Court File No. T-1381-15

**FEDERAL COURT**

B E T W E E N :

**THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, THE CANADIAN ASSOCIATION OF REFUGEE LAWYERS and ASAD ANSARI**

Applicants

- and -

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE ATTORNEY GENERAL OF CANADA**

Respondents

---

**NOTICE OF APPLICATION FOR LEAVE and for JUDICIAL REVIEW**

---

**TO THE RESPONDENT:**

AN APPLICATION FOR LEAVE TO COMMENCE AN APPLICATION FOR JUDICIAL REVIEW has been commenced b the applicants under

[X] SUBSECTION 22.1(1) OF THE *CITIZENSHIP ACT*; or

[ ] SUBSECTION 72(1) OF THE *IMMIGRATION AND REFUGEE PROTECTION ACT*.

UNLESS A JUDGE OTHERWISE DIRECTS, THIS APPLICATION FOR LEAVE will be disposed of without personal appearance by the parties, in accordance with paragraph 22.1(2)(c) of the Citizenship Act.

IF YOU WISH TO OPPOSE THIS APPLICATION FOR LEAVE, you or a solicitor authorized to practice in Canada and acting for you must prepare a Notice of Appearance in Form IR-2 prescribed by the Federal Courts Citizenship, Immigration and Refugee Protection Rules, serve it on the tribunal and the applicant's solicitor or, if the applicant does not have a solicitor, serve it on the applicant, and file it, with proof after service, in the Registry, within 10 days after the day on which this application for leave is served.

IF YOU FAIL TO DO SO, the Court may nevertheless dispose of this application for leave and, if the leave is granted, of the subsequent application for judicial review without

further notice to you.

Note: Copies of the relevant Rules of Court, information on the local office of the Court and other necessary information may be obtained from any local office of the Federal Court or the Registry in Ottawa, telephone: (613) 992-4238.

The applicant seeks leave of the Court to commence an application for judicial review of:

The Applicants are not seeking to review a decision.

The Applicants are seeking a writ of prohibition to prohibit the Minister of Citizenship and Immigration from applying certain provisions of the *Citizenship Act* as set out below and for an order in the nature of a declaration that those provisions are inconsistent with sections 6(1), 7, 11(h) and (i), 12 and 15(1) of the *Charter of Rights and Freedoms* ("the *Charter*"), cannot be saved under s. 1, and are therefore of no force or effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

**IF THE APPLICATION FOR LEAVE IS GRANTED, THE APPLICANTS SEEK THE FOLLOWING RELIEF BY WAY OF JUDICIAL REVIEW:**

1. A declaration pursuant to s. 52(1) of the *Constitution Act, 1982* that section 5(1)(c.1) of the *Citizenship Act*, R.S.C. 1985, c. C-29, as amended by the *Strengthening Canadian Citizenship Act*, S.C. 2014, c. 22 violates sections 6(1) and 15(1) the *Canadian Charter of Rights and Freedoms* in a manner that cannot be saved under section 1, and is therefore of no force or effect.

2. An order in the nature of prohibition prohibiting the Minister of Citizenship and Immigration ("the Minister") or his delegate(s) from applying paragraph 5(1)(c.1) of the *Citizenship Act* as amended by the *Strengthening Canadian Citizenship Act* because it is inconsistent with the *Charter* and therefore of no force or effect.

3. A declaration pursuant to s. 52(1) of the *Constitution Act, 1982*, that sections 10(2), (3) and (4), 10.1(2) and 10.4(2) of the *Citizenship Act*, R.S.C. 1985, c. C-29, as amended by the *Strengthening Canadian Citizenship Act*, S.C. 2014, c. 22 violate sections 7, 11(h), 11(i), 12 and

15(1) of the *Canadian Charter of Rights and Freedoms* in manners that cannot be saved under s. 1, and are therefore of no force or effect.

4. An order in the nature of prohibition prohibiting the Minister of Citizenship and Immigration ("the Minister") or his delegate(s) from continuing with proceedings against the Applicant Asad Ansari under s. 10(2) of the *Citizenship Act*, R.S.C. 1985, c. C-29 as amended by the *Strengthening Canadian Citizenship Act*, S.C. 2014, c. 22.

5. An order in the nature of prohibition prohibiting the Minister or his delegate(s) from applying section 10(2) or 10.1(2) against any other person because it is inconsistent with the *Charter* and therefore of no force or effect.

6. Such further and other relief as counsel may advise and this Honourable Court may permit.

**IF THE APPLICATION FOR LEAVE IS GRANTED, THE APPLICATION FOR JUDICIAL REVIEW IS TO BE BASED ON THE FOLLOWING GROUNDS:**

**A. THE APPLICANTS**

**i. The British Columbia Civil Liberties Association**

1. The British Columbia Civil Liberties Association ("BCCLA") is a non-profit, non-partisan, unaffiliated advocacy group. It was incorporated in 1963 pursuant to the *British Columbia Society Act*. The objectives of the BCCLA include the promotion, defence, sustainment and extension of civil liberties and human rights throughout British Columbia and Canada. To that end, the BCCLA prepares position papers, engages in public education, assists individuals to address violations of their rights and takes legal action as both an intervener and a plaintiff.

2. The BCCLA has a long-standing interest in matters of immigrant and refugee rights, and has been extensively involved in advocacy and education in respect of a wide range of issues affecting immigrants and refugees in Canada. The BCCLA has an extensive history of making submissions to courts and government bodies with respect to the impacts of laws and policies on the constitutional rights of non-citizens in Canada.

3. The BCCLA has a strong interest in the issues raised in this proceeding, and has consistently opposed the creation of a class of Canadians who could have their citizenship revoked. When the *Strengthening Canadian Citizenship Act* was first proposed as Bill C-24 in February 2014, the BCCLA, together with the Canadian Association of Refugee Lawyers issued a petition calling for the bill's withdrawal. The over 800 page petition, with over 25,000 signatures, was delivered to the office of Citizenship and Immigration Canada in Vancouver on June 3, 2014. Since the Bill's introduction, the BCCLA has engaged in numerous public education initiatives aimed at informing Canadians about the bill and its impacts through publishing blogs and giving public talks and media interviews.

4. The BCCLA has extensive experience litigating complex constitutional issues before the courts. It most commonly appears as an intervener before the Supreme Court of Canada as well as other Canadian courts. It also has experience as an applicant or plaintiff, having been a full party in the following proceedings:

a. *British Columbia Civil Liberties Association v. British Columbia (Attorney General)* (1988), 49 D.L.R. (4th) 493 (B.C.S.C.);

b. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2007 FC 901;

c. *British Columbia Civil Liberties Association v. Royal Canadian Mounted Police*, 2008 FC 49;

d. *Amnesty International Canada and British Columbia Civil Liberties Association v. Canada (Chief of the Defence Staff)*, 2008 FCA 401;

e. *John Dixon and British Columbia Civil Liberties Association v. Powell River (City)*, 2009 BCSC 406;

f. *Abdelrazik et al. v. Canada (Attorney General)*, Federal Court File T-889-10;

g. *British Columbia Civil Liberties Association v. Regina*, 2012 BCPC 406;

h. *British Columbia Civil Liberties Association v. University of Victoria*, 2015 BCSC 39;

i. *Carter et al. v. Canada (Attorney General)*, [2015] 1 S.C.R. 331;

j. *British Columbia Civil Liberties Association v. Canada (Attorney General)*, Federal Court File T-2201-14; and

k. *British Columbia Civil Liberties Association and the John Howard Society of Canada v. Canada (Attorney General)*, British Columbia Supreme Court File No. S150415.

**ii. The Canadian Association of Refugee Lawyers**

5. The Canadian Association of Refugee Lawyers ("CARL") was formed and incorporated in September 2011 as a non-profit and non-partisan association of lawyers and academics with an interest in legal issues related to refugees, asylum seekers, and the rights of immigrants. Its purposes include legal advocacy on behalf of those groups. CARL serves as an informed national voice on refugee law and human rights and promotes just and consistent practices in the treatment of refugees in Canada.

6. Relying on the broad experience of this membership, CARL has a mandate to research, litigate and advocate on refugee rights and related issues. CARL carries out this mandate in the courts, before parliamentary committees, in the media, among its membership *via* bi-annual conferences, and elsewhere in the public sphere. In particular, the association actively engages in public interest litigation, including interventions, on behalf of vulnerable refugees, asylum seekers, permanent residents and other migrants.

7. CARL has a strong interest in the issues raised by this litigation, and has publically expressed its fundamental concern with new citizenship requirements and revocation proceedings. After Bill C-24 was tabled, CARL submitted a brief to the Parliamentary subcommittee studying the bill, engaged in public education activities, published op-eds, and organized and presented at legal education fora. As well, CARL worked with the BCCLA to issue a petition calling for the withdrawal of the legislation.

8. CARL has participated in a number of cases raising important issues respecting the rights of non-citizens, including numerous interventions before the Federal Courts and the Supreme Court of Canada. CARL has also litigated as a full applicant before this Court in:

a. *Canadian Doctors for Refugee Healthcare v. Canada (Attorney General)*, 2014 FC 651; and

b. *Y.Z. and the Canadian Association of Refugee Lawyers v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 892.

**iii. Asad Ansari**

9. Asad Ansari was born in Pakistan on March 8, 1985. He left Pakistan with his family at the age of 7 months to reside in Saudi Arabia. He became a permanent resident of Canada on August 5, 1997, and a Canadian citizen on May 10, 2001.

10. Mr. Ansari was arrested on June 2, 2006 and charged with participating in or contributing to the activities of a terrorist group. That day and subsequently, a number of other individuals were also arrested and charged with terrorism-related offences flowing from the same investigation.

11. Mr. Ansari was tried before the Honourable Justice Dawson of the Superior Court of Justice at Brampton, Ontario, sitting with a jury, on an indictment alleging that he, Fahim Ahmad and Steven Chand:

> (1) unlawfully did between the first day of March 2005, and the second day of June, 2006, in the City of Mississauga, in the City of Toronto, in the City of Fort Erie, in the Township of Ramara, in the Township of Guelph/Eramosa, and elsewhere in the Province of Ontario, knowingly participate in or contribute to, directly or indirectly, any activity of a terrorist group, namely Fahim Ahmad and others, for the purpose of enhancing the ability of the terrorist group to facilitate or carry out a terrorist activity, thereby committing an offence contrary to 83.18(1) of the *Criminal Code*.[1]

12. Following thirteen months of pre-trial proceedings, Mr. Ansari, Mr. Ahmad and Mr. Chand were arraigned together on April 12, 2010.[2] After fifteen days of proceedings before the jury, on May 3, 2010, Mr. Ahmad entered guilty pleas before Dawson J. and was severed from the proceedings. The trial of the Mr. Ansari and Mr. Chand then continued before the jury for a number of additional weeks.

13. It was the Crown's theory that Mr. Ahmad was the leader of a terrorist group, of which Zakaria Amara was a prominent member during at least part of the material time. The Crown alleged that in December 2005 Mr. Ansari and others attended a terrorist training camp organized by Mr. Ahmad and Mr. Amara and that Mr. Ansari thereafter provided computer assistance to Mr. Ahmad and Mr. Amara knowing that in doing these things he was participating in and/or contributing to a group that was terrorist in nature.

14. Mr. Ansari testified in his own defence and denied the allegations.

15. After six days of deliberation, on June 23, 2010, Mr. Ansari and Mr. Chand were found guilty as charged.

---

[1] Originally, Mr. Ansari and thirteen others were charged on the same indictment with various terrorism-related offences. Eleven of the co-accused either pleaded guilty or had their charges withdrawn over the course of the pre-trial process. Another individual, N.Y., was prosecuted separately as a young person.

[2] Ahmad and Chand separately faced additional charges on the same indictment.

16. On October 4, 2010, Mr. Ansari was sentenced to one day in jail and three years' probation in addition to the three years, two months and 26 days he served in pre-trial custody.[3] In sentencing Mr. Ansari, Dawson J. noted that "[b]ased on the usual rule of two days credit for each day of pre-trial custody Mr. Ansari has already served the equivalent of a sentence of approximately six years and five months."[4] The Crown had not sought any additional period of incarceration beyond the one day imposed.

17. Mr. Ansari appealed the conviction. His appeal was heard by the Court of Appeal for Ontario in December 2014. On August 19, 2015, the Court dismissed his appeal.

18. On or about July 10, 2015, Mr. Ansari received a letter from the Minister of Citizenship and Immigration, dated July 2, 2015. The letter indicated that the Minister was considering revoking Mr. Ansari's citizenship as a result of his criminal conviction. The notice indicated that the Minister had reason to believe that Ansari was a citizen of Pakistan, and provided him with 60 days in which to provide the Minister with any information or documentation Mr. Ansari believed was relevant to the Minister's decision. This deadline was subsequently extended to November 10, 2015.

19. Mr. Ansari was 21 years old at the time of his arrest and 20 years old at the time of his involvement with his co-accused that gave rise to the charge.

20. Apart from this matter, Mr. Ansari has had no contact with the criminal justice system. He is currently completing an undergraduate degree in Political Science. He plans to apply to graduate school.

---

[3] Mr. Ansari remained in custody from his arrest on June 2, 2006, until he was granted bail on August 29, 2009.
[4] *R. v. Ansari*, [2010] O.J. No. 6371 at para. 3

## B. THE LEGISLATION

21. On June 19, 2014 Royal Assent was given to the *Strengthening Canadian Citizenship Act* ("Bill C-24"). Bill C-24 amended various provisions of the *Citizenship Act* including, as relevant to this application, adding an additional requirement for being granted Canadian citizenship (the "intent to reside" provision) and expanding the grounds upon which a person may have their citizenship revoked and amending the procedures that lead to revocation (the "revocation" provisions).

### i. Intent to Reside Requirements

22. Prior to Bill C-24, section 5(1) of the *Citizenship Act* required the Minister of Citizenship and Immigration ("The Minister") to grant citizenship to any person who met five requirements:

a. Made an application for citizenship;

b. Is 18 years of age or older;

c. Is a permanent resident of Canada and in the previous four years has accumulated at least three years of residence in Canada according to a formula set out in the *Act*;

d. Has an adequate knowledge of one of the official languages of Canada;

e. Has an adequate knowledge of Canada and of the responsibilities and privileges of citizenship; and

f. Is not subject to a removal order or a declaration pursuant to s. 20 of the *Act*.

23. Bill C-24 introduced a new requirement in paragraph 5(1)(c.1). This provision now requires individuals applying for Canadian citizenship to establish an intention "to continue to reside in Canada" unless they fall into a narrow category of persons connected to the public service or Canadian Forces working abroad.

24. Consequently, individuals who have Canadian citizenship by birth are free to reside outside of Canada indefinitely while maintaining their citizenship. Naturalized Canadians, on the other hand, have their mobility constrained by the risk that departure from Canada post-naturalization will be construed as evidence of past misrepresentation of an intent to reside in Canada.

**ii. Revocation Provisions**

25. Prior to Bill C-24, section 10 of the *Citizenship Act* provided that an individual's citizenship could be revoked only if it were established that their citizenship was obtained "by false representation or fraud by knowingly concealing material circumstances," in effect removing the grant of citizenship when improperly made *ab initio*. A finding of fraud could be made only by the Governor in Council on a report prepared by the Minister. Prior to issuing a report, the Minister was required to notify the affected individual, who had a right to require that the matter be referred to the Federal Court for adjudication. The Court would make a determination as to whether or not the Minister had established on a balance of probabilities that the Applicant had obtained his citizenship by fraud.

26. Bill C-24 both expanded the grounds upon which citizenship could be revoked, and changed the applicable procedure.

27. Beyond revocation based on fraud, s. 10(2) of the *Act* now permits revocation where the Minister is satisfied that a citizen was convicted of:

a. High treason or treason under s. 47 of the *Criminal Code* and sentenced to imprisonment for life;

b. A terrorism offence as defined in section 2 of the *Criminal Code* or any offence outside of Canada that, if it had been committed in Canada, would constitute a terrorism offence, and sentenced to at least five years imprisonment;

c. Offences under various provisions of the *National Defence Act* related to terrorism, treason, and spying, and sentenced to imprisonment for life or – in the case of terrorism related offences – five years; and

d. An offence under ss. 16 or 17 of the *Security of Information Act*.

28. These provisions operate retrospectively. A person who was convicted of one of the enumerated offences prior to the enactment of the Bill C-24 amendments would still be subject to citizenship revocation, even though the law at the time of their conviction or even at the time of the offence did not provide for such a consequence.

29. With respect to the newly enacted grounds for revocation set out in s. 10(2), the decision to revoke citizenship is taken by the Minister directly, not by the Governor in Council. The subject no longer has the right to have the matter referred to Court for adjudication. Instead, pursuant to s. 10(3), the Minister is required to notify the subject of the grounds on which the Minister is relying to make his decision, and inform them of their right to make written representations.

30. There is no right to an oral hearing. The amended *Act* states that the Minister *may* hold an oral hearing if, pursuant to prescribed factors, he is of the view that a hearing is required. There is no right to disclosure of relevant materials in the possession of the Minister. The Minister need only set out the grounds on which he is relying to make his decision.

31. Pursuant to s. 10.1(2) an individual may also have their citizenship revoked if the individual, while a Canadian citizen, “served as a member of an armed force of a country or as a member of an organized armed group and that country or group was engaged in an armed conflict with Canada.” As with revocation based on convictions, this provision operates retrospectively.

32. Revocation under s. 10.1(2) differs from s. 10(2) in that the Minister is required to commence an action against the individual for a declaration from the Federal Court that that they had served in an armed force or organized armed group.

33. Bill C-24 also contains provisions related to the issue of statelessness. Section 10.4(1) provides that the new revocation provisions do not authorize any action that would conflict with "any international human rights instrument regarding statelessness to which Canada is a signatory." The *Act* does not contain any further indication of what relevant instruments Canada is a party to, nor what the effect of any such instrument might be. It also does not appear to capture customary international law norms binding on Canada.

34. If there exist any such instruments to which Canada is a party that prohibit the deprivation of citizenship that would render a person stateless, subsection 10.4(2) of the *Act* places an onus on the affected person to establish on a balance of probabilities that they are not a citizen of any country that the Minister has reasonable grounds to believe that they are a citizen.

35. There is no right of appeal against a decision of the Minister. The sole recourse against a decision by the Minister to revoke citizenship under the new grounds of revocation is an application for leave for judicial review pursuant to s. 22.1 of the *Act*.

36. There is no right of appeal against a declaration made by the Federal Court under s. 10.1(2) unless the Court certifies that a serious question of general importance is involved and states the question: s. 10.7.

37. Under the amended *Act*, a person whose citizenship is revoked due to a conviction for an offence under s. 10(2) or for engaging in armed conflict with Canada under 10.1 becomes a foreign national: s. 10.3.

## C. THE INTENT TO RESIDE PROVISION IS UNCONSTITUTIONAL

38. The requirement under s. 5(1)(c.1)(i) that an applicant intends to reside in Canada if granted citizenship requires citizenship applicants to prospectively disavow the mobility rights that all Canadian citizens enjoy under the *Canadian Charter of Rights and Freedoms*. In doing so, it creates a two-tiered system of citizenship that discriminates against individuals on the basis of national origin, as well as race and ethnicity.

### i. The Intent to Reside Requirement Violates Section 6(1) of the *Charter*

39. Section 6(1) of the *Charter of Rights and Freedoms* provides that "Every citizen of Canada has the right to enter, remain in and leave Canada." State conduct that *de facto* prevents an individual from leaving Canada violates this right.

40. Bill C-24's amendments require an applicant to forswear exercising their constitutional right to leave Canada as a condition of obtaining citizenship. It also would effectively require them to forego exercising the right to leave Canada for substantial periods of time or to reside abroad because, if they do so, they risk the revocation of their citizenship due to misrepresentation or fraud on the basis that any expressed intention to reside in Canada made during the application process was dishonest.

41. Certain rights under the *Charter* vest only in citizens, and it is inconsistent with these constitutional guarantees to require those seeking to become citizens to agree not to exercise those rights.

### ii. The Intent to Reside Provision Violates Section 15(1) of the *Charter*

42. Section 15(1) of the *Charter of Rights and Freedoms* provides that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

43. The intent to reside requirement creates a two-tiered form of citizenship, divided between those who acquire citizenship at birth (who are free to reside abroad and yet maintain their citizenship) and those who obtain citizenship through naturalization (who must forswear any intention to reside abroad, and who risk loss of citizenship if they subsequently do so). This draws a distinction based on the enumerated ground of national origin, and also engages the enumerated grounds of ethnic origin, colour and race.

44. The distinction is based on prejudice and stereotyping of persons who were once immigrants from foreign states and who seek out Canadian citizenship, characterizing them as seeking to obtain citizenships of convenience. The legislation demonstrates a view that – unlike Canadian-born citizens who reside abroad – foreign-born citizens who reside abroad are simply exploiting Canadian citizenship for personal convenience. It regards their citizenship as less authentic and their commitment as less genuine than that of birthright citizens.

45. This stereotypical reasoning fails to consider the many valid reasons why naturalized citizens might reside outside of the country. It assumes naturalized citizens ‘take advantage’ of Canada in ways that domestically-born citizens do not. It presumes that foreign-born citizens who reside abroad cannot or do not contribute to Canadian society.

46. By imposing significant burdens (including limitations on other *Charter* protected rights) on some citizens but not others based on their respective national origins, the intention to reside provision perpetuates unjustified and negative views, and therefore violates s. 15(1) of the *Charter*.

## D. THE REVOCATION PROVISIONS ARE UNCONSTITUTIONAL

47. The newly enacted provisions that permit the revocation of citizenship based on conduct that post-dates the grant of citizenship violate the constitution both because of inherent unfairness in the process that leads to revocation, and based on the severe and discriminatory impact that revocation imposes on individuals.

### i. The Revocation Provisions Violate Section 12 of the *Charter*

48. The revocation provisions constitute cruel and unusual treatment and/or punishment.

49. Revocation is a form of punishment as it is a penal consequence that flows from a criminal conviction or from a finding that the individual has engaged in armed conflict with Canada (which itself will ordinarily be criminal conduct).

50. In addition, citizenship revocation constitutes “treatment” for s. 12 purposes. Dealings with an individual by the state in the context of an administrative regime can constitute treatment. Deportation of an individual from Canada is a form of treatment that can be addressed under s. 12 of the *Charter*. The revocation of citizenship is based on a process initiated by the Minister, and normally results in deportation; it is accordingly treatment that falls within the scope of s. 12.

51. A punishment is cruel and unusual when it is grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender.

52. If revocation is not considered a punishment and is analyzed solely as treatment, the assessment under s. 12 involves an examination of several factors including whether the treatment goes beyond that which is necessary to achieve a legitimate aim; whether there are

adequate alternatives to the treatment; whether the treatment is arbitrary; and the treatment's value or social purpose.

53. Citizenship revocation imposes harms on individuals that are wholly disproportionate to any legitimate government objective. Revocation results in the loss of civil rights that are so fundamental that they have themselves been enshrined in the *Charter*, and exiles individuals from the Canadian polity. Revocation also renders individuals foreign nationals, which exposes them to extended periods of detention in Canada, or expulsion from Canada to other countries to which they may have no connection whatsoever. The loss of citizenship also impacts individuals by placing them in circumstances of precariousness and uncertainty as to their status or future. In some cases, this impact will rise to the level of serious mental anguish and psychological harm.

54. The revocation regime as it exists also gives rise to a real risk that individuals will be rendered stateless. The reverse onus provision in s. 10.4(2) of the *Act*, in tandem with the subjective discretion that makes statelessness a matter of the Minister's opinion, creates circumstances where the Minister believes that a person is a citizen of a particular foreign state notwithstanding that – at least from the perspective of that foreign state – the individual is not a citizen. The result would be a situation where, notwithstanding the existence of doubts respecting an individual's foreign citizenship, their Canadian citizenship is revoked and they are rendered stateless.

55. Being rendered stateless imposes severe impacts on individuals. Stateless individuals are deprived of the exercise of basic rights, are unable to claim the protection of a home state, and are at serious risk of mistreatment.

56. The gross disproportionality of all of the consequences of revocation is particularly acute given that many individuals would have already been punished within the context of the criminal justice system for their conduct.

### ii. The Revocation Provisions Violate Section 7 of the *Charter*

57. Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

**Engagement of s. 7**

58. Revocation of citizenship restricts an individual's liberty interest. It removes their mobility and voting rights, which are inherent aspects of liberty. When an individual's citizenship is revoked under either ss. 10(2) (national-security related convictions) or 10.1 (armed conflict), they are rendered a foreign national. Such a person would inevitably be viewed as inadmissible under either ss. 34, 36 or 40 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"). This may result in the prolonged detention of such individuals: *IRPA* s. 55.

59. In many cases revocation will also impact the security of the person interest by placing an individual at a real risk of being deported to face serious mistreatment. Labels placed on an individual though the revocation process such as "terrorist" or "traitor" may enhance the risk of mistreatment or persecution.

60. Revocation also engages the security of the person interest because of the serious and prolonged psychological suffering it may impose on individuals. For many individuals captured by the new revocation provisions and who would now face deportation, their other nationality derives from a country with which they have no meaningful connection, have little or no

familiarity with the language or culture, and have no family or other support network. The risk of removal that arises as a direct consequence of revocation may have a sufficiently severe psychological and social impact so as to engage s. 7's security of the person interest.

61. Revocation also raises a real risk of rendering a person stateless. Notwithstanding s. 10.4(1) of the *Act*, there is a real risk that revocation will render an individual stateless in some circumstances. This risk arises because, unless an individual can establish that they are not a citizen of any other state on a balance of probabilities, the Minister's conclusion that they would not be rendered stateless through revocation is dispositive, even if this conclusion is speculative or erroneous.

62. Individuals may not be in a position to discharge their burden due to the inherent problems with proving of a negative, the above-described lack of disclosure from the Minister, and practical issues such as difficulties proving foreign law. Revocation proceedings may occur while an individual is outside of Canada and lacks access to local assistance, effectively depriving them of a meaningful opportunity to adduce the necessary evidence respecting citizenship. Consequently, by creating a reverse onus situation, individuals may be stripped of citizenship on the basis of the Minister's subjective views, even if there exist reasonable grounds to believe those views are wrong and that the individual is not a citizen of any foreign state.

63. Stateless persons are inherently vulnerable and at risk of not being able to exercise basic human rights. Stateless persons are particularly vulnerable to prolonged detention.

**Procedural Fundamental Justice**

64. Because revocation engages s. 7 of the *Charter* and may result in extreme consequences, individuals subject to revocation are entitled to a high degree of procedural fairness. The need for

procedural fairness is all the more acute given the absence of any right of appeal from a decision of the Minister to revoke.

65. The *Act* establishes a discretionary regime that lacks basic procedural protections for persons at risk of revocation.

66. With the exception of revocation for engaging in armed conflict with Canada, which requires the Minister to bring a proceeding in the Federal Court, the extent of the procedural protections are: (1) the person is given notice of the grounds on which the Minister is relying to make a decision; and (2) is informed of their right to make written representations within a specified period of time: s. 10(3).

67. The new regime fails to afford sufficient protections to meet the requirements of natural justice because:

a. The *Act* does not require the Minister to disclose relevant information in his possession to the individual;

b. By requiring that the Minister notify an individual of the grounds upon which he is relying to render his decision, but not necessarily the evidence supporting those grounds, the *Act* does not guarantee the right to know the case put against one and to answer that case;

c. The *Act* imposes an unfair onus on the individual to establish that revocation would not render them stateless;

d. The *Act* does not guarantee an hearing before an independent and impartial magistrate; and

e. The *Act* does not guarantee an oral hearing in all circumstances where such a hearing is necessary.

68. Under the previous regime, in which all revocation actions could be referred to the Federal Court for adjudication, courts had adopted a requirement for full disclosure and production of all relevant information within the party's possession. Under C-24's approach, in

which there is no judicial proceeding, there is no general disclosure requirement placed on the government.

69. The Minister is under no obligation to disclose information in his possession that, while not being relied upon, is nevertheless relevant to the proceeding. In particular, the Minister has no obligation to disclose information to the individual that tends to undermine the basis for the revocation, even if the Minister were in possession of it and aware of its relevance.

70. This may be particularly relevant when it comes to the question of whether the individual is a citizen of a foreign state. The Minister may be in possession of information or evidence that is relevant to the question of citizenship and provides some support for the proposition that the individual is not a citizen of a different state, and yet have no obligation to provide such information to the individual in question. Absent such disclosure, the individual may be unable to meet their onus to establish their lack of foreign citizenship.

71. The Minister is, in fact, under no obligation to disclose any relevant evidence. The *Act* merely requires the Minister to disclose the "grounds" on which he is relying, not the evidence that he believes supports those grounds.

72. With the exception of those revocation proceedings that fall under s. 10.1 of the *Act*, the *Act* does not provide for a fair hearing before an independent and impartial magistrate. The proceedings are purely administrative, with the Minister both initiating and adjudicating the revocation process. In practice, both the investigative and adjudicative functions under the *Act* are delegated to officials within Citizenship and Immigration Canada's Case Management Branch, who are not independent from one another or from the Minister himself.

73. The *Act* is furthermore unconstitutional because it does not guarantee a right to an oral hearing. Procedural fairness requires an oral hearing where credibility is at stake, and serious issues of credibility will often arise during revocation proceedings, such as where an individual is required to rebut the Minister's *prima face* view that they have or are entitled to have the citizenship of another state, or where revocation is being pursued on the basis of convictions in foreign states for terrorism offences.

74. The *Act* does not even require that the Minister grant an oral hearing when prescribed factors point to the need for one. Rather than use the mandatory term "shall", s. 10(4) uses the permissive "may", clearly indicating a purely discretionary regime. Establishing a discretionary regime in which the decision maker determines whether or not to conduct an oral hearing cannot replace a right to an oral hearing in circumstances where s. 7 is engaged.

75. The legislation is crafted in such a way that revocation may be effectuated on the basis of a foreign conviction or conduct undertaken abroad, where the citizen is located outside of Canada when revocation proceedings are commenced. In these circumstances, individuals will be unable to meaningfully participate in the revocation process. If revocation occurs, the individual would not be entitled to re-enter Canada to pursue judicial review, which imposes a significant impediment to obtaining relief from the courts.

**Substantive Fundamental Justice**

76. The revocation provisions also violate the principles of fundamental justice in the substantive sense by imposing punishment on individuals retrospectively.

77. Citizenship revocation under both s. 10(2) and s. 10.1(2) may be imposed based on convictions or conduct that occurred prior to the entry into force of Bill C-24. This imposes a form of punishment that did not exist at the time of the conduct in question.

78. It is a principle of fundamental justice that no person may be punished for conduct that was not prohibited at the time it was committed. Even where it is permissible to punish a person for their prior conduct, it is a principle of fundamental justice that they cannot be punished more severely than what the law authorized as punishment at the time of the commission of the offence. Revocation under ss. 10(2) and 10.1(2) violate this principle.

79. Section 10(2) also violates the principles of fundamental justice by authorizing the imposition of a punishment on individuals who have already been punished for their conduct. Revocation under s. 10(2) is predicated on an individual having already been convicted of an offence and having been sentenced to a minimum term of imprisonment (ranging from five years to life imprisonment, depending on the underlying offence). Revocation acts as a second punishment that may be applied even long after the original punishment has been served.

80. It is a principle of fundamental justice that an individual not be punished twice for the same conduct. Revocation under s. 10(2) violates this principle.

### iii. The Revocation Provisions Violate Sections 11(h) and (i) of the *Charter*

81. Section 11 of the *Charter* guarantees a series of protections for individuals who have been charged with an offence. The section is engaged when either of two conditions are met: when a proceeding is, by its very nature, criminal; or when true penal consequences flow from a proceeding.

82. With respect to revocation based on s. 10(2) of the *Act*, every such person has by definition been charged with an offence, and therefore enjoys the protection of s. 11 of the *Charter* in relation to that proceeding and the consequences that flow from it.

83. Section 11(h) of the *Charter* provides that

> Any person charged with an offence has the right… if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again.

84. Revocation of citizenship as a result of a conviction as set out in s. 10(2) of the *Act* violates s. 11(h) of the *Charter* because revocation in these circumstances is a true penal consequence which is imposed upon someone who has already been punished for the same offence. It constitutes impermissible double-punishment.

85. A true penal consequence is one that, by its magnitude, would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within a limited sphere of activity.

86. While revocation under s. 10(1) based on misrepresentation can be understood as a consequence directed at restoring an outcome that would have obtained had the true facts been known at the relevant time, individuals subject to revocation under s. 10(2) do not fall within the same framework. In this category of revocation, the claim is that individuals ought to face the consequence of losing citizenship that was properly obtained. In these circumstances, citizenship revocation is the modern enactment of the 18$^{th}$ and 19$^{th}$ century criminal punishment of transportation, and constitutes *de facto* exile.

87. Moreover, the magnitude of the consequence of revocation is far more severe than many consequences for a criminal conviction: it divests the individual of constitutionally-enshrined rights and eliminates their right to remain in Canada.

88. In enacting the C-24 amendments, Parliament intended that revocation operate as a form of punishment.

89. When revocation occurs under s. 10(2), it imposes a punishment on an individual who has already previously been punished for an offence, and therefore violates s. 11(h).

90. Revocation under s. 10(2) also violates s. 11(i) of the *Charter*, which provides that:

> Any person charged with an offence has the right… if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

91. To the extent that s. 10(2) operates retrospectively, it seeks to impose a more severe punishment as a consequence of the prior conduct than existed at the time of its commission, when citizenship revocation was not an available punishment.

92. Revocation based on armed conflict with Canada under s. 10.1(2), while not necessarily requiring an associated criminal charge, also engages s. 11. Revocation on grounds other than misrepresentation or fraud is a true penal consequence. As such, the process that leads to such revocation must be in conformity with s. 11.

93. To the extent that s. 10.1(2) permits the Minister to seek to revoke citizenship on the basis of acts that occurred prior to the enactment of Bill C-24, these provisions violate s. 11(i) because they would impose a punishment on an individual that is more harsh than the penalties that existed at the time of the relevant conduct.

94. Any person who engages in conduct that is described in s. 10.1(2) prior to the enactment of Bill C-24 would likely have been guilty of high treason under ss. 46(1)(b) or (c) and (3)(a) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. At the time of commission, they could be subject to the punishments set out in the *Criminal Code* at the time, but would not face any possibility of citizenship revocation. Parliament cannot impose punishment retrospectively when such punishment was not prescribed by law at the time of commission.

### iv. The Revocation Provisions Violate Section 15(1) of the *Charter*

95. Because revocation may only intentionally be applied to dual or multi-citizens, the provisions discriminate between persons based on the analogous ground of citizenship. Mono-citizens (those who have no claim to any citizenship other than Canadian) are not subject to revocation. Those who hold other citizenships are. This constitutes discrimination on the basis of the recognized analogous ground of citizenship.

96. The revocation provisions establish two classes of citizens: mono-Canadian citizens (who are not subject to revocation) and dual or multi-citizens (who are subject to revocation). It treats those individuals who are not citizens of any other state preferentially to those persons who do hold a second citizenship, as the former category are not at risk of losing Canadian citizenship and the benefits that flow from it.

97. This distinction perpetuates historical disadvantage of Canadian citizens who originate from other countries, and is influenced by prejudicial reasoning respecting the “otherness” or disloyalty of those who hold the citizenship of a foreign state. It renders dual citizens less secure in their Canadian citizenship than mono-citizens.

**IF LEAVE IS GRANTED, THIS APPLICATION WILL BE SUPPORTED BY THE FOLLOWING MATERIAL:**

1. Affidavits from the Applicants, to be sworn;

2. Affidavits from experts and other witnesses prepared in support of the application, to be sworn; and

3. Such further material as this Honourable Court may permit.

As there is no decision and as the application is for a constitutional declaration, the applicant has not received the reasons from the tribunal.

If the application for leave is granted, the Applicants propose that the application for judicial review be heard at Toronto in English.

for **WALDMAN AND ASSOCIATES**
281 Eglinton Avenue East
Toronto, ON M4P 1L3

**Lorne Waldman**
Tel: 416-482-6501
Fax: 46-489-9618
lorne@waldmanlaw.ca

for **JOHN NORRIS**
Barrister
Simcoe Chambers
100-115 Simcoe Street
Toronto, ON M5H 4E2

Tel: 416-596-2960
Fax: 416-596-2598
john.norris@simcoechambers.com

**GOLDBLATT PARTNERS LLP**
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

**Marlys A. Edwardh**
Tel: 416-979-4380
Fax: 416-979-4430
medwardh@goldblattpartners.com

**Daniel Sheppard**
Tel: 416-979-6442
Fax: 416-979-4430
dsheppard@goldblattpartners.com

**Counsel for the Applicants, The British Columbia Civil Liberties Association and the Canadian Association of Refugee Lawyers**

for **BREESE DAVIES LAW**
171 John Street, Suite 101
Toronto, ON M5T 1X3

**Breese Davies**
Tel: 416-649-5061
Fax: 416-352-7733
bdavies@bdlaw.ca

**Counsel for the Applicant Asad Ansari**

TO: THE MINISTER OF CITIZENSHIP AND IMMIGRATION
c/o Department of Justice Canada
Ontario Regional Office
130 King Street West, Suite 3400, Box 36
Toronto, ON M5X 1K6

AND TO: THE ATTORNEY GENERAL OF CANADA
c/o Department of Justice Canada
Ontario Regional Office
130 King Street West, Suite 3400, Box 36
Toronto, ON M5X 1K6

**THE BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION ET AL.**

Applicants

and

**THE ATTORNEY GENERAL OF CANADA ET AL.**

Respondents

Court File No.

SERVICE OF A TRUE COPY ADMITTED ON
AUG 20 2015
ON BEHALF OF THE
DEPUTY ATTORNEY GENERAL OF CANADA
WILLIAM F. [illegible]
per: Department of Justice

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the AUG 20 2015 day of A.D. 20
Dated this AUG 20 2015 day of 20

YOGINDER GULIA
REGISTRY OFFICER
AGENT DU GREFFE

FEDERAL COURT
COUR FÉDÉRALE
CANADA

**FEDERAL COURT**

# NOTICE OF APPLICATION FOR LEAVE and for JUDICIAL REVIEW


**WALDMAN AND ASSOCIATES**
281 Eglinton Avenue East
Toronto, ON M4P 1L3

**Lorne Waldman**
Tel: 416-482-6501
Fax: 46-489-9618
lorne@waldmanlaw.ca

**GOLDBLATT PARTNERS LLP**
20 Dundas Street West, Suite 1100
Toronto, ON M5G 2G8

**Marlys A. Edwardh**
Tel: 416-979-4380
Fax: 416-979-4430
medwardh@goldblattpartners.com

**Daniel Sheppard**
Tel: 416-979-6442
Fax: 416-979-4430
dsheppard@goldblattpartners.com

**Counsel for the Plaintiffs, BCCLA and CARL**

**JOHN NORRIS**
Barrister
Simcoe Chambers
100-115 Simcoe Street
Toronto, ON M5H 4E2

Tel: 416-596-2960
Fax: 416-596-2598
john.norris@simcoechambers.com

**BREESE DAVIES LAW**
171 John Street, Suite 101
Toronto, ON M5T 1X3

**Breese Davies**
Tel: 416-649-5061
Fax: 416-352-7733
bdavies@bdlaw.ca

**Counsel for the Plaintiff, Asad Ansari**


F:\15-622\00783517.DOCX