IN THE HIGH COURT OF THE DOMINION OF CANADA

(On appeal from a judgment of the Federal Court of Appeal)

BETWEEN:

AYA MOREZ

APPELLANT
(Appellant)

- and -

THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

RESPONDENT
(Respondent)

FACTUM OF THE RESPONDENT, THE MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

Team
Counsel for the Respondent

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PART I – OVERVIEW

[1] The serious issue of human smuggling leading to mass arrivals at Canada's borders has compelled Parliament to enact amendments to the *Immigration and Refugee Protection Act* ["*IRPA*"]. These amendments protect people from the dangers of human smuggling by encouraging the use of legal, regular channels of arrival in Canada's refugee system. The respondent opposes the appellant's application seeking an order that some of these amendments, namely ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IPRA*, infringe s. 15(1) of the *Canadian Charter of Rights and Freedoms* ["*Charter*"]. The challenged sections are designed to restrict access to travel documents for those who arrive irregularly, and prolong the periods before which they are eligible to apply for permanent residence and temporary resident permits. They are not discriminatory under s. 15(1). They are a reasonable and balanced attempt by Parliament to prevent the harms caused by human smuggling while providing protection and safety to refugees. If the appellant does establish an infringement of s. 15(1), the challenged sections constitute a reasonable limit on that right, justifiable in a free and democratic society.

> *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].
> *Canadian Charter of Rights and Freedoms*, s 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15 [*Charter*].

PART II – STATEMENT OF FACTS

A. Legislation at Issue

[2] In recent years in Canada, there has been an increase in the number of mass arrivals of refugee claimants at Canada's borders. Parliament has been pressed to consider the serious issue of human smuggling.

> *Official Problem* at 1 and 6, para 29.

[3] The urgent need to address this situation has led the government to enact amendments to *IRPA*. Pursuant to the amended s. 20.1(1), the Minister may designate a group's arrival as irregular if he is of the opinion that examinations or investigations of people in the group cannot be conducted in a timely manner, or if he has reasonable grounds to suspect that human smuggling has taken place in contravention of *IRPA* s. 117(1). Under the amended s. 20.1(2) any foreign national who is part of an irregular arrival, who does not have the proper documents required for entry into Canada, becomes a designated foreign national. These sections are not at issue.

[4] The sections at issue, ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1, seek to deter the use of human smuggling by restricting designated foreign nationals' access to travel documents and by prolonging the periods before which they are eligible to apply for permanent residence and temporary resident permits.

B. <u>Relevant Facts Concerning the Appellant</u>

[5] The appellant is a citizen of Mucno, a totalitarian military state with a poor human rights record. The government of Mucno does not issue identity documents to its citizens.

Official Problem at 3, para 1.

[6] In March of 2007, the appellant's family became the target of violence perpetrated by Mucno government soldiers; on the days of March 4th and 5th, many of the appellant's family members were killed. The appellant's brother Ano Morez had escaped, although his whereabouts were unknown at that time.

Official Problem at 3 and 6, paras 2-3 and 23.

[7] On March 5 2007, motivated by a genuine fear for her life, the appellant left her home in Mucno, fleeing to the neighbouring country of Aflot. In June 2007, the appellant paid a human smuggler with jewellery and services in exchange for taking her to Canada.

Official Problem at 3, paras 4 and 7.

[8] On July 31, 2007, the vessel carrying the appellant and 36 other individuals landed at Liverpool, Nova Scotia. Two of the passengers had died en route. The RCMP detained the surviving passengers.

Official Problem at 4, para 8.

[9] Thirty-four of the surviving passengers were malnourished and dehydrated, including the appellant herself, and 23 were diagnosed with Hepatitis A.

Official Problem at 6, para 27.

[10] On August 10, 2007, the Minister designated this group as an irregular arrival and the appellant accordingly became a designated foreign national.

Official Problem at 4, para. 10.

[11] The appellant began a refugee claim in mid-August 2007. On December 19, 2008, the appellant was found to be a Convention refugee by the Refugee Protection Division. The appellant was ordered released at the next review of her detention on February 5, 2009.

Official Problem at 4, paras 12 and 14.

[12] The appellant moved to Hamilton, Ontario in March 2009. She first resided at a women's shelter, and received help from a local settlement agency. She became employed at a retirement home and moved into her own apartment in July 2009.

Official Problem at 4, paras 15 and 16.

[13] The appellant has thrived in her employment and in volunteer work, and she has made several good friends in Hamilton, paras 17 and 19.

Official Problem at 4.

[14] The appellant submitted at trial that she felt safe in Canada, and that she wished to become a citizen as soon as possible.

Official Problem at 4, para. 18.

[15] On February 7, 2011, the appellant discovered through searching news articles that her brother was alive and had recently been accepted as a refugee in France. He had been hospitalized with a rare terminal illness.

Official Problem at 5, paras 21-23.

[16] In March 2011, the appellant made a written request to the Minister for travel documents. Her request was refused on the basis that she was a designated foreign national and she received written reasons from the immigration officer to that effect.

Official Problem at 2-3.

C. Parliament's Concerns with Human Smuggling

[17] Illegal migrant ships are often unfit for human travel. Migrants aboard these ships are usually exposed to severe overcrowding, unsanitary conditions, and inadequate nutrition.

Official Problem at 6, para 26(a).

[18] Death is common aboard migrant ships. Migrants who do survive are sometimes suffering from communicable diseases upon arrival, and are frequently malnourished.

Official Problem at 6, para 26(b).

[19] It is common for migrants on smugglers' ships to experience violence, and sexual assault is a frequent occurrence.

Official Problem at 6, para 26(c).

[20] Human smugglers often exploit their power over migrants by charging exorbitant fees and extorting additional payments from family members.

Official Problem at 6, para. 26(d).

[21] Canada has discovered convicted criminals among persons arriving on migrant ships.

Official Problem at 6, para. 28.

D. Facts Concerning Canada's Refugee System

[22] Canada's refugee system faces a problem of significant backlog (60,000 at the end of 2006). There was a 60% increase in refugee claims made in Canada from 2004-2006, only 45% of which were granted. It takes 4.5 years on average, and can take up to 10 years, to remove a failed refugee claimant from Canada.

Official Problem at 5, para. 25.

E. Procedural History

[23] The appellant brought an application pursuant to section 18.1 of the *Federal Courts Act* for a review of the decision of the immigration officer to deny her travel documents. Her application sought an order declaring that sections 11(1.1), 20.2(1), 24(5), 25(1.01), and 31.1 of *IRPA* infringe s. 15 of the *Charter*. She asked for the impugned sections to be struck by the court, and she requested an order in the nature of mandamus requiring the government to issue her travel documents.

Official Problem at 3.

[24] Justice Keire, at the Federal Court, held that the impugned sections did not violate s. 15. She found that the distinction drawn by the sections is not based on an enumerated or analogous ground, but rather on manner of arrival to Canada. She went on to say that, if she was incorrect in holding that there was no infringement of section 15(1), the sections could not be justified pursuant to s. 1.

Official Problem at 6-7.

[25] Justice Sharma, writing for herself and Justice Tanasee at the Federal Court of Appeal, adopted the reasons of Justice Keire concerning s. 15(1) and dismissed the appeal without commenting on s. 1. Justice Fujiwara dissented, holding that the sections infringed s. 15(1) and were not justified pursuant to s. 1.

Official Problem at 8.

PART III – STATEMENT OF POINTS IN ISSUE

[26] This Court has granted the appellant leave to appeal on the following three questions:

1. Do sections 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IRPA* infringe the applicant'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?
3. If the answer to (2) is no, what is the appropriate remedy?

[27] The respondent respectfully submits that this Court should answer these questions as follows:

1. The appellants have not demonstrated that s. 15(1) is violated by the impugned sections. The provisions do not distinguish on the basis of an enumerated or analogous ground, and they do not create a disadvantage by perpetuating stereotype or prejudice.
2. The government can demonstrate, pursuant to s.1 of the *Charter*, that Parliament has enacted appropriately balanced legislation that provides protection and safety to refugees, addresses the serious issue of human smuggling, and maintains the integrity of Canada's refugee system.
3. The appeal should be dismissed. In the alternative, this Court should find the non-issuance of travel documents unconstitutional, issue a declaration to this effect and send the matter back to the Minister for reconsideration. In the alternative, should the legislation in whole or in part be found unconstitutional and declared of no force and effect, this Court should suspend the declaration of invalidity.

PART IV – ARGUMENT

A. SECTION 15(1)

The Appellant has not established that section 15(1) is infringed.

[28] The appellant has not met her burden of establishing that the impugned sections infringe section 15(1) of the *Charter*. The distinction drawn by the legislation is not based on an enumerated or analogous ground, nor is it substantively discriminatory. The respondent's submissions regarding section 15(1) are founded upon the position that it is the right and obligation of Parliament to legislate in order to deter human smuggling, protect vulnerable migrants, and uphold the integrity of Canada's immigration and refugee system. While the

legislation does place particular restrictions on designated foreign nationals, the distinction is not the kind prohibited by 15(1); moreover, it is based on genuine concern for the safety and protection of refugees.

[29] The current test is for establishing an infringement of s. 15(1) claim is: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?" (*Kapp*; *Withler*). The two steps reflect that distinctions, even when based on prohibited grounds, are not automatically discriminatory. "Equality is not about sameness and s. 15(1) does not protect a right to identical treatment" (*Withler*).

> *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483, 294 DLR (4th) 1.
> *Withler v Canada*, 2011 SCC 12 at paras 30-31, [2011] 1 SCR 396 [*Withler*].

1. <u>The sections do not create a distinction based on enumerated or analogous grounds.</u>

[30] The first step of a section 15(1) analysis requires a consideration of the full context. The identification of a single mirror comparator group is no longer required as part of a section 15(1) analysis.

> *Withler*, *supra* para 29 at para 43.

[31] To demonstrate that the appellant has not established a distinction on enumerated or analogous grounds, the respondent makes the following three submissions:

a. As found by the courts below, the challenged sections of *IRPA* draw a distinction based on *manner of arrival*. No enumerated or analogous ground is engaged on the face of the legislation.
b. The appellant has not established with evidence that the legislation indirectly draws a distinction on any enumerated or analogous ground.

c. Manner of arrival has not been and should not be recognized as analogous to those enumerated in s. 15, because it does not share the features of those grounds, and its recognition would significantly compromise Parliament's sovereignty over Canada's borders.

a. As found by the courts below, the direct distinction drawn by the legislation is based on *manner of arrival,* and not any enumerated or analogous ground.

[32] Although they are not at issue, ss. 20.1(1) and 20.1(2) of *IRPA* are important to the analysis, as they are the sources of the distinction drawn by the impugned sections. Section 20.1(1) gives the Minister the authority to designate a group as an irregular arrival if he or she (a) is of the opinion that the examination of persons in the group cannot be conducted in a timely manner, or (b) has reasonable grounds to suspect that human smuggling has taken place for profit or in connection with organized crime and terrorism. Pursuant to 20.1(2), persons who are part of an irregular arrival become designated foreign nationals unless they are admissible to Canada and in possession of the documents required by the regulations.

[33] Nothing on the face of these sections imposes differential treatment on any enumerated or analogous ground. The distinction is based on the following factors: persons arriving in a group; concerns about the timeliness of their examination; suspicion that human smuggling has taken place or that other criminal activity is involved; and if the persons arriving have documentation and are otherwise admissible to Canada. Non-citizens are differentiated, but only in the sense that all of immigration and refugee law applies only to non-citizens. The sole fact that immigration law treats non-citizens differently than citizens cannot be the basis of a Charter challenge, as s.6(1) accords the "the right to enter, remain in and leave Canada" only on citizens, and this is evidence that drafters of the Charter were concerned not to limit the sovereignty of

Parliament in legislating immigration law (*Chiarelli*; *Medovarski*). There is also no distinction in on any other grounds, such as national origin or family status. Manner of arrival is the concern of Parliament in this case, and the impugned sections enact that distinction.

> *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at paras 24 and 26-27, 90 DLR (4th) 289 [*Chiarelli*].
> *Medovarski v Canada*, 2005 SCC 51 at para 46, [2005] 2 SCR 539 [*Medovarski*].

b. There is *no evidence of indirect distinction* on the basis of any one or any combination of prohibited grounds.

[34] Nothing on the evidentiary record supports a finding that the impugned sections of *IRPA* have a disproportionate impact on a combination, intersection or subset of the grounds of national origin, family status, citizenship, or any other prohibited grounds. At trial, Justice Keire found that the impugned sections draw a distinction based on manner of arrival, and this was upheld in the Federal Court of Appeal, with Justice Fujiwara dissenting. Justice Fujiwara held that the legislation draws a distinction on an intersection of national origin and citizenship, basing his reasoning on the personal circumstances of the appellant (*Official Problem* at 8-9). The respondent respectfully submits that the appellant, beyond describing her experience, did not establish evidence of any such disproportionate impact on her or on others.

> *Official Problem* at 8-9.

[35] A finding of disproportionate impact is not supported by the text of the legislation, either, because it is clear that the impugned sections may impact individuals from diverse national origins and circumstances. As submitted above, the distinction drawn by the impugned sections is influenced by s. 20.1(1) of *IRPA*, which is not at issue. Pursuant to 20.1(1), the Minister can designate as irregular any group, from any country in the world, arriving by land, sea, or air. To establish adverse effects discrimination on the basis of national origin, the appellant would have

to demonstrate that the cumulative impact of the Minister's exercise of discretion is falling disproportionately on citizens of a particular nation because of their nationality. Yet the appellant has presented no evidence of the impact of the Minister's exercise of discretion pursuant to s. 20.1(1) beyond the designation of the irregular arrival at issue in this case. A cumulative or systemic disproportionate impact cannot be established on the basis of one instance of the Minister's exercise of discretion. In *Withler*, the Supreme Court emphasized the importance of viewing the benefit scheme that was at issue "as a whole and over time," and the impugned sections of *IRPA* need to be considered in a similar manner.

Withler, *supra* para 29 at para 81.

[36] Furthermore, even designated foreign nationals who are found to be Convention refugees, like the appellant, could potentially be of any national origin. Ms. Morez herself comes from a totalitarian, repressive state that directly persecuted her and did not provide her with travel documents, but other refugees as a whole come from many nations and have experienced persecution in diverse circumstances. As James Hathaway notes in the *The Law of Refugee Status*, having no passport is not a necessary prerequisite to being a refugee. Nor is it a requirement that the state be complicit in one's persecution (*Ward*). Refugees have been accepted in Canada from democratic countries, for example from Ireland and Hungary (*Ward, J.B., Piel*). If there is a group arrival from such a country that meets the criteria in 20.1(1), the Minister may designate it as irregular. No particular country or type of country is being singled out for different treatment by the legislation.

James C. Hathaway, *The Law of Refugee Status* (Toronto: Butterworths, 1991) at 43.
Ward v Canada (Minister of Employment & Immigration) [1993] 2 SCR 689 at paras 32-41, 103 DLR (4th) 1.

J.B. v Canada (Minister of Citizenship and Immigration), 2011 FC 210, 97 Imm LR (3d) 243 [*J.B.*].
Piel v Canada (Minister of Citizenship and Immigration), 2001 FCT 562, 106 ACWS (3d) 318.

c. Manner of arrival is not the appropriate subject of an analogous ground.

[37] The only question that remains is whether manner of arrival should be recognized as an analogous ground. The respondent submits that there are a number of compelling reasons that it should not be recognized. The Supreme Court has identified various factors that may be indicia of an analogous ground (*Corbiere*). They include: if a ground is an immutable personal characteristic (*Miron*, *Corbiere*); whether the ground is associated with historical disadvantage, vulnerability to social prejudice (*Miron*, *Egan*, *Corbiere*); or political powerlessness (*Andrews*, *Egan*, *Miron*, *Corbiere*); recognition of the ground in federal or provincial human rights codes (*Corbiere*); and whether the ground is presumptively irrelevant to most state objectives (*Andrews*, *Miron*). Manner of arrival is not the appropriate subject of an analogous ground because, unlike the other analogous grounds that have been recognized, it does not sufficiently relate to these factors.

Corbiere v Canada (Minister of Indian and Northern Affairs), [1999] 2 SCR 203 at para 60, 173 DLR (4th) 1, 61 CRR (2d) 189 [*Corbiere*].
Miron v Trudel, [1995] 2 SCR 418 at paras LX, LXVIII, 23 OR (3d) 160, 124 DLR (4th) 693 [*Miron*].
Andrews v Law Society of British Columbia, [1989] 1 SCR 143 at para 68, 56 DLR (4th) 1 [*Andrews*].
Egan v Canada, [1995] 2 SCR 513 at p. 599, 124 DLR (4th) 609 [*Egan*].

i) Manner of arrival is not an immutable personal characteristic.

[38] An analogous ground is one that has its basis in "a personal characteristic that is immutable or changeable only at unacceptable cost to personal identity" (*Corbiere*; *Withler*). The Supreme Court's conceptualizing of analogous grounds in this way began as far back as La Forest J.'s comments on the analogous ground of citizenship in his concurring judgment in *Andrews*. In the case at bar, the legislative distinction drawn by the impugned sections is based on manner of arrival to Canada, which is not a fundamental personal characteristic.

> *Corbiere*, *supra* para 37 at para 13.
> *Withler*, *supra* para 29 at para 33.
> *Andrews*, *supra* para 37 at para 67.

[39] Although the appellant may have had no alternative way to arrive in Canada, this does not mean her manner of arrival is an analogous ground. Although designated foreign nationals may have had a variety of reasons for arriving in Canada in the manner that they did—including that for some, there was no alternative—it can be reasonably assumed that no person who participated in a mass arrival at Canada's borders did so because to arrive in any other way would detrimentally affect their personal identity.

[40] In this respect, manner of arrival is different from other grounds that have been recognized as analogous by the Supreme Court. For example, sexual orientation was described as a "deeply personal characteristic" (*Egan*), while Aboriginality-residence, "relates to a community and land that have particular social and cultural significance to many or most band members" (*Corbiere*). In comparison, manner of arrival has no deep personal value.

> *Egan*, *supra* para 37 at p. 528.
> *Corbiere*, *supra* para 37 at para 62.

ii) Manner of arrival has not been the basis for historical disadvantage.

[41] Manner of arrival is a broad and amorphous concept. Unlike other grounds of discrimination like race, sex or disability, the variety of circumstances in which non-citizens arrive in Canada does not correlate in a readily discernible way to persistent patterns of historical disadvantage.

[42] Also, it should be noted that the impugned sections are not related, and are in no way comparable, to grave instances of injustice against particular groups that have occurred in Canada's past. If one looks to the example of the MS St. Louis, carrying Jews fleeing Nazi Europe, being turned away from the shores of Halifax in 1939, it is clear that the deep-seated prejudice that motivated Canada's action in that case is not a factor in Canada's contemporary refugee system. Legislation that seeks to prevent human smuggling by imposing delays on eligibility for immigration applications and by restricting access to travel documents cannot be appropriately compared to the terrible decision to turn away that vessel, and the disastrous consequences that ensued.

> Irving Abella and Harold Troper, *None Is Too Many: Canada and the Jews of Europe 1933-1948* 3d ed. (Toronto: Key Porter, 2000).

iii) Manner of arrival does not connote a politically powerless group.

[43] Manner of arrival does not correlate with political powerlessness. Non-citizens as a group have been recognized as lacking political power (*Andrews*). However, except to the extent that all of immigration and refugee law concerns non-citizens, legislating on the basis of manner of arrival does not distinguish non-citizens in any particular way. The Minister's discretion to designate a group arrival from any country anywhere in the world as irregular, by land, sea, or air, indicates that no particular insular group is distinguished by the legislation. Moreover,

refugees experiencing political powerlessness might arrive via legal, regular channels, and in fact it is exactly such arrivals that the legislation seeks to encourage.

Andrews, supra para 37 at paras 4-5.

iv) Manner of arrival has not been recognized in other jurisdictions.

[44] When analogous grounds are added to s.15 by judicial interpretation, they become part of a constitutional provision that is supreme and therefore is not easily amended or repealed (*Andrews*). For this reason, courts have recognized grounds as analogous only after a compelling case has been made in public debates or scholarly analysis, or there is evidence of legislative consensus, including through the adoption of the ground in other anti-discrimination instruments in Canada, in other jurisdictions, or in international law. This occurred with the first three analogous grounds recognized by the Supreme Court: sexual orientation, marital status, and citizenship (*Egan*, *Miron*, *Andrews*). The fourth is Aboriginality-residence, recognized in *Corbiere*, and it is a unique product of Aboriginal history and Parliament's exercise of jurisdiction pursuant to s.91(24) of the *Constitution Act, 1867*. There is no similar evidence for manner of arrival. The appellant has provided no indication of its recognition as a prohibited ground in any anti-discrimination laws in Canada, abroad or internationally.

Andrews, supra para 27 at paras 38, 68-70.
Egan, supra para 37 at para 178.
Miron, supra para 37 at para 155.
Corbiere, supra at paras 6, 15.
Constitution Act, 1982, s. 52, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

v) Manner of arrival is relevant to Parliament's legislative objectives.

[45] Manner of arrival to Canada is of utmost concern to Parliament. Unlike grounds such as sex and race, it cannot be understood as presumptively irrelevant to legitimate legislative

objectives. Human smuggling and the resulting illegal arrival of groups of migrants at Canada's borders implicates important policy considerations. Moreover, Parliament legislates concerning manner of arrival in many other respects. For example, *IRPA* and its associated regulations prescribe the documentation required and conditions that need to be fulfilled to enter Canada in a variety of situations, thus legislating the manner in which non-citizens may legally arrive. Distinctions of this sort are fundamental to immigration and refugee law. If manner of arrival were recognized as comparable to the "'irrelevant personal differences' such as those listed in s. 15," as La Forest J. described them in *Andrews*, Canada's ability to exercise sovereignty over its borders would be significantly constrained.

Andrews, *supra* para 37 at para 63.

2. <u>The distinction does not create a disadvantage by perpetuating prejudice or stereotyping.</u>

[46] The respondent acknowledges that the distinction drawn by manner of arrival creates a disadvantage: the impugned sections prolong the periods before which designated foreign nationals can apply for permanent residence and temporary resident permits, and in effect delay their ability to sponsor family members. They also restrict designated foreign nationals' access to travel documents. However, s. 15(1) is concerned with discriminatory distinctions that create a disadvantage by perpetuating stereotype or prejudice (*Withler*, *Kapp*). The impugned sections do not amount to discrimination, but are rather based on legitimate considerations: the urgent need to deter human smuggling and mass arrivals to Canada, so that people do not make dangerous voyages, and so that the integrity of Canada's borders and immigration system are protected.

Withler, *supra* para 29 at paras 30-31, 34.
Kapp, *supra* para 29 at para 17.

a. The impugned sections are properly connected to the urgent need to address human smuggling, while continuing to extend protection to those in dire circumstances.

[47] In the s. 15(1) inquiry, it is important to consider "the larger social, political and legal context" (*Turpin*, *Withler*). The social and political context here includes the pressing issue of an increase in human smuggling leading to mass arrivals at Canada's borders. To address the issue, Parliament has decided to target both the supply of, and the demand for, the harmful activity. This is similar to Parliament's approach to other social evils, such as child pornography (*Sharpe*).

> *Withler*, supra para 29 at para 66.
> *R v Turpin*, [1989] 1 SCR 1296 at p. 1331, 48 CCC (3d) 8 [*Turpin*].
> *R v Sharpe*, 2001 SCC 2 at para 92, [2001] 1 SCR 45 [*Sharpe*].

[48] These disincentives do not constitute prejudice against the appellant or anyone else, when the broader context is considered. They are Parliament's attempt to address the urgent problem of human smuggling while maintaining protection for people facing dire circumstances who arrive irregularly. In fact, Canada continues to extend protection and safety to designated foreign nationals accepted as refugees, to provide them with services such as health care (Martin Jones & Sasha Baglay, *Refugee Law*, Toronto: Irwin Law Inc, 2007), and to give them the opportunity to integrate over time into Canadian society. The appellant has begun the process of social integration, and most importantly, she testified at trial that she "feels safe in Canada." Nothing in the impugned sections can be construed as prejudicial when this larger context is taken into account.

> *Official Problem* at 4.
> Martin Jones & Sasha Baglay, *Refugee Law* (Toronto: Irwin Law Inc., 2007) at 88.

[49] Moreover, the impugned sections are not based in stereotype. According to the Supreme Court in *Withler*, "[w]here the claim is that a law is based on stereotyped views of the claimant

group, the issue will be whether there is correspondence with the claimants' actual characteristics or circumstances." In this case, the group affected is made up of those who use human smugglers, terrorists or persons connected to organized crime, and that otherwise cannot be identified and have their admissibility determined in a timely manner. Because the legislation operates to deter future migrants from using human smugglers, the group corresponds to the objective of addressing this urgent problem, and therefore it is not based on stereotype.

Withler, supra at para 29 at para 38.

[50] It is also not a stereotype, but a reality, to characterize traveling via human smuggling as an extremely dangerous and exploitative activity. It involves the paying of exorbitant fees to smugglers and the potential that pressure will be put on one's self and family to pay more later. It involves the potential to experience violence, illness, unsanitary and overcrowded living conditions, and even death. The appellant was fortunate enough to survive the experience, but two of her fellow travelers did not. It is important that Canada takes the firm and public stance that human smuggling is not acceptable so that this dangerous method of travel does not become even more of a pressing problem.

Official Problem at p. 6, 4.

b. The impugned sections uphold the integrity of Canada's immigration system.

[51] The impugned sections should also be considered within the broader legal context (*Turpin*, *Withler*). The legal context is contemporary immigration law, in which it is a fundamental principle that non-citizens do not have the unqualified right at common law to enter and remain in Canada (*Chiarelli*, *Prata*). The Supreme Court in *Chiarelli* further held that only citizens have the *Charter* right "enter, remain in and leave Canada," in s. 6(1). As such, it stated,

"Parliament therefore has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada. It has done so in the *Immigration Act*."

> *Turpin*, *supra* para 47 at p. 1331.
> *Withler*, *supra* para 29 at para 66.
> *Chiarelli*, *supra* para 33 at paras 24 and 26-27.
> *Prata v Minister of Manpower & Immigration*, (1975), [1976] 1 SCR 376 at p. 380, 52 DLR (3d) 383.
> *Charter*, *supra* para 1 at s 6(1).

[52] To give full meaning to Parliament's right as described in *Chiarelli*, it must be recognized that Parliament can prescribe conditions not just for the entry process, but also for all of the time that migrants are subject to *IRPA*. The impugned sections are conditions that apply post-entry, and through their deterrent effect on human smuggling, they ensure that the immigration and refugee system continues to be guided by law. In the wider legal context, then, it is clear that the distinctions drawn by the impugned sections are not motivated by prejudice or stereotype. Rather, they are motivated by Parliament's right and obligation to legislate in immigration and refugee law concerning important and pressing policy considerations.

> *Chiarelli*, supra para 33 at para 27.

B. SECTION 1

The impugned sections are a justifiable limit on the claimant's right to equality under s. 1 of the *Charter*.

[53] If this Court finds that restrictions mandated by ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IRPA* violate section 15 of the *Charter*, the test for justification under s. 1 must be applied. The Supreme Court set out the appropriate test in *Oakes*. The first step is to determine whether the objectives of the legislation are sufficiently pressing and substantial to justify limiting the *Charter* right. The second step assesses whether the means chosen to attain those

objectives are proportional to the ends. This step has three criteria: (1) the infringement must be rationally connected to the objective of the legislation; (2) the impugned sections must minimally impair the *Charter* right; and (3) the salutary benefits must outweigh the deleterious effects of the legislation.

> *Charter*, *supra* para 1 at s. 1.
> *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200, 14 OAC 335 [*Oakes*].
> *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835, 20 OR (3d) 816, 120 DLR (4th) 12 [*Dagenais*].

[54] In this case Justice Keire and Justice Fujiwara were wrong to hold that ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of the *IRPA* were not reasonable and demonstrably justified limits on the Claimant's *Charter* right to equality. These sections form a necessary part of an important legislative scheme, and serve a pressing and substantial objective; furthermore, the means chosen to attain this objective are proportional to the ends. Specifically, they are rationally connected to the government objective, they impair the right to equality as little as is reasonably possible, and their benefits outweigh their deleterious effects.

1. <u>The objectives of 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of the *IRPA* are pressing and substantial.</u>

[55] To be a reasonable limit under s. 1, a law must pursue an objective that is sufficiently important to justify limiting a *Charter* right. The objective of the infringing sections in this case is to protect vulnerable migrants by deterring human smuggling, as is evidenced by the Short Title of the Bill from which these sections are taken: the "Preventing Human Smugglers from Abusing Canada's Immigration System Act."

> *Oakes*, *supra* para 53 at para 70.
> *IRPA*, *supra* para 1.

[56] At trial Justice Keire acknowledged that deterring human smuggling was an objective of the legislation, and accepted that the legislation had a sufficiently pressing and substantial objective to warrant limiting the appellant's *Charter* right. This position was endorsed by Justice Fujiwara of the Federal Court of Appeal.

Official Problem at 7-9.

[57] Protecting migrants by deterring human smuggling is a sufficiently important objective to justify limiting the appellant's *Charter* right given the evidence accepted at trial. Justice Kiere found that human smuggling exposed migrants and their families to risk of harm or death, that smuggling ships had been found to provide passage for convicted criminals, and that two persons on the appellant's own ship had died en route to Canada. The objective of deterring human smuggling is also an immensely important objective for the government to pursue given its international obligations to curb the practice and protect migrants.

Official Problem at 4, 6.
Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime, 15 December 2000, UN Doc. A/55/383 (Annex III)(effective date: 28 January 2004), Art. 6, 6(3)(a), 9, 9(1) [*Protocol*].

2. <u>Proportionality: The means employed by ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of the *IRPA* to achieve the legislative objective are proportionate to their ends.</u>

a. Rational Connection: The limiting measures are rationally connected to their objective

[58] As articulated by McLachlin C.J. in *Hutterian Brethren,* to meet the requirement of rational connection, it is unnecessary for the government to prove that the infringing measures will achieve the stated objectives. It is enough that Parliament had a reasonable basis for believing that the restrictive measures may further the legislative goal.

Alberta v Hutterian Brethren of Wilson Colony, 2009 SCC 37 at para 48, [2009] 2 SCR 567, 310 DLR (4th) 193 [*Hutterian Brethren*].

[59] The *IRPA* amendments work, as a whole, to severely limit the practice of human smuggling. Some of the sections work directly, targeting supply, by further criminalizing the practice.[1] The legislative sections at issue in this appeal work in concert with these, but are designed to specifically target and decrease the demand for human smuggling, and in this way deter the practice and further Parliament's objective.

IRPA, supra para 1.

[60] The infringing measures impose restrictions on migrants who have used human smuggling as their means of entry into Canada. Specifically, the measures have the effect of restricting a designated foreign national's ability to sponsor family, their ability to travel outside Canada, and their ability to apply for Ministerial exemption from these limitations. It is reasonable to presume that these restrictions will be perceived by potential migrants as an additional cost associated with using human smuggling as a means of migrating to Canada. It is equally reasonable to presume that this additional cost will deter some potential migrants from using human smuggling as their means of making a refugee claim in Canada. Where this deterrent effect occurs, the demand for human smuggling will be reduced, and the government's objective of protecting vulnerable migrants from the harms of human smuggling will have been furthered.

b. Minimal Impairment: The limiting measures minimally impair the Appellant's *Charter* right.

[61] Human smuggling is a complex social issue (*Hutterian Brethren*) which has forced Parliament to act as a mediator "between the claims of competing groups" (*Irwin Toy*). While

[1] As examples, s. 117(1): expands the definition of what constitutes human smuggling ("organizing entry into Canada"); s. 117(3): creating a mandatory minimum penalty scheme for human smuggling; and, s. 133.1: extending the limitation period within which human smuggling can be prosecuted.

Parliament is dedicated to protecting the appellant's equality interests, it must be equally dedicated to preventing the deaths of future, vulnerable migrants, who are contemplating exposing themselves to the dangers of human smuggling. Thus, Parliament has been compelled by the increasing frequency of mass arrivals, and the unacceptably harmful practice of human smuggling, to partake in a difficult balancing act in its attempts to protect the competing interests of vulnerable groups.

> *Hutterian Brethren, supra* para 58 at para 53 ("The question at this stage of the s. 1 proportionality analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit. … In making this assessment, 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.")
> *Irwin Toy Ltd v Quebec (Attorney General),* [1989] 1 SCR 927 at 993-995, 58 DLR (4th)577 [*Irwin Toy*].
> *Official Problem* at 6

[62] The Supreme Court has repeatedly articulated that, where Parliament is playing this mediating role, it is forced "to strike a balance without the benefit of absolute certainty concerning how that balance is best struck" (*Irwin Toy*). In such circumstances, it is enough that Parliament had a "reasonable basis for concluding that it impaired the relevant right as little as possible" (*McKinney*). Such a heightened degree of deference is appropriate in this case, given the role Parliament is playing, the importance of its objective, and the complexity of the problem it faces.

> *Irwin Toy, supra* para 61 at 993.
> *McKinney v University of Guelph,* [1990] 3 SCR 229 at 285-286, 2 OR (3d) 319 [*McKinney*].

[63] The respondent submits that Parliament has struck an appropriate balance in this case, and has a reasonable basis for concluding that the infringing measures minimally impair the appellant's *Charter* rights. The infringing measures will not achieve the above-outlined

deterrent effect if they are not perceived as imposing significant and substantively unavoidable restrictions. By delaying both travel and sponsorship opportunities for at least five years the measures will be perceived by potential migrants as significant restrictions. By equally delaying a designated foreign national's access to the s. 25 Ministerial exemption regime, the restrictions will be perceived as substantively unavoidable. The respondent submits that less intrusive measures would fail to have a similarly strong deterrent effect, fail to reduce the demand for human smuggling, and thereby, fail to further the government's important objective. The minimal impairment test does not require Parliament to adopt measures that would not achieve the objective in a real and substantial manner.

Hutterian Brethren, supra para 58 at para 55.

[64] The respondent further submits that, any arguments that this legislation does not minimally impair because it removes a designated foreign national's ability to request discretionary exemption must be rejected. The infringing measures represent a balanced approach to limiting Ministerial discretion. The government's objective makes it necessary to remove a designated foreign national's ability to make a request under section 25 of *IRPA*; however, the challenged sections do not remove the Minister's ability to exercise discretion with regards to designated foreign nationals. Nothing in them, or in the *IRPA* more broadly, prevent a Minister from exercising his prerogative powers to issue travel documents to a designated foreign national; moreover, under sections 25.1 and 25.2 of *IRPA*, the Minister retains the ability, on his own initiative, to grant discretionary exemption from the regular operation of the Act on humanitarian and compassionate grounds, or public policy grounds, respectively.

IRPA, supra para 1 at s. 25, 25.1 and 25.2.
UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, Art. 28 United Nations, Treaty Series, vol. 189, p. 137.

[65] In other contexts, courts have upheld limits on discretion as minimal impairments of *Charter* rights. As noted by the Supreme Court in *Canadian Newspapers*, some government objectives require significant restrictions to discretion. In that case, the Court upheld a *Criminal Code* section authorizing a court order banning the disclosure of sexual assault complainants' identities. The section made such an order mandatory if requested by either the complainant or the prosecutor. The appellants argued that only sections which provided a measure of discretion could minimally impair their *Charter* right to freedom of the press. Lamer J. (as he then was) held that only a mandatory ban was capable of providing assurances to complainants that their identity would not be disclosed. Accordingly, he held that making the power to issue publication bans discretionary would serve to undermine Parliament's important objective of encouraging the reporting of sexual assault. This decision, and its principle that discretion is not required for legislation to minimally impair, was affirmed as recently as 2010 in *Toronto Star Newspapers Ltd. v Canada*.

> *Canadian Newspapers Co. v. Canada (Attorney General),* [1988] 2 SCR 122 at 130-133, [1988] SCJ No. 67 [*Canadian Newspapers*].
> *Criminal Code,* RSC 1985, c. C-46, s. 442(3).
> *Toronto Star Newspapers Ltd. v Canada*, 2010 SCC 21 at para 18, [2010] 1 SCR 721.

c. Proportionate Effect: The salutary effects of the limiting measures outweigh their deleterious effects.

[66] The final stage of the s.1 analysis requires a determination of whether the deleterious effects of a measure on individuals or groups outweigh the salutary benefits gained from the measure.

> *Oakes, supra* para 53.
> *Dagenais, supra* para 53 at para 95.
> *Hutterian Brethren, supra* para 58 at para 77-78.

i) The salutary effects of the measure

[67] By deterring human smuggling these infringing measures protect migrants and save lives. While the appellant arrived in Canada relatively unharmed, two people on board the same ship did not survive the journey. The respondent submits that any deleterious effects of the measures must be weighed against the fact that any reduction in human smuggling is equally a reduction in grave harm and death to vulnerable migrants.

Official Problem at 6

[68] Canada has an obligation under international law to fight human smuggling and protect migrants. These measures work in concert with the other *IRPA* amendments to curb this unacceptably dangerous practice, and thereby protect vulnerable migrants. Therefore, a further salutary benefit of the measures is that they aid in Canada's efforts to honour its commitments under international law.

Protocol, supra para 57.

ii) The deleterious effect

[69] While the respondent acknowledges the appellant's unfortunate circumstance, it submits that the sole deleterious effect of the measures is the imposition of a delay. The implementation of the infringing measures do not remove a designated foreign national's ability to sponsor family members or travel outside of Canada; they delay their ability to do so. And as already stated, this delay is necessary for the government to achieve is pressing and substantial objective of protecting vulnerable migrants by deterring human smuggling. During the period of delay, designated foreign nationals who are granted refugee protection are able to live in peace and

security as a result of the sanctuary Canada provides them from their well-founded fear of persecution abroad.

3. Conclusion

[70] The vulnerability of migrants, and the harms associated with human smuggling, require a proportionate but firm legislative response. Restricting a designated refugee's ability to travel or sponsor family for at least five years is such a response. The means used by Parliament to further its pressing and substantial objective are proportionate with the ends; and therefore, any limitations on the appellant's rights are demonstrably justifiable in a free and democratic society pursuant to s. 1.

C. REMEDY

1. Unconstitutional use of discretion within Crown prerogative

[71] If this Court finds that the appellant has been the subject of discriminatory treatment, the respondent submits that this is not the product of ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IRPA*, but rather, the result of the Minister of Citizenship and Immigration's failure to consider issuing travel documents in this particular case. As was recently affirmed in *Abdelrazik v Canada (Minister of Foreign Affairs)*, though travel documents are issued at the discretion of the Minister pursuant to Crown prerogative, "the exercise of the royal prerogative in the issuance of passports is subject to examination for compliance with the *Charter*." Therefore, the respondent submits that, where a *Charter* violation concerns the non-issuance of travel documents, it is open to the Court to find that the actual rights-infringement flowed from the unconstitutional exercise of the royal prerogative, rather than a result of the challenged legislation.

Abdelrazik v Canada (Minister of Foreign Affairs), 2009 FC 580 at paras 134-135, [2010] 1 FCR 267.

[72] Were this court to arrive at such a finding, then s. 52 of the *Constitution Act, 1982* is not engaged; and, the court would need to turn to s. 24(1) of the *Charter* to provide a remedy it considers appropriate and just in the circumstances. As articulated in *Doucet-Boudreau v Nova Scotia (Minister of Education)* an appropriate and just remedy is "one that meaningfully vindicates the rights and freedoms of the claimants."

Constitution Act, 1982, supra para 44, s. 52.
Charter, *supra* para 1 at s. 24(1)
Doucet-Boudreau v Nova Scotia (Minister of Education), 2003 SCC 62 at para 55, [2003] 3 SCR 3.

[73] The respondent submits that the appropriate and just remedy for the Court to apply in this case would be to issue a declaration that the Ministers' failure to consider issuing travel documents infringed the appellant's *Charter* right, and return the matter to the Minister for reconsideration.

2. <u>Unconstitutional legislation</u>

[74] In the event that the Court determines that the challenged legislation – ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of *IRPA* – in whole, or in part, violates s. 15 of the *Charter*, and cannot be saved under s. 1, the respondent submits that the appropriate remedy is to declare all of the challenged provisions to be of no force and effect, but to suspend the declaration of invalidity.

[75] As stated in *Schachter v Canada,* a suspended declaration of invalidity is particularly appropriate where a failure to do so would have a significant impact on the rule of law. Given the manner in which this legislation seeks to affect patterns in international migration, deter

illegal entry into Canada and control domestic behaviour, striking down this legislation without suspending the declaration of invalidity would leave a considerable void, and could have significant implications on the rule of law. In these circumstances it is appropriate that Parliament be given time to address these issues in a more comprehensive fashion.

Schachter v Canada, [1992] 2 SCR 679 at 717, 93 DLR (4th) 1 [*Schachter*].

[76] Severing, or striking down only a portion of the challenged sections, would not be warranted or appropriate in these circumstances, as this is not the "clearest of cases" as described in *Schachter*. Specifically, to declare invalid only a portion of these measures would both undermine the legislative objective pursued by Parliament, and represent an unacceptable intrusion into the legislative domain.

Schachter, supra para 75 at 719.

3. <u>Mandamus is not an appropriate remedy.</u>

[77] Whether this Court finds that the infringement of the appellant's rights flowed from the misuse of discretion, or from the challenged legislation itself, an order in the nature of mandamus, requiring the Minister to issue travel documents to the appellant, would not be an appropriate remedy in these circumstances. Dictating executive actions through an order of mandamus is an exceptional remedy that should be reserved for when there is only one constitutionally valid response (*Insite*). Where a range of constitutional options is available, a declaration is the appropriate remedy. As the Supreme Court stated in *Canada (Prime Minister) v Khadr*:

> Judicial review of the exercise of the prerogative power for constitutionality remains sensitive to the fact that the executive branch of government is responsible for decisions under this power, and that the executive is better placed to make such decisions *within a range of constitutional options.* The

> government must have flexibility in deciding how its duties under the power are to be discharged.
>
> *Canada v PHS Community Services Society*, 2011 SCC 44 at para 150, [2011] 3 SCR 134, [*Insite*].
> *Canada (Prime Minister) v Khadr*, 2010 SCC 3 at para 37, [2010] 1 SCR 44, [2010] SCJ No. 3 (emphasis added).

PART V – ORDERS SOUGHT

[78] The respondent asks the Court to dismiss the application.

[79] In the alternative, if the Court finds the Minister's failure to consider issuing travel documents violates the *Charter*, the respondent asks this Court to issue a declaration to this effect and to remit the request for travel documents to the Minister for consideration.

[80] In the alternative, if the Court declares ss. 11(1.1), 20.2(1), 24(5), 25(1.01) and 31.1 of the *IRPA* unconstitutional, the respondent asks the Court to declare that these sections to be of no force and effect, but suspend the effect of such a declaration of invalidity for a year to enable Parliament to enact legislation in accordance with the Court's ruling.

ALL OF WHICH IS RESPECTFULLY SUBMITTED
Dated Feb 10, 2012

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Counsel for Minister of Citizenship, Immigration and Multiculturalism
Team

PART VI – LIST OF AUTHORITIES

LEGISLATION **PARA #s**

JURISPRUDENCE **PARA #s**

SECONDARY MATERIALS **PARA #s**

INTERNATIONAL MATERIALS **PARA #s**