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 APPELLANT

TEAM

[Para #]

PART I: OVERVIEW

[1] The Appellant, Ms. Aya Morez, challenges provisions in the *Immigration and Refugee Protection Act* that violate her right to equality under s 15 of the *Canadian Charter of Rights and Freedoms*. These provisions deprive her of benefits promised to refugees under the *1951 Refugee Convention*, and punish her for fleeing to Canada from a brutal regime with the aid of human smugglers, the only means available to her. These provisions stigmatize the victims of human smuggling on the very basis that they have been victimized – their nation of origin.

> *Official Problem*, The Wilson Moot 2012 at 3 [*Official Problem*]
> *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].
> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].
> *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [*Refugee Convention*].

[2] At the center of this case is the guarantee of substantive equality. While Ms. Morez receives formally the same treatment as other refugees, this treatment has an adverse effect on her and other refugees whose national origin makes it impossible to flee to Canada except in an irregular fashion. By punishing Convention Refugees for fleeing their home countries in the only manner available to them, the impugned provisions create yet another hurdle to a historically disadvantaged group. By associating legitimate refugees with criminality, the impugned provisions encourage a prejudicial climate of xenophobia and distrust towards designated foreign nationals.

[3] These violations are not demonstrably justified under s 1 of the *Charter*. The impugned provisions punish desperate and vulnerable refugees for the conduct of smugglers in circumstances where the refugee has little choice as to how they flee their homeland. These

provisions will not serve as a deterrent to refugees given the circumstances in which they must flee. The Appellant seeks an order that sections 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of the *IRPA* are of no force and effect as well as an order in the nature of mandamus requiring the Minister to grant her travel documentation.

Charter, *supra* para 1, s 1.
IRPA, supra para 1, ss 11(1.1), 20.2(1), 24(5), 25(1.01), 31.1 [the impugned provisions].

PART II: STATEMENT OF FACTS

A. The Claimant Aya Morez

[4] Aya Morez is a Convention Refugee who escaped her home country, the totalitarian state of Mucno, in 2007. Her uncle fought against and killed one of the sons of a military leader of Mucno. Government soldiers retaliated by killing most of her family. On March 5, 2007, Aya came home to discover the beaten, bloody bodies of her parents and younger sister. Her brother Ano was missing. Fearing the return of the soldiers, Aya left that night. She gathered what she could carry, and set out by foot, traveling under cover of darkness and hiding in the dense forests of Mucno.

Official Problem at 3.

[5] Arriving in the neighboring country of Aflot a month later, Ms. Morez made contact with a local man who arranged to place her on a fishing boat bound for Canada. He accepted as payment Aya's mother's jewelry and her "services" in his home. In late June, Ms. Morez was placed on the fishing vessel with 38 Aflot nationals. At trial, evidence was accepted to show that conditions on these ships are deplorable. This ship was no exception; two of the passengers died during the trip and more than half of the passengers were diagnosed with Hepatitis A upon arrival to Canada.

Official Problem at 3, 6.

[6] When Aya arrived in Liverpool, Nova Scotia, the Minister of Citizenship and Immigration ("the Minister") designated the arrival of Aya and the other passengers as irregular pursuant to s 20.1(1)(b) of the *IRPA*. The Minister found that there were reasonable grounds to suspect a violation of s 117(1) of the *IRPA*, that is, that those who organized the arrival did so knowing, or being reckless to the fact, that at least some of the passengers were entering Canada in a manner that contravened the *IRPA*.

Official Problem at 4.
IRPA, supra para 1, ss 20.1(1)(b), s 117(1).

B. Impact of the Impugned Provisions

[7] As a designated foreign national Ms. Morez cannot apply for either temporary (s 24(5)) or permanent residence (ss 11(1.1), 20(1.1)) for a period of five years. Under the impugned provisions, Ms. Morez will not be eligible for residency and the accompanying travel documents until December 2013.

IRPA, supra para 1, ss 24(5), 11(1.1), 20(1.1).
Official Problem at 6.

[8] The impugned provisions further prevent Ms. Morez from applying to the Minister for relief under s 25 of the *IRPA* to grant her residency or travel documents on humanitarian and compassionate grounds. This option is available to others affected by the *IRPA* through which they may ask to have their unique personal circumstances taken into account. This provision allows the Minister to relax the strict requirements of the *IRPA* when their impact will be harsh or unfair in an individual's unique circumstances.

IRPA, supra para 1, s 25(1.01).

[9] In December of 2008, after being detained for 18 months, the Refugee Protection

Division of the Immigration and Refugee Board declared Ms. Morez a Convention Refugee. She was released from detention two months later and moved into a women's shelter until she was able to save enough money from her job at a retirement home to afford her own apartment.

Official Problem at 5.

[10] She then discovered that her brother Ano, who had escaped Mucno at the same time as Aya, was living in France with a terminal illness. Doctors have estimated that Ano will likely die by February 2013. He cannot travel as a result of his illness. If the impugned provisions are upheld, Aya will likely be unable to see her brother.

Official Problem at 5.

[11] Section s 31.1 of the amended *IRPA,* states that, until Ms. Morez is granted permanent or temporary residency, she will not be afforded the protection of Article 28 of the *Refugee Convention*. She is not afforded the right to the documents she needs to travel out of and back to Canada.

IRPA, supra para 1, s 31.1.
Official Problem at 2.
Refugee Convention, supra para 1, Article 28.

C. Judicial History

[12] At trial, Justice Keire found no s 15 violation, holding that the distinction was on the basis of manner or arrival rather than an enumerated or analogous ground under the *Charter*. However, in assuming there was a s 15 violation for the purposes of considering s 1, Justice Keire concluded an infringement would not be justified.

Official Problem at 7.

[13] Justice Keire identified two pressing and substantial objectives for the impugned provisions: the prevention of human smuggling and the reduction of false refugee claims. She

found, however, that the impugned provisions did not pass the proportionality analysis because there was no rational connection between these objectives and the wait times imposed on legitimate refugees seeking residency status. Findings were made that the wait period is contrary to some of the express objectives of the *IRPA*: to fulfill international obligations such as those in the *Refugee Convention* and facilitate family reunification.

Official Problem at 7.
Refugee Convention, *supra* para 1.
IRPA, *supra* para 1, ss 3(2)(f), 3(3)(f).

[14] At the Federal Court of Appeal, Justice Sharma adopted the reason of Justice Keire in dismissing the appeal. In dissent, Justice Fujiwara found a violation of s 15 through a distinction based on intersecting grounds of national origin and citizenship.

Official Problem at 8.

PART III: STATEMENT OF POINTS IN ISSUE

Issue I: The impugned provisions violate the appellant's s 15(1) right to equality as they have a discriminatory and adverse effect on refugees whose nation of origin makes them a target for human smugglers.

Issue II: The infringement cannot be justified under s 1 of the *Charter*; the impugned provisions fail at all three stages of the *Oakes* test.

Issue III: Remedy – The impugned provisions of the *IRPA* should be declared invalid pursuant to s 52(1) of the *Constitution Act.*

PART IV: ARGUMENT

Issue I: The Impugned Provisions Violate the Appellant's s 15 Right to Equality

[15] A s 15 analysis should focus on the purpose of the equality guarantee in the *Charter*, promoting "a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration" (*Andrews*). The impugned provisions deny the victims of human smuggling benefits owed to them under the law. This has an adverse effect on legitimate refugees whose status as designated foreign nationals is directly tied to their national origin, fracturing their belief that they are recognized as equal human beings at law, equally deserving of concern, respect and consideration.

Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at para 16 [*Andrews*].

[16] In *Withler*, the Supreme Court of Canada restated the current s 15(1) test developed in *Andrews* and affirmed in *Kapp*: First, does the law create a distinction based on an enumerated or analogous ground? Second, does the distinction create disadvantage by perpetuating prejudice or stereotyping?

Withler v Canada (Attorney General), 2011 SCC 12 at para 30 [*Withler*].
Andrews, supra para 15.
R v Kapp, 2008 SCC 41 at para 17 [*Kapp*].

A. The impugned provisions create a distinction on the basis of enumerated or analogous grounds

i. The impugned provisions, *on their face*, distinguish on the basis of manner or arrival

Designated foreign nationals are denied equal benefit of the law

[17] As a result of the impugned provisions, a refugee who is a designated foreign national cannot apply for permanent residence (ss 11(1.1), 20.2(1)), temporary residence (s 24(5)) or

special consideration on humanitarian or compassionate grounds (s 25(1.01)) until five years after a final determination of their refugee status. A five-year delay in granting permanent residence will also necessarily delay an application for citizenship, providing a barrier to integration into Canadian society (*Canadian Council for Refugees*). During this period, for no reason other than their status as designated foreign nationals, these refugees will not be entitled to vote, and their opportunities to work will be limited and they may face difficulties obtaining loans or mortgages.

> *IRPA, supra* para 1, ss 11(1.1), 20.2(1), 24(5), 25(1.01).
> Canadian Council for Refugees, "Bill C-4 – Comments on a Bill that Punishes Refugees" (11 November 2011) (Legislative Comment) online: CCR <http://ccrweb.ca> [*Canadian Council for Refugees*].
> *Canada Elections Act*, SC 2000, c 9, s 3 [*Elections Act*].

[18] Interpretation of the rights owed to Canadians by the *Charter* must be informed by Canada's international obligations, including those owed under the *Refugee Convention* (*Singh*). International law has a critical influence on the interpretation of the rights contained in the *Charter* (*Slaight, Baker*). In this context, principles adopted in the *Refugee Convention* demonstrate the importance of the rights being denied to refugees through the impugned provisions, as well as the suspect nature of distinctions drawn on the basis of manner of arrival.

> *Singh v Minister of Employment and Immigration*, [1985] 1 SCR 177 [*Singh*].
> *Slaight Communicatinos v Davidson*, [1989] 1 SCR 1038 [*Slaight*].
> *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 [*Baker*].

[19] The operation of the impugned provisions deprive the claimants the benefit of Article 28 and 34 of the *Refugee Convention*. Article 28 reads:

> The Contracting States shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory, unless compelling reasons of national security or public order otherwise require …

While this right is provided to refugees in Canada generally, s 31.1 of the *IRPA* deems

designated foreign nationals to be staying unlawfully in Canada "for the purposes of Article 28 of the *Refugee Convention*", explicitly denying them this benefit. Article 34 provides that:

> The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings.

An arbitrary five-year delay, imposed exclusively on designated foreign nationals, does not comply with this requirement.

Refugee Convention, supra para 1, Articles 28, 34.
IRPA, supra para 1, s 31.1.

The designation is on the basis of manner of arrival

[20] Justice Keire, on application for judicial review in the Federal Court below, held that the distinction drawn by the impugned provisions was on the basis of manner of arrival to Canada. Under the impugned provisions, there are two situations in which the arrival of a group in Canada may be deemed to be irregular: either in the case where human smuggling is suspected (20.1(1)(b)) or where examination for the purpose of establishing identity or inadmissibility cannot be conducted in a timely manner (20.1(1)(a)). Anyone who has arrived in a manner which has been designated as irregular, and does not hold a visa or other document (i.e., travel documents) required under the *IRPA* to gain entry, will be deemed a designated foreign national.

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

[21] Manner of arrival, as the term is used by Justice Keire, distinguishes between two groups of refugees: those who have arrived irregularly and others. Within the context of the *IRPA*, manner of arrival has a specific meaning; it is used to distinguish between smuggled refugees and others.

Official Problem at 7.
IRPA, supra para 1.

ii. The impugned provisions, *by their effect,* distinguish between refugees on the basis of national origin

[22] While the impugned provisions draw a formal distinction on the basis of manner of arrival, they have an adverse effect on refugees whose manner of arrival is effectively determined by their national origin. Substantively, this creates a distinction between smuggled refugees and other refugees. It is well established that the proper approach to equality under s 15 is substantive rather than formal (*Withler*). There need not be a discriminatory purpose or intention in the legislation to support a violation of s 15 (*Eldridge*). Legislation that is neutral in its general application may violate equality rights if it has a discriminatory impact on a particular individual or a group (*Andrews*). Central to the purpose of s 15 is the amelioration of groups within Canadian society who have suffered disadvantage (*Eaton*). Where the government does provide a benefit, it must do so in a non-discriminatory manner, and "in many circumstances" this will require that the government extend the benefit to a previously excluded class of persons (*Eldridge*).

> *Withler, supra* para 16.
> *Eldridge v British Columbia (Attorney General),* [1997] 3 SCR 624 at paras 62, 73 [*Eldridge*].
> *Andrews, supra* para 15.
> *Eaton v Brant Board of Education*, [1997] 1 SCR 241 at para 67 [*Eaton*].

[23] Because Ms. Morez is from Mucno, she cannot avoid the burden of becoming a designated foreign national. As Justice Fujiwara pointed out in the Federal Court of Appeal below, "[b]eing undocumented, it is difficult to conceive of how else Aya could have made the trip from Mucno to Canada other than in the manner she did." Mucno is an isolationist nation in the sense that it does not allow its citizens to travel outside its boarders and does not issue travel documents. If Aya had valid travel documents, she would not have been deemed a designated

foreign national. There are no offices in Aflot where she could have applied for foreign refugee status. Ms. Morez did not choose between available options for coming to Canada, rather she fled her home with a very real and immediate fear for her life, desperately seeking the only means of escape available to her.

> *Official Problem* at 8.
> *Clarifications to the Official Problem*, Wilson Moot 2012 [*Official Clarifications*].

[24] The international community has recognized, through the *Refugee Convention* and the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, that refugees often have no choice in how they escape their country. The International Council on Human Rights Policy recognizes smuggled migrants as "a diverse class of people, who in practice exercise different degrees of choice when they travel."

> *Refugee Convention, supra* para 1.
> *Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime*, GA Res 55/25, 28 January 2004, UNGAOR [*Smuggling Protocol*].
> International Council on Human Rights Policy, "Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence" (Geneva: ICHRP, 2010) at 72 (online: <www.ichrp.org>).

[25] Through the impugned provisions, the government has created a distinction that has a differential effect on refugees from nations like Mucno. This is analogous to the requirement, found to be discriminatory by the Supreme Court of Canada in *Meiron*, that all firefighters must be able to run 2.5 kilometers in 11 minutes. While this is a barrier that distinguishes *on its face* on the basis of fitness, the Supreme Court found that this was a distinction on the basis of sex since *in effect* this would bar most women from becoming firefighters, in spite of the fact that some men could not pass the running test and indeed some women could.

> *British Columbia (Public Service Employee Relations Commission) v BCGSEU*, [1999] 3

SCR 3 [*Meorin*].

[26] While national origin is not always completely determinative of designated foreign national status (*i.e.*, not all refugees from isolationist nations will become designated foreign nationals, not all designated foreign nationals are from isolationist nations), Ms. Morez's situation demonstrates that there is a strong correlation between the two. As a result of her nation of origin, she cannot avoid becoming a designated foreign national. This law disproportionately affects people of her national origin.

iii. National origin as a prohibited ground of discrimination

[27] Few *Charter* cases have dealt specifically with the enumerated ground of national origin. This case presents an opportunity to develop the jurisprudence interpreting the nature of this ground. The purpose of national origin as an enumerated ground must be read together with the inclusion of race. Both should work towards the "unattainable goal … that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another" (*Andrews*). While these grounds are related, they are two distinct rights. The need for protection from discrimination on the basis of national origin is demonstrated by the circumstances of Aya Morez, who faces a tilted playing field because of her Mucno origins. The purpose of recognizing discrimination based on national or ethnic origin is similar to that for the enumerated ground of sex: to ameliorate positions of disadvantage in society.

Andrews, *supra* para 15 at para 26.

B. The Distinction Created in the Impugned Provisions is Discriminatory

[28] Not every distinction based on enumerated or analogous grounds will constitute a violation of s 15. As the Supreme Court of Canada said in *Kapp*: "the focus is on *preventing* governments from making distinctions... that have the effect of perpetuating group disadvantage and prejudice; or impose disadvantage on the basis of stereotyping."

Kapp, supra para 16 at para 25.

i. Markers of suspect decision making.

[29] The enumerated grounds in s 15 have been described as "markers of suspect grounds associated with stereotypical, discriminatory decision making" (*Corbiere*). These are characteristics that have been chosen, whether by lawmakers or the courts, because distinctions based upon them have historically been made in a discriminatory fashion. Any distinction on the basis of national origin should be viewed very critically by this court, particularly in the context of immigration and refugee law since nation of origin has historically been a basis for discriminatory refugee and immigration policies. Grounds of prohibited distinction are not a purely legal construct, but rather they "reflect a political and social reality to which the law has, belatedly, given recognition" (*Pothier*). The inclusion of national origin signals Parliament's recognition of the social and historical barriers faced by individuals from some countries; and the recognition of the temptation to ignore these barriers.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203, 173 DLR (4th) 1 at para 7 [*Corbiere*].
Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 CJWL 37 at 41.

[30] Manner of arrival has been recognized as a marker of suspect distinction in both the spirit and the letter of international law. For example, Article 19 of the *Smuggling Protocol* prohibits discrimination against a migrant on essentially identical grounds as the impugned provisions.

Article 31 of the *Refugee Convention* prohibits Contracting States from penalizing refugees for illegal entry or presence, or entering into a territory without authorization. These prohibitions demonstrate that the international community has recognized that how a refugee crosses a boarder is an irrational basis for differential treatment of that refugee. Even though manner of arrival is not an analogous ground to those enumerated in the *Charter*, that a distinction is made on this historically suspect ground should act as a marker to this court to examine critically the true nature of that distinction. In this case, it is tied to national origin.

> *Smuggling Protocol*, *supra* para 24, Article 19.
> *Refugee Convention*, *supra* para 1, Article 31.

ii. The impugned provisions perpetuate prejudice

[31] By punishing refugees arriving in Canada in an irregular manner, the impugned provisions promote negative stereotypes and perpetuate prejudice against smuggled refugees. By imposing penalties on legitimate refugees, the government is giving credence to stereotypical beliefs that the victims of human smuggling are abusing Canada's immigration system. The impugned provisions associate the victims of human smuggling with criminality. The amended *IRPA*, under s 31.1, sends a negative message that legitimate refugees who are designated foreign nationals are not staying in Canada legally.

> *IRPA*, *supra* para 1, s 31.1.

[32] The prejudicial effects of associating smuggled refugees with criminality has been clearly recognized by Navanethem Pillay, UN High Commissioner for Human Rights when she said:

> The association of irregular migration with criminality promotes the stigmatization of migrants and encourages a climate of xenophobia and hostility against them.

The impugned provisions will inflame prejudices against refugees, and promote stereotypical beliefs about smuggled refugees.

Navanethem Pillay, Opening Remarks delivered at the Panel Discussion on Human Rights of Migrants in Detention Centers (17 September 2009).

The distinction in the impugned provisions does not correspond to the needs, capacities or circumstances of smuggled refugees

[33] As pointed out by Justice Keire in the Federal Court below:

> The punishment in the impugned sections is not directed at smugglers, nor even at those who advance false refugee claims, but at all those whose arrivals in Canada are 'irregular'

The impugned provisions do not correspond with the capacity or circumstances of the claimant or other refugees from isolationist countries. Aya and others in her position do not deserve this punishment. Despite the connotation that irregular refugees are "illegal" or "illegal immigrants," Aya Morez has not committed any crime. Being the object of human smuggling is not a crime under international or domestic law, nor is it an offence under the *IRPA.*

Official problem at 7.

iii. The impugned provisions perpetuate disadvantage

The nature of the interests affected is serious and fundamental

[34] The nature of the interests affected demonstrates that the distinctions created by the impugned provisions are in fact discriminatory. As pointed out by Justice L'Heureux-Dubé in *Egan*, "[t]he more fundamental the interest affected or the more serious the consequences of the distinction, the more likely that the impugned distinction will have a discriminatory impact."

Egan v Canada, [1995] 2 SCR 513 at 63 [*Egan*].

[35] The consequences of the "designated foreign national" distinction on Ms. Morez are both fundamental and serious. If the impugned provisions are upheld, she will not be reunited with her last living family member. The *Refugee Convention* officially adopted in unanimous

recommendation B that unity of the family is an essential principle of dealings with Convention Refugees. The *IRPA* itself also recognizes the facilitation of reunification of refugees with their family members as one of the objectives of the Act; and an important element of the self-sufficiency and social and economic wellbeing of refugees.

Refugee Convention, *supra* para 1.
IRPA, *supra* para 1, s 3(2)(f).

[36] The impugned provisions will delay smuggled refugees from applying for citizenship for an additional five years. This affects a basic aspect of full membership in Canadian society. As Justice Fujiwara noted in the Federal Court of Appeal below, Ms. Morez "quite ardently wishes she could change one of the key grounds on which the distinction at issue is based – her citizenship."

Official Problem at 8.

[37] By delaying citizenship, the impugned provisions will prevent refugees from voting (*Elections Act*). The right to vote, enshrined in s 3 of the *Charter* is one of the most fundamental rights of Canadians. As pointed out by Chief Justice McLachlin, "[t]he right to vote, which lies at the heart of Canadian democracy, can only be trammeled for good reason."

Elections Act, *supra* para 17, s 3.
Charter, *supra* para 1, s 3.
Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68 at para 1 [*Sauvé*].

Smuggled refugees experience preexisting disadvantage

[38] The purpose of s 15, as pointed out by the Supreme Court of Canada in *Andrews*, focuses on the rights of "groups who suffer social, political and legal disadvantage in our society". Smuggled refugees from isolationist countries are exactly the kind of group who should be protected by s 15 of the *Charter*. Smuggled refugees face many of the same challenges as illegal

migrants, who the Federal Court of Canada has commented, "lack political power, are frequently disadvantaged, and are incredibly vulnerable to abuse" (*Toussaint*). As a subset of non-citizens, smuggled refugees are a "discrete and insular minority" (*Andrews*) and are not eligible to vote. Convention Refugees are *by definition* a historically disadvantaged group. As defined by the *IRPA*, refugees necessarily have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. It is hard to imagine a group in modern Canadian society more lacking in political power or more vulnerable to having their interests overlooked than smuggled refugees.

Andrews, *supra* para 15 at paras 56, 63.
Toussaint v Canada, 2010 FC 810 at para 82 note 3.
Refugee Convention, *supra* para 1.
IRPA, *supra* para 1, s 96.

iv. The impact of the impugned provisions implicates intersecting grounds of discrimination

[39] While the impugned provisions distinguish on the basis of national origin, they exclusively have an adverse effect on non-citizens. It is not correct to view these grounds of discrimination as separate and additive. Rather, they are interlocking, synergistic and closely related. The discrimination faced by refugees from isolationist countries does not "fit into discrete boxes of grounds of discrimination" any more than the experiences of a gendered disabled person can be understood as those of *either* experiences of disability or gender (*Pothier*).

Pothier, *supra* para 29 at 59.

[40] The court in *Andrews* recognized that it is important to take seriously discrimination against non-citizens because, as a group which cannot vote, non-citizens are in danger of being overlooked by elected officials. Victims of human smuggling, even more so than other non-

citizens, are a group which elected officials have little interest in protecting. As an unpopular, racialized, impoverished group, there is not only no political capital to be gained in protecting this group, there is in fact political capital to be gained in marginalizing this group.

> *Andrews*, supra para 15.
> Ban Ki-Moon, Opening remarks delivered at the Third Meeting of the Global Forum on Migration and Development (04 November 2009).

Section 15 Conclusion

[41] A substantive approach to equality demonstrates that the impugned provisions create a distinction on the basis of enumerated grounds, and has a discriminatory effect on smuggled refugees from isolationist nations. While these provisions *on their face* create a distinction of the basis of manner of arrival, they have an adverse effect based on national origin. This adverse effect perpetuates the disadvantages and inflames dangerous stereotypes felt by this group.

Issue II: The Infringement Cannot Be Saved by s 1 of the *Charter*

Overview of Section One Analysis

[42] Section 1 serves to both guarantee the rights and freedoms within the *Charter* and set out limits to which that guarantee can be subject. Limits must be reasonable, prescribed by law, and demonstrably justified in a free and democratic society.

> *Charter*, *supra* para 1, s 1.
> *R v Oakes*, [1986] 1 SCR 103 at paras 62-63.

[43] Having found a violation of s 15, the onus now shifts to the government to demonstrate that they have a valid legislative objective for infringing those rights and that the impugned provisions are reasonable limits in pursuit of the objective. While the onus is the civil standard of proof, it is a stringent standard, particularly with s 15 infringements. Only twice has the Supreme

Court of Canada upheld a s 15 infringement under s 1.

Oakes, *supra* para 42 at paras 65-68.
Peter W Hogg, *Constitutional Law of Canada*, 5th ed Supp, vol 2 (Scarborough, Ont: Thomson/Carswell, 2007) (loose-leaf updated 2011, release 1) at 55-52 citing *Newfoundland v NAPE*, [2004] 3 SCR 381 and *Lavoie v Canada*, [2002] 1 SCR 769.

[44] The two-part test for s 1 was first set out in *Oakes*:

a. The government must show a pressing and substantial objective;

b. The measures chosen to attain the objective must be reasonable and demonstrably justified. This proportionality analysis requires that the government satisfy three distinct steps:

i. There must be a rational connection between the objective and impugned provisions;

ii. The provisions must minimally impair the affected right; and

iii. There must be proportionality between the salutary and deleterious effects of the provisions.

Oakes, *supra* para 42 at paras 69-70.
Egan, *supra* para 34 at para 182.

a. Identification of a Pressing and Substantial Objective

[45] To satisfy the first step of the *Oakes* test, the government's objective behind the impugned provisions must be of "sufficient importance to warrant overriding a constitutionally protected right or freedom."

R v Big M Drug Mart Ltd, [1985] 1 SCR 295 at 352.

[46] The main objective put forward by the government is to deter human smuggling. Specifically, the Respondent is concerned not only with punishing the smugglers themselves, but with dissuading migrants in general, and refugees in particular, from coming in dangerous,

"irregular" ways. The Respondent claims a second objective, namely to reduce the number of false refugee claims and thereby diminish strain on the immigration system.

Official Problem at 1, 6.

[47] With the objectives identified, the question becomes whether they are "pressing and substantial" in the circumstances, which generally requires evidence from the government to support the objectives.

Canada (Attorney General) v Hislop, 2007 SCC 10 at para 49.

[48] The record indicates that the impugned provisions came about "[a]s a result of high-profile arrivals" that motivated concern about human smuggling. The Government's concern for the safety and welfare of persons arriving in an "irregular" fashion, given evidence of disease, death and other exploitation experienced by passengers, is warranted. Additionally, in considering the secondary objective, government statistics show that less than half of the refugee claims heard from 2004-2006 were granted and cite a 60,000 person backlog in the processing of refugee claims.

Official Problem at 1, 5-6.
Official Clarifications.

[49] The objective of deterring human smuggling is a very broad one. At the first stage of the *Oakes* analysis, the focus must be on the objective of the infringing measure itself and not a general objective of the legislation more broadly. The impugned provisions only have an impact on legitimate refugees who have been smuggled, not the smugglers themselves. As such, a more carefully tailored description of the primary objective would be to *deter refugees from engaging the services of human smugglers*. It is this objective, and the objective of deterring false claims, that must be examined through the proportionality analysis.

Vriend v Alberta, [1998] 1 SCR 493 at para 110 [*Vriend*].

Thomson Newspapers Co v Canada (Attorney General), [1998] 1 SCR 877 at para 98 [*Thomson Newspapers*].
Oakes, *supra* para 42 at para 69.

b) Proportionality Analysis

[50] Assuming this Court accepts the Respondent's proffered objectives as pressing and substantial, the impugned provisions fail at each and every stage of the proportionality analysis.

i. The impugned provisions are not rationally connected to the government's objective

[51] There is no rational connection between either of the government's proposed objectives and the impugned provisions. In *Oakes*, the Court identifies that establishing a rational connection means that the measures in question are "carefully designed to achieve the objective in question … [and] not arbitrary, unfair or based on irrational considerations."

Oakes, *supra* para 42 at para 70.

[52] The impugned provisions target Convention Refugees, arbitrarily suspending certain of their rights for a five-year period. There is no evidence as to how this penalty will deter smuggling, nor is it "based on reason or logic".

RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199 at para 153 [*RJR-MacDonald*].

[53] With respect to the second objective of reducing false claims, the main effect of the impugned provisions on Ms. Morez is to impose a five-year wait period before she will be able to apply for any type of Canadian residency status. The five-year clock does not start until "after the day on which a final determination in respect of the claim is made". Thus, the measure is arbitrary because the only persons affected are legitimate refugees arriving in "irregular" ways and not those with false claims or those who are attempting to "jump the queue." Only those

persons whose refugee claims are successful will have the opportunity to apply for residency or obtain Canadian travel documents.

IRPA, supra para 1, ss 11(1.1)(a), 20.2(1)(a), 24(5)(a).

[54] The creation of a five-year wait period is arbitrary. The government has no rational basis on which to illustrate that imposing this wait period, or any period at all, will achieve its objectives. When the provisions only punish and do not deter, the Government sends the message that refugee rights are less important than punitive measures "ostensibly designed" to curb human smuggling and reduce false claims.

Sauvé, supra para 37 at para 40.

[55] In order for these measures to be rationally connected to deterring persons from arriving in an irregular manner, those individuals who potentially "choose" to do so would have to be aware of these provisions before making that choice. This assumes such a choice even exists, which was not the case for Ms. Morez, who had no choice but to come in the way she did. Her circumstances would not have enabled her to learn about the future consequences of her irregular arrival in Canada. Whatever might be said of Canadian citizens, foreign nationals – especially refugees fleeing persecution by isolationist states – cannot be assumed to know Canadian law. This is heightened by the fact that these provisions came into effect on March 5, 2007, the same day Ms. Morez fled Mucno. Deterrence is not an attainable objective when a law's subjects are most likely not in a position to know the law until after their arrival.

Official Problem at 1-3.

[56] The impugned provisions only punish those whose refugee claims are successful. There is no rational connection to any aspect of deterring human smuggling when the only persons affected by the impugned provisions are not in any position to know what ramifications await

based on their manner of arrival.

Official Problem at 7.

[57] The measures also fail to advance the objective of reducing false refugee claims. The impugned provisions focus on people who have already been granted refugee status. The impugned provisions do not properly address the backlog of refugee claims, the low percentage of successful claims, or the long delay in removing false claimants from Canada. Even if these provisions were not so narrowly targeted, the government does not have evidence to show that recent mass arrivals have had any material impact on the total number of refugee claims made in a year nor that those arriving in an irregular manner are more likely to have their refugee claims denied than any other person.

Official Clarifications.
Official Problem at 6.

[58] The Respondent has failed to demonstrate that the provisions address the issue of human smuggling in any meaningful way. If anything, the impugned provisions penalize those persons who the government has committed to protecting through the *IRPA* and Canada's international obligations.

IRPA, supra para 1, s 3(2).
Refugee Convention, *supra* para 1.

ii. The impugned provisions do not minimally impair the rights of the claimant group

[59] For an infringement to be justified, it must impair the *Charter* right in question only to the extent necessary to achieve the objective. This is not the case when the most disadvantaged subset of migrants, legitimate refugees fleeing danger, bears the brunt of these provisions. More effective and direct means exist to achieve the Respondent's objectives.

Oakes, *supra* para 40 at para 70.
Sauvé, *supra* para 37 at para 55.

[60] The amendments already allow for detention upon arrival until a determination of a person's refugee claim is made. This is a serious limit on the person's liberty and would act as a significant deterrent for any person aware of the *IRPA* amendments. Once refugee status has been granted, what reason is there to burden a Convention Refugee further through the imposition of a five-year waiting period? The harms and risks associated with human smuggling are posed by a certain subset of those labeled "designated foreign nationals", the smugglers and false claimants, including possible terrorists and criminals. This subset would be identified during detainment and then dealt with under different provisions not at issue in this appeal. It is only this group, not Convention Refugees, that should be the target of any punitive provisions should target.

IRPA, supra para 1, ss 55-56.

[61] Canada's international commitments impose an obligation to protect certain rights of Convention Refugees. Article 31 of the *Refugee Convention* states that Contracting States should not impose penalties against refugees on account of their illegal entry or presence within the territory.

Refugee Convention, *supra* para 1, Article 31.

[62] The Government has a more direct route to deter human smuggling, namely through criminal provisions aimed at the smugglers themselves. Other measures brought in alongside the impugned provisions lower the threshold for the crime of "organizing entry into Canada," impose mandatory minimums for convictions for smuggling offences, and give the Government more time to bring criminal proceedings against suspected smugglers.

IRPA, supra para 1, ss 117(1), 117(3.1), 117(3.2), 121(a), 133.1.

[63] To fulfill their objective of deterring refugees from coming to Canada via human smuggling, the Government can look to another of its international commitments, the *Smuggling Protocol*, for ways to help affect that change internationally. The Protocol contains a number of preventative, not punitive, measures directed at increasing public awareness of the crime of human smuggling and addressing the serious risks posed to migrants. The Protocol encourages member states to address the socio-economic causes of smuggling through development programs. The Protocol also provides that it not be interpreted or applied in a way that discriminates against persons on the basis that they are the victims of human smuggling. These proposed solutions demonstrate international agreement that the way to deter vulnerable migrants from using smuggling services is not through reactionary punitive measures, but through preventative means.

Smuggling Protocol, *supra* para 24, Articles 2, 15, 19.

[64] The government's concerns with false refugee claims and the backlog they create can be remedied by taking administrative action tailored to that problem. Such measures could involve hiring more officers to hear refugee claims or simplifying and speeding up procedures, even on a temporary basis to reduce the backlog. More staff and resources could address the long removal time for failed claimants and translate into a more realistic deterrent for those arriving with false claims.

Official Clarifications.

[65] Further evidence that the impugned provisions are not minimally impairing is found in the removal of the ability to make a request of the Minister on humanitarian and compassionate grounds under s 25(1.01). Having a "safety valve" provision to address compelling circumstances such as that of Ms Morez would not undermine the professed objectives. This

denial of any discretion or consideration of compassionate circumstances belies a punitive approach that is not carefully tailored to respect rights. Such a limit is not minimally impairing.

IRPA, supra para 1, s 25(1.01).
RJR-MacDonald, supra para 47 at paras 162-167.

iii. The deleterious effects of the impugned provisions are not outweighed by any salutary effects

[66] This third step of the proportionality analysis was altered in *Dagenais* and then *Thomson Newspapers* from its original enunciation in *Oakes,* to require that the government prove "proportionality between the deleterious and the salutary effects of the measures." In looking beyond the objective to the practical impact of the impugned provisions, this stage of the analysis is fundamentally distinct from the first two steps.

Dagenais v Canadian Broadcasting Corp, [1994] 3 SCR 835 at 889 [*Dagenais*].
Thomson Newspapers, supra para 49 at para 124-125.
Oakes at para 70 and 71.
Egan, supra para 34 at para 182.

[67] The deleterious effects are plainly obvious in the disadvantages and burdens imposed on the Appellant. Ms. Morez is denied the rights and legal protections afforded to other refugees who have not arrived in Canada through "irregular" means, an option which is not open to her due to her national origin in Mucno. By virtue of the impugned provisions, she cannot apply for any type of residency status nor can she obtain travel documents, the latter being an outright denial of a right provided in the *Refugee Convention*, to which Canada is a signatory.

Refugee Convention, *supra* para 1, Article 28.

[68] Ms. Morez is denied the basic dignity of visiting her dying brother, the only family she has left. Family reunification is recognized as a fundamental principle in the *Refugee Convention* and as necessary for migrants' social and economic wellbeing in the *IRPA*. Section

3(3)(f) of the *IRPA* says the Act "is to be construed and applied in a manner that … complies with international human rights instruments to which Canada is signatory." The impugned provisions do the opposite by denying Convention Refugee rights in order to send migrants a message of deterrence that does not get through to refugees.

> *Refugee Convention*, *supra* para 1.
> The Office of the United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees*, (Geneva: UNHCR, December 2010) at 10.
> *IRPA*, *supra* para 1, ss 3(2)(f), 3(3)(f).

[69] If there is one tenuous salutary effect of these provisions, it would be that under s 25(1.01) the removal of Ministerial discretion to grant any designated foreign national's request for consideration on humanitarian and compassionate grounds would apply to false claimants in addition to refugees. Therefore, this could deter false claimants from choosing to come to Canada via smugglers. If false claimants know they will not be able to make such a request, this may serve as a deterrent in that Canada might become a less than ideal destination. However, the possibility of a deterrence factor here does not compare to the serious deleterious effects the impugned provisions impose on Convention Refugees.

Section 1 Conclusion

[70] The government objectives, however legitimate, are not achieved by these measures. There is no demonstrated deterrent effect; the only real effect is to punish legitimate refugees like the Appellant. The impugned provisions have grave consequences and subvert the rights of a vulnerable group often subject to further public prejudice and discrimination. A few tenuous proposed benefits cannot correct the heavy imbalance stacked up against refugees coming to Canada in this manner.

Issue III: Remedy – The Impugned Provisions Should be Declared of No Force and Effect

[71] The appropriate remedy for the unjustified infringement of Ms Morez's s 15 equality rights is to declare the impugned provisions of no force and effect pursuant to s 52(1) of the *Constitution Act, 1982*. Additionally, the Appellant seeks an order of mandamus directing the Minister to grant her travel documents to enable her to visit her dying brother in France.

Constitution Act, 1982 (UK), 1982, c 11.

[71] This is not a case where it would be appropriate to suspend the declaration of invalidity. The impugned provisions are part of a package of amendments to a long-standing statute. They carved out a new category of Convention refugees and, as set out above, subjected them to discriminatory treatment in a manner not required to achieve any legitimate state objective. To delay a declaration of invalidity would be to allow for an unconstitutional state of affairs to remain in force when the law could operate equally well as it did before the amendments.

Schachter v Canada, [1992] 2 SCR 679 at paras 79-81.

[72] In the alternative, if this Court is not prepared to declare all the impugned provisions invalid, s 25(1.01) must be addressed in order for Ms. Morez to be able to travel to see her brother. In this case, the word failed might be "read in" to the legislation so that s 25(1.01) would read:

> (1.01) A designated foreign national may not make a request under subsection (1)
> (a) if they have made a <u>failed</u> claim for refugee protection but have not made an application for protection, until five years after the day on which a final determination in respect of the claim is made.

As in *Schacter, Miron, Sharpe* and *Vriend,* this court has jurisdiction to use the remedy of reading in to extend legislation to a group who is otherwise excluded by the legislation. The inconsistency is that a group, Convention Refugees, is wrongly included in the provision, which restricts the liberty of those it affects. By limiting the applicability of s 25(1.01) to

failed claimants, the legislation is extended to allow a successful refugee claimant who is also designated foreign national to make a request to the Minister on humanitarian and compassionate grounds, while keeping the possible deterrence factor intact for false claimants.

IRPA, supra para 1, s 25(1.01).
Schacter, supra para 71 at paras 32, 34.
Miron v Trudel, [1995] 2 SCR 428.
R v Sharpe, [2001] 1 SCR 45.
Vriend v Alberta, supra para 49.

PART V: ORDER SOUGHT

[73] The Appellant, Ms. Aya Morez, respectfully requests:

(a) an order declaring that sections 11(1.1), 20.2(1), 24(5), 25(1.01) of the *Immigration and Refugee Protection Act* unjustifiably infringe s 15(1) of the *Charter* and are therefore of no force or effect pursuant to s 52(1) of the Constitution Act, 1982.

(b) an order of mandamus directing the Minister to grant Ms. Morez travel documents on an expedited basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated February 10, 2012

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Counsel for the Appellant, Team

VI. LIST OF AUTHORITIES

LEGISLATION:

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

Constitution Act, 1982 (UK), 1982, c 11.

Immigration and Refugee Protection Act, SC 2001, c 27.

Canada Elections Act, SC 2000, c 9.

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British Columbia (Public Service Employee Relations Commission) v BCGSEU, [1999] 3 SCR 3, 176 DLR (4th) 1.

Canada (Attorney General) v Hislop, 2007 SCC 10, [2007] 1 SCR 429.

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Vriend v Alberta, [1998] 1 SCR 493, 156 DLR (4th) 385.

Withler v Canada (Attorney General), 2011 SCC 12, [2011] 1 SCR 396.

SECONDARY SOURCES/COMMENTARY:

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International Council on Human Rights Policy, "Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence" (Geneva: ICHRP, 2010) at 72 (online: <www.ichrp.org>).

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Dianne Pothier, "Connecting Grounds of Discrimination to Real People's Real Experiences" (2001) 13 *Canadian Journal of Women in the Law* 37.

INTERNATIONAL MATERIALS

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Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, GA Res 55/25, 28 January 2004, UNGAOR.

The Office of the United Nations High Commissioner for Refugees, *Convention and Protocol Relating to the Status of Refugees*, (Geneva: UNHCR, December 2010).

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