S.C.C. File No. 36784

IN THE SUPREME COURT OF CANADA
ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Between:

THAHN TAM TRAN

Appellant

- and -

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

- and -

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATON
ATTORNEY GENERAL OF BRITISH COLUMBIA
CANADIAN ASSOCIATION OF REFUGEE LAWYERS
AFRICAN CANADIAN LEGAL CLINIC

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(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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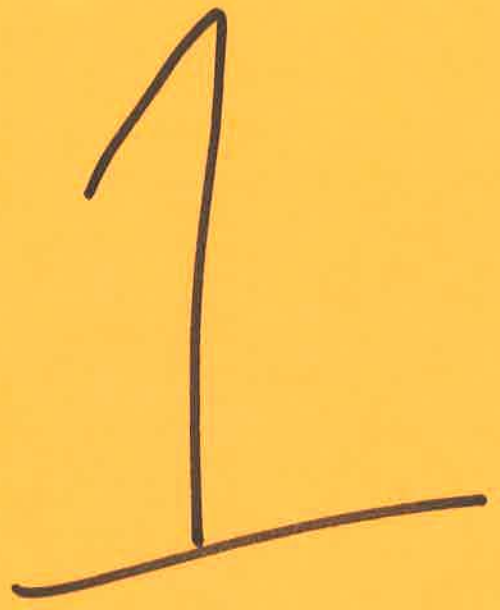

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The decision under review at the Federal Court of Appeal was whether the Appellant should be found inadmissible pursuant to s. 36(1)(a) of the *Immigration and Refugee Protection Act* ("*IRPA*"). The Court held that the phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of *IRPA* can reasonably be interpreted as the maximum term of imprisonment under the law in force at the time admissibility is determined. The BCCLA argues that this interpretation of the statute is inconsistent with s. 11(i) of the *Charter of Rights and Freedoms* ("*Charter*") and violates the presumption against retroactive punishment.

2. BCCLA takes no position as to the facts in this matter.

PART II – POINTS IN ISSUE

3. The BCCLA is intervening in this Appeal with respect to the following issue: whether the phrase "punishable by a maximum term of imprisonment of at least 10 years" in s. 36(1)(a) of the *IRPA* refers to the maximum term of imprisonment available at the time the person was sentenced or the maximum term of imprisonment under the law at the time admissibility is determined.

4. Section 36 (1)(a) of the *IRPA* states as follows:

> **36.** (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for
> (*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

PART III – STATEMENT OF ARGUMENT

5. The BCCLA submits that Mr. Tran should be subject to the legal consequences in accordance with the law that was in force at the time he was convicted. As this Court has recently stated,"(p)eople's conduct and the legal consequences that flow from it should be judged on the basis of the law in force at the time and secondly because the general presumption against retroactive punishment requires this result. This is a basic tenet of our legal system."[1]

6. This submission is based on three distinct arguments: (1) an inadmissibility determination resulting in deportability is a "penal consequence", thereby triggering the protection contained in section 11(i) of the *Charter* against the retroactive interpretation of section 36(1)(a) of *IRPA*; (2) rule of law mandates the presumption against retroactivity; and

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[1] *R v KRJ* [2016] SCJ No 31 [KRJ] at para 1. **[BCCLA, Book of Authorites "B.A.", TAB 12]**

(3) international jurisprudence supports the application of the presumption against retroactivity.

A. Inadmissibility Determinations and Deportation are "penal consequences"

7. Section 11 of the *Charter* provides robust protection against the retroactive interpretation of s.36(1)(a) of *IRPA*. Section 11(i) of the *Charter* states 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 receive the benefit of the lesser punishment. That section states:

> Any person charged with an offence has the right ...
> (i) 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;

8. To attract the protection of s. 11(i) of the *Charter*, the measure at issue must qualify as punishment or a penal consequence. The BCCLA submits that deportation arising from an inadmissibility determination under s. 36(1)(a) of the *IRPA* is indeed "punishment" that attracts the protection of s. 11(i) of the *Charter*.

9. In *Wigglesworth*, the Supreme Court determined that the protection awarded by section 11 of the *Charter* is restricted to "criminal or quasi-criminal proceedings and proceedings giving rise to penal consequences."[2]

10. In the 1989 decision of *Hurd*[3], the Federal Court of Canada interpreted *R. v. Wigglesworth* and held that deportation was not a "true penal consequence". However, the BCCLA submits that *Hurd v. Canada* has been overtaken by developments in the jurisprudence, and, in particular, the decision of this Court in *K.R.J*[4].

11. Deportation is properly characterized in the present instance as a "true penal consequence". In *K.R.J.* the Court created a new test, which should be applied to the criminal context. Application of this new test to the present context is aligned with both the "liberal and purposive" interpretation warranted by the *Charter* as well the recent U.S. and U.K. jurisprudence on this point.

12. Although *K.R.J.* was determined in the context of criminal proceedings, the Court is clear that the test applies to proceedings outside the criminal context as well, noting that the Court has always looked to effects as well as purposes when considering the constitutionality

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[2] *R. v Wigglesworth,* [1987] 2 SCR 541 at para 19 [Wigglesworth]. . **[BCCLA, B.A., TAB 16]**
[3] *Hurd v. Canada (Minister of Employment and Immigration),* [1989] 2 FC 594 at para 19. **[BCCLA, B.A., TAB 4]**
[4] *KJR, supra* note 1. **[BCCLA, B.A., TAB 12]**

of laws.[5] Whether deportation resulting from an inadmissibility determination is a punishment or true penal consequence, such that s. 11 of the *Charter* applies, therefore falls to be determined by the *K.R.J.* test. The test is as follows:

> A measure constitutes punishment if:
> (1) it is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either
> (2) it is imposed in furtherance of the purpose and principles of sentencing, or
> (3) it has a significant impact on an offender's liberty or security interests.[6]

13. The BCCLA submits that deportation resulting from an inadmissibility determination is a true penal consequence and satisfies the *K.R.J.* test.[7].

Deportation is a consequence of conviction

14. Deportation arising from an admissibility determination pursuant to s. 36(1)(a) of *IRPA* is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence. Deportability following an inadmissible determination is clearly a consequence of an individual's conviction, pursuant to the wording of s. 36(1)(a) of *IRPA*.

15. The Oxford Dictionary defines consequence as "a result or effect".[8] In the present case, but-for being convicted of a "serious offence", the person concerned would not be deportable due to an inadmissibility determination.[9]

16. Deportations arising from an inadmissibility determination are indeed part of the "arsenal of sanctions" to which an accused may be subject. The recent decision of this Court in *R. v. Pham* affirmed *R. v. Hamilton*,[10] and found that "(t)he risk of deportation can be a factor to be taken into consideration in choosing among the appropriate sentencing responses and tailoring the sentence to best fit the crime and the offender".[11]

17. The decision in *R. v. Pham* permits the immigration consequences of sentencing to be taken into account, within a range. The implication of the ruling in *R. v. Pham* is that the Court

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[5] *K.R.J.* at paras. 35 to 43. **[BCCLA, B.A., TAB 12]**
[6] *Ibid* at para 41. **[BCCLA, B.A., TAB 12]**
[7] *Supra* note 5 at para. 26: "Clearly, the concerns with retrospective laws are particularly potent in proceedings that are criminal, quasi-criminal, or in which a "true penal consequence" is at stake -- the context to which s. 11 applies (Wigglesworth, at p. 559). **[BCCLA, B.A., TAB 16]**
[8] *Oxford English Dictionary* (Oxford: Oxford Univesrity Press, 2016)
[9] While not all those who are found guilty of a "serious" offence will be subject to deportation, this is acceptable under the first criterion of the test for punishment in *KRJ.* That criterion is concerned with whether an accused may be liable for a consequence that forms part of the arsenal of sanctions.
[10] *R v Hamilton*, (2004) 72 OR (3d) 1 at paras 156 and 158 (CA). **[BCCLA, B.A., TAB 11]**
[11] *R v Pham*, [2013] 1 SCR 739 at para 19. **[BCCLA, B.A., TAB 14]**

can consider deportation consequences of criminality when determining upon a sentence precisely because these consequences are part of the arsenal of sanctions to which the accused is subject.

Purpose and principles of sentencing

18. The second component of the *K.R.J.* test is also satisfied. Namely, a deportation order issued pursuant to s. 36(1) of the *IRPA* is, in part, imposed in furtherance of the purpose and principles of sentencing. Section 718 of the *Criminal Code* sets out, *inter alia*, the following principles of sentencing:

> **Purpose**
> 718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
> (a) to denounce unlawful conduct;
> ...
> (c) to separate offenders from society, where necessary;

19. In the present case, the Minister states that the goal of s. 36(1)(a) of *IRPA* is to uphold the public policy purpose of prioritizing security, which in fact, falls under the objective of "separating offender from society, where necessary" under s. 718(c) of the *Code*.[12] It is further of note that in *K.R.J.,* this Court held that "sanctions intended to advance public safety *do not* constitute a broad exception to the protection s. 11(i) of the *Charter* affords and may indeed qualify as punishment."[13] While the Court also said that a public protection purpose is not, on its own, determinative, it went on to say that "the purpose of sentencing is to 'protect society' or advance 'respect for the law and the maintenance of a just, peaceful and safe society' (s. 718 of the *Criminal Code*) by fulfilling one or more of the traditional sentencing objectives (s. 718(a) through (f) in accordance with the principles of sentencing reflected in ss. 718.1 and 718.2."[14]

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[12] Respondent's memorandum at 15, para 49.
[13] *KRJ*, *supra* note *5* at para 33. Further, at para 34: The Court held: To be clear, while measures imposed at sentencing for the purpose of protecting the public may constitute punishment under s. 11(i), a public-protection purpose is not, on its own, determinative. To satisfy the second branch of the Rodgers test, a consequence of conviction must be imposed in furtherance of the purpose and principles of sentencing. As discussed, the purpose of sentencing is to "protect society" or advance "respect for the law and the maintenance of a just, peaceful and safe society" (s 718 of the Criminal Code) by fulfilling one or more of the traditional sentencing objectives (s 718(a) through (f)) in accordance with the principles of sentencing reflected in ss 718.1 and 718.2. **[BCCLA, B.A., TAB 12]**
[14] *K.R.J.* at para. 34. **[BCCLA, B.A., TAB 12]**

Significant impact on liberty and security interests

20. The right to liberty is defined expansively in the jurisprudence. It encompasses freedom from physical restraint and "the right to make fundamental personal choices free from state interference".[15]

21. As for security of the person, this Court recently stated that "(s)ecurity of the person encompasses 'a notion of personal autonomy involving... control over one's bodily integrity free from state interference' [...] and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering".[16]

22. In the context of the present case, Mr. Tran stands to be deported from Canada pursuant to a finding of inadmissibility under s. 36(1)(a) of *IRPA*; this clearly impacts his liberty and security interests.

Additional considerations

23. That a deportation pursuant to s. 36(1)(a) of the *IRPA* falls within the protection of s. 11(i) of the *Charter* pursuant to the *K.R.J* test is also warranted by "the liberal and purposive approach" this Court has mandated in interpreting *Charter* rights, including s. 11.[17]

24. Moreover, the Federal Court of Appeal's finding that deportation is not a "penal consequence" runs contrary to recent jurisprudence of the United States and the United Kingdom.

25. In its 2010 *Padilla* decision, the United States Supreme Court ("USSC") retreated from the rigid criminal-civil dichotomy and recognized that deportation can have penal consequences. The law, the USSC explained, has "enmeshed criminal convictions and the penalty of deportation."[18]

26. At issue in *Padilla* was the question of whether a lawyer is constitutionally obliged to warn her client about the immigration consequences of a guilty plea. The traditional rule had been that lawyers must warn about the direct (criminal) consequences of a plea, but not regarding the indirect ones (usually civil). While lower courts had been of the view that the civil character of deportation placed it outside of the Sixth Amendment's scope, a majority led

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[15] *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 at para 49 [Blencoe] **[BCCLA, B.A., TAB 1]**

[16] Ibid, para 55-56; **[BCCLA, B.A., TAB 1]** *Carter v. Canada (Attorney General),* [2015] 1 S.C.R. 331 at para 64 **[BCCLA, B.A., TAB 2]**

[17] *Hunter v Southam Inc.*, [1984] 2 SCR 145, 1984 CanLII 33 (SCC) at 155-156; **[BCCLA, B.A., TAB 3]** *R v Brydges,* [1990] 1 SCR 190 at para 13. **[BCCLA, B.A., TAB 10]**

[18] Supreme Court of the United States, *Padilla v Kentucky*, (2010) 130 S Ct 1473 at 1481. **[BCCLA, B.A., TAB 9]**

by Justice Stevens disagreed. Noting that deportation "is not, in a strict sense, a criminal sanction", the majority explained that "deportation is nevertheless intimately related to the criminal process [;] and "we find it 'most difficult' to divorce the penalty from the conviction in the deportation context."[19] Accordingly, the Court found that the Sixth Amendment mandates that defense counsel must warn a client of the possible immigration consequences of a guilty plea.[20]

27. Similarly, there is some recent shift in the U.K. jurisprudence which characterizes deportation pursuant to criminality as "penal". Lord Justice Wilson of the Court of Appeal, in deciding whether to deport a convicted criminal, cast deportation as "penal" by holding that it, in part, responds to the need to deter foreign nationals "from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation." According to the Court of Appeal's decision, the characterization of deportation cannot be regarded as anything but "penal".[21]

B. Rule of Law Mandates the Presumption Against Retroactivity

28. Interpreting s. 36(1)(a) of *IRPA* retroactively is contrary to the principle of rule of law.

29. In the present case, Mr. Tran stands to be deported. This potential for a high level of unfairness, in the absence of express statutory language ousting the principle against retrospective application, is concerning. There is nothing in s. 36(1)(a) of the *IRPA* that expressly oust the presumption against retroactivity.

30. This Court in *K.R.J.*, in the context of section 11 of the *Charter*, albeit within the criminal law context, affirmed the following words of Lord Diplock: "acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it".[22]

31. It is strongly presumed that legislation is not intended to be applicable to facts that were already in the past when the legislation came into force.[23] As Professor Sullivan states, "(i)n order to comply with the law or rely on it in a useful way, a person must know what the law is prior to acting… the retroactive application of legislation makes it impossible for the law to be

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[19] *Ibid.* **[BCCLA, B.A., TAB 9]**

[20] Maureen Sweeny & Hillary Scholten, "Penalty and Proportionality in Deportation for Crimes" (2011) 31 St Louis U Pub L Rev 11 at 11. **[BCCLA, B.A., TAB 20]**

[21] *OH (Serbia) v Secretary of State for the Home Department,* [2008] EWCA Civ 694 at para 15. **[BCCLA, B.A., TAB 8]** There is also some jurisprudence indicating the contrary in the UK. See: *R v Mintchev (Kirili)*, [2011] EWCA Crim 499 at para 18. **[BCCLA, B.A., TAB 13]**

[22] K.R.J., *supra* note 1 at para 23. **[BCCLA, B.A., TAB 12]**

[23] Ruth Sullivan, *"Statutory Interpretation"*, 2d ed (Toronto: Irwin Law), p. 259. **[BCCLA, B.A., TAB 19]**

known in advance of acting: the content of the law becomes known only when it is too late to do anything about it. In effect, the law is deemed to have been different from what it actually was. The principle has been upheld by Canadian Courts, as exhibited by the deision in *Mackenzie v British Columbia (Commissioner of Teachers' Pensions).*[24]

32. As expressed by Professor John Gardner, in accordance with the principle of the rule of law, the law must be such that those subject to it can reliably be guided by it, either to avoid violating it or to build the legal consequences of having violated it into their thinking about what future actions may be open to them. People must be able to find out what the law is and to factor it into their practical deliberations. The law must avoid taking people by surprise, ambushing them, putting them into conflict with its requirements in such a way as to defeat their expectations and frustrate their plans.[25]

33. Professor Lon Fuller enunciated similar concerns in his seminal work, *The Morality of Law*, wherein he stated that retrospective laws threaten the rule of law in another way, by undercutting the integrity of laws currently in effect, "since it puts them under the threat of retrospective change".[26] The Supreme Court of Canada adopted professor Fuller's concern in *K.R.J.*[27]

34. In the context of s. 36(1)(a) of the *IRPA*, the presumption against retroactivity is mandated by the rule of law. Mr. Tran was convicted in 2012, and at the applicable time, he would not have been rendered deportable. The *IRPA* has not changed from 2012 to now. Mr. Tran should not, by virtue of a new criminal law under which he could not be convicted presently, be deportable due to a change in the *Criminal Code*. Indeed, such a consequence takes him by surprise and violates the firmly established principle of the rule of law as laid out by this Honourable Court in *K.R.J.*

C. International Jurisprudence and the Presumption Against Retroactivity

35. The presumption against retroactivity also applies in the present case in light of the principle of non-retroactivity applied in the immigration context by other jurisdictions.

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[24] *Mackenzie v. British Columbia (Commissioner of Teachers' Pensions),* (1992), 94 D.L.R. (4th) 532 (B.C.C.A.) **[BCCLA, B.A., TAB 7]**

[25] J Gardner, "Introduction" in HLA Hart, ed, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2d ed (Oxford: Oxford University Press, 2008) at xxxvi, as cited in *K.R.J.* at para. 23. **[BCCLA, B.A., TAB 12]**

[26] Lon L Fuller, *The Morality of Law*, rev ed (New Haven: Yale University Press, 1969) at 39 as cited in *KRJ*, *supra* note 5 at para 24. **[BCCLA, B.A., TAB 12]**

[27] *Ibid.*. **[BCCLA, B.A., TAB 12]**

36. The USSC has rejected the retroactive imposition of penalties in the immigration context.[28] In *Landgraf v USI Film Products*, the Court adopted Justice Story's reasoning from *Wheeler* which held that a statute may be considered retroactive even if it does not purport to take effect at a time earlier than its date of passage.[29] According to Justice Story, statues that takes effect at the date of passage, but nevertheless impair an individual's vested rights can also be said to be retroactive in nature. The USSC held:

> every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."[30]

37. In *Landgraf*, the USSC confirmed that there exists a strong presumption against interpreting laws in a way that produces a retroactive effect. The Court noted that, although there is no absolute bar against a retroactive law, assuming that it does not trigger constitutional protections, it will not apply a statute retroactively unless the legislature has made clear its intention that this is its desired effect. This requirement "helps to ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness."[31] The rationale for this strong presumption, which is "deeply rooted in American jurisprudence," is grounded in fundamental fairness: "individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[21] Accordingly, in *Landgraf* the USSC articulated a two-part test for the determination of whether a statute should be construed as applying retroactively.

> 1. First, the court must "ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively."
> 2. Second, the court must determine whether applying the legislation would actually result in an impermissible retroactive effect.[32]

38. The USSC applied this test to the deportation context in *St. Cyr*[33], the facts of which are similar to the facts of the present case. *St. Cyr* concerned the question of whether legislation retroactively removed the Attorney General's statutory authority to issue a waiver of deportation to an individual convicted of a felony. Mr. St. Cyr, a US permanent resident, plead guilty to the possession of a controlled substance in March 1996. At the time of his plea, the

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[28] Supreme Court of the United States, *Landgraf v USI Film Products*, (1994) 511 US 244 at 265-266. **[BCCLA, B.A., TAB 6]**
[29] *Ibid* at 269. **[BCCLA, B.A., TAB 6]**
[30] *Ibid.* **[BCCLA, B.A., TAB 6]**
[31] *Ibid* at 268. **[BCCLA, B.A., TAB 6]**
[32] *Ibid* at 280. **[BCCLA, B.A., TAB 6]**
[33] United States Supreme Court, *INS v St Cyr,* [2001] 533 US 289 [St Cyr]. **[BCCLA, B.A., TAB 5]**

law authorized the Attorney General to issue a discretionary waiver of deportation. However, the Attorney General refused to issue such a waiver on the grounds that subsequent legislation removed the waiver discretion that would have been available to Mr. St. Cyr at the time of his plea.

39. The USSC held that the subsequent legislation is inapplicable in the case of a permanent resident who has entered into a plea agreement that would have rendered him eligible for a discretionary waiver at the time the agreement was concluded.[34]

40. In applying the first prong, the USSC stated that there is a high threshold for finding that the legislature clearly intended retroactivity. The Court outlined the following:

- The standard for finding such unambiguous direction is a demanding one. '[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation.'[35]
- With respect to deportation legislation, there is an established principle that any lingering statutory ambiguity should be decided in favor of the individual who risks being deported.[36]

41. In applying the second prong of the test, the USSC held an individual's vulnerability to deportation cannot be said to be purely prospective in nature; while it does affect his ability to remain in the country going into the future, it is also retrospective in that a permanent resident may reasonably rely on the possibility of a discretionary waiver that was legally available to him at the time he made a plea.[37]

42. Justice Ginsburg of the USSC applied these principles in *Vartleas v. Holder*.[38] She applied the presumption against retroactivity to a law intended to bar immigrants from re-entry into the US, if they had in the past committed a crime of "moral turpitude". At issue in *Vartleas* was whether this law could bar a legal resident from re-entry into the US after brief trip abroad when the legal standard that was in place at the time the individual was convicted permitted brief trips abroad without a bar to re-entry. Citing *Landgraf* and *St. Cyr*, Justice Ginsburg found that if the new law were applied to Vartelas, if would lead to unfair retroactive results by creating a new "disability".[39]

> Vartelas presents a firm case for application of the antiretroactivity principle. Neither his sentence, nor the immigration law in effect when he was convicted and sentenced, blocked him from occasional visits to his parents in Greece.

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[34] St Cyr, *supra* note 34 at 326 **[BCCLA, B.A., TAB 5]**
[35] *St Cyr, supra* note 34 at 316-317. **[BCCLA, B.A., TAB 5]**
[36] *Ibid at* 320. **[BCCLA, B.A., TAB 5]**
[37] *St Cyr, supra* note 34 at 324. **[BCCLA, B.A., TAB 5]**
[38] United States Supreme Court, *Varelas v. Holder,* [2012] 566 U.S. [*Holder*]. **[BCCLA, B.A., TAB 17]**
[39] *Ibid,* p. 7 **[BCCLA, B.A., TAB 17]**

> Current §1101(a)(13)(C)(v), if applied to him, would thus attach "a new disability" to conduct over and done well before the provision's enactment.[40]

43. Similarly, applying s. 36(1)(a) of the *IRPA* to Mr. Tran would subject him to new impediments which were in fact not in place at the time he was sentenced and convicted. There is no express language ousting the presumption of retroactivity in the present case.

44. The U.K. jurisprudence also militates against the retroactive interpretation of s. 36(1)(a) of *IRPA*. In the recent case of *R (Miller) v. Secretary of State*, a three-judge panel of the High Court of Justice, Queen's Bench Division, unanimously summarized how courts apply constitutional principles to the process of statutory interpretation.[41] The Court held that a rule against retroactivity is an example of a particularly strong constitutional principle.

> There is a strong presumption against Parliament being taken to have intended to give a statute retrospective effect, even if the language used in the statue might appear to create such effect.[42]

45. As Lord Nicholls explained in *Wilson*, this presumption against retroactivity is connected to the notice of fairness:

> This was well identified by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe*, [1991] 2 All ER 712 at 724: The true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'[43]

PART IV – STATEMENT ON COSTS

46. BCCLA seeks no costs and respectfully ask that no costs are awarded against them.

PART V – ORDER SOUGHT

47. BCCLA seeks leave to present oral argument before the Court based on these submissions.

All of which is respectfully submitted this 21st day of November 2016, at Toronto.

LORNE WALDMAN
WARDA SHAZADI MEIGHEN
The British Columbia Civil Liberties Association

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[40] *Holder, supra,* note 28 at p. 9. **[BCCLA, B.A., TAB 17]**
[41] *R (Miller) v. Secretary of State* [2016] EWHC 2768 at para. 83 **[BCCLA, B.A., TAB 15]**
[42] *Ibid.* **[BCCLA, B.A., TAB 15]**
[43] *Wilson and others v. Secretary of State for Trade and Industry (Appellant)*, [2003] UKHL 40 at para 19 **[BCCLA, B.A., TAB 18]**

PART VI – TABLE OF AUTHORITIES

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1.	*Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44	20
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16.	*R. v Wigglesworth*, [1987] 2 SCR 541	9, 10, 13
17.	*Vartleas v. Holder*, 566 U.S. (2012)	42
18.	*Wilson and others v. Secretary of State for Trade and Industry (Appellant)*, [2003] UKHL 40	45
Books		
19.	Ruth Sullivan, *"Statutory Interpretation"*, 2d ed (Toronto: Irwin Law), p. 259.	31

20.	Maureen Sweeny & Hillary Scholten, "Penalty and Proportionality in Deportation for Crimes" (2011) 31 St Louis U Pub L Rev 11	26

PART VII – STATUTORY PROVISIONS

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

Criminal Code of Canada, R.S.C., 1985, c. C-46, s. 718

Immigration and Refugee Protection Act ("*IRPA*"), s. 36(1)(a)

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11, s. 11 11. Any person charged with an offence has the right (a) to be informed without unreasonable delay of the specific offence; (b) to be tried within a reasonable time; (c) not to be compelled to be a witness in proceedings against that person in respect of the offence; (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; (e) not to be denied reasonable bail without just cause; (f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment; (g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations; (h) 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; and (i) 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.	*Loi constitutionnelle de 1982,* Annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11 s. 11 11. Tout inculpé a le droit : a) d'être informé sans délai anormal de l'infraction précise qu'on lui reproche; b) d'être jugé dans un délai raisonnable; c) de ne pas être contraint de témoigner contre lui-même dans toute poursuite intentée contre lui pour l'infraction qu'on lui reproche; d) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable; e) de ne pas être privé sans juste cause d'une mise en liberté assortie d'un cautionnement raisonnable; f) sauf s'il s'agit d'une infraction relevant de la justice militaire, de bénéficier d'un procès avec jury lorsque la peine maximale prévue pour l'infraction dont il est accusé est un emprisonnement de cinq ans ou une peine plus grave; g) de ne pas être déclaré coupable en raison d'une action ou d'une omission qui, au moment où elle est survenue, ne constituait pas une infraction d'après le droit interne du Canada ou le droit international et n'avait pas de caractère criminel d'après les principes généraux de droit reconnus par l'ensemble des nations; h) d'une part de ne pas être jugé de nouveau pour une infraction dont il a été définitivement acquitté, d'autre part de ne pas être jugé ni puni de nouveau pour une infraction dont il a été définitivement déclaré coupable et puni; i) de bénéficier de la peine la moins sévère, lorsque la peine qui sanctionne l'infraction dont il est déclaré coupable est modifiée entre le moment de la perpétration de l'infraction et celui de la sentence.
Criminal Code of Canada, R.S.C., 1985, c. C-46, s. 718 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just	*Code criminel,* LRC 1985, c C-46, s. 718 718 Le prononcé des peines a pour objectif essentiel de protéger la société et de contribuer, parallèlement à d'autres initiatives de prévention du crime, au respect de la loi et au maintien d'une société juste, paisible et sûre par l'infliction de sanctions justes visant

sanctions that have one or more of the following objectives: (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct; (b) to deter the offender and other persons from committing offences; (c) to separate offenders from society, where necessary; (d) to assist in rehabilitating offenders; (e) to provide reparations for harm done to victims or to the community; and (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.	un ou plusieurs des objectifs suivants : a) dénoncer le comportement illégal et le tort causé par celui-ci aux victimes ou à la collectivité; b) dissuader les délinquants, et quiconque, de commettre des infractions; c) isoler, au besoin, les délinquants du reste de la société; d) favoriser la réinsertion sociale des délinquants; e) assurer la réparation des torts causés aux victimes ou à la collectivité; f) susciter la conscience de leurs responsabilités chez les délinquants, notamment par la reconnaissance du tort qu'ils ont causé aux victimes ou à la collectivité.
Immigration and Refugee Protection Act ("IRPA"), s. 36(1)(a) 36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for (a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*Loi sur l'immigration et la protection des réfugiés,* LC 2001, c 27, s. 36(1)(a) 36 (1) Emportent interdiction de territoire pour grande criminalité les faits suivants : a) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;