

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)**

B E T W E E N:

**THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE
CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION
GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD
MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI AND
REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA**

Appellants

- and -

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

Respondents

- and -

**ASSOCIATION QUÉBÉCOISE DES AVOCATS ET AVOCATES EN DROIT DE
L'IMMIGRATION, ADVOCATES FOR THE RULE OF LAW,
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, WEST COAST
LEGAL EDUCATION AND ACTION FUND ASSOCIATION AND WOMEN'S LEGAL
EDUCATION AND ACTION FUND INC., BRITISH COLUMBIA CIVIL LIBERTIES
ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION,
CANADIAN ASSOCIATION OF REFUGEE LAWYERS, NATIONAL COUNCIL OF
CANADIAN MUSLIMS AND CANADIAN MUSLIM LAWYERS ASSOCIATION,
CANADIAN LAWYERS FOR INTERNATIONAL HUMAN RIGHTS AND THE
CANADIAN CENTRE FOR VICTIMS OF TORTURE, HIV AND AIDS LEGAL CLINIC
OF ONTARIO, QUEEN'S PRISON LAW CLINIC,
RAINBOW REFUGEE SOCIETY and RAINBOW RAILROAD**

Interveners

**FACTUM OF THE INTERVENER
BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION**
(Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada)

GOLDBLATT PARTNERS LLP
20 Dundas Street West, Suite 1100
Toronto, Ontario M5G 2C2

Jessica Orkin & Adriel Weaver
Tel: 416-977-6070
Fax: 416-591-7333
Email: jorkin@goldblattpartners.com
aweaver@goldblattpartners.com

**Counsel for the Intervener, the
British Columbia Civil Liberties Association**

REFUGEE LAW OFFICE
20 Dundas St. West, Suite 201
Toronto, Ontario M5G 2H1

**Andrew J. Brouwer
Michael Bossin Heather
Neufeld Leigh Salsberg
Erin Simpson**

Tel (A. Brouwer): 416-435-3269 Fax:
(416) 977-5567
Email: Andrew.Brouwer@lao.on.ca

**Counsel for the Appellants, Canadian
Council for Refugees, Amnesty
International and the Canadian
Council of Churches**

DOWNTOWN LEGAL SERVICES
655 Spadina Avenue Toronto,
Ontario M5S 2H9

Prasanna Balasundaram
Tel: (416) 934-4535
Fax: (416) 934-4536

Email: law.dls@utoronto.ca
**Counsel for the Appellants,
ABC, DE, FG and Nedira Jemal Mustafa**

GOLDBLATT PARTNERS LLP
30 Metcalfe Street, Suite 500
Ottawa, Ontario K1P 5L4

Colleen Bauman
Tel: 613-235-5327
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

**Ottawa Agent for the Intervener, the
British Columbia Civil Liberties Association**

GOLDBLATT PARTNERS LLP
500-30 Metcalfe
Street Ottawa,
Ontario K1P 5L4

Colleen Bauman
Tel: 613-482-2463
Fax: 613-235-3041
Email: cbauman@goldblattpartners.com

Ottawa Agent for the Appellants

JARED WILL & ASSOCIATES

226 Bathurst St., Suite 200
Toronto, Ontario M5T 2R9

**Jared Will Joshua
Blum**

Tel: (416) 657-1472
Fax: (416) 657-1511
Email: jared@jwlaw.ca

**Counsel for the Appellants,
Mohammad Majd Maher Homsy,
Hala Maher Homsy, Karam Maher Homsy and
Reda Yassin Al Nahass**

ATTORNEY GENERAL OF CANADA

Department of Justice Canada
Ontario Regional Office
120 Adelaide Street West, Suite 400
Toronto, Ontario M5H 1T1

Marianne Zoric

Tel: (647) 256-7318
Fax: (416) 954-8982
Email: marianne.zoric@justice.gc.ca

Martin Anderson

Tel: (647) 256-0879
Fax: (416) 954-8982
Email: martin.anderson@justice.gc.ca

Department of Justice
Quebec Regional Office
200 West René-Lévesque Blvd
East Tower, 12th Floor
Montreal, Quebec H2Z 1X4

Ian Demers

Tel : 514-516-2781
Email: ian.demers@justice.gc.ca

Counsel for the Respondents

ATTORNEY GENERAL OF CANADA

Department of Justice,
National Litigation Section
50 O'Connor Street, 5th Floor
Ottawa, Ontario K1A 0H8

Christopher M. Rupar

Tel: 613-670-6290
Fax: 613-954-1920
Email: christopher.rupar@justice.gc.ca

Ottawa Agent for the Respondents

**CLICHE-RIVARD AVOCATS ET
AVOCATES**

2330 rue Notre-Dame Ouest
Suite 302
Montreal, Quebec H3J 1N4

Guillaume Cliche-Rivard

Email: g.cliche.rivard@dmavocats.com

Rosalie Caillé-Lévesque

Email: rcl@dmavocats.com

Me Julie-Anne Desnoyers

Email: jad@dmavocats.com

Tel: (514) 316-0875

Fax: (514) 400-1163

**Counsel for the Intervenors,
Association quebecoise des avocats et avocates
en droit de l'immigration
Counsel**

McCARTHY TÉTRAULT LLP

Suite 2400 – 745 Thurlow Street
Vancouver, British Columbia V6E 0C5

Connor Bildfell

Email: cbildfell@mccarthy.ca

Adam H. Kanji

Email: akanji@mccarthy.ca

Alexandra Comber

Email: acomber@mccarthy.ca

Tel.: (236) 330-2044

Fax: (604) 643-7900

**Counsel for the Intervener,
Advocates for the Rule of Law**

JURISTES POWER LAW

99 Bank Street, Suite 701
Ottawa, Ontario K1P 6B9

Darius Bossé

Tel.: (613) 702-5560

Fax: (613) 706-1254

Email: DBosse@juristespower.ca

**Ottawa Agent for the Intervener,
Advocates for the Rule of Law**

**DAVID ASPER CENTRE FOR
CONSTITUTIONAL RIGHTS**

78 Queen's Park Crescent
Toronto, Ontario M5S 2C5

Cheryl Milne

Tel (416) 978-0092
Fax: (416) 978-8894
Email: cheryl.milne@utoronto.ca

Jamie Liew

Barrister and Solicitor
39 Fern Ave
Ottawa, ON K1Y 3S2
Tel: 613-808-5592
Fax: 1-888-843-3413
Email: jamie@jcyliew.com

**Counsel for the Intervener,
David Asper Centre for Constitutional Rights,
West Coast Legal Education and Action Fund
Association and Women's Legal Education and
Action Fund Inc.**

LANDINGS LLP

1414-25 Adelaide St E
Toronto, Ontario, M5C 3A1

Jacqueline Swaisland

Efrat Arbel

Jonathan Porter

Tel: (416) 363-1696
Fax: (416) 352-5295
Email: jswaisland@landingslaw.com

**LEGAL AID ONTARIO
REFUGEE LAW OFFICE**

20 Dundas Street West
Toronto, Ontario M5G 2H1

Benjamin Liston

Tel: (416) 977-8111
Fax: (416) 977-5567
Email: listonb@lao.on.ca

**Counsel for the Intervener,
Canadian Civil Liberties Association**

NORTON ROSE FULBRIGHT

45 O'Connor Street, Suite 1500
Ottawa, Ontario K1P 1A4

Matthew J. Halpin

Tel: (613) 780-8654
Fax: (613) 230-5459
Email: matthew.halpin@nortonrosefulbright.com

**Ottawa Agent for the Intervener,
David Asper Centre for Constitutional Rights,
West Coast Legal Education and Action Fund
Association and Women's Legal Education and
Action Fund Inc.**

SILCOFF SHACTER

Barristers & Solicitors
951 Mount Pleasant Road
Toronto, Ontario M4P 2L7

Maureen Silcoff

Adam Bercovitch Sadinsky

Tel: (416) 322-1480

Fax: (416) 323-0309

Email: msilcoff@silcoffshacter.com

absadinsky@silcoffshacter.com

**Counsel for the Intervener,
Canadian Association of Refugee Lawyers**

**NATIONAL COUNCIL OF CANADIAN
MUSLIMS**

705 – 116 Albert Street
Ottawa, Ontario K1P 5G3

Sameha Omer

Nusaiba Al-Azem

Tel: (613) 254.9704 Ext: 224

Fax: (613) 701.4062

Email: somer@nccm.ca

nalazem@nccm.ca

**MITHOOWANI WALDMAN
IMMIGRATION LAW**

101-500 Eglinton Avenue East
Toronto, Ontario M4P 1N3

Naseem Mithoowani

Tel: (416) 792-6077

Fax: (416) 792-6177

Email: naseem@mwlawgroup.ca

**Counsel for the Interveners,
National Council of Canadian Muslims and
Canadian Muslim Lawyers Association**

RAVENLAW LLP

1600-220 Laurier Avenue West
Ottawa, Ontario K1P 5Z9

Simcha Walfish

Tel: (613) 567-2904

Fax: (613)-567-2921

Email: swalfish@ravenlaw.com

**Ottawa Agent for the Intervener,
Canadian Association of Refugee Lawyers**

SUPREME ADVOCACY LLP

100- 340 Gilmour Street
Ottawa, Ontario K2P 0R3

Marie-France Major

Tel: (613) 695.8855 Ext: 102

Fax: (613) 695.8580

Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for the Interveners,
National Council of Canadian Muslims and
Canadian Muslim Lawyers Association**

WALDMAN & ASSOCIATES

281 Eglinton Avenue East
Toronto, Ontario M4P 1L3

Lorne Waldman

Tel: (416) 482-6501
Fax: (416) 489-9618
Email: lorne@waldmanlaw.ca

**Counsel for the Intervener, Canadian Lawyers
for International Human Rights and the
Canadian Centre for Victims of Torture**

HENEIN HUTCHISON LLP

235 King Street East, 1st Floor
Toronto, Ontario M5A 1J9

**Ewa Krajewska
Meghan Pearson**

Tel: (416) 368-5000
Fax: (416) 368-6640
Email: ekrajewska@hhllp.ca;
mpearson@hhllp.ca

**HIV & AIDS LEGAL CLINIC ONTARIO
(HALCO)**

1400-55 University Ave
Toronto, Ontario M5J 2H7

Deborah Rachlis

Tel: (416) 340-7790
Fax: (416) 340-7248
Email: rachlisd@lao.on.ca

**Counsel for the Intervener,
HIV & AIDS Legal Clinic of Ontario**

ALISON M. LATIMER, Q.C.
Barrister & Solicitor
1200-1111 Melville Street
Vancouver, British Columbia V6E 3V6

Alison M. Latimer, Q.C.
Tel: 778-848-7324
Email: alison@alatimer.ca

**Counsel for the Intervener,
Queen's Prison Law Clinic**

MAHON & COMPANY
1555-1500 West Georgia Street
Vancouver, British Columbia V6G 2Z6

**Frances Mahon
Yalda Kazemi**

Tel: 604-283-1188
Fax: 604-608-3319
Email: frances@mahonlitigation.com

**Counsel for the Intervener,
Rainbow Refugee Society**

**BATTISTA SMITH MIGRATION
LAW GROUP**
160 Bloor Street East, Suite 1000
Toronto, Ontario M5W 1B9

**Michael Battista
Adrienne Smith**

Tel: (416) 203-2899
Fax: (416) 203-7949
Email: battista@migrationlawgroup.com

**Counsel for the Intervener,
Rainbow Railroad**

POWER LAW
99 Bank Street, Suite 701
Ottawa, Ontario K1P 6B9

Darius Bossé
Tel: 613-702-5566
Fax: 613-702-5566
Email: dbosse@juristespower.ca

**Ottawa Agent for the Intervener,
Queen's Prison Law Clinic**

HAMEED LAW
43 Florence Street
Ottawa, Ontario K2P 0W6

**Yavar Hameed
Nicholas Valela**

Tel: (613) 656-6917
Fax: (613) 232-2680
Email: yhameed@hameedlaw.ca

**Ottawa Agent for the Intervener,
Rainbow Railroad**

PART I – OVERVIEW AND STATEMENT OF FACTS

1. The record in this appeal provides clear and extensive evidence of widespread, arbitrary and lengthy detention of refugee claimants in the United States pending the outcome of their immigration proceedings;¹ criminal prosecution by the United States of refugee claimants for immigration offences, at increasing frequency;² and the negative impact of both detention and prosecution on claimants’ ability to retain and instruct counsel and meaningfully advance their claims for protection.³

2. These practices and effects apply equally to refugee claimants returned to the United States under the Safe Third Country Agreement (the “STCA”) as to those who arrive by other routes. As the Appellants set out, many STCA returnees are detained immediately upon return to the United States with no requirement that the detention be justified and with profoundly limited, if any, opportunities for review.⁴ They are also subject to prosecution for illegal entry.

3. The British Columbia Civil Liberties Association (the “BCCLA”) intervenes in this appeal to address the implications under s 7 of the *Charter* of the potential detention and prosecution of STCA returnees within the United States. The BCCLA advances two arguments:

- a) The operative question is whether removing refugee claimants to the risk of detention and prosecution violates the principles of fundamental justice. If so, it shocks the conscience.
- b) The relevant principles of fundamental justice must be determined, interpreted, and applied—and any balancing must be undertaken—in a manner that is informed by and reflects both Canada’s international legal obligations and other *Charter* rights.

PART II – QUESTIONS IN ISSUE

4. The BCCLA intervenes on the issue of whether the impugned provisions violate s 7.

¹ See *e.g.* Affidavit of Anwen Hughes [“Hughes Affidavit”] at paras 4-23 (Appeal Book [AB] Vol 20, Tab 100); Affidavit of Deborah Anker [“Anker Affidavit”] at paras 18-23 (AB Vol 17, Tab 98).

² See *e.g.* Hughes Affidavit at paras 30-31; Anker Affidavit at paras 28-32.

³ See *e.g.* Hughes Affidavit at paras 26-28; Anker Affidavit at paras 26-27, 30.

⁴ See Appellants’ Factum at para 5.

PART III - ARGUMENT

A. Removal of Refugee Claimants Shocks the Conscience if it Violates the Principles of Fundamental Justice

5. In the judgment under appeal, the Federal Court of Appeal held that Canadian courts would respond to the removal of individuals to foreign legal systems and administrations only where those individuals would suffer effects that would “shock the conscience” of Canadians. It went on to conclude that that “very high” threshold had not been met in this case.⁵

6. As this Court stressed in *Burns*, however, the “shocks the conscience” terminology should not be allowed to obscure the ultimate assessment that is required: namely whether or not the extradition is in accordance with the principles of fundamental justice. The rule is not that departures from fundamental justice are to be tolerated unless in a particular case it shocks the conscience. An extradition that violates the principles of fundamental justice will always shock the conscience. The important inquiry is to determine what constitutes the applicable principles of fundamental justice in the extradition context.⁶

The “shocks the conscience” standard therefore does not oust or forestall but rather *requires* consideration of the applicable principles of fundamental justice.

7. The Respondents submit that the test under s 7 is whether the consequences the individual would be exposed to in a foreign state would shock the conscience, and that only if that threshold is met will the principles of fundamental justice be violated. This would convert the “shocks the conscience” standard into a freestanding inquiry applicable in the context of foreign state action, displacing consideration of the full panoply of fundamental principles that properly animate s 7. That submission is not supported by this Court’s jurisprudence. It is true that in some instances, this Court has framed the question as whether the penalties or procedures in a foreign state are such that removal will shock the conscience and *thereby* violate the principles of fundamental justice.⁷ In others, however, it has adhered to a formulation that more explicitly reflects its unanimous judgment in *Burns*, asking whether removal is contrary to the principles of fundamental

⁵ [Canada \(Citizenship and Immigration\) v Canadian Council for Refugees](#), 2021 FCA 72 at paras 158, 161.

⁶ [United States v Burns](#), 2001 SCC 7 at para 68. [Emphasis in original.]

⁷ See e.g. [Caplin v Canada](#), 2015 SCC 32 at para 1.

justice *so as to* shock the conscience.⁸ And in others still, it has considered whether removal would violate s 7 without advertent to the “shocks the conscience” standard at all.⁹

8. Moreover, this Court has repeatedly affirmed the approach articulated in *Burns*.¹⁰ Those instances in which this Court has expressed that s 7 will be violated where foreign state practices are found to shock the conscience should not be read as indicating a departure from that approach. Alternatively, and at a minimum, this Court’s jurisprudence contemplates that a finding that the risk of deprivation of a protected interest by a foreign state shocks the conscience may either result in, or flow from, the determination that fundamental principles have been breached. In either case, the “shocks the conscience” standard describes nothing more or other than a breach of those principles. The BCCLA submits that this position ought to be affirmed once more by this Court.

9. Whether the principles of fundamental justice have been violated is a necessarily contextual question. In circumstances that engage competing principles—that is, ones militating both for and against removal—the court must engage in a balancing exercise. Where an individual is sought for extradition, for example, the court must weigh the impact of surrender on the individual’s protected interests against principles of comity, reciprocity, and mutual assistance in effective law enforcement. The “shocks the conscience” standard will be met where the impact of surrender on the individual’s rights outweighs countervailing principles:

The “shocks the conscience” language signals the possibility that even though the rights of the fugitive are to be considered in the context of other applicable principles of fundamental justice, which are normally of sufficient importance to uphold the extradition, a particular treatment or punishment may sufficiently violate our sense of fundamental justice as to tilt the balance against extradition.¹¹

10. Where balancing is required, the nature or severity of the impact on the rights of the individual must be exceptional or indeed extreme in order to meet the “shocks the conscience”

⁸ See e.g. [Canada \(Attorney General\) v Barnaby](#), 2015 SCC 31 at para 2. Notably, *Barnaby* was released concurrently with *Caplin*.

⁹ [India v Badesha](#), 2017 SCC 44.

¹⁰ See [Lake v Canada \(Minister of Justice\)](#), 2008 SCC 23 at para 32; [Canada \(Justice\) v Fischbacher](#), 2009 SCC 46 at para 39; [Nevsun Resources Ltd. v Araya](#), 2020 SCC 5 at para 52.

¹¹ [Burns](#), *supra* at para 69.

standard. Where, in contrast, countervailing principles either do not exist or bear less weight, that standard may be much more readily achieved.

11. The relevant principles of fundamental justice, and their scope, weight, and application, are informed by both international law and Canadian legal and constitutional norms.¹²

B. International Law and Other *Charter* Rights Must Be Considered in Identifying and Applying the Relevant Principles of Fundamental Justice

i. International Legal Obligations

12. This Court has repeatedly affirmed that the *Charter* should be interpreted consistently with Canada’s international obligations, and is “generally presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”¹³ The presumption of conformity has become a “firmly established interpretive principle” in “delineating the breadth and scope of *Charter* rights”.¹⁴

13. Canada has ratified the *Refugee Convention*¹⁵ and given domestic effect to its international refugee obligations through the *Immigration and Refugee Protection Act* (“*IRPA*”).¹⁶ Fundamental principles forbidding overbreadth and gross disproportionality must therefore be interpreted and applied consistent with the protections provided by the *Refugee Convention*, including those contained in Article 31. Article 31 of the *Refugee Convention* provides as follows:

- (1) The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

¹² [Burns](#), *supra* at paras 79-92, 76-78; [Suresh v Canada \(Minister of Citizenship and Immigration\)](#), 2002 SCC 1 at paras 59-75, 49-52.

¹³ [Reference Re Public Service Employee Relations Act \(Alta.\)](#), [1987] 1 SCR 313 at 349.

¹⁴ [Quebec \(Attorney General\) v 9147-0732 Québec inc.](#), 2020 SCC 32 at paras 31, 34 (quoting [Kazemi Estate v Islamic Republic of Iran](#), 2014 SCC 62 at para 150).

¹⁵ *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) [189 UNTS 137](#); Accession by Canada (4 June 1969) [674 UNTS 372](#); *Protocol Relating to the Status of Refugees* (adopted 31 Jan 1967, entered into force 4 Oct 1967) [606 UNTS 267](#); Accession by Canada (4 June 1969) [674 UNTS 402](#).

¹⁶ [SC 2001, c 27, s 3\(2\)\(b\)](#).

- (2) The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

14. The protections afforded by Article 31 apply equally to refugee claimants as to those already found to be refugees, and to those who briefly transited another country as to those who travelled directly to the country in which they seek asylum.¹⁷

15. Canada's international law obligations under Article 31(1) of the Refugee Convention have been expressly incorporated into Canadian law by s 133 of the *IRPA*, which provides that a

person who has claimed refugee status, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with [specified immigration-related offences under the *IRPA* or the *Criminal Code*] pending disposition of their claim for refugee protection or if refugee protection is conferred.

Under both international and domestic law, Canada has thus affirmed its commitment to the principle that refugees should not face penalties for illegal entry or presence. But for the STCA, refugee claimants who had transited through the United States would therefore not only be eligible to make their claims in Canada, but also enjoy the protection of Article 31(1) as incorporated through s 133 of the *IRPA*.

16. This Court has consistently interpreted the protections afforded by Article 31(1) in a liberal and purposive manner. In *B010 v Canada*, it held that “penalties” within the meaning of Article 31(1) are not restricted to criminal sanctions and include “[o]bstructed or delayed access to the refugee process”.¹⁸ This Court has also repeatedly held that the purpose of Article 31(1) – to provide immunity for genuine refugees who enter illegally in order to seek refuge – cannot be achieved unless the law recognizes that “persons often seek refuge in groups and work together to enter a country illegally.” Thus, in accordance with Article 31(1), “a state cannot impose a criminal

¹⁷ See [Vienna Convention on the Law of Treaties \(1969\), 1155 UNTS 331](#), Articles 31-33; [Febles v Canada \(Citizenship and Immigration\)](#), 2014 SCC 68; Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: [UN Doc A/CONF.2/SR.13](#) and [UN Doc A/CONF.2/SR.14](#); UNHCR, “[Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers](#)” (February 1999) at para 4 and “[Summary Conclusions: Article 31 of the 1951 Convention](#)” (June 2003) at para 10(c).

¹⁸ [B010 v Canada \(Citizenship and Immigration\)](#), 2015 SCC 58 at paras 57, 63.

sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety”.¹⁹

17. At international law—as given explicit domestic legal effect—refugee claimants cannot be obstructed or delayed in their access to the refugee process or subjected to criminal sanction on account of their illegal entry to or presence in the country even if they have not arrived directly from a territory where their life or freedom was threatened, or if they aided others to enter illegally.

18. Further, pursuant to Article 31(2), refugee claimants cannot be subject to restrictions on their movements other than those which are necessary. Detention can only be “exceptionally resorted to for a legitimate purpose”, absent which it will be considered arbitrary.²⁰ Detention may be justified for three purposes, namely to protect public order, public health, or national security.²¹ Detention imposed for the purpose of deterring future refugee claimants or dissuading those who have commenced claims from pursuing them is arbitrary and contrary to international norms.²²

19. Detention imposed as a punitive measure against refugee claimants who entered or are in the country illegally is not only arbitrary contrary to Article 31(2), but also a violation of the non-penalization principle set out in Article 31(1).²³ Article 31(1) recognizes that genuine refugees and refugee claimants are often—by virtue of the very persecution that gives rise to that status—forced to flee in haste and without valid travel documents, and thus have no choice but to enter illegally into the country where they seek asylum. Article 31(1) prohibits punishing refugees for illegal entry because they are not morally blameworthy in relation to that offence.²⁴

¹⁹ *R v Appulonappa*, 2015 SCC 59 at para 43; *B010*, *supra* at para 63.

²⁰ UNHCR, “[Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers](#)” (2012) at para. 21.

²¹ *Ibid* at paras 21-30. Detention on the “public order” ground may be imposed to prevent absconding, in connection with accelerated procedures for manifestly unfounded or clearly abusive claims, and for initial identity and/or security verification.

²² *Ibid* at para 32.

²³ *Ibid* at para 32; see also Anker Affidavit at para 18.

²⁴ [Draft Report of the Ad Hoc Committee on Statelessness and Related Problems. Proposed Draft Convention Relating to the Status of Refugees: UN Doc E/AC.32/L.38](#) (15 February 1950), Annex I (draft Article 26); Annex II (comments, p 57). See also *R v Uxbridge Magistrates Court & Another ex parte Adimi*, [1999] Imm AR 560 (UK High Court (Divisional Court)) at para 15.

20. As set out above, the record on this appeal provides extensive evidence of widespread punitive detention and prosecution of refugee claimants within the United States, including those returned from Canada under the STCA, contrary to Article 31 of the *Refugee Convention*. These contraventions by the United States of binding international legal commitments must inform the Court's determination whether the impugned provisions are in accordance with the principles of fundamental justice.

ii. Other Charter Rights

21. Sections 7 to 14 of the *Charter* set out a scheme of interconnected legal rights.²⁵ Sections 8 to 14 “address specific deprivations of the ‘right’ to life, liberty and security of the person in breach of the principles of fundamental justice, and as such, violations of s. 7. They are designed to protect, in a specific manner and setting, the right to life, liberty and security of the person set forth in s. 7.”²⁶

22. In the context of potential harms that may be inflicted by a foreign state, this Court has held that the causal relationship between those harms and the actions of the Canadian government is attenuated to a degree that precludes direct application of *Charter* rights under ss 8 through 14. Other *Charter* rights do, however, inform the interpretation of s 7, and the values underlying various *Charter* provisions form part of the balancing process engaged in under s 7.²⁷

²⁵ [R v Malmö-Levine; R v Caine](#), 2003 SCC 74 at para 160.

²⁶ [Re B.C. Motor Vehicle Act](#), [1985] 2 SCR 486 at 502. This is not to say that s 7 defines or limits the scope of the rights guaranteed by ss 8 to 14, certain protections of which are also available to corporate persons or to natural persons – such as witnesses – who are not facing risk of deprivation of life, liberty or security of the person, and others of which are not available to corporate persons ([9147-0732 Québec inc](#), *supra*). The concern for coherence and congruity between ss 7 and 8 to 14 relates to the content of the principles of fundamental justice rather than to the circumstances in which particular rights will be engaged. See *e.g.* [R v CIP Inc.](#), [1992] 1 SCR 843 at 854; [R v Mills](#), [1999] 3 SCR 668 at para 87.

²⁷ [Burns](#), *supra*, at para 57; [Kindler v Canada \(Minister of Justice\)](#), [1991] 2 SCR 779 at 831; [Canada v Schmidt](#), [1987] 1 SCR 500 at 522.

23. Basic values against arbitrariness—whether in whole or, as in the case of overbreadth, in part—and gross disproportionality are principles of fundamental justice under s 7.²⁸ They also find specific expression in ss 9 and 12, respectively. Thus, arbitrary detention contrary to s 9 would also violate s 7,²⁹ as would subjection to cruel and unusual treatment or punishment contrary to s 12. The same standard of gross disproportionality applies to both provisions,³⁰ and s 7 must be read in a way that is consistent with s 12.³¹ This is equally true in relation to immigration and refugee law as it is in relation to criminal law.

24. Section 9 of the *Charter* “expresses one of the most fundamental norms of the rule of law. The state may not detain arbitrarily, but only in accordance with law.”³² In order for detention not to be arbitrary, it must be governed by “standards that are rationally related to the purpose of the power of detention.”³³ Section 9 also encompasses the right to prompt review of detention under s 10(c). While the meaning of “prompt” may vary somewhat with the circumstances of the detention, statutory provisions applicable in the Canadian domestic context that require review within 24 or 48 hours “indicate the seriousness with which the deprivation of liberty is viewed, and offer guidance as to acceptable delays before this deprivation is reviewed.”³⁴

25. As noted above, the record contains extensive evidence of the routine, widespread and increasing detention of refugee claimants in the United States—including STCA returnees—without any burden on the government to justify that detention and with profoundly limited opportunity for individualized review.³⁵

²⁸ [Canada \(Attorney General\) v Bedford](#), 2013 SCC 72 at para 96.

²⁹ See [R v Grant](#), 2009 SCC 32 at para 54.

³⁰ [Malmo-Levine, supra](#) at paras 160-161; see also [R v Lloyd](#), 2016 SCC 13 at paras 41-42; [R v Safarzadeh -Markhali](#), 2016 SCC 14 at para 72.

³¹ [Lloyd, supra](#) at para 41.

³² [Charkaoui v Canada \(Citizenship and Immigration\)](#), 2007 SCC 9 at para 88.

³³ Peter Hogg, *Constitutional Law of Canada* 5th ed (supp) (Toronto: Carswell, 2017) at 49-8; see also [Charkaoui, supra](#) at para 89; [R v Hufsky](#), [1988] 1 SCR 621 at 633; [R v Swain](#), [1991] 1 SCR 933 at 1012.

³⁴ [Charkaoui, supra](#) at para 91.

³⁵ See e.g. Hughes Affidavit at paras 11-14.

26. Section 12, which guarantees the right not to be subject to cruel or unusual treatment or punishment, protects against the imposition of detention (among other forms of treatment) or punitive measures that are “so excessive as to outrage standards of decency.”³⁶

27. With respect to immigration detention, this Court has held that “[d]enying the means required by the principles of fundamental justice to challenge a detention may render the detention arbitrarily indefinite and support the argument that it is cruel or unusual.”³⁷

28. With respect to punishment, this Court has repeatedly found that standards of decency are outraged by sanctions that are grossly disproportionate to the offence, having regard not only to the individual accused but also reasonable hypothetical offenders.³⁸ Mandatory minimum sentences have been held to be grossly disproportionate where they would foreseeably apply to offences that involve little or no moral fault and little or no real risk of harm.³⁹ Further, this Court has held that the imposition of punishment that is grossly disproportionate to an offender’s degree of moral blameworthiness would “shock the conscience of Canadians.”⁴⁰

29. Any punishment inflicted on refugee claimants for the offence of illegal entry is grossly disproportionate to their moral blameworthiness and the risk of harm. Thus, even if Canada were not bound by Article 31(1) of the *Refugee Convention*, s 12 of the *Charter* would still preclude the imposition of punishment on refugee claimants for offences related to their irregular entry into the country. Such punishment would shock the conscience. Yet it is not only reasonably but entirely foreseeable that criminal sanctions and other punitive measures will be applied to STCA returnees, who are equally morally innocent in relation to the offence of illegal entry to the United States.

30. In the extradition context, the fact that an individual would be exposed to a sentence in the requesting country that would violate s 12 if imposed in Canada will not necessarily render the Minister’s decision to order surrender unreasonable.⁴¹ Yet even within that context, which requires

³⁶ [R v Smith](#), [1987] 1 SCR 1045 at 1072, 1089, 1109.

³⁷ [Charkaoui](#), *supra* at para 96.

³⁸ See e.g. [R v Smith](#), *supra*; [R v Goltz](#), [1991] 3 SCR 485; [R v Nur](#), 2015 SCC 15.

³⁹ [Nur](#), *supra* at para 83.

⁴⁰ [R v Lloyd](#), *supra* at para 33.

⁴¹ [United States v Hillis](#), 2021 ONCA 447.

balancing various factors that generally weigh in favour of extradition, courts have in some instances held that it would shock the conscience if the individual were surrendered given the gross disproportionality of the potential foreign sentence to the individual's personal circumstances.⁴²

31. In the circumstances of this appeal, the transfer of individuals to a foreign state is ostensibly for the purpose of ensuring effective protection for refugees. None of the countervailing considerations that inform extradition surrender decisions—including reciprocity, comity, and the need to bring fugitives to justice—is engaged in relation to the return of refugee claimants to the United States under the STCA. The resultant exposure of STCA returnees to grossly disproportionate punishment accordingly weighs that much more heavily in the s 7 analysis.

32. The impugned provisions form an essential link in the causal chain of a range of harms to STCA returnees in the United States, including arbitrary detention without meaningful review, and penalization (including both criminal prosecution and punitive detention) for illegal entry. These practices not only violate Article 31 of the *Refugee Convention* but would also be contrary to ss 9 and/or 12 of the *Charter* if undertaken in Canada. Although s 9 is not directly engaged by the arbitrary detention of STCA returnees, nor s 12 by their grossly disproportionate punishment, the values reflected in these provisions and the protections that they would afford refugee claimants but for the STCA, must inform the Court's analysis of what s 7 requires and how it is to be applied.

PARTS IV & V – COSTS & ORDER SOUGHT

33. The BCCLA does not seek costs and asks that none be awarded against it.

34. It takes no position on the outcome of this appeal but respectfully requests that it be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of June 2022.



Jessica Orkin



Adriel Weaver

Counsel for the Intervener British Columbia Civil Liberties Association

⁴² [United States v Leonard](#), 2012 ONCA 622 at para 94, leave to appeal refused, [2012] SCCA No 543.

PART V – LIST OF AUTHORITIES

JURISPRUDENCE		PARA
1.	<i>B010 v Canada (Citizenship and Immigration)</i>, 2015 SCC 58	16
2.	<i>Canada (Attorney General) v Barnaby</i>, 2015 SCC 31	7
3.	<i>Canada (Attorney General) v Bedford</i>, 2013 SCC 72	23
4.	<i>Canada (Citizenship and Immigration) v Canadian Council for Refugees</i>, 2021 FCA 72	5
5.	<i>Canada (Justice) v Fischbacher</i>, 2009 SCC 46	8
6.	<i>Canada v Schmidt</i>, [1987] 1 SCR 500	22
7.	<i>Caplin v Canada</i>, 2015 SCC 32	7
8.	<i>Charkaoui v Canada (Citizenship and Immigration)</i>, 2007 SCC 9	24, 27
9.	<i>Febles v Canada (Citizenship and Immigration)</i>, 2014 SCC 68	14
10.	<i>India v Badesha</i>, 2017 SCC 44	7
11.	<i>Kazemi Estate v Islamic Republic of Iran</i>, 2014 SCC 62	12
12.	<i>Kindler v Canada</i>, [1991] 2 SCR 779	22
13.	<i>Lake v Canada (Minister of Justice)</i>, 2008 SCC 23	8
14.	<i>Nevsun Resources Ltd. v Araya</i>, 2020 SCC 5	8
15.	<i>Quebec (Attorney General) v 9147-0732 Québec inc.</i>, 2020 SCC 32	12, 21
16.	<i>R v Appulonappa</i>, 2015 SCC 59	16
17.	<i>R v CIP Inc.</i>, [1992] 1 SCR 843	21

18.	<u><i>R v Goltz</i>, [1991] 3 SCR 485</u>	28
19.	<u><i>R v Grant</i>, 2009 SCC 32</u>	23
20.	<u><i>R v Hufsky</i>, [1988] 1 SCR 621</u>	24
21.	<u><i>R v Lloyd</i>, 2016 SCC 13</u>	23, 28
22.	<u><i>R v Malmo-Levine; R v Caine</i>, 2003 SCC 74</u>	21,23
23.	<u><i>R v Mills</i>, [1999] 3 SCR 668</u>	21
24.	<u><i>R v Nur</i>, 2015 SCC 15</u>	28
25.	<u><i>R v Safarzadeh-Markhali</i>, 2016 SCC 14</u>	23
26.	<u><i>R v Smith</i>, [1987] 1 SCR 1045</u>	26, 28
27.	<u><i>R v Swain</i>, [1991] 1 SCR 933</u>	24
28.	<u><i>R v Uxbridge Magistrates Court & Another ex parte Adimi</i>, [1999] Imm AR 560 (UK High Court (Divisional Court))</u>	19
29.	<u><i>Reference re BC Motor Vehicle Act</i>, [1985] 2 SCR 486</u>	21
30.	<u><i>Reference re Public Service Employee Relations Act</i>, [1987] 1 SCR 313</u>	12
31.	<u><i>Suresh v Canada (Citizenship and Immigration)</i>, 2002 SCC 1</u>	11
32.	<u><i>United States v Burns</i>, 2001 SCC 7</u>	6, 7, 8, 9, 11, 22
33.	<u><i>United States v Hillis</i>, 2021 ONCA 447</u>	30
34.	<u><i>United States v Leonard</i>, 2012 ONCA 622</u>	30

LEGISLATION		
35.	<i>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</i> <i>Chartre canadienne des droits et libertés, partie I de la Loi constitutionnelle de 1982, constituant l'annexe B de la Loi de 1982 sur le Canada (R-U), 1982, c 11</i>	<i>passim</i>
36.	<i>Immigration and Refugee Protection Act, SC 2001, c 27, s 3(2)(b)</i> <i>Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27, s 3(2)(b)</i>	13
37.	<i>Immigration and Refugee Protection Act, SC 2001, c 27, s 133</i> <i>Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27, s 133</i>	15
INTERNATIONAL LAW		
38.	Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Records: UN Doc A/CONF.2/SR.13 and UN Doc A/CONF.2/SR.14	14
39.	<i>Convention Relating to the Status of Refugees</i> (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (English version ; French version); Accession by Canada (4 June 1969) 674 UNTS 372	13
40.	<i>Draft Report of the Ad Hoc Committee on Statelessness and Related Problems. Proposed Draft Convention Relating to the Status of Refugees: UN Doc E/AC.32/L.38</i>	19
41.	<i>Protocol Relating to the Status of Refugees</i> (adopted 31 Jan 1967, entered into force 4 Oct 1967) 606 UNTS 267 (English version ; French version); Accession by Canada (4 June 1969) 674 UNTS 402	13
42.	United Nation High Commissioner for Refugees, <i>Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers</i> . February 1999	14

43.	United Nation High Commissioner for Refugees, <i>Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers</i> . 2012	18, 19
44.	United Nation High Commissioner for Refugees, <i>Summary Conclusions: Article 31 of the 1951 Convention</i> . June 2003	14
45.	<i>Vienna Convention on the Law of Treaties</i> (1969), 1155 UNTS 331 (English version ; French version)	14
SECONDARY SOURCES		
46.	Hogg, Peter. <i>Constitutional Law of Canada 5th ed (supp)</i> . Toronto: Carswell, 2017	24