [*Charkaoui 1*].
[64] *Revell FCA*, *supra* note 1 at para 45.
[65] *Medovarski, supra* note 16 at para 46, citing *Canada (Minister of Employment and Immigration) v Chiarelli*, 1992 CanLII 87 (SCC) at 733 [*Chiarelli*].

held that an inadmissibility finding, in and of itself, does not engage s. 7, providing further distinction between the issuance of a removal order and effecting deportation.[66] This creates a degree of separation between the inadmissibility finding and deportation itself, which effectively precludes engagement of s. 7 before deportation is certain.

b) Parliament has restricted the scope of H&C jurisdiction

48. One important assumption underlying the Supreme Court's decision in *Medovarski* ought to be revisited. Finding that even if deportation did engage s. 7 interests, any deprivation of those interests will be in accordance with the principles of fundamental justice, the Supreme Court placed stock in the general availability of H&C relief by way of a s. 25(1) application.[67] However, persons found inadmissible on grounds of organized criminality can no longer, by right, make H&C applications to gain admittance to Canada, and such persons have thus been denied the availability of an important safety valve within the *IRPA*.[68]

49. It may be true that Parliament can choose to "narrow or eliminate the availability of H&C relief for some individuals", and there is no constitutional or quasi-constitutional right to discretionary consideration of H&C factors.[69] However, since having access to H&C considerations constitutes one of the safety valves ensuring the constitutionality of the deportation process as a whole, s. 7 ought to fill the gap and remedy the lack of protection for those individuals. As the Supreme Court instructs, "*Medovarski* [...] does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny."[70]

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[66] *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319 at para 40, citing *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at para 63.
[67] *Medovarski, supra* note 16 at para 47.
[68] *Obazughanmwen, supra* note 56 at para 26.
[69] *Goodman v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1569 at para 27, aff'd 2022 FCA 21.
[70] *Charkaoui 1, supra* note 63 at para 17.

50. The guarantee for s. 7 protection is more acute for persons found to be inadmissible for organized criminality, but have compelling personal factors worthy of consideration, including profound familial ties in Canada. This is because their personal circumstances may raise s. 7 interests, but they can no longer be readily considered.

c) Other safety valves are insufficient in the Appellant's circumstances

51. In *Revell FCA*, de Montigny J.A. identified several potential safety valves (or curative provisions) which purportedly precluded s. 7 engagement at the admissibility hearing stage: (1) s. 42.1(1) ministerial declaration; (2) s. 25(1) H&C application, conditional on obtaining ministerial declaration; (3) a restricted PRRA; and (4) request for temporary deferral.[71] Further, de Montigny J.A. noted that a judge can often provide a more thorough consideration of a request for a stay on judicial review than an enforcement officer can of a request for deferral.[72]

52. A recent Federal Court of Appeal decision is helpful in illuminating this issue relating to the role of safety valves. *Obazughanmwen* is a decision dealing with the contention that CBSA officers and MDs at the referral stage ought to be able to consider H&C and best interest of the child ("**BIOC**") factors.[73] In *Obazughanmwen*, de Montigny J.A. acknowledged that those found to be inadmissible for organized criminality indeed face harsher consequences since the adoption of the *Faster Removal of Foreign Criminals Act* ("***FRFCA***").[74] However, de Montigny J.A. rejected the argument for expansion because it is well-settled that CBSA officers and MDs cannot consider H&C and BIOC factors at the referral stage, and this is solely because of the administrative (as opposed to adjudicative) nature of their functions.[75]

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[71] *Revell FCA, supra* note 1 at paras 46-50.
[72] *Ibid* at para 51.
[73] *Obazughanmwen, supra* note 56 at para 3.
[74] *Ibid* at paras 25-26.
[75] *Ibid* at paras 30, 36.

53. The administrative decision makers for the remaining safety valves within the deportation regime are also bound by the distinct and limited nature of their statutory jurisdictions. Moreover, save for s. 25(1), they do not include the ability to make H&C considerations. For example, in *Agraira*, the Supreme Court specifically instructed that s. 34 (now s. 42.1) "should not be transformed into an alternative humanitarian review".[76] The ID, on the other hand, is "well equipped to handle complex issues" and make findings of fact or law with a complete evidentiary record before it.[77] Further, in *Obazughanmwen*, which involved a permanent resident referred to the ID for both serious criminality and organized criminality, de Montigny J.A. found that a restricted PRRA is of limited assistance.[78] While de Montigny J.A. in *Revell FCA* suggested that judicial review could be a safety valve, *CCR* has clearly rejected this possibility.[79]

54. Justice de Montigny's observations in *Obazughanmwen* respecting the ID's comprehensive jurisdiction suggest that circumstances could militate in favour of having s. 7 consideration by the ID at the admissibility hearing stage. The ID should be able to consider s. 7 engagement in exceptional circumstances – doing so would not vitiate Parliament's choice to limit the availability of s. 25(1) for some individuals.

55. Finding s. 7 to be engaged in these circumstances would not require s. 7 to be engaged at the admissibility hearing stage in every instance. This is because s. 7 ought to be engaged only in exceptional circumstances where the impact of deportation surpasses the threshold for engagement and protection is not readily available to the claimant through safety valves. Nor will s. 7 be engaged at every step of the deportation process. Having had a fulsome s. 7 consideration at the

[76] *Agraira, supra* note 21 at para 84.
[77] *Obazughanmwen, supra* note 56 at para 49.
[78] *Ibid* at para 26.
[79] *Revell FCA, supra* note 1 at paras 51-52; *CCR, supra* note 42 at para 77.

admissibility hearing stage, the remaining steps should not engage s. 7 unless the nature of the risk facing the Appellant changes from the time of his admissibility hearing.

56. In sum, s. 7 ought to be engaged at the admissibility hearing stage because it would be consistent with the flexible and contextual, modern standard from *Bedford*. Moreover, the circumstances of the instant case warrant revisiting *Medovarski* so that the scope of s. 7 engagement can be broadened in a limited way, and under exceptional circumstances, given that a s. 25(1) assessment is now unavailable by right for persons like the Appellant.

E. The Appellant's deportation engages his right to security of the person

1) Section 7 is misapplied in immigration proceedings

57. Canadian courts have long held that features associated with deportation can result in a s. 7 deprivation.[80] This occurs if legislation limits, negatively impacts, infringes, or interferes with an individual's s. 7 rights. Even the mere risk of deprivation will suffice.[81] These protections extend to all individuals in Canada, including permanent residents and foreign nationals.[82]

58. Outside of immigration law, s. 7 has protected rights often implicated by deportation such as receiving health care in a timely manner and making inherently private choices such as where to live.[83] Most importantly for this appeal, s. 7 protects from state action causing serious harmful effects on psychological integrity. This finding arose in *G. (J.)*, where the extension of a temporary custody order over three children engaged the mother's s. 7 rights.[84]

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[80] *Charkaoui 1, supra* note 63 at para 17.
[81] *CCR, supra* note 42 at para 56.
[82] *Singh v Minister of Employment and Immigration*, 1985 CanLII 65 at para 35 (SCC).
[83] *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35 at para 124; *Godbout v Longueuil (City)*, [1997] 3 SCR 844 at para 66.
[84] *New Brunswick (Minister of Health and Community Services) v G. (J.)* [1999] 3 SCR 46 at para 60, [1999] CarswellNB 305 [*G. (J.)*].

59. In immigration proceedings, Canadian courts have rejected s. 7 engagement in cases analogous to *G. (J.),* including deportation resulting in permanent separation from the claimant's teenage daughter and a refusal to issue a visa resulting in permanent separation from the claimant's Canadian-born child.[85] While in *G. (J.)*, a temporary separation from one's children was found to engage s. 7, within the immigration context, permanent separation from family has not amounted to the same engagement.

60. In *Charkaoui 2*, the Supreme Court of Canada clearly stated that "s. 7 [...] [application] does not turn on a formal distinction between the different areas of law.[86] The Court emphasized focusing on harm suffered by the individual rather than "legal labels" attached to legislation.[87]

61. Following this principle of equal *Charter* application, the deprivation of any previously protected s. 7 right in a non-immigration context should also lead to s. 7 engagement in deportation proceedings. The state could then justify the deprivation at a later stage.

2) Recent deportation jurisprudence

62. In 2019, the Federal Court of Appeal heard two cases concerning the deportation of a long-term permanent resident: the instant case, and the case of *Moretto*.[88] Similar to this case*, Moretto* concerned the deportation of a claimant who had lived in Canada for nearly 50 years and was facing removal from his family, friends, and medical support systems. The claimant was eventually deported to Italy where he had no connections and did not speak the language. In both cases, the claimants raised *Charter* arguments that due to their strong connection to Canada and the lack of

[85] *Moretto v Canada (Citizenship and Immigration)*, 2019 FCA 261 [*Moretto*]; *Chu v Canada (Minister of Citizenship and Immigration)*, 2006 FC 893.
[86] *Charkaoui v Canada (Citizenship and Immigration)*, 2008 SCC 38 at para 53.
[87] *Charkaoui 1, supra* note 63 at para 18.
[88] *Moretto, supra* note 85.

connection to their home countries, deportation would engage their s. 7 right against severe, state-induced psychological harm.[89]

63. In both cases, the Federal Court of Appeal acknowledged that the harm associated with deportation likely surpassed the threshold for deprivation. In *Moretto*, de Montigny J.A. found that removal "would have a profound and serious impact on his psychological integrity" that was "far greater" than the *G. (J.)* threshold.[90] In *Revell FCA*, the Court was "inclined to think" that deporting the Appellant would go "beyond the normal consequences of removal" and that the harms would be "arguably far greater than the ones […] referred to in *G. (J.).*"[91]

64. Despite these findings of severe psychological injury for both claimants, the Federal Court of Appeal, relying primarily on *Medovarski*, decided that deportation in addition to psychological stress did not engage either of the claimants' s. 7 rights. It made this finding "with some reluctance," noting that it "[felt] bound" by the *Medovarski* precedent.[92]

65. In *Medovarski*, the Supreme Court of Canada considered the deportation of two long-term permanent residents in Canada. Relying on the principle that "non-citizens [have] no unqualified right to enter or remain in the country" from *Chiarelli*, the Court found that deportation in itself could not engage the claimants' s. 7 liberty or security interests.[93]

3) The Federal Court of Appeal erred in its application of *Medovarski*

66. In this case, the Federal Court of Appeal erred by interpreting *Medovarski* as foreclosing the possibility of s. 7 engagement due to psychological stress from deportation.[94] As clarified in

[89] *Moretto, supra* note 85 at para 45; *Revell FCA, supra* note 1 at para 63.
[90] *Moretto, supra* note 85 at para 51.
[91] *Revell FCA*, *supra* note 1 at para 77.
[92] *Ibid* at para 76, 79.
[93] *Chiarelli, supra* note 65 at 513; *Medovarski, supra* note 16 at paras 45-46.
[94] *Revell FCA*, *supra* note 1 at para 78.

Charkaoui 1, *Medovarski* merely states that deportation *on its own* is insufficient for engagement, not that deportation cannot engage s. 7 alongside psychological stress.[95] *Medovarski* is also an older decision which predates *Bedford*'s modern approach and primarily concerned the interpretation of a transitional provision in the *IRPA*. The decision dedicated only one brief paragraph to the *Charter* issue and did not analyze s. 7 or consider the claimants' personal circumstances. Furthermore, as mentioned above, *Medovarski* was decided at a time when access to humanitarian considerations under s. 25(1) was unrestricted. This is no longer the case.[96]

67. With respect, the Federal Court of Appeal's findings that s. 7 was not engaged in this case or *Moretto* is based on an overly narrow interpretation of *Medovarski* and an application of s. 7 that is incongruent with non-immigration s. 7 jurisprudence. Rather than applying a categorical approach to s. 7 engagement, it is consistent with the *Charkaoui* decisions to flexibly consider the personal circumstances of each deportee.

4) Deportation engages the Appellant's security of the person

68. As explained above, an applicant can show a s. 7 deprivation due to psychological injury if state action has a "serious and profound effect on [their] psychological integrity." Psychological harm rising to the level of nervous shock or psychiatric illness is not required for a deprivation, but the state action must cause harm surpassing ordinary stress or anxiety.[97]

69. The consequences of deportation are well-described in a passage from *R v Wong*.[98] There, the Supreme Court highlights that a deportee may be forced to leave a country where they have lived for decades, and face permanent separation from their family in an unfamiliar country

[95] *Charkaoui 1, supra* note 63 at para 17.
[96] *Obazughanmwen, supra* note 55 at para 26.
[97] *G. (J.)*, *supra* note 84 at para 60; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44 at para 81.
[98] *R v Wong*, 2018 SCC 25 at para 72.

without personal connections. The evidence at the ID aptly demonstrates the psychological harm the Appellant would suffer if deported. He is extremely close with his family, whom he regularly visits with his long-term girlfriend. The Appellant's psychologist testified that the Appellant's current life centres around his grandchildren, and without them, he would be "devoid of direction and purpose."[99] His children also testified that removal from his family would lead to "significant depression" and that he "may not survive the deportation from emotional devastation." The Appellant himself admitted fears of suffering from an emotional downward spiral in England and of being unable to restart his life at an elevated age without his support systems in Canada.[100]

70. As recognized by de Montigny J.A., the Appellant's deportation would surpass the threshold of psychological harm contemplated in *G. (J.)*. In that case, the mother's s. 7 engagement arose from a six-month temporary extension of the custody order. Here, the Appellant faces permanent removal from his family, in addition to his partner and home. Further, it would place him in an unfamiliar country without social connections or employment prospects.

5) The State's Action Caused the Deprivation of the Appellant's s. 7 Rights

71. A claimant can prove deprivation by showing a non-speculative risk between state action and the harm suffered.[101] They can prove causality by showing that the state knew, or ought to have known, that the harm can arise resulting from state action.[102] This connection is proven even if the state's action is not the "only or the dominant cause" of the harm suffered.[103]

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[99] *ID Decision*, *supra* note 2 at paras 24-26.
[100] *Ibid*.
[101] *Bedford, supra* note 41 at para 76.
[102] *CCR, supra* note 42 at para 111.
[103] *Ibid* at para 60; *Bedford*, *supra* note 41 at para 111.

72. The Canadian government had actual knowledge of the harm the Appellant would suffer if deported, as evidenced by the findings made at the ID.[104] Thus, there is a non-speculative risk that the state's action will cause severe psychological injury.

F. THE DEPRIVATION IS NOT IN ACCORDANCE WITH THE PRINCIPLES OF FUNDAMENTAL JUSTICE

73. The principles of fundamental justice analysis is performed by weighing the impacts of a law against its purpose. As stated in the Federal Court of Appeal decision, the purpose of the *IRPA* is to prevent Canada from "becom[ing] a haven for criminals and others whom we legitimately do not wish to have among us."[105] Additionally, it is important to consider the enumerated objective of family reunification in s. 3(1)(d).[106]

74. This deportation is not in accordance with the principles of fundamental justice for two reasons: (1) the serious criminality (s. 36(1)(a)) and H&C considerations (s. 25(1)) provisions are overbroad and; (2) the deportation is a grossly disproportionate measure.

1) Overbreadth

75. A law is overbroad if it captures any conduct or individual that is not connected to the law's stated purpose.[107] Both ss. 36(1)(a) and 25(1) meet this definition.

a) Serious criminality uses an inaccurate metric for inadmissibility

76. Section 36(1)(a) is overbroad because it applies to all individuals who have committed crimes punishable by a maximum of 10 years, even if they receive a significantly lower sentence. The decision to use maximum possible sentence as a metric for determining serious criminality, rather than the actual sentence given, indiscriminately captures offenders who commit the least

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[104] *ID Decision*, *supra* note 2 at paras 21, 24-26.
[105] *Revell FCA, supra note 1* at para 93.
[106] *IRPA*, *supra* note 6, s 3(1)(d).
[107] *R v Moriarity*, 2015 SCC 55 at para 24.

serious forms of maximum 10-year sentence crime. Other provisions, which tie general punishments to maximum prison lengths without consideration of other factors, have also been deemed overbroad in Canadian jurisprudence.[108]

77. The use of this metric for determining inadmissibility leads to absurd results. For instance, it allows individuals who receive a minimum six-month sentence for committing a 10-year maximum punishment crime to be found inadmissible, while separate offenders who receive a maximum sentence for a 5-year maximum punishment crime are spared.

78. Furthermore, using maximum sentence penalties as a metric for serious criminality ignores the fact that some criminal laws capture a broad variety of different offenses, thus allowing for a range of different possible sentences. For instance, s. 95(1) of the *Criminal Code* restricts possession of prohibited or restricted firearms with ammunition.[109] At the severe end of the spectrum, the law maximally punishes dangerous criminals carrying a loaded, prohibited firearm in public with the intention to harm others. On the low end, this law captures licensed, responsible gun owners who mistakenly store their ammunition improperly. For these non-serious offenders, an admissibility determination goes against the *IRPA'*s purpose. Other crimes which could lead to a serious criminality determination include the use of a forged passport, theft of a credit card, and unauthorized use of a computer.[110] Some violent crimes which do not qualify for serious criminality include assaulting a police officer and infanticide.[111]

79. After committing the drug offences in 2008, the Appellant was charged with a middling sentence, but was not referred to an admissibility hearing. He did commit a subsequent crime, but

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[108] *R v Chen,* 2021 BCSC 697 at para 206; *R v R.S.*, 2021 ONSC 2263 at paras 64, 70.
[109] *Criminal Code*, RSC 1985, C c-46, s 95(1) [*Criminal Code*].
[110] *Revell FCA, supra* note 1 at 114.
[111] *Criminal Code*, *supra* note 109, ss 227, 270(1).

only received a short, suspended sentence. While the Appellant was originally not considered a safety risk after his offence in 2008, six years later he was reported, and subsequently referred, to an admissibility hearing for this same original offence.[112] The government has not provided any evidence showing why the Appellant would not constitute a safety risk in 2008, but should now be inadmissible to Canada several years later for the same crime.

80. It does not fit the *IRPA*'s purpose to label all offenders who receive less severe sentences for 10-year maximum crimes as inadmissible. There are many individuals within Canada who are criminally convicted but still able to make overall positive contributions to the country. Deporting these individuals does not fit the purpose of preventing Canada from becoming a haven for criminals and others whom we legitimately do not wish to have among us. This is increasingly true when the deportee, the Appellant in this case, has a loving family in Canada and removal would run contrary to the secondary objective of family reunification.

b) The restricted access to H&C considerations

81. Section 25(1) is also overbroad due to its restricted access for certain claimants. Individuals deemed inadmissible under one of ss. 34, 35, 35.1, and 37, such as the Appellant, are unable to access H&C relief unless they are first granted a s. 42.1(1) ministerial declaration.

82. Problematically, the s. 42.1(1) discretion is limited and only allows consideration of "national security and public safety considerations" including a "broader array of […] considerations constituting the national interest."[113] There is no room to consider personal circumstances.

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[112] Immigration, Refugees and Citizenship Canada, *ENF 05 Writing A44(1) Reports* (IRCC, 17 April 2023), s 10.4, online (pdf): <www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf05-eng.pdf>.
[113] *Agraira, supra* note 21 at paras 69-70.

83. By gatekeeping access to s. 25(1) behind s. 42.1(1), the deportation scheme eliminates the possibility that many claimants who would suffer immense psychological harm due to deportation will get fulsome consideration of their s. 7 rights before being deported. This restriction creates a gap in the deportation scheme through which long-term residents with strong connections to Canada who are ineligible for H&C consideration can fall through the cracks.

84. In *Hassouna v Canada (Citizenship and Immigration)*, Justice Gagné found that prior to a loss of Canadian citizenship, the principles of fundamental justice first required an analysis on H&C grounds.[114] This requirement was satisfied in the former *Citizenship Act* when the Governor in Council was given residual discretion to review a claimant's *entire situation*, in light of all relevant facts.[115] While in a slightly different context, this same fulsome consideration is not provided to deportees, such as the Appellant, who are restricted from accessing s. 25(1).

85. Section 25(1) is the only safety valve which can fully consider the Appellant's personal circumstances. The collective gatekeeping effects of ss. 25(1) and 42.1(1) preclude ineligible claimants from accessing their best opportunity for relief, unless granted access through a narrow form of discretion which is not properly tailored to consider their needs. If safety valves can be held up by Canadian courts as curing unconstitutional legislative schemes,[116] restrictions preventing access to those same safety valves must also lead to unconstitutional effects on those restricted.

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[114] *Hassouna v Canada (Citizenship and Immigration)*, 2017 FC 473 at para 116 [*Hassouna*].
[115] *Ibid* at para 114.
[116] *PHS*, *supra* note 52 at para 113.

2) Gross Disproportionality

86. Additionally, the Appellant's deportation would be grossly disproportionate. A law will not accord with the principles of fundamental justice if its effect on the s. 7 interest is "so grossly disproportionate to its purposes that [it] cannot rationally be supported."[117]

87. While deportation of some non-citizens convicted of serious offences does fulfill the purpose of the *IRPA*, in this case, it does so at a disproportionate cost. As addressed earlier, the Appellant is currently 59 years old and has lived in Canada permanently since the age of ten. In Canada he has his three children, three grandchildren, girlfriend, career, and medical support. The Appellant's life in Canada is effectively the only one he has never known. His family in England is all dead or has moved away, and he has no remaining friends there. His entire teenage and adult life has been spent in Canada. Returning to England after nearly 50 years without employment opportunities, medical support, friends or family would be a devastating blow to him and would likely lead to "significant depression" and an "emotional downward spiral" without the support systems that he has built up in Canada.[118]

88. Gross disproportionality does not consider the beneficial effects of a law on society.[119] Instead, it weighs the negative effects on the individual against the purpose of the law. Deportation will not be a grossly disproportionate step in all removal proceedings. Rather, a deportation in the specific context of this case, where the Appellant has lived his entire life in Canada, his entire family is here, and he has no ties in England, is grossly disproportionate. Rather than applying a blanket rule that no deportation can ever provide grossly disproportionate results, the individual

[117] *Bedford, supra* note 41 at para 120.
[118] *ID Decision*, *supra* note 2 at paras 25-26.
[119] *Bedford, supra* note 41 at para 121.

circumstances of potential deportees must be considered to determine if deportation is in accordance with the principles of fundamental justice.

3) Safety valves are insufficient to cure unconstitutional effects on the Appellant

89. The *IRPA*'s safety valves do not properly consider the implications of the Appellant's deportation and are insufficient to cure any overbroad and grossly disproportionate effects.

90. The Federal Court of Appeal highlighted several safety valves where the Appellant might have his circumstances properly considered including: (1) an H&C consideration through a ministerial declaration, (2) a restricted PRRA, (3) a deferral of removal, and (4) a TRP.[120] For separate reasons, each of these safety valves are inadequate for providing proper relief.

91. As discussed above, H&C relief is insufficient since the Appellant must first be granted access through ministerial declaration where his personal circumstances are not considered.

92. A restricted PRRA is similarly ineffective since it can only be used to assess removal which would expose the deportee to a risk of torture, death or, in certain circumstances, cruel and unusual treatment.[121] These factors are irrelevant for the Appellant's personal circumstances, a point admitted by the Federal Court of Appeal.[122]

93. The deferral of removal allows CBSA officers to temporarily defer deportation.[123] In doing so, they can only consider exceptional circumstances such as illness, risk of death, extreme sanction, or inhumane treatment. [124] These factors are not applicable to the Appellant's situation. Further, an officer cannot grant permanent residence or overrule an order of deportation.[125]

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[120] *Revell FCA, supra* note 1 at paras 47-50.
[121] *IRPA, supra* note 6, s 97(1).
[122] *Revell FCA*, supra note 1 at para 49.
[123] *IRPA, supra* note 6, s 48.
[124] *Baron, supra* note 30 at para 51.
[125] *Gill v Canada (Public Safety and Emergency Preparedness),* 2020 FC 1075 at para 16.

94. TRPs are a highly discretionary, exceptional form of temporary relief which are "issued cautiously" to foreign nationals found inadmissible. [126] The applicant must meet the "very heavy burden" of demonstrating "compelling reasons" for them to remain in the country.[127] While s. 24 considers some H&C factors, it does not entail a full-scale H&C analysis.[128] Because of the high bar to accessing a TRP and the incomplete assessment of H&C factors, it is not a sufficient safety valve for the Appellant.

95. Because the available safety valves do not adequately consider the Appellant's personal circumstances, the overbroad and grossly disproportionate effects remain. This deficiency further demonstrates the need for a fulsome consideration of the Appellant's s. 7 interests at the admissibility hearing stage.

G. THE SECTION 7 INFRINGEMENTS CANNOT BE JUSTIFIED

96. The Appellant's unconstitutional deportation cannot be justified. The Supreme Court has previously noted that for a s. 7 violation to be justified, exceptional circumstances like "natural disasters, the outbreak of war, epidemics, and the like" would need to be present.[129] Such exceptional circumstances are not present here.

6) The Oakes analysis

97. The *Oakes* test for justification asks whether the impugned law is rationally connected to its purpose, minimally impairs the infringed right or freedom, and if its salutary effects outweigh the deleterious consequences.[130] Here, the *Oakes* analysis demonstrates that this deportation cannot be justified in a free and democratic society.

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[126] *Martin*, *supra* note 36 at paras 23, 25-28, 33.
[127] *Shala v Canada (Citizenship and Immigration)*, 2021 FC 326 at para 20.
[128] *Emmanuel v Canada (Citizenship and Immigration)*, 2023 FC 1694 at para 19.
[129] *Re BC Motor Vehicle Act,* 1985 CanLII 81 (SCC); *Charkaoui 1, supra* note 63 at para 66.
[130] *R v Oakes*, [1986] 1 SCR 103, 53 OR (2d) 71.

98. While the Appellant concedes that the provision is rationally connected to the purpose of the *IRPA*, a less impairing scheme is available. Rather than using a ten-year maximum penalty threshold for determining inadmissibility, s. 36(1)(a) could be based on the actual length of sentence received. This is a more accurate metric for the severity of the crime committed and determining whether the individual should remain in Canada or not.

99. The proportionality stage assesses the law's purpose, taking "full account of the severity of the deleterious effects of a measure on individuals or groups."[131] This step allows a holistic analysis of whether the benefits from the limitation are proportional to the deleterious effects "as measured by the values underlying the *Charter*."[132]

100. At the final balancing stage, in addition to the drastic effects on the Appellant, this Court should also consider the severe psychological harm that deportation would inflict on the Appellant's Canadian family, partner, and friends. The immense harm caused by this deportation strongly outweighs the risk of keeping someone in the country who is not a safety threat. The circumstances here do not justify the unconstitutional deportation of the Appellant.

PART IV: ORDERS SOUGHT

101. The Appellant respectfully requests this Court quash the decision of the ID and remit the matter for redetermination in accordance with these reasons.

All of which is respectfully submitted this 9th day of February 2024.

[131] *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 76.
[132] *Thomson Newspaper Co v Canada (Attorney General)*, 1998 CanLII 829 (SCC) at para 125.

APPENDIX: LIST OF AUTHORITIES

Legislation

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Criminal Code, RSC 1985, C c-46.
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Canadian Council for Refugees v Canada (Minister of Citizenship and Immigration), 2023 SCC 17.
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R v R.S., 2021 ONSC 2263.
R v Wong, 2018 SCC 25.
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Immigration, Refugees and Citizenship Canada, *ENF 05 Writing A44(1) Reports* (IRCC), (17 April 2023), s 10.4, online (pdf): <www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf05-eng.pdf>.

APPENDIX A

CONSOLIDATION

Immigration and Refugee Protection Act

S.C. 2001, c. 27

…

Serious criminality

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for:

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

…

Organized criminality

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

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

CODIFICATION

Loi sur l'immigration et la protection des réfugiés

L.C. 2001, ch. 27

…

Grande criminalité

36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants:

(a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;

…

Activités de criminalité organisée

37 (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants:

(a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan; …