REGISTRY NO. IMM-3411-16

FEDERAL COURT

B E T W E E N:

DAVID ROGER REVELL

APPLICANT

-and-

MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT

-and-

BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

INTERVENER

MEMORANDUM OF FACT AND LAW OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

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MEMORANDUM OF FACT AND LAW OF THE INTERVENER, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

PART I. OVERVIEW AND STATEMENT OF FACTS

1. This judicial review concerns the scope of *Charter* protection available to long term permanent residents facing deportation from Canada due to criminality. In determining that the issuance of a deportation order did not violate Mr. Revell's section 7 or section 12 *Charter* rights, the Member of the Immigration Division held that he was bound to follow the dicta of the Supreme Court of Canada's 1992 decision in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 SCR 711 ("*Chiarelli*"). The BCCLA submits that the *Chiarelli* decision needs to be revisited. The principle of vertical *stare decisis* is not applicable as there have been significant developments in the law since the *Chiarelli* decision.

2. The BCCLA's position is that *Chiarelli,* and subsequently *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration),* 2005 SCC 51 ("*Medovarski*"), err by placing exclusive and undue reliance on the common law principle that "non-citizens do not have an unqualified right to enter or remain in the country" in determining the scope of s. 7 *Charter* rights for non-citizens facing deportation. The BCCLA submits that deploying a rights-negating common law precept to pre-empt inquiry into the impact of the state conduct on the individual rights bearer is inconsistent with current principles of s. 7 *Charter* interpretation and has distorted the jurisprudence relating to the deportation of permanent residents. The BCCLA also submits that it is inconsistent with a s. 7 contextual analysis to arbitrarily limit "the principles and policies underlying immigration law" to only one common law principle. In particular the BCCLA submits there are a number of other relevant contextual factors specific to the status of "permanent resident" that should be considered when assessing the scope of the principles of fundamental justice in relation to the deportation of permanent residents.

3. The BCCLA submits that the common law principle – "non-citizens do not have an unqualified right to enter or remain in the country" – is really an invocation of an executive prerogative, whether framed affirmatively as the assertion of unfettered state power or negatively as the denial of an individual right. There can be no doubt that the mere invocation of executive power cannot supply a complete answer to the question of whether deportation in certain circumstances violates section 7 of the *Charter*.

4. The BCCLA takes no position on the facts as summarized by the parties.

PART II POINTS IN ISSUE

5. The BCCLA limits its submissions to the scope of s. 7 *Charter* protection available to permanent residents who are being deported on the basis of serious criminality. In particular the BCCLA submits:

(1) the Supreme Court decisions in *Chiarelli* and *Medovarski* must be revisited; and

(2) the use of the common law principle – no alien has an unqualified right to enter or remain in Canada – in *Chiarelli* and *Medovarski* is not consistent with contemporary interpretative principles for the following reasons:

a. the scope of the s. 7 right must be determined from perspective of rights bearer, not the state;

b. there is no place for societal interest justification or societal interests balancing in the s. 7 analysis; and

c. the contextual analysis to determine how principles of fundamental justice should be applied must not be arbitrarily limited to a rights precluding common law principle.

PART III ARGUMENT

A. *Chiarelli* and *Medovarski* need to be revisited

6. *Chiarelli* is a 1992 case concerning the deportation of a permanent resident due to a criminal conviction and subsequent sentence. Mr. Chiarelli was barred by

statute from asking the Immigration Appeal Board to exercise humanitarian and compassionate discretion in his case. His deportation was challenged on the basis of s. 7, s. 12, and s. 15 of the *Charter*. The Court held that it need not address whether s. 7 was engaged in his case, as there could be no breach of fundamental justice for a non-citizen in these circumstances. The Court reasoned that because the most fundamental principle of immigration law was that "non-citizens had no unqualified right to enter or remain in the country," breaching a statutory condition imposed on their presence in Canada (in this case that they not be convicted of certain types of criminal offences) is "sufficient to justify a deportation order." No further inquiry was required if the non-citizen breached a condition imposed on them by the state authority: "it is not necessary, in order to comply with fundamental justice to look beyond this fact [the condition being breached] to other aggravating or mitigating circumstances."

Chiarelli, pp. 733-734

7. Thirteen years later, the Supreme Court returned to the common law principle that "non-citizens had no unqualified right to enter or remain in the country" in *Medovarski*. *Medorvarski* also concerned permanent residents who were subject to deportation due to criminality. Much of *Medovarski* focuses on the statutory interpretation arguments regarding the effect of transitional provisions cancelling appeals to the Immigration Appeal Division where humanitarian factors could be assessed. In the two paragraphs addressing the s. 7 arguments, the Court relies on *Chiarelli*. In *Medovarski* the Court asserts that the common law principle cited in *Chiarelli* is the sole basis to find that s. 7 is not engaged. The Court does not explain how or why it transposed the principle used in *Chiarelli* to determine the scope of fundamental justice to now deny a breach of life, liberty or security of the person. No particular facts are considered, nor is there any legal analysis. The simple fact that the person concerned is a non-citizen, accompanied by the declaration that non-citizens do not have an unqualified right to enter or remain in Canada, suffices to conclude that that s. 7 is not engaged. At the stage of analyzing the principles of fundamental justice, which the Court undertook despite finding that s. 7 was not

engaged, the Court finds that the humanitarian and compassionate factors can be assessed under the s. 25(1) process and in any case, *Chiarelli* already determined that the "principles of fundamental justice do not mandate the provision of a compassionate appeal from the a decision to deport a permanent resident for serious criminality."

Medovarski, paras. 46-47

8. In both *Chiarelli* and *Medovarski* the Court does not consider the specific facts of the individuals facing removal or the particular nature of permanent residence status. There is no assessment of the impact of the government conduct on the individual. Instead, the mere fact of the state's authority over the individual is used to oust any consideration of the impact on their individual *Charter* rights.

9. *Chiarelli* has been treated as a controlling case by immigration and refugee decision-makers, as was done by the Immigration Division in the applicant's case. As stated by the respondent, "both cases [*Chiarelli* and *Medovarski*] continue to serve as a compass to guide the direction of the law, being cited in many cases."

Respondent's Further Memorandum of Argument, para. 24

10. The respondent argues that it was not open to the Immigration Division to "overrule the Supreme Court of Canada and steer the jurisprudence in a different direction." It is a trite law that the Immigration Division is a court of competent jurisdiction pursuant to s. 24(1) of the *Charter*, has the power to decide questions of law, and the jurisdiction to determine to *Charter* issues.

Respondent's Further Memorandum of Argument, para. 25
Stables v. Canada (Citizenship and Immigration), 2011 FC 1319, para. 29

11. The Supreme Court was clear in the decisions of *Carter v. Canada (Attorney General)*, 2015 SCC 5 ("*Carter*") and *Canada (Attorney General) v. Bedford*, 2013 SCC 72 ("*Bedford*"), that the lower courts must perform their full role where there is a significant change of circumstances. In *Bedford*, the Supreme Court was

critical of the position that a lower court could never revisit a decision of a higher court:

> [43] The intervener, the David Asper Centre for Constitutional Rights, argues that the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional. It submits that lower courts should not be limited to acting as "mere scribe[s]", creating a record and findings without conducting a legal analysis (I.F., at para. 25).
>
> [44] I agree. As the David Asper Centre also noted, however, a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role.

Bedford, paras. 43-44

5. In *Carter* the Supreme Court again considered the principle of "vertical *stare decisis*" and found it could not be used as a "straitjacket that condemns the law to stasis":

> [44] The doctrine that lower courts must follow the decisions of higher courts is fundamental to our legal system. It provides certainty while permitting the orderly development of the law in incremental steps. However, *stare decisis* is not a straitjacket that condemns the law to stasis. Trial courts may reconsider settled rulings of higher courts in two situations: (1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate" (*Canada (Attorney General) v. Bedford*, 2013 SCC 72 (CanLII), [2013] 3 S.C.R. 1101, at para. 42).

Carter, para. 44

12. The BCCLA adopts the applicant's argument that there have been significant developments in the law warranting a revisiting of the decision in *Chiarelli,* and by extension, *Medovarski*, including: the removal of access to an H & C process for

Mr. Revell, and the development of the *Charter* and international human rights norms recognizing the limits to the authority of states to remove non-citizens.

Applicant's Further Memorandum of Argument, paras. 46-56

B. The use of a rights-precluding common principle in *Chiarelli* and *Medovarski* is not consistent with contemporary principles of s. 7 interpretation

13. The Court in *Chiarelli* (and subsequently) relies on the common law proposition that aliens have no unqualified right to enter or remain in Canada as a complete answer to the constitutionality of deportation of long- term permanent residents found inadmissible on grounds of criminality. This kind of reasoning turns *Charter* protection on its head by enabling the common law prerogative power to prevail over a constitutionally entrenched individual right. The anomalous quality of the dicta have become more apparent as *Charter* jurisprudence has evolved. As set out below the approach is not consistent with fundamental principles of *Charter* interpretation.

i. *The scope of the section 7 right must be considered from the perspective of rights bearer, not the state*

14. In *Chiarelli* the Court holds it need not look at the any "aggravating or mitigating circumstances" in considering whether the principles of fundamental justice have been breached; the sole factors it needs to consider are the state's authority to remove and that the person concerned breached a condition of their status in Canada. The individual is defined by the status accorded by the state, not by her specificity as an individual. All non-citizens are regarded as identical *qua* non-citizen for purposes of assessing them as rights bearers. The Court in *Chiarelli* acknowledges that "personal circumstances of individuals who breach this condition may vary widely" and that the "offences which are referred to... also vary in gravity, as may the factual circumstances surrounding the commission of a particular offence." But since all that matters under s. 7 is that they are non-citizens, these factors are constitutionally irrelevant. It does not matter how long the person has

lived in Canada, the circumstances of their offences, whether they have a mental illness or addiction issues, or the types of connections they have in Canada. *Chiarelli* tells us that these distinctions are not relevant to the contextual analysis in s. 7 in respect of all non-citizens, whether they are foreign nationals who have just arrived in Canada or have been permanent residents who came to Canada in infancy.

15. It is otherwise well established in *Charter* jurisprudence that the applicant bears the burden of demonstrating that their right has been infringed, and that the rights infringement is assessed by reference to the impact of state action on them. The applicant in this case does not assert that non-citizens as such have an unqualified right to enter or remain. Rather, the applicant argues that, in the particular circumstances of his life and situation, deportation would violate his *Charter* rights. The claim that non-citizens do not have an unqualified right to enter and remain is not responsive to the applicant's argument, but instead has the effect of muting the applicant. The approach that has been taken in these cases precludes consideration of the impact of state conduct on the individual.

16. This form of *Charter* analysis has a distorting effect, and is not currently accepted in any area of the law outside of immigration. For example, the denial of parole is accepted as a limitation of s. 7 rights, even though no incarcerated offender has an unqualified right to release. Litigants who are not charged with a criminal offence do not have a s. 10(b) *Charter* right to counsel, but the Supreme Court of Canada has found that the denial of state funded counsel in the particular circumstances of a woman resisting the apprehension of her children violated her s. 7 rights because the impact to the mother of losing her children was so potentially devastating.

Mooring v. Canada (National Parole Board), [1996] 1 SCR 75
New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46

17. The approach in *Chiarelli* and subsequent cases involving the deportation of permanent residents is an anomaly. The jurisprudence does not endorse a blanket bar to large groups of people accessing *Charter* protection. For example, an assessment

of gross disproportionality cannot be done without considering the impact on an individual. Recent jurisprudence has confirmed that government conduct can be found to be grossly disproportionate based on its impact on *one* individual. In other words, the impact of coercive state action on an individual, in light of that individual's personal circumstances, must be considered.

Bedford, para. 122

ii. There is no place for societal interest justification or societal interests balancing in the s. 7 analysis

18. The jurisprudence has now established that a consideration of societal interests (including public safety) does not belong in the s. 7 assessment. Instead, these types of considerations properly belong in the s. 1 justification stage of the analysis.

19. In *Chiarelli*, the Court relied on reasoning from the extradition cases of *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 and *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858 that without the power of deportation, Canada could become a haven for criminals; the Court explicitly retreated from that same rationale in the decision in *United States v. Burns*, 2001 SCC 7.

Chiarelli, p. 733

20. In *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9 ("*Charkaoui*") the Supreme Court considered s. 7 rights in the context of a national security scheme. Even there, the Supreme Court was very clear that "s. 7 is not concerned with whether a limit on life, liberty or security of the person is *justified* but with whether the limit has been imposed in a way that respects the principles of fundamental justice." The Court acknowledged that the national security context may require some modifications, but this particular context did not in and of itself excuse the government from having to meet the requirements of fundamental justice under s. 7:

> It follows that while administrative constraints associated with the context of national security may inform the analysis on whether a particular process is fundamentally unfair, security concerns cannot be used to excuse procedures that do not conform to fundamental justice at the s.7 stage of the analysis. If this context makes it impossible to adhere to the principles of fundamental justice in their usual form, adequate substitutes may be found. But the principles must be respected to pass the hurdle of s. 7. That is the bottom line.
>
> *Charkaoui,* paras. 21, 23

21. Recently, in *Bedford* and *Carter*, the Court again cautioned against the danger of balancing societal interests against the rights bearer's s. 7 interests within the s. 7 analysis.

Bedford, paras. 125-127
Carter, paras. 79-80

22. In *Chiarelli* the error is even graver. There is no doubt that the Court is utilizing a societal interest justification in the s. 7 analysis but in *Chiarelli* these interests are not even balanced against the s. 7 interests of the individual complainant. Instead, the societal interest justifications were asserted as a way to oust any need for an analysis of the interests at stake from the perspective of the rights bearer. This approach is not at all in line with contemporary s. 7 jurisprudence.

iii. *The contextual analysis to determine how principles of fundamental justice should be applied must not be arbitrarily limited to a rights precluding common law principle*

23. It is not consistent with a s. 7 contextual analysis to arbitrarily limit the analysis of "the principles and policies underlying immigration law" to only one common law principle that does not distinguish among non-citizens, treating all non-citizens as aliens. This common law principle is neither consistent with other historical common law principles, or the common law's recognition that a person facing deprivation of a legal right, entitlement or benefit that they already enjoy and rely upon is generally entitled to greater protection than a person who is initially seeking the legal right, entitlement or benefit.

24. Domicile was a well-established right in the common law. It tied an individual to a jurisdiction, as a matter of law, when a person had a residence in a country with a settled intention to remain permanently. Under the common law, the legal state of domicile comes into existence when the facts and intention of the individual support it. Domicile does not depend on or require state recognition for its establishment. For most of the twentieth century, domiciled immigrants in Canada could only be deported in exceptional circumstances. Landed immigrants did not automatically acquire domicile; rather, Canada became their domicile after the passage of time. The *Immigration Act* of 1976 replaced domicile with permanent residence, while recognizing that those who previously benefited from domicile required substantial procedural protections.

Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3 at para. 38

25. The applicant has documented the trends in international jurisprudence toward recognizing long-term residents' rights to remain in their country of residence despite their criminality. This background should also inform the contextual analysis under s. 7.

Applicant's Further Memorandum, paras. 63-87

PART IV ORDERS SOUGHT

26. The BCCLA is not seeking any orders.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 3, 2017

Audrey Macklin and Lobat Sadrehashemi
Solicitors for the Intervener

PART V LIST OF AUTHORITIES

Canada (Attorney General) v. Bedford, 2013 SCC 72

Canada (Minister of Employment and Immigration) v. Chiarelli, [1992] 1 SCR 711

Carter v. Canada (Attorney General), 2015 SCC 5

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9

Chieu v. Canada (Minister of Citizenship and Immigration), 2002 SCC 3

Kindler v. Canada (Minister of Justice), [1991] 2 S.C.R. 779

Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration), 2005 SCC 51

Mooring v. Canada (National Parole Board), [1996] 1 SCR 75

New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46

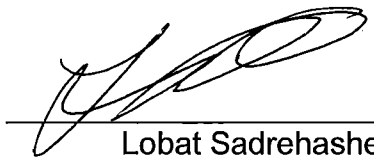
Reference Re Ng Extradition (Can.), [1991] 2 S.C.R. 858

Stables v. Canada (Citizenship and Immigration), 2011 FC 1319

United States v. Burns, 2001 SCC 7

SOLICITOR'S CERTIFICATE OF SERVICE

I, Lobat Sadrehashemi, Barrister and Solicitor, certify that I caused the Respondent to be duly served with the Intervener's Memorandum of Fact and Law dated April 3, 2017, by transmitting this document by facsimile to Marjan Double, counsel for the Respondent at 604-666-2639 and Peter Larlee/Lorne Waldman, counsel for the Applicant at 604-681-8087on April 3, 2017.



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