IN THE HIGH COURT OF THE DOMINION OF CANADA

(On appeal from the Federal Court of Appeal)

BETWEEN:

AYA MOREZ

Appellant

– and –

ATTORNEY GENERAL OF CANADA

Respondent

FACTUM OF THE RESPONDENT
TEAM

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PART I – OVERVIEW

1. The Canadian government has a responsibility to combat human smuggling. This international phenomenon is an abuse of human life and our immigration system. Canada encourages individuals to arrive in Canada in a manner which is safe and lawful. Accordingly, the government has imposed restrictions on those who arrive in Canada in an irregular manner. At stake is Canada's ability to protect those who are most vulnerable to being smuggled, and the integrity of Canada's immigration and refugee system.

2. The Appellant has been accepted in Canada as a Convention refugee. She arrived in Canada in an irregular manner, smuggled aboard an illegal migrant ship, and thus she must wait five years before seeking permanent residence and travel documentation. She alleges that this delay infringes her right to be free from discrimination, protected under s.15(1) of the *Canadian Charter of Rights and Freedoms*. While Canada is deeply sympathetic to the Appellant's personal situation, the *Charter* does not provide her with a remedy. The impugned provisions do not amount to discrimination under s.15(1), but draw a legitimate distinction on the basis of manner of arrival in Canada. If the Appellant does establish an infringement of her equality rights, this is a justifiable limit in a free and democratic society.

> *Canadian Charter of Rights and Freedoms*, s 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

PART II – STATEMENT OF FACTS

1. The harmful phenomenon of human smuggling

3. Canadians have been exposed to the realities of human smuggling in recent years, as an increasing number of migrant ships have arrived on our shores. Each ship brings a mass arrival of undocumented persons, making refugee claims, to Canada.

Official Problem, the Wilson Moot 2012, at 1, para 29 [Official Problem].

4. The Appellant's story illustrates many of the serious risks associated with human smuggling in migrant ships. Ms. Aya Morez ("the Appellant") and 38 other persons embarked on a fishing ship in Aflot in late June 2007, landing at Liverpool, Nova Scotia on July 31, 2007. The journey lasted over a month in the height of summer. Two passengers died en route. All but two of the survivors were malnourished and dehydrated upon arriving in Liverpool. Twenty-three were diagnosed with Hepatitis A.

Official Problem, *supra* para 3 at paras 8, 27.

5. In addition to illness and death, violence is common aboard migrant ships. Sexual assaults occur aboard the ships than in the passengers' countries of origin. Convicted criminals have been discovered amongst the passengers of such ships. The ships are generally overcrowded, unsanitary, and insufficiently stocked with food.

Official Problem, *supra* para 3 at para 26.

6. The smugglers who organize migrant ship journeys are predators. Smugglers demand exorbitant fees to carry their passengers, and exploit their vulnerability by using significant pressure tactics. They will often raise the price after a first payment has been met, and demand further payments from family members left behind after the ship's departure.

Official Problem, *supra* para 3 at para 26.

7. Canada has a duty to combat human smuggling, having ratified the United Nations *Anti-Smuggling Protocol*. Canada's duty is both to help alleviate the suffering of potential migrants, and to work against the criminal organizations that smuggle people.

> *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the *United Nations Convention against Transnational Organized Crime (2000)*15 November 2000, 2225 UNTS 209 (entered into force 28 January 2004, accession by Canada 13 May 2002) [*Anti-Smuggling Protocol*].

2. Canada's refugee system is under strain

8. The increasing number of migrant ships to Canada adds to the already significant burden on the Canadian refugee system. At the end of 2006, the latest year for which data is available, there was a backlog of approximately 60,000 refugee claims. The number of claimants rose by 60% between 2004 and 2006. During that period only 45% of refugee claims were granted. There is no evidence that those who arrive en masse by migrant ships are more likely to be granted refugee status than regular arrivals.

> Official Problem, *supra* para 3 at paras 25, 29.
> Clarifications to the Official Problem 2012, at para 6 [Clarifications].

3. Canada's legislative response

9. Sections 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 ("the impugned provisions"), form an integral part of Canada's legislative response to human smuggling. Bill C-4, the legislation that incorporated the impugned provisions into the *Immigration and Refugee Protection Act* ("*IRPA*"), was designed to tackle the problem from a number of angles. Certain provisions target human smugglers on Canadian soil, criminalizing their activities.

> Bill C-4, *An Act to amend the Immigration and Refugee Protection Act, the Balanced Refugee Reform Act and the Marine Transportation Security Act*, 1st Sess, 41st Parl, 2011, cls 4-5, 7-9, 18.
> *Immigration and Refugee Protection Act*, SC 2001, c 27, s 11(1.1), 20.2(1), 24(5), 25(1.01), 31.1 [*IRPA*].

10. The impugned provisions attack the business of human smuggling from the demand side by providing for a delayed administrative process for those refugees who arrive in Canada by

irregular means. Specifically, designated foreign nationals must wait five years after the final determination of their refugee claim is made in order to apply for permanent residence or a temporary resident permit.

IRPA, *supra* para 9, s 11(1.1), 20.2(1), 24(5), 25(1.01), 31.1.

4. The Appellant's history

11. The Appellant is from Mucno, a military-run state that does not issue identification documents to its citizens. In February 2007, the Appellant's uncle was involved in fighting that resulted in the death of the son of Mucno's military leader. Government soldiers killed several of the Appellant's relatives in retaliatory action. Upon discovering that her parents and sister had been killed, the Appellant left her home, travelling on foot to neighbouring Aflot, a Mucno ally. At one point during her journey, she heard rumour of a bounty on her head.

Official Problem, *supra* para 3 at paras 1-6.

12. In Aflot, the Appellant contacted a local man who could provide a boat to Canada. She paid him and provided services in his home until the departure date in exchange for passage. The conditions of the sea journey, described above, left two of the Appellant's companions dead. She was herself dehydrated and malnourished. Upon arrival, the Appellant told the police that if she returned to Mucno she would be killed.

Official Problem, *supra* para 3 at paras 7-9.

13. The Appellant was a "designated foreign national" pursuant to the 2007 *IRPA* amendments, because her group's arrival was designated irregular pursuant to s. 20.1(1)(b) of the *IRPA*, and she did not hold the documents required under the regulations. The Appellant was held in detention for 18 months, until she was found to be a Convention refugee at a hearing on December 19, 2008.

Official Problem, *supra* para 3 at paras 11, 13, 14.

14. Canada has provided the Appellant with conditions in which she has thrived. Since her release from detention, the Appellant has found fulfilling employment and volunteer opportunities in a safe and welcoming society.

Official Problem, *supra* para 3 at para 17.

15. In February 2011, the Appellant learned that her brother Ano was alive and living in France. She contacted him, and learned that he was suffering from a rare affliction. Doctors told him that he had less than two years to live.

Official Problem, *supra* para 3 at para 23.

16. The Appellant immediately made an application for permanent residence as a Convention refugee, and for a refugee travel document or a temporary resident permit.

Clarifications, *supra* para 8 at 2.

5. Procedural history

17. In March 2011, an immigration officer denied the Appellant's request on the basis that she was a designated foreign national.

Official Problem, *supra* para 3 at 2-3.

18. On application for judicial review, Keire J held that the impugned provisions did not violate s.15(1) of the *Charter*. She found that they do not draw a distinction on the basis of an enumerated or analogous ground, but on the basis of the manner of arrival to Canada. Nonetheless, she went on to find that if the impugned provisions did infringe s.15(1), they could not be saved by s.1.

Official Problem, *supra* para 3 at 6-7.

19. On appeal, Sharma JA, writing for the majority, adopted the reasons of Keire J on s.15(1) and dismissed the appeal. She made no comment on s.1. In dissent, Fujiwara JA held that the impugned sections violate s.15(1) of the *Charter*, and could not be saved by s.1.

Official Problem, *supra* para 3 at 7-8.

PART III – STATEMENTS OF POINTS IN ISSUE

1. Do the impugned sections of the *IRPA* infringe the Appellant's right to equality under s.15(1) of the *Charter*?
2. If the answer to (1) is yes, is the infringement reasonable and demonstrably justified in a free and democratic society under s.1 of the *Charter*?
3. If the answer to (2) is no, what is the appropriate remedy?

PART IV – ARGUMENT

Issue 1: The Impugned Provisions Do Not Infringe s.15(1) of the *Charter*

20. The Appellant fails at both stages of the test for identifying whether a law or program is discriminatory, and thus she has not established an infringement of s.15(1). The Appellant bears the burden of proof at the two stages of the *Kapp* test, recently affirmed in *Withler* ("the *Kapp* test"). The test requires the claimant to establish that:

> (1) The law creates a distinction based on an enumerated or analogous ground; and
> (2) The law creates a disadvantage, by perpetuating prejudice or stereotyping.
>
> *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143 at 178, 56 DLR (4th) 1, per McIntyre J, dissenting but not on this point [*Andrews*].
> *R v Kapp* 2008 SCC 41 at para 17, [2008] 2 SCR 483.
> *Withler v Canada (Attorney General)*, 2011 SCC 12 at para 30, [2011] 1 SCR 396 [*Withler*].

21. The impugned legislative distinction respects the Appellant's right to be free from discrimination. Canada concedes that the legislation makes a distinction in conferring a benefit, in that it delays the Appellant's ability to apply for permanent residence and travel documents. However, the impugned sections of the *IRPA* draw a distinction based on the individual's manner of arrival in Canada, and not on the basis of an enumerated or analogous ground. In any event, the law does not have a discriminatory impact.

1. The legislation does not distinguish on the basis of an enumerated or analogous ground

22. Comparison at this step of the *Kapp* test establishes that there is a "distinction," in the sense that the Appellant is treated differently than others, but the distinction is not on the basis of a personal characteristic that falls within the enumerated or analogous grounds of s.15(1). A direct or indirect distinction on one such ground is necessary to establish an infringement of

s.15(1). A comparison to other foreign nationals, including those affected by the impugned measures, demonstrates that the distinction is on the basis of manner of arrival in Canada.

R v Kapp, supra para 20 at para 17.
Withler, supra para 20 at paras 33-34, 62-63.

1.1 The impugned provisions make a distinction in conferring a benefit: they impose a delay on seeking permanent residence

23. Canada acknowledges that all five impugned provisions, when considered together, temporarily withhold a benefit from the Appellant which is available to other foreign nationals: they impose a five-year waiting period before she can apply for permanent residence and travel documents. The Appellant's interest in applying for permanent residence is that permanent residents have a right of entry into Canada. Foreign nationals such as the Appellant cannot do so without further legal authorization.

IRPA, supra para 9, s 19(2).

1.2 The law does not distinguish directly within the meaning of s.15(1)

24. The law does not distinguish directly on the basis of an enumerated or analogous ground, but rather it distinguishes on the basis of an individual's manner of arrival in Canada. This is not an enumerated ground, and has not been recognized as an analogous ground. A law is only said to distinguish directly when on its face, it draws a distinction on the basis of one such ground.

Withler, supra para 20 at para 64.

(i) Manner of arrival in Canada should not be recognized as an analogous ground

25. An individual's manner of arrival in Canada should not be recognized as an analogous ground because it fits neither the characteristics nor the purpose of the analogous grounds as set out in *Corbiere*. In that case, the Supreme Court held that each of the enumerated grounds and

analogous grounds is a "personal characteristic that is immutable or changeable only at unacceptable cost to personal identity." The enumerated and analogous grounds identify bases of distinction that often result in discrimination. The individual's manner of arrival in Canada is not immutable or constructively immutable, would not further the purposes of the enumerated and analogous grounds, and does not signify a personal characteristic, but rather a group that is too heterogeneous to constitute an analogous ground.

> *Corbiere v Canada (Minister of Indian and Northern Affairs),* [1999] 2 SCR 203 at para 13, 173 DLR (4th) 1 [*Corbiere*].

(ii) Manner of arrival in Canada is a matter of choice

26. The record suggests that the Appellant had a meaningful choice as to how she would arrive in Canada, and thus that the manner of arrival in Canada is not immutable or constructively immutable. With respect, Fujuiwara JA erred in his dissenting judgment when he found that the Appellant had no choice but to enter Canada in the way she did. Keire J made no such finding of fact at first instance. There is nothing on the record before this Court which suggests that the Appellant could not have chosen to make an application to a Canadian visa office in a neighbouring country, or to an office of the United Nations High Commissioner for Refugees. As the Supreme Court held in *Walsh*, legislation which differentiates on the basis of a personal choice does not infringe s.15(1).

> *Immigration and Refugee Protection Act Regulations*, SOR/2002-227, s 150.
> *Nova Scotia (Attorney General) v Walsh*, 2002 SCC 83 at paras 43, 50, [2002] 4 SCR 325 [*Walsh*].

(iii) Manner of arrival in Canada does not further the purpose of the enumerated and analogous grounds

27. The manner of arrival in Canada should not be a protected characteristic under s.15(1) because it does not conform to the purpose of the enumerated and analogous ground. These

grounds are meant to identify categories of distinction that should arouse suspicion as being potentially discriminatory. Laws that make distinctions on the basis of manner of arrival do not merit scrutiny under the *Charter*, as the government is entitled to regulate the way in which individuals arrive in our country.

> *Corbiere, supra* para 25 at para 13.

(iv) Manner of arrival in Canada signifies a group too heterogeneous to constitute an analogous ground

28. The term "manner of arrival in Canada" signifies an amorphous and heterogeneous group which does not share personal characteristic analogous to those enumerated in s.15(1). The individuals on board the boat which landed in Liverpool on July 31, 2007 have only one thing in common: the Minister deemed their arrival in Canada irregular. The group is an aggregation of individuals who shared a manner of arrival in Canada, and not of individuals who share a deeply personal characteristic.

> *R v Banks*, 2007 ONCA 19 at para 104, 84 OR (3d) 1.

1.3 The legislation does not indirectly affect the Appellant on the basis of an enumerated or analogous ground

29. The legislation does not indirectly distinguish between the Appellant and others on the basis of an enumerated or analogous ground. Indirect, or adverse effects discrimination, occurs only when legislation which is facially neutral has a "disproportionately negative impact on a group that can be identified on the basis of an enumerated or analogous ground" (*Withler*). The term "designated foreign national" does not function as a proxy to discriminate on the basis of national origin, family status and/or citizenship ("the cited enumerated or analogous grounds").

> *Withler, supra* para 20 at para 64.
> *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624 at para 60, 151 DLR (4th) 577 [*Eldridge*].

(i) Manner of arrival in Canada is not determined by personal characteristics identified in any enumerated or analogous grounds

30. The individual's irregular arrival in Canada is not determined by her identification with any of the cited enumerated or analogous ground. The case is distinct from *Granovsky*, where the CPP contribution requirements "operated unequally in their effect on persons who want to work but whose disabilities prevent them from working." Here, there is no evidence that while the Appellant may have wanted to arrive in Canada in a regular manner, her association with these grounds prevented her from doing so. The onus is on the Appellant to provide evidence that she had no choice in how she arrived in Canada.

> *Granovsky v Canada (Minister of Employment and Immigration)*, 2000 SCC 28, at para 43, [2000] 1 SCR 703 [*Granovsky*].

31. Any relevant limits on the Appellant's choices were a result of her personal circumstances, and not because of a personal characteristic that falls within any cited enumerated or analogous grounds. If her choice was limited, it was by her urgent need to leave Aflot, itself a product of her paternal uncle's actions, and the bounty on the heads of all his relatives. These limits are not personal characteristics cited in s.15(1).

> Official Problem, *supra* 3 at paras 5-6.

(ii) The law does not distinguish on the basis of any enumerated or analogous grounds

32. The legislation does not result in treatment which is actually differential on the basis of a personal characteristic which falls within any of the enumerated or analogous grounds, and so the distinction cannot support a finding of discrimination. For example, in *Eldridge*, deaf people were treated differently than non-deaf people in that the failure to provide sign language translation meant that they did not have an effective means of communication with their healthcare providers. The Appellant's situation is analogous to that in *Re Affordable Energy*

Coalition, where the claimants could not demonstrate that they were treated differently than other groups. The Appellant has not demonstrated that the migrants from Aflot are subject to any different restrictions than the Appellant, and they do not share the personal characteristics that the Appellant cites as the basis for discrimination.

> *Eldridge, supra* para 29 at para 71.
> *Affordable Energy Coalition, Re,* 2009 NSCA 17 at para 77, 307 DLR (4th) 293 [*Re Affordable Energy Coalition*].

33. Any differential or adverse effects of the legislation relate essentially to the manner in which these foreign nationals arrive in Canada, and not to their immutable personal characteristics. In this respect, the case is similar to *BC Health Services*, where "the differential and adverse effects of the legislation on some groups … relate essentially to the type of work they do, and not to the persons they are." Here, the differential treatment relates essentially to the way in which the individual arrives, and not the person that they are. Thus, "the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here" (*BC Health Services*).

> *Health Services and Support - Facilities Subsector Bargaining Assn v British Columbia,* 2007 SCC 27 at para 165, [2007] 2 SCR 391 [*BC Health Services*].
> *Re Affordable Energy Coalition supra* para 32 at para 83.

2. The effect of the distinction is not discriminatory

34. Should this Court find that the impugned provisions draw a distinction on the basis of an enumerated or analogous ground, the provisions nonetheless do not discriminate by perpetuating prejudice and disadvantage or stereotyping. The fact that a provision creates a disadvantage or withholds access to a benefit on the basis of an enumerated or analogous ground is not itself sufficient to establish an infringement of s.15(1). Comparison to other foreign nationals seeking legal status under the *IRPA* bolsters the contextual understanding of the Appellant's place within

the scheme and the *IRPA*, and establishes that that the law does not perpetuate prejudice and disadvantage or stereotype, as is required by the second step of the *Kapp* test.

> *R v Kapp, supra* para 20 at para 17.
> *Withler, supra* para 20 at paras 35-36, 65.

2.1 The law does not perpetuate prejudice and disadvantage

35. The delay in applying for permanent residence and travel documents does not perpetuate prejudice and disadvantage, as it does not treat a historically disadvantaged group in a way that exacerbates the situation of that group. Two relevant contextual factors guide this inquiry: the nature of the interest affected and the Appellant's pre-existing disadvantage.

> *R v Kapp, supra* para 20 at para 23.
> *Withler, supra* para 20 at paras 35, 38.

(i) The interests affected: an application for permanent residence and travel documents

36. The legislation affects the Appellant's interest in applying for permanent residence and travel documents, neither of which is of fundamental constitutional and societal significance. A consideration of the nature of the interest allows a court to appreciate the "discriminatory caliber of differential treatment" (*Law*). The delay in this case does not constitute non-recognition of the Appellant: she is recognized as legally staying in Canada as a Convention refugee. That permanent residence and travel documents are not core interests is reinforced by the fact that the Appellant is not ultimately interested in obtaining these benefits themselves, but in reunification with her brother due to her exceptional circumstances.

> *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 74, 170 DLR (4th) 1 [*Law*].

(ii) Mobility rights as a non-citizen are limited

37. With regard to her interest in travel documents specifically, as a non-citizen, the Appellant does not have a freestanding right to travel outside Canada. Section 6 of the *Charter* expressly provides for a distinction between citizens and non-citizens in terms of their mobility rights: "every citizen of Canada has the right to enter, remain in and leave Canada." As the Supreme Court stated in *Chiarelli,* the most fundamental principle of immigration law is that non-citizens, including permanent residents, do not have an unqualified right to enter or remain in Canada. As a refugee, Ms. Morez's situation is of course different than other foreign nationals, in that she has a right to remain in Canada. This however, does not mean that she has an unqualified right to travel outside Canada.

> *Charter*, *supra* note 2, s 6.
> *Chiarelli v Canada (Minister of Employment & Immigration)*, [1992] 1 SCR 711 at 733, 90 DLR (4th) 289.
> *Chieu v Canada (Minister of Citizenship & Immigration)* 2002 SCC 3 at para 57, [2002] 1 SCR 84.

(iii) The actual effect on the interests is minimal

38. The legislation has a minimal effect on the Appellant's interests. The legislation imposes a five-year delay in applying for permanent residence and obtaining travel documents, and is not a complete denial of access to these benefits. As the Supreme Court found in *Lovelace*, to the extent that the impugned measures affect the interest, the effect is "remote."

> *Lovelace v Ontario*, 2000 SCC 37 at para 89, 188 DLR (4th) 193.

(iv) The measures do not perpetuate but ameliorate the Appellant's historical disadvantage

39. The delay in applying for permanent residence and obtaining travel documents does not perpetuate prejudice and disadvantage to members of a group on the basis of characteristics

within s.15(1). The impugned provisions do not treat the Appellant in a way which exacerbates her situation, but instead ameliorate it.

Withler, supra para 20 at para 35.

40. There is no evidence of a Canadian history of disadvantage, stereotyping, marginalization, and stigmatization of individuals who identify with the cited enumerated and analogous grounds. In identifying historical disadvantage and existing prejudice, a court analyzes "the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances." In *Eldridge,* the Supreme Court's analysis of the historical disadvantage suffered by persons with disabilities was an analysis of "the history of disabled persons in Canada." The domestic focus of this inquiry is appropriate, as the *Charter* cannot be used to make Canada partly responsible for historical disadvantage and prejudices created by totalitarian regimes abroad. The Appellants have produced no evidence of a Canadian history of unfair treatment or prejudice against individuals who share the cited enumerated and analogous grounds, and so the law cannot be said to perpetuate prejudice and disadvantage.

Law, supra para 36 at para 63.
Eldridge, supra para 29 at para 56 (emphasis added).

41. Should this Court consider the Appellant's experience of historical disadvantage and prejudice outside Canada, within the entire context of the *IRPA* her situation has been ameliorated. As in *Withler,* considering the impugned provisions in isolation "create[s] a decontextualized, and therefore unrealistic, analysis," which ignores the role that the *IRPA* has played in ameliorating her historical disadvantage. The legislation provided for her admission into Canada and identification as a Convention refugee. She now has access to healthcare, education, employment, and identification documents. She feels safe in Canada.

Withler, supra para 20 at para 74.

2.2 The law does not stereotype, but corresponds to the Appellant's circumstances

42. The legislative delay does not stereotype the Appellant and others like her, but corresponds with her actual needs and circumstances. Stereotyping is the second way in which discriminatory impact can be established under the *Kapp* test. It occurs when a law or program makes a distinction on the basis of "attributed rather than actual characteristics" (*Law*). The result is a decision which does not correspond with the claimant's actual circumstances and characteristics.

> *Law*, *supra* para 36 at para 69.
> *Withler*, *supra* para 20 at para 36.

43. If identification with the cited enumerated and analogous grounds makes an individual more likely to arrive in Canada in an irregular manner without visa or other documents required under the regulations, the differential treatment at issue corresponds to the Appellant's actual circumstances. As the Supreme Court noted in *Law*, "some of the enumerated and analogous grounds have the potential to correspond with need, capacity, or circumstances." The five-year delay corresponds to her circumstances as a member of an undocumented group arrival, and her interest in arriving in Canada in a safe manner. As in *Withler*, the correspondence "confirms the absence of any negative or invidious stereotyping."

> *Law*, *supra* para 36 at para 69.
> *Withler*, *supra* para 20 at para 77.

(i) The process for permanent residence corresponds with the Appellant's circumstances as a designated foreign national

44. The five-year delay in seeking permanent residence corresponds with the Appellant's circumstances as an undocumented member of a group arrival. Distinctions between foreign nationals are necessary throughout the *IRPA* in order for Canada to meet the actual needs of foreign nationals and achieve its immigration goals. It is not unreasonable for Canada to delay a

foreign national's international travel under Canadian documents when that foreign national arrived to Canada without regular, or any, documentation, until they have established themselves in Canadian society. Throughout the *IRPA,* "[p]arliament has placed particular emphasis on the importance of providing acceptable documents" (*Rasheed*) The integrity of the Canadian immigration and refugee system, which the *IRPA* is designed to uphold, depends upon the government retaining a measure of control over whom it issues travel documents to.

> *Rasheed v Canada (Minister of Citizenship and Immigration),* 2004 FC 587 at para 13, 251 FTR 258 [*Rasheed*].

(ii) The delay incentivizes safe travel to Canada

45. The distinction creates an incentive for individuals to arrive in Canada in a regular manner, and thus corresponds with the interest of persons in the Appellant's situation to arrive in Canada in a manner which is safe. The situation onboard the ship which arrived in Liverpool in July 2007 demonstrates that irregular arrivals pose a serious risk to the health and dignity of individuals who arrive in Canada in this manner. By creating a further incentive for individuals to arrive in Canada in a regular way, the legislation corresponds with the Appellant's interests.

Issue 2: Any Restrictions Are Justified Under s.1.

46. If the impugned provisions do infringe the Appellant's rights, that infringement is justified under s.1 of the *Charter*. Under the *Oakes* test for s.1, the government must demonstrate that the provisions (a) have a pressing and substantial objective, and (b) employ means that are proportional to the objective. The means will be proportional if they are rationally connected to the objective, achieve it in a minimally impairing fashion, and if the salutary effects of the provisions outweigh the deleterious effects of the infringement.

R v Oakes, [1986] 1 SCR 103 at paras 69-70, 26 DLR (4th) 200 [*Oakes*].
Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at para 99, 120 DLR (4th) 12.

1. The objectives of the impugned provisions are pressing and substantial

47. The government's pressing and substantial objectives in enacting the impugned provisions are to combat human smuggling and to reduce the strain on the Canadian refugee system. Both objectives are clear from the language of Bill C-4 which enacted the provisions. Bill C-4 created s.20.1 of the *IRPA*, by which the Minister can designate the arrival of a group as irregular if either there are reasonable grounds to suspect that the arrival benefited a "criminal organization or terrorist group," or examinations of the persons in the group cannot be conducted "in a timely manner." The first stipulation demonstrates the government's intent to combat human smuggling, while the second is concerned with the strain on Canada's refugee system.

IRPA, *supra* para 9, s 20.1(1).

48. The objective of combating human smuggling is pressing and substantial for a number of reasons. In *Keegstra*, the Supreme Court emphasized three factors that demonstrate the pressing and substantial nature of a government objective. All three pertain to the objective of combating human smuggling. First, the harms of human smuggling are severe, as shown by the facts before this Court. Human smuggling leads to death, illness, violence, and suffering. Second, Canada

has ratified an international human rights instrument addressing the harm, namely the United Nations *Protocol against the Smuggling of Migrants by Land, Sea and Air*. Third, the harms caused by human smuggling are harms to rights protected by the *Charter* itself, which recognizes the right to life and security of the person.

> *R v Keegstra*, [1990] 3 SCR 697 at paras 63, 69, 78, 1 CR (4th) 129 [*Keegstra*].
> Official Problem, *supra* para 3 at para 26.
> *Anti-Smuggling Protocol*, *supra* para 7 at s 7.
> *Charter*, *supra* para 2, s 7.

49. The objective of alleviating the strain on Canada's refugee system is also pressing and substantial. Fiscal and administrative objectives become pressing in the context of a crisis, where the government's freedom to allocate scant resources is necessary to provide for vital programs. With a backlog of 60,000 claims in Canada's refugee system, and the number of claims increasing by 60% over the last three years for which the government has data, long wait times burden refugees and refugee applicants in Canada at every step of the process. Administrative delays create prolonged uncertainty and anxiety for these individuals. To alleviate the strain on Canada's refugee system is to alleviate this uncertainty and anxiety, and to ensure a fair and objective process for all refugee claimants.

> *Newfoundland (Treasury Board) v NAPE*, 2004 SCC 66 at para 72, [2004] 3 SCR 381.
> Official Problem, *supra* para 3 at para 25.

50. The objective of these provisions is not to deter the arrival of those who have no reasonable choice in how to reach Canada. The Appellants characterize the government's objectives narrowly, as preventing human smugglers from abusing Canada's refugee system, and easing the strain on Canada's refugee system, by deterring irregular arrivals to Canada. They argue that, insofar as some people may have no other way to reach Canada than by irregular means, this purpose is impermissible. It would, however, be irrational of the government to attempt to deter a class of people whose plight at home is so dire that they would rather endure

the risks of human smuggling to get to Canada than stay in their countries. Such people will logically not be deterred by these provisions. The deterrent effect can only reasonably be construed to be aimed at those who do have a choice in how they arrive in Canada.

2. The impugned provisions are rationally connected to their objectives

51. To meet the rational connection requirement, the government "must show that it is reasonable to suppose that the limit may further the goal, not that it will do so" (*Hutterian Brethren*). Where legislation operates by "changing human behaviour," as these provisions aim to do, a court will not insist on scientific proof to support rational connection (*RJR-MacDonald*). In *Butler*, the Supreme Court found a rational connection between obscenity and harm to society because it was reasonable to presume, without recourse to scientific evidence, that "exposure to images bears a causal relationship to changes in attitudes." Rational connection is a question of reason and logic, not of empirical fact.

> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 48, [2009] 2 SCR 567 [*Hutterian Brethren*].
> *RJR-MacDonald Inc v Canada (Attorney General)*, [1995] 3 SCR 199 at para 154, 127 DLR (4th) 1 [*RJR-MacDonald*].
> *R v Butler*, [1992] 1 SCR 452 at para 103, 89 DLR (4th) 449 [*Butler*].

52. The impugned provisions are intended to achieve their objectives by deterring potential migrants from choosing irregular means to arrive in Canada. Rational connection is therefore established in this case because it is reasonable to suppose that (a) the provisions may deter potential migrants, and (b) such deterrence may further the objectives.

2.1 The provisions may deter potential migrants

53. The impugned provisions deter potential irregular arrivals in Canada by creating a disincentive to this manner of arrival. The provisions impose a slower administrative process on

irregular arrivals, encouraging those contemplating boarding a migrant ship to pursue regular channels to reach Canada. The offer of a human smuggler will be less enticing to an individual who understands that by following proper channels to reach Canada he or she can avoid a five-year delay in applying for permanent residency.

54. It is reasonable to suppose that prospective migrants will become aware of these provisions, and thus be deterred. Awareness of deterrent laws spreads over time as those laws are applied. In *Hufsky*, the Supreme Court took judicial notice of the fact that after seven years of operation, the public was now well aware of a random stop program aimed at deterring driving offences. Similarly, the deterrent effect of the impugned provisions does not need to occur instantly in order for the provisions to be rationally connected to their objectives. Over time, community and family networks will spread awareness of these provisions to countries from which migrant ships depart. Refugees and migrants in Canada who enter the Canadian system will want to ensure that relatives and friends in their countries of origin who might contemplate irregular arrival in Canada know about the impugned provisions.

R v Hufsky, [1988] 1 SCR 621 at para 20, [1988] SCJ No 30 [*Hufsky*].

2.2 Deterrence will further the objectives

(i) Deterrence will help combat human smuggling

55. Deterrence will help combat human smuggling by lessening the number of persons willing to embark on migrant ships. Human smugglers will receive less business, impairing their ability to operate. Fewer migrant ships being filled will also mean less suffering aboard such ships. The effect of deterrence on human smuggling does not depend on all prospective irregular arrivals being deterred. So long as it is reasonable to presume a causal link between this

deterrent measure and the choice to pursue other means to reach Canada, rational connection is satisfied.

(ii) Deterrence will help alleviate the strain on Canada's refugee system

56. The objective of alleviating the strain on the Canadian system will also be furthered by deterrence. With fewer ships arriving in Canada, there will be fewer mass arrivals for the immigration system to absorb. Mass arrivals tax the immigration system in a far greater manner than the mere number of migrants arriving would suggest. Passengers aboard migrant ships are often, like the Appellant, in poor health. To become designated foreign nationals, they must also lack required documents. These factors contribute to the difficulty of processing claimants who arrive en masse. The group nature of irregular arrivals compounds the problem, requiring staff and resources to be diverted to process them.

Official Problem, *supra* para 3 at para 26.

3. The provisions minimally impair the Appellant's rights

57. The impugned provisions satisfy the minimal impairment requirement because they fall within a range of reasonable alternatives. In assessing minimal impairment, "the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives."

Hutterian Brethren, supra para 51 at para 53.

3.1 Deference to the legislature is warranted

58. The government is entitled to deference in the means chosen to advance its objectives, because the impugned provisions advance the interests of a vulnerable group (*Thomson*

Newspapers), balance competing social policy considerations (*Irwin Toy*), and deal with a phenomenon that is not susceptible to precise measurement (*McKinney*).

> *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 112, 159 DLR (4th) 385 [*Thomson Newspapers*].
> *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927 at para 80, 58 DLR (4th) 577 [*Irwin Toy*].
> *McKinney v University of Guelph*, [1990] 3 SCR 229 at paras 104-5, 76 DLR (4th) 545 [*McKinney*].

59. The provisions are part of Canada's efforts to protect potential victims of human smugglers from the dangers of being smuggled. This is not a case like *Dunmore*, in which the group whose rights were impinged by the statutory scheme was equally vulnerable to the group that the scheme aimed to protect. Here, while refugees now living in Canada such as the Appellant are indisputably a vulnerable group, their vulnerability is not of the same order as those who are still at risk of being smuggled, now or in the future. Members of the vulnerable group that these provisions seek to protect are at risk of death. Given this level of vulnerability, the legislature's efforts to protect this group must be granted deference.

> *Dunmore v Ontario (Attorney General)*, 2001 SCC 94 at para 58, [2001] 3 SCR 1016 [*Dunmore*].

60. The impugned provisions constitute an effort by the legislature to respond to a problem that, by its nature, renders a solution difficult to tailor. The effect of various means to combat human smuggling is not capable of "precise measurement" (*McKinney*). A multitude of unpredictable factors will influence the prevalence of human smuggling, including climate change and political events throughout the world. Decisions on how to address this problem will "inevitably be the product of a mix of conjecture, fragmentary knowledge, general experience and knowledge of the needs, aspirations and resources of society, and other components" (*McKinney*). The Supreme Court in *McKinney* stressed that, in cases such as this one, courts must show deference to the legislature, which has "evident advantages" over the judiciary in making decisions based on incomplete evidence.

> *McKinney*, *supra* para 58 at para 104.

3.2 The provisions are minimally impairing

61. There is no alternative means to achieve the government's objectives that is less impairing of the Appellant's rights. The alternatives would all either substantially fall short in achieving the objectives, cause greater infringement of the Appellant's rights, or fall within the range of reasonable alternatives within which the government is entitled to deference.

(i) Pursuing smugglers directly is insufficient

62. Canadian efforts to pursue human smugglers directly cannot replace the impugned provisions. Both approaches are complementary parts of the government's overall approach to human smuggling, which is a complex social problem. In *Butler*, the Supreme Court stated that where the government adopts different measures as part of a "multi-pronged" approach to address a complex social problem, "[t]here is nothing in the *Charter* which requires Parliament to choose between such complimentary measures."

> *Butler*, supra para 51 at para 124.

63. Direct criminal prosecution of human smugglers is only a partial response to the problem of human smuggling. The criminal penalties for human smugglers enacted as part of the 2007 *IRPA* amendments will not suffice to deter human smuggling by themselves. The criminal organizers of human smuggling typically remain in the country of embarkation to carry on their business, and are beyond Canada's reach. The impugned provisions are necessary to achieve the government's goals, since they directly impair the business of criminal human smugglers by attacking demand. Without the impugned provisions, Canada's response to human smuggling would be deficient.

> *IRPA*, *supra* para 9, s 117.
> Official Problem, *supra* para 3 at para 7.

(ii) Alternative deterrents would infringe on rights more significantly

64. The impugned provisions strike an appropriate balance between the government's objectives and the rights and interests of refugees. The government could have legislated to prevent any person arriving irregularly in Canada from applying for refugee status. This measure would create a greater deterrent effect, but would cause great hardship to those who, out of ignorance of Canadian policy or desperation, came to Canada in an irregular manner.

(iii) An emergency relief exemption would undermine the provisions' effectiveness

65. The government could have allowed for an exemption to the impugned provisions in exceptional circumstances, but this would have seriously undermined their deterrent effect. The fixed nature of a penalty is recognized to create a deterrent effect. Thus, in criminal sentencing, mandatory minimum sentences can serve to advance the sentencing principle of general deterrence, because it is against the certainty of the minimum sentence that the potential offender will measure the consequences of offending. Similarly, if these provisions allowed for an exemption to the delay in being permitted to travel, then the delay would not be perceived as an inevitable consequence of irregular arrival. No matter how narrow an exemption might be, a person contemplating irregular arrival to Canada would conclude from its existence that they would be able to exploit it if the need arose. Whether accurate or not, this perception would prevent the provisions from effectively deterring irregular arrival.

R v Morrisey, 2000 SCC 39 at para 46, [2000] 2 SCR 90.

66. The courts have recognized that when government attempts to influence human behaviour, creating exceptions to categorical measures can frustrate those attempts. In *Canadian Newspapers Co.*, the Supreme Court found that a complete ban on publishing the identities of complainants in sexual assault cases was minimally impairing, because it took judicial notice of

the fact that allowing the exercise of discretion would deprive complainants of the certainty that their identities would not be published. The exemption would undermine the goal of the scheme, which was to encourage complainants to step forward. This is a similar case, in that the behaviour the government seeks to encourage would likewise be undermined by an exemption that would take away the certainty of the deterring provisions.

> *Canadian Newspapers Co v Canada (Attorney General)*, [1988] 2 SCR 122 at para 19, 52 DLR (4th) 690 [*Canadian Newspapers Co*].

67. Moreover, the effects of a deterrent on the social phenomenon of human smuggling will be difficult to quantify. The legislature's decision not to include any exemption in the provisions creating that deterrent is thus one entitled to deference from this Court.

> *McKinney*, *supra* para 58 at para 104.

(iv) The period of delay falls within the range of reasonable alternatives

68. There is no obviously more appropriate duration for the delay created by these provisions. A five-year period will be perceived as substantial by most potential migrants, but does not amount to near-permanence for those who feel compelled to arrive in Canada irregularly. The legislature's decision to create a five-year delay is exactly the kind of policy judgment to which courts show deference. The principle set out in *Edwards Books* is applicable here, that at the stage of minimal impairment "[t]he courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line."

> *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at para 142, 35 DLR (4th) 1 [*Edwards Books*].

4. The deleterious effects of the provisions are proportional to their salutary effects

69. The impugned provisions strike a balance between the pursuit of their objectives and the interests of potential irregular arrivals to Canada. While the deleterious effects on the Appellant

are severe, they must be measured against the salutary effects of provisions that are aimed at combating a practice that results in death and suffering.

70. Most of those affected by the impugned provisions will not suffer from travel restrictions in the same way as the Appellant. For the typical person, a five-year delay in being able to travel outside Canada might be a real inconvenience, but not a great harm. The Appellant's unfortunate situation is unique, and in her case the provisions are causing hardship.

71. The salutary effect of these provisions is to save lives. On the Appellant's trip alone, two out of 39 passengers died. The toll could have been far higher, had the dehydrated, malnourished group, more than half of whom were suffering from Hepatitis A, been at sea just a few days longer. It is reasonable, based on the rational connection analysis above, to suppose that these provisions will effectively deter some individuals who have a choice in how they arrive in Canada from boarding illegal migrant ships. With fewer people embarking on these ships, fewer people will die on them.

Official Problem, *supra* para 3 at paras 8, 27.

72. The scale of the provisions' salutary effects must be assessed in light of the continued increase in human smuggling to Canada. The frequency of arrivals of migrant ships has been on the rise, and is inherently unpredictable. Group migration can be motivated by regional instability, natural disasters, and socio-economic forces, all of which are difficult or impossible to foresee. A significant increase in these destabilizing forces is possible at any time. It is crucial that Canada have a comprehensive approach to human smuggling in place in advance of such an increase, so that fewer people will choose to react by embarking on illegal migrant ships.

Official Problem, *supra* para 3 at paras 29.

Issue 3: The Appropriate Remedy is a Suspended Declaration of Invalidity

73. If this Court finds that the impugned provisions are unconstitutional, then the appropriate remedy is a declaration of invalidity, suspended for one year. The delay would account for important social interests that would be adversely affected by an immediate declaration of invalidity, and would allow Parliament time to enact *Charter*-compliant legislation based on the findings of this court.

74. Striking down the impugned legislation without providing something in its place would pose a danger to those vulnerable people who might contemplate irregular arrival to Canada. Danger to the public is one of the grounds upon which courts will grant a suspended declaration of invalidity. If the impugned provisions are simply struck down, their deterrent effect will vanish. Canada may see a wave of irregular arrivals, brought here by smugglers hoping to exploit the window of time before Parliament drafts a revised deterrent to irregular arrival. All of the government's objectives in enacting these provisions would then be frustrated. A suspended declaration of invalidity would avoid this harmful result.

Schachter v Canada, [1992] 2 SCR 679 at para 85, 93 DLR (4th) 1 [*Schachter*].

75. The Appellant's request for an order in the nature of mandamus under s.24(1) cannot succeed, because she has no legal entitlement to travel documents. The Appellant has appealed a judicial review of a Ministerial decision that was decided entirely on the basis that the Appellant was a designated foreign national. Even given a finding that the impugned provisions are unconstitutional, there are insufficient facts before this court to consider whether the Appellant should be granted travel documents. Refugees who are not designated foreign nationals must make an application for these documents, in the course of which their eligibility is assessed. The Appellant will be free to make such an application once Parliament modifies its legislation, or the declaration of invalidity becomes active, whichever occurs first.

PART V – ORDER SOUGHT

76. The Respondent respectfully requests an order dismissing the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of February, 2012

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Counsel for the Attorney General of Canada

PART VI – LIST OF AUTHORITIES AND STATUTES

LEGISLATION **PARA #s**

JURISPRUDENCE

INTERNATIONAL MATERIALS