

# REVISITING THE APPLICATION OF SECTION 7 OF THE CHARTER IN IMMIGRATION AND REFUGEE PROTECTION

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## I. Introduction

Section 7 of the *Canadian Charter of Rights and Freedoms* states that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>1</sup> To establish an infringement of s. 7, it is necessary to establish first, that state action has resulted in depriving an individual of their life, liberty or security of the person and second, that this deprivation was achieved in a manner inconsistent with one or more principles of fundamental justice. This article focuses on the first step of the analysis: whether proceedings under Canada’s immigration and refugee protection laws engage the life, liberty or security of the person of non-citizens.

The very first case decided by the Supreme Court of Canada involving a s. 7 claim outside of the criminal context was *Singh v Canada (Minister of Employment and Immigration)*.<sup>2</sup> Three of six judges recognized that the denial of a Convention refugee’s right under the *Immigration Act, 1976* not to be removed from Canada to a country where his life or freedom would be threatened amounted to a deprivation of his security of the person within the meaning of s. 7. Justice Bertha Wilson’s judgment in *Singh* is remarkable in several ways.<sup>3</sup> It established that the word “everyone” in s. 7 applies to “every human being physically present in Canada and by virtue of such presence amenable to Canadian law.” It recognized that “security of the person” encompasses not only freedom from physical punishment or suffering but freedom from the threat of such punishment. In determining whether s. 7 of the *Charter* applied to government acts, it refused to embrace the distinction between acts said to impact “rights” and those affecting “mere privileges”, focusing instead on their consequences for the affected person’s s. 7 interests.

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<sup>1</sup> *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 [Charter].

<sup>2</sup> *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177, 17 DLR 4th 422 [Singh].

<sup>3</sup> See generally Catherine Dauvergne, “How the *Charter* Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence” (2013) 58 McGill LJ 663 at 668–671 [Dauvergne, “How the *Charter* Has Failed”].

Over thirty years later, significant questions remain about the application of s. 7 in the sphere of immigration and refugee law. Following over a decade of inconsistent Federal Court of Appeal decisions on whether the right to liberty was engaged by immigration and refugee proceedings, the Supreme Court laconically declared that “the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.”<sup>4</sup> Two years later, it adjusted its position, holding that “[w]hile the deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the [security] certificate process or the prospect of deportation to torture, may do so.”<sup>5</sup> More recently, the Supreme Court appeared to endorse, in *obiter*, the view that liberty and security of the person are not engaged in the earlier decision making stages of the immigration and refugee protection regime so long as these interests can be considered in proceedings that immediately precede removal.<sup>6</sup> Thus, s. 7 was not engaged at the stage of determining whether a refugee claimant was inadmissible to Canada because the claimant had access to a subsequent pre-removal risk assessment where the risk of removal to face death, torture or cruel and unusual treatment or punishment would be considered and s. 7 would be engaged.<sup>7</sup> In a recent decision, the Federal Court of Appeal held that to decide whether a bar on pre-removal risk assessments filed within a year of the rejection of a refugee protection claim violated a non-citizen’s s. 7 right to security of the person, it would be necessary to revisit the reasoning underlying the thirty-year-old *Singh* judgment.<sup>8</sup>

In this article, I provide a brief and general overview of the Supreme Court’s jurisprudence on the application of s. 7. Against this background, I take stock of and critically assess, in historical context, the current state of the law on the engagement of liberty and security of the person in immigration and refugee proceedings. I conclude that in the refugee and immigration context, Canadian courts have adopted a narrow approach to the engagement of s. 7 that is inconsistent with their approach in the cognate areas of criminal law and extradition law and for which they have failed to articulate a transparent and principled justification.

I examine four aspects of the s. 7 engagement jurisprudence that illustrate this inconsistency and cry out for a principled reappraisal by the Supreme Court.

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<sup>4</sup> *Medovarski v Canada (Minister of Citizenship and Immigration)*; *Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 46, [2005] 2 SCR 539 [*Medovarski*].

<sup>5</sup> *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 17, [2007] 1 SCR 351 [*Charkaoui*].

<sup>6</sup> *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, 390 DLR (4th) 385 [*B010*].

<sup>7</sup> *Ibid* at para 75.

<sup>8</sup> *Peter v Canada (Minister of Public Safety and Emergency Preparedness)*; *Savunthararasa v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 51 at paras 28–29, 395 DLR (4th) 758 [*Savunthararasa*].

First, the Federal Court of Appeal's inconsistent early jurisprudence on whether s. 7 is engaged in immigration and refugee proceedings was marked by persistent confusion between two distinct components of s. 7 analysis: whether these proceedings engage non-citizens' life, liberty and security of the person and whether, viewed in their statutory context, they offend principles of fundamental justice. The Federal Court and Federal Court of Appeal have continued to rely on some of these early decisions, which are ripe for re-examination. Second, the Supreme Court's bald assertion in *Medovarski* that the deportation of non-citizens does not, in itself, implicate their liberty and security of the person fails to address key arguments, some grounded in the Court's own s. 7 jurisprudence, that support s. 7 engagement. As recognized in some Federal Court of Appeal judgments, immigration and refugee protection proceedings involve the threat of detention incidental to forced removal. The possibility of detention engages liberty in the extradition and penal contexts which, with the advent of "crimmigration" – the convergence of criminal law and immigration law – are not far removed from the context of removal proceedings. Deportation can also engage non-citizens' liberty by preventing them from making fundamental personal choices, such as nurturing or caring for their Canadian-born children, that go beyond the bare assertion of mobility rights. Interference with such profoundly intimate choices could also produce an effect on non-citizens' psychological integrity serious and profound enough to engage their security of the person. Third, more than thirty years after *Singh*, uncertainty persists on whether non-citizens' security of the person is engaged in any circumstance where deportation places them at risk of persecution, torture or cruel and unusual punishment or whether s. 7 engagement hinges on non-citizens' ability to establish a violation of their statutory rights. While the Supreme Court has hinted in some of its judgments that non-citizens' right not to be deprived of their security of the person except in accordance with the principles of fundamental justice is a freestanding constitutional right, it has not yet expressly and unequivocally addressed this fundamental aspect of s. 7 engagement. Finally, by opining that s. 7 does not apply to determinations of exclusion or inadmissibility because these proceedings are not sufficiently proximate to removal, the Supreme Court has without justification imposed in the immigration and refugee protection context a standard of causation more onerous than that which it applies for s. 7 engagement generally.

In my concluding remarks, I briefly address how a principled approach to s. 7 engagement in immigration and refugee protection decision making could make a real difference for non-citizens who seek to challenge their removal from Canada. Abandoning the narrow approach to s. 7 engagement in this context would shift the courts' focus to the crucial question of whether the state has interfered with non-citizens' liberty and security of the person in a manner rationally connected and proportionate to the objectives of Canada's immigration laws, as required by our fundamental constitutional values.

## II. The scope of application of section 7 of the *Charter*: a brief overview

To demonstrate a violation of s. 7, one must establish, first, that a law or state action interferes with or deprives natural persons<sup>9</sup> present in Canada and thus subject to Canadian law<sup>10</sup> of their life, liberty or security of the person<sup>11</sup> and, second, that this deprivation is not in accordance with the principles of fundamental justice.<sup>12</sup> This part summarizes the state of the law on the question of whether s. 7 is engaged, the first of these issues, through a review of leading cases decided in a variety of contexts touching on the administration of justice.

### 1. State action implicating the administration of justice

The dominant strand of jurisprudence on s. 7 sees its purpose as guarding against the kinds of deprivation of life, liberty and security of the person “that occur as a result of an individual’s interaction with the justice system and its administration,”<sup>13</sup> a term which refers to “the state’s conduct in the course of enforcing and securing compliance with the law.”<sup>14</sup> Thus, s. 7 protects against measures that can be attributed to state action implicating the “administration of justice,”<sup>15</sup> broadly interpreted by the Court as extending beyond processes operating in the criminal law sphere<sup>16</sup> to the investigation of complaints of discrimination under human rights legislation,<sup>17</sup> parental rights in relation to state-imposed medical treatment<sup>18</sup> and in

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<sup>9</sup> *Irwin Toy Ltd v Québec (AG)*, [1989] 1 SCR 927 at 1002–3, 58 DLR (4th) 577.

<sup>10</sup> *Singh*, *supra* note 2 at para 35. Exceptionally, the *Charter* may apply to the actions of state agents participating in activities of a foreign state or its agents that are contrary to Canada’s international obligations: *Canada (Justice) v Khadr*, 2008 SCC 28 at para 18, [2008] 2 SCR 125.

<sup>11</sup> *Carter v Canada (AG)*, 2015 SCC 5 at para 55, [2015] 1 SCR 331 [*Carter*].

<sup>12</sup> *Ibid* at para 35.

<sup>13</sup> *Gosselin v Quebec (AG)*, 2002 SCC 84 at para 77, [2002] 4 SCR 429 [*Gosselin*].

<sup>14</sup> *Ibid*, citing *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at 79, 216 NBR (2d) 25 [*G(J)*]. While some Supreme Court judges have expressly argued in favour of extending the application of s. 7 to contexts other than those linked to the administration of justice, this position has not in my view clearly been adopted by a majority of the Court: *Chaoulli v Québec (AG)*, 2005 SCC 35 at paras 195–199, [2005] 1 SCR 791 [*Chaoulli*] per Binnie, LeBel and Fish JJ; see Gerald Heckman, “Charte Canadienne: droit à la vie, à la liberté et à la sécurité de la personne et justice fondamentale” in Stéphane Beaulac & Jean-François Gaudreault-Desbiens, eds, *Jurisclasseur Québec – Collection Droit Public – Droit Constitutionnel* (Toronto: LexisNexis, 2015) at para 9.

<sup>15</sup> *Ibid*.

<sup>16</sup> *Ibid* at para 78.

<sup>17</sup> *Ibid*, citing *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*].

<sup>18</sup> *B(R) v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 21 OR (3d) 479 [*B(R)*].

the child custody process<sup>19</sup> and the right to refuse state-imposed addiction treatment.<sup>20</sup> Canada's conduct in enforcing and securing non-citizens' compliance with its immigration laws falls well within this concept of administration of justice.

## 2. Life, Liberty and Security of the Person

### (a) Life

The right to life under s. 7 is engaged where a law or state action imposes death or an increased risk of death on a person, either directly or indirectly.<sup>21</sup> State measures that interfere with patients' timely access to potentially life-saving medical care have been found to engage the right to life.<sup>22</sup> Deporting a refugee "where there are grounds to believe that this would subject the refugee to a substantial risk of torture" would also violate the guarantee of life, liberty and security of the person.<sup>23</sup>

### (b) Liberty

The right to liberty is engaged where the state subjects an individual to physical restraint or to the threat of physical restraint. An offense has the potential of depriving persons of their liberty and engages s. 7 "as of the moment it is open to the judge to impose imprisonment": there is no need that imprisonment "be made mandatory."<sup>24</sup> Immigration detention, such as that provided under the *Immigration and Refugee Protection Act*<sup>25</sup> for individuals designated by a security certificate, also engages liberty.<sup>26</sup>

The s. 7 liberty interest is no longer restricted to "mere freedom from physical restraint" but is engaged "where state compulsions or prohibitions affect

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<sup>19</sup> *G(J)*, *supra* note 14.

<sup>20</sup> *Winnipeg Child and Family Services (Northwest Area) v DFG*, [1997] 3 SCR 925, 121 Man R (2d) 241.

<sup>21</sup> *Carter*, *supra* note 11 at para 62.

<sup>22</sup> See *Chaoulli*, *supra* note 14 at para 62 (prohibition on the purchase of private health insurance) and *Canada (AG) v PHS Community Services Society*, 2011 SCC 44 at para 91, [2011] 3 SCR 134 [*PHS*] (measures preventing health professionals from offering medical supervision and counselling to their addicted clients at a safe injection site).

<sup>23</sup> *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 129, [2002] 1 SCR 3 [*Suresh*].

<sup>24</sup> *Reference re Motor Vehicle Act (British Columbia) s 94(2)*, [1985] 2 SCR 486 at 79, 24 DLR (4th) 536 [*Motor Vehicle Reference*].

<sup>25</sup> *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

<sup>26</sup> As the Supreme Court held in *Charkaoui*, *supra* note 5 at para 13: "The provisions at issue... clearly deprive detainees such as the appellants of their liberty. The person named in a certificate can face detention pending the outcome of the proceedings."

important and fundamental life choices.”<sup>27</sup> For example, the *Identification of Criminals Act*, which provided for the fingerprinting of persons charged with but not convicted of an offense, engaged their right to liberty because it “require[d] a person to appear at a specific time and place and oblige[d] that person to go through an identification process on pain of imprisonment for failure to comply.”<sup>28</sup> Similarly, the statutory power of an administrative tribunal to compel any person “to appear at a specific time and place to testify subject to legal consequences for failure to comply” constitutes a deprivation of liberty and engages s. 7 of the *Charter*.<sup>29</sup>

The right to liberty “protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference.”<sup>30</sup> It does not guarantee unconstrained freedom nor protect any and all decisions that individuals may make in conducting their affairs. Rather, it encompasses only those matters “that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.”<sup>31</sup>

### (c) Security of the person

Security of the person “encompasses ‘a notion of personal autonomy involving... control of 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.”<sup>32</sup>

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<sup>27</sup> *Blencoe*, *supra* note 17 at para 49.

<sup>28</sup> *R v Beare*; *R v Higgins*, [1988] 2 SCR 387 at 402, 71 Sask R 1 [*Beare*] cited in *Blencoe*, *supra* note 17 at para 49.

<sup>29</sup> *Thomson Newspapers Ltd. v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at 573 (L’Heureux-Dubé J), cited in *Blencoe*, *supra* note 17 at para 49 [*Thomson*]. The relevant statute gave the members of the Restrictive Trade Practices Commission the authority to order any person to be examined upon oath before a member and to exercise the powers of a superior court for the enforcement of subpoenas to witnesses “or punishment of disobedience thereof”: *ibid.*, at para 24.

<sup>30</sup> *Godbout v Longueil (City)*, [1997] 3 SCR 844 at para 66, 152 DLR (4th) 577 [*Godbout*] per La Forest J, writing for L’Heureux-Dubé and McLachlin JJ, cited with approval by a majority of the Court in *Blencoe*, *supra* note 17 at para 51.

<sup>31</sup> *Ibid.* By denying individuals with grievous and irremediable medical conditions the right to request a physician’s assistance in dying, the *Criminal Code*’s prohibition on assisted suicide interfered “with their ability to make decisions concerning their bodily integrity and medical care and thus trench[ed] on liberty”: *Carter*, *supra* note 11 at para 66. Several Supreme Court judges (but not a majority) would have recognized that the right to liberty encompassed the right of parents to make decisions regarding the medical care provided to their children and a person’s right to choose where to establish his or her home: respectively, *B(R)*, *supra* note 18 and *Godbout*, *supra* note 30 at paras 66–67.

<sup>32</sup> *Carter*, *supra* note 11 at para 64 [case citations omitted].

Security of the person is engaged by state action that interferes with individuals' physical integrity. Delays inherent in the *Criminal Code* regime governing the provision of therapeutic abortions increased the risk of medical complications and mortality and infringed the physical aspect of women's right to security of the person.<sup>33</sup> Similarly, legislation that prohibited patients from purchasing private medical insurance and forced them to accept delays in the public medical system denied them timely access to care "for a condition... clinically significant to their current and future health," adversely impacted their physical and psychological health and engaged their security of the person.<sup>34</sup> Security of the person encompasses "freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself."<sup>35</sup> Accordingly, denying a Convention refugee the right under Canada's *Immigration Act, 1976* not to be removed to a country "where his life or freedom would be threatened" would amount to a deprivation of security of the person.<sup>36</sup>

State action that has a serious and profound effect on a person's psychological integrity restricts that person's security of the person. The effects of the state's interference, assessed objectively "with a view to their impact on the psychological integrity of a person of reasonable sensibility,"<sup>37</sup> need not rise to the level of "nervous shock or psychiatric illness," but must be greater than "ordinary stress or anxiety."<sup>38</sup> Security of the person will be violated only by serious psychological incursions resulting from state interference with an individual interest of fundamental importance or, in other words, the profoundly intimate and personal choices of an individual.<sup>39</sup> Breaches of security of the person were found where the state interfered with a woman's choice to end her pregnancy,<sup>40</sup> a person's choice to end her life<sup>41</sup> and a parent's interest in raising and caring for a child.<sup>42</sup> Such

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<sup>33</sup> *R v Morgentaler*, [1988] 1 SCR 30 at 59, 63 OR (3d) 281 [*Morgentaler*].

<sup>34</sup> *Chaoulli*, *supra* note 14 at para 123 per McLachlin CJ and Major and Bastarache JJ and at paras 191, 203–6 per Binnie, LeBel and Fish JJ. By prohibiting medical marijuana users from choosing methods of administration of the drug other than smoking dry marijuana, Parliament breached their right to security of the person by subjecting them to the risk of cancer and bronchial infections and forcing them to choose between legal and inadequate treatment and an illegal but more effective choice: *R. v Smith*, 2015 SCC 34 at para 18, [2015] 2 SCR 602. Similarly, *Criminal Code* prohibitions on bawdy houses, living on the avails of prostitution and communicating in public for the purposes of prostitution engaged prostitutes' security of the person by preventing them from taking steps to protect themselves from the risks inherent in prostitution, thereby heightening the risk of disease, violence and death: *Canada (AG) v Bedford*, 2013 SCC 72 at paras 60, 88, [2013] 3 SCR 1101 [*Bedford*].

<sup>35</sup> *Singh*, *supra* note 2 at 207 per Wilson J (Dickson CJ and Lamer J concurring).

<sup>36</sup> *Ibid.*

<sup>37</sup> *G(J)*, *supra* note 14 at para 60.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Blencoe*, *supra* note 17 at paras 82–83.

<sup>40</sup> *Morgentaler*, *supra* note 33.

<sup>41</sup> *Carter*, *supra* note 11 at paras 64–66.

<sup>42</sup> *G(J)*, *supra* note 14 at para 61.

fundamental personal choices “would not easily include the type of stress, anxiety and stigma that result from administrative or civil proceedings.”<sup>43</sup>

### 3. Causation

Section 7 is engaged only if a law or state action is the causal source of an interference with a rights claimant’s life, liberty or security of the person. The rights claimant must establish “a sufficient causal connection” between the state-caused effect and the prejudice suffered by the claimant:

A sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities... A sufficient causal connection is sensitive to the context of the particular case and insists on a real, as opposed to a speculative, link.<sup>44</sup>

In *Bedford* the Supreme Court rejected a higher standard of causation that would have required the rights claimant to show that the state action was a foreseeable and necessary cause of the prejudice to the claimant’s security interest. In its view, a “sufficient causal connection” represented a fair and workable threshold for engaging s. 7 of the *Charter*:

This is the port of entry for s. 7 claims. The claimant bears the burden of establishing this connection. Even if established, it does not end the inquiry, since the claimant must go on to show that the deprivation of her security of the person is not in accordance with the principles of fundamental justice. Although mere speculation will not suffice to establish causation, to set the bar too high risks barring meritorious claims. What is required is a sufficient connection, having regard to the context of the case.<sup>45</sup>

Over the *Charter*’s 35-year history, the Supreme Court has gradually eased the threshold for the engagement of s. 7. In particular, it has broadened the scope of liberty and security of the person and adopted a relatively low standard of causation. In the next part of my paper, I argue that in the immigration and refugee protection

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<sup>43</sup> *Blencoe*, *supra* note 17 at para 83. Despite the personal hardship endured by the respondent to a human rights complaint in the face of significant delay in a human rights commission’s investigation of the complaint, including the stigma associated with the complaint, the depletion of his financial resources and the associated physical and psychological suffering, there was no breach of security of the person because the state had not interfered with the respondent and his family’s ability to make essential life choices: *ibid* at para 86.

<sup>44</sup> *Bedford*, *supra* note 34 at para 76.

<sup>45</sup> *Ibid* at para 78.



context, the Court has, without acknowledgement or justification, resiled from this more relaxed approach to the engagement of s. 7.

### III. The application of s. 7 in immigration and refugee law – a critical appraisal

Against the background of the Court’s current approach to the engagement of s. 7, this part focuses on how courts have dealt with the question of whether liberty and security of the person are engaged in immigration and refugee protection proceedings and with the issue of causation. Each section begins with a review of the foundational cases that marked the evolution of the jurisprudence in this context, including early Federal Court and Federal Court of Appeal decisions. Some of these remain relevant today not only as historical context but because, unlike some recent decisions of the Supreme Court, they squarely address the impact of removal on non-citizens’ s. 7 interests. Indeed, Federal Court judges still return to some of these precedents when resolving claims of s. 7 engagement.

#### 1. Liberty

Early Federal Court and Federal Court of Appeal decisions were split on whether the removal of non-citizens engaged their liberty interest. One line of jurisprudence recognized that forcibly deporting someone against his will necessarily interfered with his liberty, while other decisions found no engagement of liberty. This was due in large measure to a misreading of *Chiarelli v Canada (Minister of Employment and Immigration)*,<sup>46</sup> a decision in which, as noted in the following section, the Supreme Court had expressly declined to address the question of s. 7 engagement.

##### (a) *Chiarelli v Canada (Minister of Employment and Immigration)*

In *Chiarelli*, the Supreme Court first considered, without deciding, whether the right to liberty is engaged in proceedings leading to non-citizens’ removal from Canada. To this day, the judgment casts a long shadow over s. 7 jurisprudence in the context of immigration and refugee law.<sup>47</sup> When *Chiarelli*, a permanent resident who arrived in Canada at age 15, was convicted of a serious criminal offense, a deportation order was issued against him. He asked the Immigration Appeal Board to set aside the order on humanitarian and compassionate grounds. Before the Board could hear the appeal, the Security Intelligence Review Committee (SIRC), at the behest of the Canadian government, inquired into whether *Chiarelli* was likely to engage in organized crime if allowed to remain in Canada. Relying on the SIRC’s findings, the

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<sup>46</sup> *Chiarelli v Canada (Minister of Employment & Immigration)*, [1992] 1 SCR 711, 90 DLR (4th) 289 [*Chiarelli*].

<sup>47</sup> See, generally, Dauvergne, “How the Charter Has Failed”, *supra* note 3 at 680–2. See also Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws of Australia and Canada* (Vancouver: UBC Press, 2005) at 202ff [Dauvergne, *Humanitarianism, Identity and Nation*].

Minister of Employment and Immigration issued a certificate with the result that Chiarelli's appeal on humanitarian and compassionate grounds was dismissed.

Chiarelli contested the constitutionality of the scheme on several grounds, including that reliance upon the certificate deprived him of his liberty under s. 7 through a process that did not accord with fundamental justice.<sup>48</sup> All three Federal Court of Appeal judges agreed that s. 7 was engaged:

The filing of the certificate had the effect of depriving the Immigration Appeal Board of its power to allow the appellant's appeal on compassionate grounds. This, in itself, did not directly interfere with the appellant's right to life, liberty and security of the person. However, if things are looked at realistically, it cannot be denied that, as a result of the filing of the certificate, the appellant will be deported to Italy while he otherwise might have been allowed to remain in the country. As, in my view, deportation necessarily implies an interference with the liberty of the person, I would say that a violation of section 7 of the *Charter* has been established.<sup>49</sup>

The Supreme Court declined to decide "whether deportation per se engages s. 7, that is, whether it amounts to a deprivation of life, liberty or security of the person" because it found no breach of the principles of fundamental justice.<sup>50</sup> To determine the scope of these principles, Justice Sopinka adopted a contextual approach to *Charter* interpretation and looked to the principles and policies underlying immigration law including "the most fundamental principle of immigration law... that non-citizens do not have an unqualified right to enter or remain in the country."<sup>51</sup> The requirement that permanent residents not be convicted of a serious criminal offence was a "legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country."<sup>52</sup> Where non-citizens deliberately violated essential conditions under which they could remain in Canada, giving practical effect, through deportation, to the termination of their right to remain did not breach fundamental justice,<sup>53</sup> nor did

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<sup>48</sup> The SIRC hearing was held, in part, *in camera* and in the absence of Chiarelli and his counsel.

<sup>49</sup> *Chiarelli v Canada (Minister of Employment and Immigration)*, [1990] 2 FCR 299 at 318–19, 67 DLR (4th) 697 [*Chiarelli FCA*] per Pratte JA, dissenting but not on this point. Stone and Urie JJA agreed with Pratte JA on the engagement of s. 7 and with his finding that the SIRC hearing did not accord with the principles of fundamental justice but disagreed with his conclusion that the breach of s. 7 was justified under s. 1 of the *Charter*.

<sup>50</sup> *Chiarelli*, *supra* note 46 at 731–2.

<sup>51</sup> *Ibid* at 733.

<sup>52</sup> *Ibid* at 734.

<sup>53</sup> *Ibid*. The Court stated that it was "not necessary, in order to comply with fundamental justice, to look beyond this fact [of a deliberate violation of the prohibition on committing serious crimes] to other aggravating or mitigating circumstances."

the absence of a compassionate appeal from the deportation order.<sup>54</sup> Finally, the SIRC procedure did not violate principles of fundamental justice.<sup>55</sup> Thus, *Chiarelli* established that it was not in itself fundamentally unjust for Parliament to devise criteria to govern the entry and residency of non-citizens in Canada, as contemplated by the *Charter*'s stipulation of differing mobility rights for citizens and non-citizens,<sup>56</sup> and to provide for their enforcement. Non-citizens' lack of an unqualified right to enter or remain in Canada supplied the context which informed the scope of the principles of fundamental justice. However, the Court did not tie this "fundamental principle of immigration law" to the scope of liberty or security of the person. It very deliberately made no decision on the engagement of s. 7.

### (b) Conflicting decisions at the Federal Court of Appeal

Around the time that *Chiarelli* was before the Supreme Court, the Federal Court of Appeal issued conflicting decisions on whether proceedings involving the potential removal of non-citizens engaged their right to liberty. In *Grewal v Canada (Minister of Employment and Immigration)*,<sup>57</sup> a permanent resident being deported to India for criminal activity unsuccessfully appealed the deportation to the Immigration Appeal Board. His application to the Minister for humanitarian and compassionate relief was also dismissed. Finally, an immigration adjudicator refused to re-open the immigration inquiry at which he had been ordered deported so that he might register a refugee claim. Grewal argued that, in his circumstances, s. 7 required the re-opening. Following its decision in *Chiarelli*, the Federal Court of Appeal accepted that s. 7 applied:

It has already been determined that the deportation of refugees infringes their right to security of the person. (*Singh*...). This, of course, does not mean that people cannot be deported for good reason, that is, as long as there is no violation of the principles of fundamental justice ... Hence, it is permissible to deport a permanent resident for the commission of a serious offence without violating the *Charter*, as long as fundamental justice has been accorded to that person before doing so. ... The legislation and the earlier jurisprudence of this court must yield to the dictates of section 7.<sup>58</sup>

In *Hoang v Canada (Minister of Employment and Immigration)*,<sup>59</sup> a permanent resident of Vietnamese origin previously recognized as a Convention

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<sup>54</sup> *Ibid* at 739. Significantly, a ministerial humanitarian and compassionate review would still have been available to Chiarelli under s. 114(2) of the *Immigration Act*, RSC 1985, c I-2, s 114(2).

<sup>55</sup> *Ibid* at 746.

<sup>56</sup> *Ibid* at 733-4.

<sup>57</sup> *Grewal v Canada (Minister of Employment and Immigration)*, [1992] 1 FCR 581, 85 DLR (4th) 166 (CA) [*Grewal*].

<sup>58</sup> *Ibid* at 587-8.

refugee unsuccessfully appealed a removal order issued against him as a result of convictions for serious criminal offenses. Before the Federal Court of Appeal, he argued that in light of his possible deportation to Vietnam, the procedures mandated by the *Immigration Act* violated ss. 7 and 12 of the *Charter*. Justice MacGuigan quoted at length from the Federal Court of Appeal's conclusion in *Chiarelli* that a deportation order made against a permanent resident as a result of a conviction was not contrary to s. 7 because:

There is no injustice in requiring the deportation of a person who has lost the right to remain in the country; there is no injustice, either, in prescribing that a foreigner who has been admitted here as a permanent resident will lose the right to remain in the country if he is found guilty of an offence which, in itself, Parliament considers to be serious.<sup>60</sup>

In this passage from *Chiarelli*, the Federal Court of Appeal rejected Chiarelli's s. 7 claim because he had not shown that the removal of persons convicted of a serious offense "raised any injustice" or, in other words, violated fundamental justice. It did *not* find that s. 7 was not engaged. Nevertheless, without advertent to the Federal Court of Appeal's unanimous view in *Chiarelli* that deportation "necessarily implies an interference with the liberty of the person," Justice MacGuigan erroneously concluded that "... on the authority of *Hurd* and *Chiarelli*, deportation for serious offenses affect neither s. 7 nor s. 12 rights, since it is not to be conceptualized as either a deprivation of liberty or a punishment."<sup>61</sup>

The Federal Court of Appeal compounded this error in *Canepa v Canada (Minister of Employment and Immigration)*,<sup>62</sup> once again dismissing the argument that the removal of a permanent resident who had established a substantial connection with Canada engaged s. 7. Acknowledging that the Supreme Court had, in *Chiarelli*, "left open the question whether deportation for serious offences can be conceptualized as a deprivation of liberty under s. 7," Justice MacGuigan reasoned that the Court of Appeal had answered that question in the negative in *Hoang* and was "bound by its previous decisions,"<sup>63</sup> a conclusion he reiterated in *Barrera v Canada (Minister of Employment and Immigration)*,<sup>64</sup> which involved a proceeding

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<sup>59</sup> *Hoang v Canada (Minister of Employment and Immigration)* (1990), 13 Imm LR (2d) 35, 42 ACWS (3d) 1140 [*Hoang*].

<sup>60</sup> *Chiarelli FCA*, *supra* note 49 at 310 [emphasis added].

<sup>61</sup> *Hoang*, *supra* note 59 at 41. In *Hurd v Canada (Minister of Employment and Immigration)*, [1989] 2 FCR 594, 12 ACWS (3d) 328 (CA), the Federal Court of Appeal determined that deportation proceedings were not proceedings that could lead to truly penal consequences and to which s. 11(h) of the *Charter* could apply.

<sup>62</sup> *Canepa v Canada (Minister of Employment and Immigration)*, [1992] 3 FCR 270, 93 DLR (4th) 589 leave to appeal dismissed, [1993] 1 SCR v, [1992] SCCA No. 410 [*Canepa*].

<sup>63</sup> *Ibid* at 277.

<sup>64</sup> *Barrera v Canada (Minister of Employment and Immigration)*, [1993] 2 FCR 3, 99 DLR (4th) 264.

to deport a Convention refugee as a result of serious criminal convictions. To the extent they rely exclusively on the Federal Court of Appeal's decision in *Chiarelli* for the proposition that deportation does not engage non-citizens' liberty interest, *Hoang*, *Canepa* and *Barrera* were based on a misreading of that decision and were wrongly decided.

The question of the application of s. 7 to proceedings under the *Immigration Act* was once again considered by the Federal Court of Appeal in *Nguyen v Canada (Minister of Employment and Immigration)*.<sup>65</sup> Nguyen, a landed immigrant convicted of serious criminal offenses, challenged the constitutionality of two decisions under the *Immigration Act*: first, that he was a person convicted of a serious criminal offence and thus subject to deportation; and second, that he was not eligible to have his refugee claim referred to the Refugee Division of the Immigration and Refugee Board for determination (the Minister having issued a certificate stating that he constituted a danger to the public in Canada). Relying on the Supreme Court's judgment in *Chiarelli*, Justice Marceau held that the requirement of no serious criminal convictions was neither illegitimate nor arbitrary and that the procedure to determine whether a non-citizen had breached this requirement did not violate fundamental justice and thus complied with s. 7. With regard to whether s. 7 was engaged by removal, he concluded that "forcibly deporting an individual against his will has the necessary effect of interfering with his liberty, in any meaning that the word can bear, in the same manner as extradition was found to interfere in *Kindler*, *supra*."<sup>66</sup>

Justice Marceau held that the decision finding Nguyen ineligible to have his refugee claim determined by the Convention Refugee Determination Division did not, in itself, engage s. 7 since "contrary to the first decision which entailed forced deportation and therefore deprivation of liberty, a declaration of ineligibility does not imply or lead, in itself, to any positive act which may affect life, liberty or security of the person."<sup>67</sup> However, this did not end the matter. Justice Marceau proceeded to examine the constitutionality of the two provisions *in the context of the entire scheme*:

The Supreme Court [in *Chiarelli*], following in that respect the approach of this Court, examined the constitutional challenge as being aimed at the scheme viewed as a whole. The removal of the special right to appeal was perceived as the removal of a means to oppose the deportation order and, as a result, might engage section 7 of the *Charter*. Similarly in our case, while a determination of ineligibility under subparagraph 46.01(1)(e)(ii) of the Act is only indirectly linked to the deportation order, nevertheless it has the effect of taking away the only possible barrier to the issuance of an unconditional deportation order, and as such participates in the deprivation of liberty and, possibly, the security of the individual which results from

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<sup>65</sup> *Nguyen v Canada (Minister of Employment and Immigration)*, [1993] 1 FCR 696, 100 DLR (4th) 151 (CA) [*Nguyen*].

<sup>66</sup> *Ibid* at para 7, footnote 5.

<sup>67</sup> *Ibid* at 704.

deportation. More generally, the deprivation of liberty involved in any forced deportation is given a new dimension by the fact that the individual to be deported claims to be a refugee. It is appropriate, therefore, to assume that section 7 of the Charter is brought into play with respect to the scheme as a whole, that is to say with respect not only to the issuance of the deportation order, but also to the ineligibility decision based on the public danger certificate. The question becomes whether the issuance of the public danger certificate, the central feature of the scheme as a whole, could be said to have violated a principle of fundamental justice.<sup>68</sup>

The underlined passages in Justice Marceau’s judgment support the proposition that immigration proceedings linked to the deportation of non-citizens engage their s. 7 liberty interest so long as they make deportation more likely.<sup>69</sup> This approach to causation, sensitive to the specific statutory context, is consistent with the standard recently set by the Supreme Court in *Bedford*. As will be discussed further, it is, for reasons unexplained, no longer followed in the deportation context by the Federal Court of Appeal nor, arguably, by the Supreme Court itself.<sup>70</sup>

In *Williams v Canada (Minister of Citizenship and Immigration)*,<sup>71</sup> a permanent resident of Jamaican origin convicted of serious criminal offenses was ordered deported. The Minister of Citizenship and Immigration issued an opinion that Williams constituted a danger to the Canadian public, stripping him of his right to appeal to the Immigration Appeal Board. The Federal Court of Appeal considered whether this engaged Williams’s liberty or security of the person. Justice Strayer acknowledged that the “jurisprudence of this Court on this subject has not been entirely consistent”<sup>72</sup> and contrasted the line of decisions finding s. 7 engagement (*Chiarelli* and *Nguyen*) with that finding no engagement (*Hoang, Canepa* and *Barrera*). He determined that liberty was not engaged:

... I have difficulty understanding how the refusal of a discretionary exemption from a lawful deportation order, as applied to a non-refugee who has no legal right to be in the country, must be seen as involving a deprivation of liberty. Unless “liberty” is taken to include the freedom to be anywhere one wishes, regardless of the law, how can it be “deprived” by the lawful execution of a removal order?

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<sup>68</sup> *Ibid* at para 10 [underlining added].

<sup>69</sup> *Nguyen* was followed by the Federal Court Trial Division in *Kaberuka v Canada (Minister of Employment and Immigration)*, [1995] 3 FCR 252 at 262, 32 Imm LR (2d) 38 (TD) [*Kaberuka*].

<sup>70</sup> I discuss this point further in section 3, *infra*.

<sup>71</sup> *Williams v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FCR 646, 147 DLR (4th) 93 (CA) [*Williams*].

<sup>72</sup> *Ibid* at para 23.

On the basis of the jurisprudence to date, then, I am unable to conclude that “liberty” includes the right of personal choice for permanent residents to stay in this country where, as the Supreme Court said in *Chiarelli*:

[t]hey have all deliberately violated an essential condition under which they were permitted to remain in Canada.<sup>73</sup>

The Federal Court of Appeal’s reliance on the Supreme Court’s decision in *Chiarelli* to conclude that deportation did not engage non-citizens’ liberty – a question expressly not considered by the Supreme Court – indicates that it once more<sup>74</sup> confused this question with the question answered by *Chiarelli*: whether a (presumed) deprivation of non-citizens’ liberty accorded with substantive principles of fundamental justice in circumstances where they had violated an essential condition under which they could remain in Canada.<sup>75</sup>

Justice Strayer also dismissed the respondent’s argument that, consistent with a broadening understanding of the liberty interest, deportation engaged s. 7 because it interfered with non-citizens’ personal autonomy over important decisions intimately affecting their private lives.<sup>76</sup> While he correctly held that this broader view of liberty had not yet been accepted by a majority of the Supreme Court, this would happen only four years later, in *Blencoe*. In *Romans v Canada (Minister of Citizenship and Immigration)*, a case decided shortly after *Blencoe*, the Federal Court Trial Division held that deportation engaged a deportee’s liberty interest in its broad sense:

The consequence of the issuance of the deportation order against an individual is profound. The deportation order prohibits Mr. Romans from making the fundamental personal choice to remain in Canada where he receives the love and support of his family, financial support, and the support of his social worker and the health-care system. I am satisfied that in the circumstances before me the issuance of a deportation order... engages section 7 of the *Charter*.<sup>77</sup>

What can be gleaned from a decade of Federal Court decisions on whether the deportation of non-citizens engages their liberty interest under s. 7? Decisions of

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<sup>73</sup> *Ibid* at paras 24 and 26.

<sup>74</sup> As it had in *Hoang, Canepa and Barrera*, *supra* notes 59, 60 and 62.

<sup>75</sup> The Court of Appeal did not engage with the reasoning in *Chiarelli* and *Nguyen* that deportation of non-citizens necessarily interfered with their liberty, adopted by the Federal Court, Trial Division subsequent to *Williams* in *Al Yamani v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FCR 433 at paras 59 and 61, 5 Imm LR (3d) 235 (TD).

<sup>76</sup> The respondent relied on the judgment of LaForest, L’Heureux-Dubé, Gonthier and McLachlin JJ in *B(R)*, *supra* note 18.

<sup>77</sup> *Romans v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 466 at para 22, 14 Imm LR (3d) 215 [*Romans*]. Romans, who had come to Canada at the age of two, was later diagnosed with chronic paranoid schizophrenia. Canada sought to remove him on grounds of serious criminality. Relying on *Chiarelli*, the Court found no breach of the principles of fundamental justice, a conclusion upheld by the Federal Court of Appeal which accepted, without deciding, that s. 7 was engaged: *Romans v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 272 at para 1, 17 Imm LR (3d) 34.

the Federal Court of Appeal answering this question in the negative were based on a misreading of the *Chiarelli* decision, which did not decide the question of engagement. Not one of them provides a principled or compelling answer to the observations of Justice Pratte in *Chiarelli* or of Justice Marceau in *Nguyen* that forcibly deporting an individual against his will necessarily interferes with his liberty. *Medovarski* offered the Supreme Court an opportunity to address in a principled manner the question of s. 7 engagement in the deportation context and perhaps, as Justice Dawson had done in *Romans*, apply to it the expanded conception of liberty it had recently adopted in *Blencoe*.

### (c) The Supreme Court speaks: *Medovarski* and *Charkaoui*

The question of whether liberty and security of the person were engaged by proceedings leading to non-citizens' removal from Canada was squarely before the Supreme Court in *Medovarski*.<sup>78</sup> *Medovarski* and *Esteban* were permanent residents who had been ordered deported for serious criminality. They had appealed their removal to the Immigration Appeal Division and their removal orders were automatically stayed under provisions of the *Immigration Act*. When the *IRPA* was enacted, their appeals were discontinued under transitional provisions. *Medovarski* argued that on a proper interpretation of these provisions, her right of appeal should have been preserved. In the alternative, she claimed that its discontinuance infringed s. 7:

She claims that deportation removes her liberty to make fundamental decisions that affect her personal life, including her choice to remain with her partner. *Medovarski* argues her security of the person is infringed by the state-imposed psychological stress of being deported. *Medovarski* further alleges that the process by which her appeal was extinguished was unfair, contrary to the principles of fundamental justice.<sup>79</sup>

The Supreme Court of Canada declared that:

The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli* ... at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.<sup>80</sup>

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<sup>78</sup> *Charkaoui*, *supra* note 5.

<sup>79</sup> *Medovarski*, *supra* note 4 at para 45. The Federal Court of Appeal did not decide whether s. 7 was engaged by *Medovarski*'s removal from Canada, finding that, based on *Chiarelli*, the principles of fundamental justice were not offended by the discontinuance of her appeal: *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 85 at paras 58–62, [2004] 4 FCR 48.

<sup>80</sup> *Medovarski*, *supra* note 4 at para 46.



It also held that even if liberty and security of the person were engaged, Medovarksi had not established that any unfairness wrought by the transition to *IRPA* breached the principles of fundamental justice.<sup>81</sup> According to *Chiarelli*, fundamental justice did not mandate an appeal on humanitarian and compassionate grounds, which could, in any event, be considered by the Minister if Medovarksi applied to remain in Canada under s. 25(1) of *IRPA*.<sup>82</sup>

In *Charkaoui*,<sup>83</sup> the Supreme Court significantly qualified its holding in *Medovarksi* on the engagement of s. 7. Adil Charkaoui, a permanent resident, and Hassan Almrei and Mohammed Harkat, both foreign nationals recognized as Convention refugees, were named in certificates of inadmissibility (“security certificates”) issued by the Minister of Public Safety and Emergency Preparedness and the Minister of Citizenship and Immigration under the *IRPA*. Following the issuance of the certificates, which deemed them to be threats to Canada’s national security, all three individuals were detained pending the completion of a multistage process for their removal.<sup>84</sup> First, a Federal Court judge determined whether the certificate was reasonable in proceedings conducted, at the Ministers’ request, *in camera* and *ex parte*.<sup>85</sup> A certificate determined to be reasonable became a removal order. Second, the named person could apply to the Minister of Citizenship and Immigration for a pre-removal risk assessment (PRRA), which would consider whether removal would subject him to a danger of torture or to a risk to his life or of cruel and unusual treatment or punishment, and whether his claim for protection should be refused because of the nature and severity of acts he had committed or because of the danger he constituted to the security of Canada.<sup>86</sup> A successful PRRA application would result in a stay of the removal order.

Charkaoui, Almrei and Harkat challenged the constitutionality of the procedure for determining the reasonableness of the certificate, claiming, *inter alia*, that it infringed their rights to life, liberty and security of the person under s. 7 of the *Charter*. The Court observed that the claimants were required to prove two matters:

[F]irst, that there has been or could be a deprivation of the right to life, liberty and security of the person, and second, that the deprivation was not or would not be in accordance with the principles of fundamental justice.<sup>87</sup>

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<sup>81</sup> *Ibid* at para 47.

<sup>82</sup> A humanitarian and compassionate application to the Minister had also been available to Chiarelli under the *Immigration Act*, RSC 1985, c 1-2, s 114(2).

<sup>83</sup> *Charkoui*, *supra* note 5.

<sup>84</sup> The *IRPA* provided that upon issuance of a certificate, permanent residents *may* be held in detention but that foreign nationals *must* be detained: *Charkaoui*, *supra* note 5 at para 6.

<sup>85</sup> The Ministers and the designated judge could rely on undisclosed material that neither the person named in the certificate nor their counsel could see. The judge disclosed to the named person a summary of the case against him but could not disclose information that might compromise national security.

<sup>86</sup> *IRPA*, *supra* note 25 at ss 113(d) and 97.

<sup>87</sup> *Charkaoui*, *supra* note 5 at para 12 [underlining added].

The Court's use of "could be" or "would be" signals that a successful s. 7 claim does not require that the claimant actually be detained or subjected to treatment causing psychological or physical suffering; the risk of such treatment is enough. Indeed, the Court determined that the security certificate provisions "clearly deprive detainees such as the appellants of their liberty," noting that "the person named in a security certificate can face detention pending the outcome of the proceeding,"<sup>88</sup> and that detention was automatic for foreign nationals. In other words, while the deprivation of liberty in *Charkaoui* was clear because the named persons were actually detained, the possibility of detention also engaged the liberty interest. Rejecting the Attorney General's claim that *Medovarski* excluded the application of s. 7 to removal proceedings, the Court stated that "[w]hile the deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so."<sup>89</sup>

Professor Hamish Stewart has observed that the Supreme Court of Canada's decisions in *Charkaoui* and *Medovarski* are in tension on the question of whether s. 7 is engaged in proceedings leading to removal from Canada:

Criminal proceedings, and most other penal proceedings as well, have to comply with section 7 from the outset because of the potential for imprisonment that they create ... Because of the holding in *Medovarski*, this logic apparently does not apply to deportation proceedings; thus, in *Poshteh v Canada (Minister of Citizenship and Immigration)*, the Federal Court of Appeal held that the initial steps in proceedings that may lead to deportation, such as a finding that a person is inadmissible to Canada, do not engage section 7 because those initial steps do not necessarily mean that individual will ever be detained. But because of the holding in *Charkaoui*, there must be some point in the proceedings where the likelihood of detention incidental to deportation is sufficiently high that the liberty interest is engaged and section 7 applies.<sup>90</sup>

Another possibility, of course, is that the tension between *Medovarski* and *Charkaoui* cannot be resolved and that *Medovarski* should be reconsidered, a question I examine in the next section.

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<sup>88</sup> *Ibid* at para 13 [underlining added].

<sup>89</sup> *Ibid* at para 17.

<sup>90</sup> Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2007) at 81.

**(d) Liberty and immigration and refugee proceedings: an appraisal of the case law**

*Medovarski* squarely raised a question that had long been contested in the Federal Court of Appeal: whether deportation in itself can implicate s. 7 interests. The Supreme Court's decision that it could not, based entirely on its assertion of non-citizens' qualified right to enter or remain in Canada – a principle mobilized in *Chiarelli* to narrow the content of fundamental justice in the immigration context – was perplexing. Professors Donald Galloway and Jamie Liew saw in this passage from *Medovarski* “a remarkable extrapolation... based on the failure to distinguish between, on the one hand, not interfering with a right to liberty and security, and, on the other hand, interfering with the right but doing so in a manner that accords with the principles of fundamental justice,” a distinction expressly drawn by the Court in *Chiarelli* but “glossed over” in *Medovarski*.<sup>91</sup>

Rather than confusing the question of s. 7 engagement and that of compliance with fundamental justice, the Supreme Court may, in referring to the qualified rights of non-citizens, have intended to imply that because s. 6 of the *Charter* confers exclusively on citizens the constitutional right to enter, remain in and leave Canada, the deportation of a non-citizen would not violate s. 6. However, the fact that the deportation of non-citizens does not violate their mobility rights does not mean that it cannot engage other *Charter* rights.<sup>92</sup> The Supreme Court correctly rejected a similar claim in the extradition context, holding that the fact that the breach of extraditees' s. 6 rights was generally justifiable did not insulate the extradition process from scrutiny for violation of other *Charter* rights, including s. 7.<sup>93</sup> It could not seriously be argued, for example, that a law aimed at prioritizing for

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<sup>91</sup> Donald Galloway & Jamie Chai Yun Liew, *Immigration Law*, 2d ed (Toronto: Irwin Law, 2015) at 656.

<sup>92</sup> *Ibid* at 80.

<sup>93</sup> See *R v Schmidt*, [1987] 1 SCR 500, 39 DLR (4th) 18. Schmidt was facing extradition to the United States to face a state charge of child stealing after having been acquitted of a federal charge of kidnapping. She argued that her extradition would violate her right, under s. 11(h) of the *Charter*, not to be tried again for an offence of which she had been finally acquitted. Noting that the Ontario Court of Appeal, in *Federal Republic of Germany v Rauca* (1983), 38 OR (2d) 225, 145 DLR (3d) 638 (CA) had determined that extradition was a reasonable infringement on the right of Canadian citizens, under s. 6 of the *Charter*, to remain in Canada, the Ontario High Court of Justice had decided that any argument that specific aspects of extradition were contrary to other *Charter* rights, including those guaranteed by ss. 11(h) and 7, was ruled out: *R v Schmidt* (1983), 41 OR (2d) 399 at 407, 147 DLR (2d) 616. Justice La Forest, for a majority of the Supreme Court, disagreed with this conclusion:

... I am far from thinking that the *Charter* has no application to extradition. The surrender of a person to a foreign country may obviously affect a number of *Charter* rights. In *Rauca*, *supra*, for example, the Ontario Court of Appeal recognized that extradition intruded on a citizen's right under s. 6 to remain in Canada, although it also found that the beneficial aspects of the procedure in preventing malefactors from evading justice, a procedure widely adopted all over the world, were sufficient to sustain it as a reasonable limit under s. 1 of the *Charter*. Section 6 was not raised in this case, though Schmidt is a Canadian citizen, no doubt because her counsel believed, as I do, that it was properly disposed of in the *Rauca* case. However, it does not follow from the fact that the procedure is generally justifiable that the manner in which the procedures are conducted in Canada and the conditions under which a fugitive is surrendered can never invite *Charter* scrutiny. The pre-eminence of the Constitution must be recognized; the treaty, the

removal non-citizens of African origin would not engage and violate their equality rights under s. 15.<sup>94</sup> Why, then, should non-citizens be precluded from asserting that their forced removal from Canada subjects them to possible detention or would deprive them of the opportunity to parent and care for their children, a fundamental choice recognized by several Supreme Court judges as an aspect of liberty under s. 7, or interfere with another similarly fundamental choice? Lacking in *Medovarski*, as Professor Stewart notes, is “a more careful analysis of the nature and effect of deportation on a person present in Canada.”<sup>95</sup> Equally absent is any analysis of whether non-citizens’ physical liberty is engaged by the possibility of detention incidental to removal, an argument considered by the Federal Court of Appeal in its earlier decisions. As Professor Stewart points out, deportation engages the liberty interest “because a deportation order includes the possibility of detaining the deportee in order to carry it out, just as penal proceedings engage the liberty interest because a finding of guilt includes possibility of imprisonment as punishment.”<sup>96</sup> While not giving non-citizens “an unqualified right to enter or remain in Canada,” this solution would “require the legal rules governing deportation from Canada to comply with the principles of fundamental justice,” an appropriate requirement “given the importance to a permanent resident or Convention refugee of remaining in Canada.”<sup>97</sup>

Indeed, under the *IRPA*, an officer may, without warrant, arrest and detain a foreign national, other than a protected person, who the officer has reasonable grounds to believe is inadmissible and is a danger to the public or is unlikely to appear for removal from Canada or other proceeding that could lead to the making of a removal order by the Minister under ss. 44(2).<sup>98</sup> The *IRPA* establishes a regime that places non-citizens under the administrative control of the state<sup>99</sup> in large measure through the threat of their forced removal from Canada. As part of the process set up to achieve this end, the enforcement provisions of *IRPA* establish a statutory

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extradition hearing in this country and the exercise of the executive discretion to surrender a fugitive must all conform to the requirements of the *Charter*, including the principles of fundamental justice. [Underlining added].

See also F Pearl Eliadis, “The Swing from *Singh*: The Narrowing Application of the *Charter* in Immigration Law” (1995) 26 Imm LR (2d) 130 at 142.

<sup>94</sup> See, for example, *YZ v Canada (Minister of Citizenship and Immigration)*, 2015 FC 892, 387 DLR (4th) 676, where the Federal Court determined that a provision of *IRPA* that denied refugee claimants from designated countries of origin access to an appeal before the Refugee Appeal Division violated s. 15(1) of the *Charter*.

<sup>95</sup> Stewart, *supra* note 90 at 80.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> *IRPA*, *supra* note 25, s 55(2). Permanent residents or foreign nationals may also be arrested and detained pursuant to a warrant on the same grounds: s 55(1).

<sup>99</sup> *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651, 28 Imm LR (4th) 1 [*Canadian Doctors for Refugee Care*].

compulsion on non-citizens to appear at a specific time and place subject to legal consequences, including arrest and detention, with or without a warrant depending on the circumstances. Just as this kind of statutory compulsion triggered the liberty interest in the *Beare* and *Thomson* judgments,<sup>100</sup> the potential of detention incidental to removal and to proceedings that *could lead* to removal should suffice to engage non-citizens' right to liberty under s. 7, an outcome hinted at, as noted above, in the Supreme Court's decision in *Charkaoui*.

Contrasting the scope of application of s. 7 in immigration and refugee protection proceedings to the extradition and penal contexts is instructive. In Canada, extradition proceedings begin when a foreign state requests that Canada surrender a person to be prosecuted or to serve a sentence for extraditable conduct.<sup>101</sup> The proceedings that follow involve several steps. First, the Minister of Justice issues an "authority to proceed" authorizing the Attorney General to seek a court order for the committal of the extraditee if satisfied that the conditions for extradition are met in respect of one or more offenses mentioned in the request.<sup>102</sup> The Attorney General may then apply for the issuance of a summons to the extraditee or a warrant for that person's arrest.<sup>103</sup> At the judicial phase of the extradition process, an extradition hearing before a superior court judge, the extradition judge must decide whether there is "evidence... of conduct that, had it occurred in Canada, would justify committal for trial in Canada on the offense set out in the authority to proceed" and, if so, order the committal of the person into custody to await surrender.<sup>104</sup> In the ministerial phase following committal, the Minister of Justice must decide whether to surrender the person to the requesting state<sup>105</sup> and make surrender conditional on assurances from the requesting state.<sup>106</sup>

The Supreme Court has stated that "section 7 permeates the entire extradition process" and is engaged at both the stages of committal and surrender.<sup>107</sup> At the committal stage, s. 7 requires the extradition judge to ensure "that the committal order, if it is to issue, is the product of a fair judicial process."<sup>108</sup> The liberty interest is engaged because "the person sought *may be detained* while an extradition request is dealt with, and will certainly be detained if that request is

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<sup>100</sup> *Beare*, *supra* note 28 and *Thomson*, *supra* note 29.

<sup>101</sup> *Extradition Act*, SC 1999, c 18, ss 2 and 3. Requests are usually made pursuant to an extradition treaty.

<sup>102</sup> *Ibid* at s 15.

<sup>103</sup> *Ibid* at s 16.

<sup>104</sup> *Ibid* at s 29(1).

<sup>105</sup> The reasons for which the Minister may refuse to surrender the extraditee are listed in ss. 44 to 47 of the *Extradition Act*, *ibid*.

<sup>106</sup> *Ibid* at s 58(f).

<sup>107</sup> *United States of America v Cobb*, 2001 SCC 19 at para 34, [2001] 1 SCR 587 [emphasis added].

<sup>108</sup> *Ibid*.

granted.”<sup>109</sup> Indeed, even the very first step of the process, the issuance by the Minister of an authority to proceed, is subject to s. 7. Issuance of an authority to proceed in circumstances disclosing bad faith or improper motives or where the authority to proceed provides the person sought with inadequate notice of the case he or she faces will violate the principles of fundamental justice, breach s. 7 and justify the quashing of the authority to proceed under s. 24(1) of the *Charter*.<sup>110</sup>

Similarly, in penal proceedings, it is the possibility of detention and imprisonment as an outcome of the proceedings which justifies the application of s. 7 from their outset. As Professor Stewart notes, “it would be odd if the principles of fundamental justice came into play only at the point where the accused had been convicted and the judge had decided to imprison him, or if the content of the applicable principles was different depending on whether the Crown announced its intention to seek a term of imprisonment before the trial began.”<sup>111</sup> The Supreme Court’s approach ensures that “the principles of fundamental justice will always apply in penal proceedings, whether or not imprisonment, another form of detention, or probation will ultimately be imposed.”<sup>112</sup>

That the risk of immigration detention may be lower than the risk of imprisonment in penal proceedings should not defeat the claim that the liberty interest is engaged by proceedings under the *IRPA*. A majority of the Supreme Court found that the availability of imprisonment for the offence of simple possession of marijuana was sufficient to trigger s. 7 scrutiny<sup>113</sup> despite the fact that imprisonment was only imposed by the Courts in exceptional circumstances.<sup>114</sup> The exceptional nature of imprisonment and the relatively short sentences associated with conviction spoke not to the engagement of s. 7, which flowed from the availability of imprisonment, but to whether this availability breached any principles of fundamental justice – in particular, the principle against gross disproportionality.<sup>115</sup>

An approach to the engagement of the liberty interest in immigration and refugee proceedings which, consistent with that adopted by the Court in the context of extradition and penal proceedings, recognizes that liberty is engaged from the outset of the proceedings given the possibility of detention incidental to deportation

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<sup>109</sup> Stewart, *supra* note 90 at 71 [emphasis added]. See also *United States of America v Ferras*; *United States of America v Latty*, 2006 SCC 33 at para 49, [2006] 2 SCR 77.

<sup>110</sup> *Froom v Canada (Minister of Justice)*, 2005 FCA 352 at paras 18–19, [2005] 2 FCR 19; *United States of America v Saas*, (2004) 237 DLR (4th) 623, 61 WCB (2d) 325 (ONCA).

<sup>111</sup> Stewart, *supra* note 90 at 69.

<sup>112</sup> *Ibid.*

<sup>113</sup> *R v Malmo-Levine*; *R v Caine*, 2003 SCC 74 at paras 84, 89, [2003] 3 SCR 571.

<sup>114</sup> *Ibid* at para 154.

<sup>115</sup> *Ibid* at paras 158–161.

seems particularly apt considering the growing convergence and overlap between criminal law and immigration law known as “cimmigration.”<sup>116</sup> A hallmark of this convergence has been that “immigration enforcement measures – particularly detention and deportation – are used much more commonly in response to suspected criminal activity than ever before.”<sup>117</sup> Writing on the longstanding characterization of deportation by American courts as a civil rather than criminal or penal proceeding and thus subject to a dramatically lower level of constitutional scrutiny, Kanstroom has argued that the “increasing real world convergence” between the United States’ criminal justice and deportation systems “compels a rethinking of the foundational principles underlying the constitutional status of deportation.”<sup>118</sup> Since the deportation of long-term permanent residents for post-entry criminal conduct serves an incapacitating function to the deported, a deterrent function to others and could be understood as a form of retribution – justifications accepted as part of criminal law – one might assume, Kanstroom observes, that persons subject to these types of proceedings “would at least have the most basic constitutional rights accorded to criminal defendants,” an assumption supported by the fact that deportation proceedings are “initiated by a government agency, are directly based on criminal conduct, involve incarceration and forced movement of persons, and may result in lifetime banishment.”<sup>119</sup>

Legislative developments in Canada too have seen a marked erosion of the statutory protections afforded to permanent residents against deportation on grounds of serious criminality.<sup>120</sup> These legislative efforts culminated in the enactment of the *Faster Removal of Foreign Criminals Act*,<sup>121</sup> which subjected permanent residents sentenced in Canada to more than six months imprisonment (including conditional sentence orders) to automatic removal with no IAD review of the circumstances of their case and removed the ability of the Minister to consider humanitarian and compassionate factors against removal for permanent residents inadmissible on grounds of organized criminality.<sup>122</sup> Parliament has thus made deportation the automatic consequence of receiving a sentence over six months on conviction of one

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<sup>116</sup> Sharryn Aiken, David Lyon & Malcolm Thorburn, “Criminalization, Surveillance and ‘Security Threats’: A Multidisciplinary Dialogue” (2014) 40:1 Queen’s LJ i–xi; Juliet Stumpf, “The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power” (2006) 56 Am U L Rev 367. See also Katja Franko Aas & Mary Bosworth, “Preface” in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford: Oxford University Press, 2013) at vii.

<sup>117</sup> Aiken, Lyon & Thorburn, *supra* note 116 at ii.

<sup>118</sup> Daniel Kanstroom, “Deportation, Social Control, and Punishment: Some Thoughts About Why Hard Laws Make Bad Cases” (2000) 113 Harv L Rev 1889 at 1892.

<sup>119</sup> *Ibid* at 1894.

<sup>120</sup> Canadian Bar Association, Citizenship and Immigration Law Section, *Submission on Bill C-31 – Immigration and Refugee Protection Act* (May 2002), online: CBA <[www.cba.org/Sections/Immigration-Law/Submissions-and-Legislative-Updates](http://www.cba.org/Sections/Immigration-Law/Submissions-and-Legislative-Updates)> at 51–59.

<sup>121</sup> *An Act to amend the Immigration and Refugee Protection Act*, SC 2013, c 16.

<sup>122</sup> Canadian Bar Association, National Immigration Law Section, *Bill C-43, Faster Removal of Foreign Criminals Act* (November 2012), online: CBA <[www.cba.org/Sections/Immigration-Law/Submissions-and-Legislative-Updates](http://www.cba.org/Sections/Immigration-Law/Submissions-and-Legislative-Updates)> at 7–12.

of a broad range of criminal offences. Catherine Dauvergne observes that the imposition of eligibility provisions based on criminality as a precondition of access to domestic asylum processes is an example of the “criminalization of asylum seeking.”<sup>123</sup> In light of Kanstroom’s criticisms of the American constitutional jurisprudence on deportation, the emergence of crimmigration in Canada highlights the weaknesses of an approach to the engagement of constitutional protections that would hinge on whether deportation should be labelled as a “penal,” “criminal,” “civil” or “immigration” proceeding. The Supreme Court appeared to have recognized this in *Charkaoui* when it dismissed the claim that *Medovarksi* stood for the proposition that deportation proceedings were immune from s. 7 scrutiny:

In determining whether s. 7 applies, we must look at the interests at stake rather than the legal label attached to the impugned legislation. As Professor Hamish Stewart writes:

Many of the principles of fundamental justice were developed in criminal cases, but their application is not restricted to criminal cases: they apply whenever one of the three protected interests is engaged. Put another way, the principles of fundamental justice apply in *criminal* proceedings, not because they are criminal proceedings, but because the liberty interest is always engaged in criminal proceedings. [Emphasis in original.]<sup>124</sup>

In addition to engaging non-citizens’ liberty interest, narrowly defined as including freedom from the threat of detention incidental to deportation, deportation decisions also arguably engage liberty broadly defined in *Blencoe* as protecting important and fundamental life choices. The Supreme Court has on several occasions come close to recognizing that “the right to nurture a child, to care for its development and to make decisions for it in fundamental matters... are part of the liberty interest of a parent.”<sup>125</sup> Justice Wilson, who first accepted this proposition, described the parental liberty interest as an aspect of the right to respect for an individual’s private and family life protected at international law:

[The appellant] has the right, I believe, to raise his children in accordance with his conscientious beliefs. The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual’s sense of self and of his place

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<sup>123</sup> Catherine Dauvergne, “The Troublesome Intersections of Refugee Law and Criminal Law” in Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship and Social Exclusion* (Oxford: Oxford University Press, 2013) 76 at 76.

<sup>124</sup> *Charkaoui*, *supra* note 5 at para 18, citing Hamish Stewart, “Is Indefinite Detention of Terrorist Suspects Really Constitutional?” (2005) 54 UNBLJ 235 at 242

<sup>125</sup> *B(R)*, *supra* note 18 at para 83 per La Forest, Gonthier and McLachlin JJ; *G(J)*, *supra* note 14 per L’Heureux-Dubé, Gonthier and McLachlin JJ; and *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 87, [2002] 4 SCR 710 per Gonthier and Bastarache JJ.



in the world. The right to educate his children is one facet of this larger concept. This has been widely recognized. Article 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms... states in part “Everyone has the right to respect for his private and family life...”<sup>126</sup>

Under this approach, liberty is engaged where deportation would interfere with a non-citizen’s ability to nurture and care for his or her children. Section 7 would be breached in such circumstances if deportation violated fundamental justice by causing a deprivation of liberty grossly disproportionate to the state’s objective in pursuing removal.<sup>127</sup>

The framework set down by the Supreme Court in *Blencoe* to determine whether the liberty interest is engaged requires an analysis of whether “in the circumstances of this case,” the state has prevented the rights claimant from making any fundamental personal choices – basic choices going to the core of what it means to enjoy individual dignity and independence. No such analysis appears in the Court’s decision in *Medovarksi*.<sup>128</sup> Instead, the Court invoked non-citizens’ lack of an “unqualified right to enter or remain in Canada” to defeat the s. 7 claim. But under the *Blencoe* framework, this argument would only suffice in circumstances where a non-citizen’s liberty claim could be reduced to the bare assertion of a mobility right – the right to enter Canada freely and remain there as if the international border did not exist – as the expression of the core of his or her individual dignity and independence. It is not an answer to non-citizens’ assertion of fundamental interests that go beyond mobility.

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<sup>126</sup> *R v Jones*, [1986] 2 SCR 284 at 319, 47 Alta LR (2d) 97.

<sup>127</sup> See *Bedford*, *supra* note 34 at para 120: a law or state action violates fundamental justice where its “effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported.” The requirement that deportation be proportionate to a legitimate state objective is an integral part of the jurisprudence under art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 UNTS 222 (1950) which guarantees the right to respect of one’s private and family life. While recognizing the power of European states to control the entry of aliens into their territories and their residence there, the European Court of Human Rights has held that in some circumstances, the expulsion of an alien will violate art. 8: *Üner v The Netherlands* (18 Oct. 2006), no. 46410/99 (European Court of Human Rights) at para 57, online (<http://hudoc.echr.coe.int/eng/?=001-77542>). A deportation decision that interferes with family life will be found to violate art. 8 if it is not “in accordance with the law and necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued”: *ibid*, at para 54. The United Nations Committee on the Elimination of Racial Discrimination, the treaty body responsible for monitoring the implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195, Can TS 1970 No 28 (entered into force 4 January 1969, ratified by Canada 14 October 1970) recommends that state parties avoid expulsions of non-citizens, especially of long-term residents, that would result in disproportionate interference with the right to family life: CERD, General Recommendation 30: Discrimination Against Non Citizens, 64th sess, 2004, UN Doc CERD/C/64/Misc.11/rev.3 (2004).

<sup>128</sup> One could infer from the Court’s statement that deportation “in itself” does not engage s. 7 that the circumstances of *Medovarksi*’s case disclosed no fundamental personal choices that could ground a liberty claim. If this inference is correct, the Court should have made an express finding to that effect.

The jurisprudence on whether immigration and refugee protection proceedings engage the liberty of non-citizens, including the Supreme Court's sweeping conclusion in *Medovarski* that deportation does not, in itself, implicate liberty is unsatisfactory because it fails to transparently address two key arguments that strongly support the engagement of non-citizens' liberty in this context. First, liberty is engaged by the possibility of detention incidental to removal – a claim based on an analogy to penal and extradition proceedings that is particularly apt in a context where immigration enforcement is commonly used as a response to criminal activity. Second, deportation engages non-citizens' liberty by preventing them from making fundamental personal choices beyond the bare assertion of a mobility right. In *Charkaoui*, the Supreme Court may have addressed this latter point by qualifying its holding in *Medovarski* to allow for the engagement of s. 7 by some “features associated with deportation,” thereby “leaving the door open” for advocates to persuade immigration decision makers and courts that s. 7 is engaged by the hardships that accompany deportation, including separation from family.<sup>129</sup> As the following section demonstrates, clarification is also sorely needed on whether immigration and refugee protection proceedings engage non-citizens' security of the person and, particularly, on whether the right to security of the person is a freestanding constitutional right that does not hinge on non-citizens' statutory entitlements.

## 2. Security of the person

The seminal decision on whether security of the person is engaged in the immigration and refugee protection context remains *Singh v Canada (Minister of Employment and Immigration)*.<sup>130</sup> Under the procedure in place under the *Immigration Act, 1976*, Singh's claim that he was a Convention refugee could be denied by a decision maker who had not heard his claim in person on the basis of country conditions information to which he was not given access. Singh claimed that this statutory scheme infringed s. 7 of the *Charter* and advanced two arguments in support of its engagement. First, he claimed that “because a Convention refugee is, by definition, a person who has a “well-founded fear of persecution”, the refusal to give him refuge exposes him to jeopardy of death, significant diminution of his physical liberty or physical punishment in his country of origin.”<sup>131</sup> Second, he claimed that by empowering immigration officials to detain him for purposes of examination and removal, the *Immigration Act* deprived him of his liberty.

Justice Wilson began her analysis of whether the appellant had been deprived of life, liberty and security of the person by first “determining what rights

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<sup>129</sup> Galloway & Liew, *supra* note 91 at 656.

<sup>130</sup> *Singh*, *supra* note 2.

<sup>131</sup> *Ibid* at 203.

the appellants have under the *Immigration Act, 1976*<sup>132</sup> – namely, the right to a determination from the Minister as to whether a permit should issue entitling him to enter and remain in Canada, the right not to be returned to a country where his life or freedom would be threatened and the right to appeal a removal order or a deportation order made against him – and second, by asking “whether the deprivation of these rights constitutes a deprivation of the right to life, liberty and security of the person...”<sup>133</sup> While she acknowledged that there might be some merit in the Minister’s submission that “closing off the avenues of escape provided by the Act [did] not *per se* deprive a Convention refugee of the right to life or to liberty,” because it was not certain that others would deprive him of life or liberty,<sup>134</sup> this was not the case for his right to security of the person, which “must encompass freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself”:

I note particularly that a Convention refugee has the right under s. 55 of the Act not to “... be removed from Canada to a country where his life or freedom would be threatened...” In my view, the denial of such a right must amount to a deprivation of security of the person within the meaning of s. 7.<sup>135</sup>

Justice Wilson also recognized that, as refugee claimants, the appellants were not “at this stage entitled to certain rights as Convention refugees” but instead asserted they were entitled to fundamental justice in the determination of whether they were Convention refugees or not.<sup>136</sup> Noting that a determination that the appellants were Convention refugees under the *Act* would have entitled them to the incidents of that status provided for in the *Act* (including the right not to be refouled), Justice Wilson concluded:

Given the potential consequences for the appellants of a denial of that status if they are in fact persons with a “well-founded fear of persecution”, it seems to me unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status.<sup>137</sup>

It is noteworthy that in the underlined portion of the extract from her judgment, above, Justice Wilson deliberately tied her analysis of whether s. 7 interests were engaged to whether the appellants had been deprived of rights under the *Immigration Act, 1976*. A possible explanation for doing so is found in her reasons for rejecting the Minister’s invitation to adopt the approach taken by

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<sup>132</sup> *Ibid* at 204.

<sup>133</sup> *Ibid*.

<sup>134</sup> *Ibid* at 206. As will be discussed in more detail in section 3 of this part, below, the Minister’s submission in this regard is inconsistent with the modern standard of causation adopted by the Supreme Court in *Bedford*, *supra* note 34.

<sup>135</sup> *Ibid* at 207 [underlining added].

<sup>136</sup> *Ibid* at 208.

<sup>137</sup> *Ibid* at 210.

American courts to the constitutional protection of non-citizens in immigration proceedings. In her view, an approach denying constitutional due process protections to aliens seeking entry on the ground that the power to expel or exclude them was a “fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control”<sup>138</sup> (a manifestation of the political questions doctrine) should not govern the application of s. 7 because:

[I]n the Canadian context Parliament has in the *Immigration Act, 1976* made many of the “political” determinations which American courts have been justifiably reluctant to attempt to get involved in themselves. On these appeals this Court is being asked by the appellants to accept that the substantive rights of the Convention refugees have been determined by the *Immigration Act, 1976* itself and the Court need concern itself only with the question whether the procedural scheme set up by the *Act* for the determination of that status is consistent with the requirements of fundamental justice articulated in s. 7 of the *Charter*.<sup>139</sup>

Justice Wilson may have tied the deprivation of *Charter* rights to a deprivation of statutory rights in order to pre-emptively defend against claims that by applying constitutional due process norms to the political branches’ treatment of non-citizens, the Supreme Court was treading in an area of decision-making reserved to these branches. This approach relieved the Court of the need to recognize that rights to life, liberty and security of the person sprang from the *Charter* alone; it could find support for its decision in the fact that Parliament itself had elected to recognize substantive rights arising from the recognition of Convention refugee status.

The importance placed by Justice Wilson on Singh’s rights under the *Immigration Act, 1976* raised “very important questions about the extent to which s. 7 procedural claims are founded on the existence of statutory substantive rights as opposed to independent or free-standing constitutional rights.”<sup>140</sup> Indeed, this issue was recently raised by the Federal Court of Appeal in *Savunthararasa*.<sup>141</sup> The appellants’ claims to refugee protection were denied by the Refugee Protection Division (RPD) because they had failed to demonstrate that if returned to Sri Lanka, they would face a serious possibility of persecution. The appellants were scheduled to be removed from Canada. Because less than twelve months had passed since their claim for refugee protection was last rejected, they were barred from applying for a pre-removal risk assessment under s. 112(2)(b.1) of the *IRPA*. Claiming that new

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<sup>138</sup> *Ibid* at 211, citing *Shaugnessy v US ex rel Mezei*, 345 US 206 (1953) at 210.

<sup>139</sup> *Ibid* at 212.

<sup>140</sup> David J Mullan, *Administrative Law – Cases, Text and Materials*, 5th ed (Toronto: Emond Montgomery, 2003) at 229.

<sup>141</sup> *Savunthararasa*, *supra* note 8.

evidence of risk was available that had not been put in evidence before the RPD, they requested that their removal be deferred pending an assessment of the risks in light of the new evidence. When their requests were denied by enforcement officers of the Canada Border Services Agency, they sought judicial review of these decisions on the grounds that s. 112(2)(b.1) and the removals process violated their s. 7 rights:

In the appellants' submission, section 7 of the *Charter* is engaged when a person claims he would be at "risk of harm" if removed from Canada. Further, the "risk of harm" which engages section 7 is broad enough to encompass the kinds of risks assessed under both section 96 of the *Act* (a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion) and section 97 of the *Act* (a risk of torture or a risk to life or a risk of cruel and unusual treatment or punishment). The appellants argue that enforcement officers do not, and are not permitted to, assess this full spectrum of risk.<sup>142</sup>

At the Federal Court, Justice Annis dismissed the applications. He determined that the appellants had not presented evidence of risks they faced that could not be assessed by an enforcement officer. Moreover, in a lengthy *Charter* analysis, he determined that s. 112(2)(b.1) was constitutional. The Federal Court of Appeal agreed with the appellants that Justice Annis had erred in embarking on the *Charter* analysis without a proper evidentiary record and held that his comments and analysis on that issue were *obiter dicta*. However, it provided guidance on the nature of the analysis that would be required to deal with the *Charter* issue, assuming that an applicant for deferral could show that he or she faced a risk of harm that would not be assessed by an enforcement officer:

In *Singh* ..., in order to decide whether the appellants had been deprived of the right to life, liberty or security of the person, the Court began by determining which rights the appellants possessed under the applicable immigration legislation. ...

Once the rights possessed by the appellants as refugee claimants were identified, the inquiry turned to whether the deprivation of those rights constituted a deprivation of the right to life, liberty and security of the person within the meaning of section 7 of the *Charter*. The Court concluded that security of the person encompassed "freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself"... The Court expressly left open the question of whether a more expansive approach to security of the person should be taken...

Because the Court left this question open, in the context of a claim asserting a broader concept of security of the person, the Federal Court must be mindful of the need to properly analyze at the first stage of the section 7 analysis whether the removals scheme imposes limits on the security of the person, thus engaging section 7 of the *Charter*.<sup>143</sup>

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<sup>142</sup> *Ibid* at para 8.

<sup>143</sup> *Ibid* at paras 27–29.

*Savunthararasa* confirms that the Federal Court of Appeal remains mindful that *Singh* tied the deprivation of security of the person under s. 7 to the deprivation of rights conferred under the *Immigration Act, 1976*. Indeed, it had previously distinguished *Singh* on this basis.<sup>144</sup> For example, in *Berrahma v Canada (Minister of Employment and Citizenship)*,<sup>145</sup> it considered the constitutionality of a provision whereby a refugee claimant was ineligible to have a refugee claim referred to the Refugee Division because he had filed the claim less than ninety days after first having been denied refugee status. The Court held that security of the person was not engaged and distinguished *Singh* as follows:

As I understand it, the reason the Supreme Court concluded as it did in *Singh* is that, to give effect to international obligations assumed earlier, Parliament had recognized and granted foreign nationals the right to claim refugee status, but failed at the same time to create along with the exercise of this right - a right connected with the protection of life and security - a procedure consistent with the requirements of fundamental justice. That, I think, is the difference between *Singh* and the case of an ineligible claimant: *Singh* was denied a status which the law gave him the right to claim without having any opportunity of showing that he met the conditions for obtaining it, whereas the ineligible claimant is not denied a status he is entitled to claim.<sup>146</sup>

The very idea that finding a deprivation of life, liberty or security of the person should hinge on proof of the existence of a right or status conferred by statute is plainly inconsistent with Justice Wilson's criticism, in *Singh*,<sup>147</sup> of the dichotomy between "rights" and "privileges" which had narrowed the scope of the application of the *Canadian Bill of Rights*.<sup>148</sup> A majority of the Supreme Court had held in *Mitchell v The Queen* that s. 2(e) of the *Bill of Rights*, which provided that "no law of Canada shall be construed or applied so as to deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" did not apply to the decision of the Parole Board to revoke an individual's parole because he "had no *right* to parole." Rather, parole was granted "as a matter of discretion" and subject to revocation at the Board's "absolute discretion."<sup>149</sup> This approach was consistent with the Court's view

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<sup>144</sup> See Sharry J Aiken et al, *Immigration and Refugee Law – Cases, Materials and Commentary*, 2d ed (Toronto: Emond, 2015) at 242.

<sup>145</sup> *Berrahma c Canada (Ministre de l'Emploi et de l'Immigration)* (1991), 132 NR 202, 25 ACWS (3d) 925 (FCA) (WL Can) [*Berrahma*].

<sup>146</sup> *Ibid* at para 12. See *Nguyen, supra* note 65 at para 9, insisting on the fact that *Singh* did not assist claimants found ineligible, because it dealt with "the right to claim refugee status, a right previously granted." See also *Williams, supra* note 71 at para 22.

<sup>147</sup> *Singh, supra* note 2 at 209.

<sup>148</sup> Galloway & Liew, *supra* note 91 at 652.

that parole revocation decisions did not attract procedural protections at common law; statutorily defined as being at the discretion of the Board, they could not be said to affect rights and were therefore not “judicial” in character.<sup>150</sup> In a spirited dissent, Laskin C.J. attacked this failure to recognize the right of parolees to minimum procedural safeguards in parole revocation under the common law and the *Bill of Rights*. In his view, the application of the rules of natural justice should be determined not by the judicial character of the decision maker but by “the substantive issue that a tribunal is called upon to determine, and its consequences for the affected person, whether in respect of his person, his status or his property...”<sup>151</sup> Relying on the United States Supreme Court’s decision in *Morrissey v Brewer*<sup>152</sup> that “there was more in parole than mere privilege that could be granted or withdrawn at the pleasure of the state,” he emphasized the serious consequences of revocation for a parolee, including prolonged imprisonment, “loss of job, ... loss of conditional liberty, loss of family and other association,” and concluded that parole revocation without minimum procedural safeguards breached ss. 2(c)(i) and 2(e) of the *Bill of Rights*. To Justice Wilson, an analysis based on the distinction between rights and privileges was not acceptable in relation to the *Charter*.<sup>153</sup> She preferred Chief Justice Laskin’s dissenting opinion which focused instead “on the consequences of parole revocation for the individual.”<sup>154</sup> In other words, engagement of s. 7 should hinge on the consequences of the impugned state act on the life, liberty and security of the person interests of the individual, not on whether that act can be categorized as involving the determination of a statutory right rather than the discretionary revocation of a privilege.

The judgment in *Singh of Beetz, Estey and McIntyre JJ.*, based on s. 2(e) of the *Bill of Rights*, relies on the rights-privilege distinction. Having laid out the “list of legal rights given to Convention refugees in Canada by the *Immigration Act, 1976* and Regulations,”<sup>155</sup> counsel for the appellants claimed that the regime set out in the *Act* under which a person could claim Convention refugee status provided for a procedure “for the determination of his rights” in the meaning of s. 2(e) of the *Bill of*

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<sup>149</sup> *Mitchell v The Queen*, [1976] 2 SCR 570 at 588, 61 DLR (3d) 77 [*Mitchell*], cited by Justice Wilson in *Singh*, *ibid* at 209.

<sup>150</sup> A “judicial decision” was a decision that had a conclusive effect, was adjudicative and had a serious adverse effect on rights: *Howarth v Canada (National Parole Board)*, [1976] 1 SCR 453 at 465, 50 DLR (3d) 349 per Dickson J.

<sup>151</sup> *Mitchell*, *supra* note 149 at 580 [emphasis added].

<sup>152</sup> *Morrissey v Brewer* (1972), 408 US 471. The Court found a violation of constitutional due process in the failure to give a parolee faced with revocation a simple factual hearing.

<sup>153</sup> *Singh*, *supra* note 2 at 209.

<sup>154</sup> *Ibid* at 210.

<sup>155</sup> *Ibid* at 226–7; these included the right not to be removed to a country where life or freedom is threatened (s. 55), the right to re-enter Canada if a safe country cannot be found (s. 14(1)(c)) and the right to be considered under the criteria provided in the Regulations for “employment authorization” while residing in Canada.

*Rights*.<sup>156</sup> Accepting that “what is protected by the right to a fair hearing is the determination of one’s ‘rights and obligations’ whatever they are”<sup>157</sup> Justice Beetz concluded that:

[T]he process of determining the appellants’ refugee claims involved the determination of rights and obligations for which the appellants have, under s. 2(e) of the *Canadian Bill of Rights*, the right to a fair hearing in accordance with the principles of fundamental justice. It follows also that this case is distinguishable from cases where a mere privilege was refused or revoked, such as *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376, and *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.<sup>158</sup>

Justice Beetz recognized that s. 2(e) of the *Bill of Rights* was engaged in *Singh* only because the appellants were able to point to rights, defined in the *Immigration Act, 1976*, that were “determined” through the impugned refugee status determination regime. Had non-refoulement or re-entry been cast in discretionary terms as privileges instead of rights, the reasoning in *Mitchell* might have defeated *Singh*’s claim to protection under the *Bill of Rights*. The approach to the application of s. 7 advocated by Justice Wilson avoids such a result under the *Charter* because it focuses on the consequences of denial of refugee status to the life, liberty and security of the person of those with a well-founded fear of persecution.<sup>159</sup>

Thus, the deprivation of security of the person which arose from the risk of harm to the non-citizen if removed from Canada was aligned with the risks created by Canada’s failure to put in place an effective process to determine whether claimants were Convention refugees (resulting in a deprivation of their statutory right to have their status determined). However, it was not contingent on the existence of this statutory right. For reasons previously explained, Justice Wilson’s cautious approach may have been understandable in the context of *Singh*, an early decision from a court likely divided<sup>160</sup> on whether s. 7 applied to Parliament’s control and regulation of non-citizens. It is no longer necessary or appropriate today.

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<sup>156</sup> *Ibid* at 227. Indeed, the Attorney General of Canada conceded that the determination of refugee claims involved the determination of rights of refugee claimants and that it was “only in that respect that his submissions with respect to s. 2(e)... differ from his submissions with regard to section 7 of the *Charter*...”

<sup>157</sup> *Ibid* at 228.

<sup>158</sup> *Ibid* [underlining added].

<sup>159</sup> Her position finds resonance in the Supreme Court’s admonition, in *Charkaoui*, *supra* note 5 at para 18, that “[in] determining whether s. 7 applies, we must look at the interest at stake rather than the legal label attached to the impugned legislation.” The Supreme Court was responding to the Canadian government’s blanket claim, based on *Medovarksi*, *supra* note 4, that s. 7 could not apply in immigration proceedings.

<sup>160</sup> The fact that following the hearing of the appeal the Court asked the parties to address, through written arguments, the application of the *Canadian Bill of Rights*, SC 1960, c. 44 [*Bill of Rights*] and that three judges chose to allow the appeal based on a breach of s. 2(e) of the *Bill of Rights* strongly indicates that



Support for the view that a deprivation of life, liberty or security of the person should not hinge on proof of the denial of a statutory right is also found in the Supreme Court's subsequent decision in *Suresh v Canada (Minister of Citizenship and Immigration)*.<sup>161</sup> *Suresh* examined whether a provision of the *Immigration Act* authorizing the deportation of a Convention refugee on security grounds even where the refugee's life or freedom "would be threatened" by the return violated s. 7. The Court noted that it was conceded that "deportation to torture may deprive a refugee of liberty, security and perhaps life."<sup>162</sup> It reiterated the principle enunciated in the extradition context that the guarantee of fundamental justice applied "even to deprivations of life, liberty or security effected by actors other than our government, if there is a sufficient causal connection between our government's participation and the deprivation ultimately effected."<sup>163</sup> In other words, whether s. 7 was engaged had to take into account not only the Minister's act of deporting but "the possibility of grievous consequences such as torture and death, if a risk of those consequences is established."<sup>164</sup> Notably absent in *Suresh* is the notion that a deprivation of security of the person is contingent on the deprivation of a right conferred in relevant legislation. Indeed, *Suresh* had no unqualified statutory right not to be returned to a country where his life or freedom would be threatened. As a person found inadmissible on grounds of membership in an organization believed to be involved in terrorism, his right to non-refoulement was expressly subject to the minister's broad discretion under s. 53(1)(b) of the *Immigration Act* to issue an opinion that he should be removed because he constituted a danger to Canada's security. The Court recognized that deportation may involve a risk to the "fundamental right to be protected from torture or similar abuses,"<sup>165</sup> grounded in the right not to be deprived of security of the person except in accordance with the principles of fundamental justice. To access the procedural protections of fundamental justice, the refugee needed to show that security of the person was engaged by showing not "proof of the risk of torture to that person," but "a *prima facie* case that there may be a risk of torture upon deportation."<sup>166</sup>

The *Charkaoui* decision also supports the view that the right not to be deprived of security of the person except in accordance with fundamental justice is a freestanding constitutional right. The Court concluded that "the appellants' challenges to the fairness of the process leading to possible deportation and the loss

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the Court was divided on whether s. 7 of the *Charter* applied in *Singh*: *Singh*, *supra* note 2 at 185. Indeed, Justice Beetz refrained from expressing any view on whether the *Charter* was "applicable at all to the circumstances of these cases": *ibid*, at 223–4. See also Dauvergne, *Humanitarianism, Identity and Nation*, *supra* note 47 at 186.

<sup>161</sup> *Suresh*, *supra* note 23.

<sup>162</sup> *Ibid* at para 44.

<sup>163</sup> *Ibid* at para 52.

<sup>164</sup> *Ibid* at para 52.

<sup>165</sup> *Ibid* at para 127.

<sup>166</sup> *Ibid*. See also *Ahani v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2 at para 2, [2002] 1 SCR 72 [*Ahani*].

of liberty associated with detention raise important issues of liberty and security” and that “s. 7 of the *Charter* [was] engaged.”<sup>167</sup> While it focused primarily on the impact of detention on Charkaoui’s liberty interest, the Court described the “issues of security” as follows:

The detainee’s security may be further affected in various ways. The certificate process may lead to removal from Canada, to a place where his or her life or freedom would be threatened: see e.g. *Singh* ... at p. 207, *per Wilson J.* A certificate may bring with it the accusation that one is a terrorist, which could cause irreparable harm to the individual, particularly if he or she is eventually deported to his or her home country. Finally, a person who is determined to be inadmissible on grounds of security loses the protection of s. 115(1) of the *IRPA*, which means that under s. 115(2), he or she can be deported to torture if the Minister is of the opinion that the person is a danger to the security of Canada.

In *Suresh* ..., this Court stated, at para. 76, that “barring extraordinary circumstances, deportation to torture will generally violate the principles of fundamental justice protected by s. 7 of the *Charter*.” ... The appellants claim that they would be at risk of torture if deported to their countries of origin. But in each of their cases, this remains to be proven as part of an application for protection under the provisions of Part 2 of the *IRPA*. The issue of deportation to torture is consequently not before us here.<sup>168</sup>

The Court’s description of the security issues engaged in *Charkaoui* is noteworthy for three reasons. First, a named person’s security may be affected because “the certificate process may lead to removal from Canada, to a place where his or her life or freedom would be threatened.” The Court recognizes this effect of the certificate process on security despite the fact that, at the stage of assessing the reasonableness of the certificate, removal from Canada is not inevitable.<sup>169</sup> It does not exclude the application of s. 7 because constitutional scrutiny may be applied at a subsequent stage of the proceedings. Second, *Singh* is cited in support of the proposition that security interests are engaged by a named person’s removal to a place where his life or freedom would be threatened; no mention is made of the fact that, in *Singh*, the deprivation of security of the person was linked to the denial of *Singh*’s statutory right to non-refoulement. As the Court notes, named persons determined to be inadmissible on security grounds *do not* benefit from a statutory protection against refoulement. Third, the Court’s observation that the appellants’ claim that they would be at risk of torture if deported to their countries of origin “remains to be proven as part of an application for protection under the provisions of Part 2 of the *IRPA*” and that the “issue of deportation to torture is consequently not

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<sup>167</sup> *Charkaoui*, *supra* note 5 at para 18.

<sup>168</sup> *Ibid* at paras 14–15.

<sup>169</sup> *Ibid* at para 14. See also para 18, where the Court associates Charkaoui’s “possible deportation” with engagement of his security interest.

before us”<sup>170</sup> should not be taken to mean that the Court found that the appellants’ security of the person was not engaged by the certificate process.<sup>171</sup> The Court clearly stated that features associated with deportation such as detention in the course of the certificate process “or the prospect of deportation to torture” may engage s. 7 and ultimately concluded that s. 7 was engaged because the process raised “important issues of liberty *and* security.”<sup>172</sup> Thus, the engagement of a security interest would not appear to be contingent on the outcome of the application for protection. The Court’s reference to the risk of torture remaining to be proven must also be read subject to its admonition, in *Suresh*, that engagement of security of the person did not require a “proof of the risk of torture” but a *prima facie* case that there *may* be a risk.<sup>173</sup>

Based on the preceding analysis, it is open to non-citizens to claim that their s. 7 right to security of the person is engaged in circumstances where deportation places them at risk of persecution, torture or cruel and unusual treatment or punishment, whether or not exposing them to this risk of harm also violates their statutory rights. In other words, the right not to be deprived of one’s security of the person except in accordance with the principles of fundamental justice is a freestanding constitutional right.

What of the impact of *Medovarksi*? I earlier argued that a possible, though unarticulated, justification for the Court’s finding that the deportation of non-citizens cannot in itself implicate s. 7 interests – that deportation does not violate the mobility rights of non-citizens and thus cannot violate other *Charter* rights – does not stand up to scrutiny. In any event, the Supreme Court has qualified this finding by allowing in *Charkaoui* that deportation proceedings were not immune from s. 7 scrutiny and that “some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture” may engage s. 7. In other words, in certain circumstances, the nature of the impact of deportation on an affected person may trigger that person’s security of the person interests, whether in its physical or psychological dimensions. Thus, where the deportation of individuals suffering from medical conditions “clinically significant to their current and future health” would deprive them of access to essential health care, security of the person should be engaged as it was for those citizens denied access to timely health care in *Chaoulli*.<sup>174</sup> Lorne Waldman suggests that, in this sense, *Medovarksi* and *Charkaoui* could be read consistently with the Supreme Court’s approach to the

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<sup>170</sup> *Ibid* at para 15.

<sup>171</sup> The Federal Court of Appeal appeared to suggest as much in *JP v Canada (Minister of Public Safety and Emergency Preparedness)*; *B306 v Canada (Minister of Public Safety and Emergency Preparedness)*; *Hernandez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 262 at paras 120–22, 368 DLR (4th) 524 [B306].

<sup>172</sup> *Ibid* at para 18 [emphasis added].

<sup>173</sup> *Suresh*, *supra* note 23 at para 127.

<sup>174</sup> See, on this question, Lorne Waldman, “The *Charter of Rights* and its Application in Immigration Proceedings”, (Paper delivered at the 10th Annual Conference of the Canadian Association of Refugee Lawyers, Toronto, 21 March 2016) at 39–41 [unpublished].

application of s. 7 in *Blencoe*, “where the Court held that in a non-criminal context, questions of the engagement of s. 7 must be considered on a case-by-case basis considering the serious impact of the state-imposed psychological stress on the individual.”<sup>175</sup> It is certainly conceivable that deportation may produce a serious and profound effect on a person’s psychological integrity by interfering in profoundly intimate and personal choices, including a parent’s interest in raising and caring for a child, recognized by the Supreme Court as engaging security of the person in the context of child custody proceedings.<sup>176</sup>

I have argued that the Supreme Court should approach the question of whether proceedings leading to the deportation of non-citizens engage their liberty and security of the person in a manner consistent with its broad definition of these interests in contexts other than immigration and refugee protection. Similarly, in the next section, I claim that the Court’s apparent refusal to find that s. 7 is engaged by decisions under the *Immigration and Refugee Protection Act* that do not immediately precede removal conflicts with the more relaxed standard of causation it adopted in *Bedford*.

### 3. Causation

Canadian courts’ response to non-citizens’ claim that their liberty or security of the person are engaged by decisions taken at preliminary stages of the administrative process eventually leading to removal is that s. 7 does not apply because these interests are more directly engaged and considered in the stages of this process that immediately precede removal. This prematurity “principle” was best described by Justice John Evans, then a judge of the Federal Court Trial Division, in *Jekula v Canada (Minister of Citizenship and Immigration)*.<sup>177</sup> Jekula, a Liberian citizen recognized in Sierra Leone as a refugee, claimed refugee status in Canada but was found ineligible as a person recognized as a Convention refugee by a country other than Canada to which he could be returned. An exclusion order was issued against him on the grounds he did not have authorization to remain in Canada. Justice Evans

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<sup>175</sup> *Ibid* at 25. See also Galloway & Liew, *supra* note 91 at 656.

<sup>176</sup> *G(J)*, *supra* note 14. The contrary outcome, which prevails under American jurisprudence, is that parents have constitutional rights where “the state seeks to take their children” but no such rights “if they or their children face separation as a result of one or the other’s deportation” – an odd result, as Kanstroom notes, which flows from the lack of a “unified theory of constitutional punishment”: Kanstroom, *supra* note 118 at 1934. An argument could be made that s. 7 cannot be engaged by the psychological impact of deportation on parents who “choose” to leave their Canadian-born children in Canada because, due to their intervening choice, the state would not be directly responsible for the interference with their ability to nurture their children. This argument ignores that, under the test for causation set out in *Bedford*, *supra* note 34 at para 76, parents need show only a sufficient causal connection between the state’s action and the prejudice they have suffered, not that the state action is the only or even the dominant cause.

<sup>177</sup> *Jekula v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FCR 266, 47 Imm LR (2d) 218 [*Jekula*].

held that the first step in a s. 7 analysis was to ask whether the “administrative action under review... deprive[d] the applicant of the right to life, liberty and security of the person.”<sup>178</sup> In his opinion, the eligibility decision did not have this effect:

First, while it is true that a finding of ineligibility deprives the claimant of access to an important right, namely the right to have a claim determined by the Refugee Division, this right is not included in “the right to life, liberty and security of the person”: *Berrahma* [...] at page 213; *Nguyen* [...]

Second, it may well be a breach of the rights protected by section 7 for the government to return a non-citizen to a country where she fears that she is likely to be subjected to physical violence or imprisoned. However, a determination that a refugee claimant is not eligible to have access to the Refugee Division is merely one step in the administrative process that may lead eventually to removal from Canada. The procedure followed at the risk assessment to which the applicant will be entitled under section 53 before she is removed can be subject to constitutional scrutiny to ensure that it complies with the principles of fundamental justice, even though the procedure is not prescribed in the Act or regulations: *Kaberuka* [...] at page 271. Moreover, while holding that it was not inconsistent with section 7 for the *Immigration Act* to limit access to the Refugee Division, Marceau J.A. also said in *Nguyen* [...] at pages 708-709:

It would be my opinion, however, that the Minister would act in direct violation of the Charter if he purported to execute a deportation order by forcing the individual concerned back to a country where, on the evidence, torture and possibly death will be inflicted. It would be, it seems to me . . . at the very least, an outrage to public standards of decency, in violation of the principles of fundamental justice under section 7 of the Charter.

In summary, section 7 rights are not engaged at the eligibility determination and exclusion order stages of the process. However, the applicant cannot be lawfully removed from Canada without an assessment of the risks that she may face if returned to Sierra Leone. And the manner in which that assessment is conducted must comply with the principles of fundamental justice.<sup>179</sup>

While Justice Evans relies on *Nguyen* for the proposition that s. 7 is not engaged at the eligibility determination and exclusion order stages of the process set out under the *Immigration Act*, his judgment does not advert to the fact that, as noted earlier, both the Federal Court of Appeal in *Nguyen* and the Federal Court Trial Division in *Kaberuka*, also cited in *Jekula*, had concluded that the scheme *as a whole* did in fact engage s. 7 of the *Charter*. However, Justice Evans’ decision is most remarkable because it segments the “administrative process that may lead eventually to removal from Canada” into discrete steps and posits that s. 7 should only apply to those steps which immediately precede the applicant’s deportation. This approach was later taken up by the Federal Court of Appeal in deciding, in *Poshteh v Canada*

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<sup>178</sup> *Ibid* at para 31.

<sup>179</sup> *Ibid* at paras 31–33.

(*Minister of Citizenship and Immigration*),<sup>180</sup> that s. 7 was not engaged by a determination of inadmissibility. The Immigration Division of the IRB had determined that Poshteh was inadmissible to Canada under s. 34(1)(f) of *IRPA* on the grounds that, as a child, he had been a member of a terrorist organization in Iran. While the appeal was mainly concerned with whether Poshteh was a member of the organization and whether his status as a minor was relevant to this determination, Justice Rothstein commented on Poshteh's claim that, even though his life, liberty and security of the person were not engaged in the proceeding, *IRPA* should "be interpreted in a manner consistent with the principles of fundamental justice." Justice Rothstein determined that the inadmissibility decision did not engage s. 7, relying on *Barrera* (a problematic precedent, as noted earlier<sup>181</sup>) but also pointing to the fact that other proceedings were more proximate to his deportation:

[A]ll that is being determined is whether Mr. Poshteh is inadmissible to Canada on the grounds of his membership in a terrorist organization. The authorities are to the effect that a finding of inadmissibility does not engage an individual's section 7 *Charter* rights. (See, for example, *Barrera v. Canada (MCI)* (1992), 99 D.L.R. (4th) 264 (F.C.A.)) A number of proceedings may yet take place before he reaches the stage at which his deportation from Canada may occur. For example, Mr. Poshteh may invoke subsection 34(2) to try to satisfy the Minister that his presence in Canada is not detrimental to the national interest. Therefore, fundamental justice in section 7 of the *Charter* is not of application in the determination to be made under paragraph 34(1)(f) of the Act.<sup>182</sup>

This reasoning<sup>183</sup> was recently on display in *obiter* statements by the Supreme Court in *B010 v Canada (Citizenship and Immigration)*.<sup>184</sup> B010 and other Tamil refugee claimants from Sri Lanka arrived in Canada on a dilapidated cargo ship. The Immigration and Refugee Board (Immigration Division) found them inadmissible under s. 37(1)(b) of the *IRPA* on grounds of organized criminal people smuggling. As a result, their refugee claims were ineligible to be referred to the RPD for consideration on their merits.<sup>185</sup> For a unanimous court, Chief Justice McLachlin concluded that s. 37(1)(b) targeted "procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational

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<sup>180</sup> *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] FCR 487 [*Poshteh*].

<sup>181</sup> See the text accompanying note 64.

<sup>182</sup> *Poshteh*, *supra* note 180 at para 63.

<sup>183</sup> See also *Torre v Canada (Minister of Citizenship and Immigration)*, 2016 FCA 48 at para 4; and *Brar v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 1214 at para 21, 273 ACWS (3d) 603.

<sup>184</sup> *B010*, *supra* note 6.

<sup>185</sup> *IRPA*, *supra* note 25 at s 101(1)(f); *B010*, *supra* note 6 at para 14.

organized crime.”<sup>186</sup> The appellants, who merely aided in the illegal entry of other asylum-seekers in the course of their collective flight to safety, were not “people smugglers.”<sup>187</sup> Accordingly, while it decided that it was unnecessary to address the appellants’ alternative argument that s. 37(1)(b) was overbroad and violated s. 7 of the *Charter*, the Court noted in *obiter* that this argument could not assist them “as s. 7 of the *Charter* is not engaged at the stage of determining admissibility under s. 37(1)”:

This Court recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the *IRPA* did not engage s. 7, because “even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place” (para. 67). It is at this subsequent pre-removal risk assessment stage of the *IRPA*’s refugee protection process that s. 7 is typically engaged. The rationale from *Febles*, which concerned determinations of “exclusion” from refugee status, applies equally to determinations of “inadmissibility” to refugee status under the *IRPA*.<sup>188</sup>

The Court’s reliance on *Febles* as authority for the proposition that “exclusion from refugee protection under the *IRPA* did not engage s. 7” is problematic. *Febles* focused on the interpretation of article 1F(b) of the Refugee Convention<sup>189</sup> which excludes from the protection of the Convention any person with respect to whom there are serious reasons for considering that “he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee.” Article 1F(b) was directly incorporated into Canadian law through s. 98 of *IRPA*, which provides that a person excluded under sections E or F of Article 1 of the Refugee Convention is not a Convention refugee or person in need of protection. Responding to *Febles*’ argument that a narrow interpretation of s. 98 should be adopted because it was consistent with the *Charter*, the Supreme Court held that its broader interpretation of the provision was consistent with the *Charter*, since excluded persons could apply for a pre-removal risk assessment or could challenge their removal to a country where their *Charter* rights are jeopardized pursuant to the principles set out in *Suresh*.<sup>190</sup>

While the appellant would prefer to be granted refugee protection than have to apply for a stay of removal, the *Charter* does not give a positive right to refugee protection. The appellant is excluded from refugee protection as a result of his commission of serious non-political crimes. If

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<sup>186</sup> *BOIO*, *supra* note 6 at para 72.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid* at para 75.

<sup>189</sup> Convention Relating to the Status of Refugees, 4 June 1969, Can TS 1969 No 6.

<sup>190</sup> *Febles v Canada (Minister of Citizenship and Immigration)*, 2014 SCC 68 at para 67, [2014] 3 SCR 431 [*Febles*].

removal of the appellant to Cuba jeopardizes his *Charter* rights, his recourse is to seek a stay of removal, as discussed earlier.<sup>191</sup>

While *Febles* may be read as affirming that a provision restricting the authority of the IRB to grant refugee status to excluded persons does not in itself *violate* their s. 7 rights, the Court did not expressly find that s. 7 was not even *engaged* because their liberty or security of the person were not engaged. It certainly supplied no reasoning to justify such a conclusion. A more plausible reading of *Febles* is that while s. 7 of the *Charter* may be engaged by the process to which Febles was subjected, he had not shown that his exclusion from proceedings that would result in a grant of refugee protection violated fundamental justice because the *IRPA* provided alternate avenues by which his security of the person interests could be addressed and protected. Is there another basis, apart from *Febles*, for the Court's *obiter* views in *B010* that s. 7 is not *engaged* in determinations of inadmissibility to or exclusion from refugee status? The Court's rationale mirrors that set out by the Federal Court of Appeal in one of the two decisions appealed from in *B010*.<sup>192</sup> Quoting at length from *Jekula*, the Federal Court of Appeal had determined that s. 7 of the *Charter* would only be engaged at "a stage under the process in *IRPA* which is subsequent to the inadmissibility finding."<sup>193</sup>

What can we make of the claim that s. 7 does not apply in the *IRPA*'s administrative process so long as other "steps" or proceedings are available before a non-citizen reaches the stage at which deportation from Canada may occur? As revealed in the discussion of decision making in the extradition and penal contexts in section 2, above, this logic has not prevailed in the context of other multi-stage proceedings that may result in detention or imprisonment. What reasoning underlies the claim that an ineligibility determination or a finding of inadmissibility does not attract s. 7 protection because it is merely one step in the administrative process that may lead eventually to removal from Canada, with others to follow? The argument appears to be that s. 7 is not engaged at that step because there are steps later in the process more directly and foreseeably linked to a deprivation of a non-citizen's s. 7 interests where the person's circumstances can be scrutinized to ensure that this deprivation complies with the principles of fundamental justice. This reasoning implies a standard of causation more onerous than the "sufficient causal connection" standard adopted by the Supreme Court in *Bedford*. It requires that state action be a foreseeable and necessary cause of the prejudice to the person's s. 7 interests – a standard expressly rejected in *Bedford*. It is instructive to contrast this approach to Justice Marceau's decision, in *Nguyen*, to examine the eligibility determination in the context of the scheme viewed as a whole:

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<sup>191</sup> *Ibid* at para 68.

<sup>192</sup> *B306*, *supra* note 171.

<sup>193</sup> *Ibid* at para 125.



[W]hile a determination of ineligibility... is only indirectly linked to the deportation order, nevertheless it has the effect of taking away the only possible barrier to the issuance of an unconditional deportation order, and as such participates in the deprivation of liberty and, possibly, the security of the individual which results from deportation.<sup>194</sup>

Justice Marceau's approach *is* consistent with the "sufficient causal connection" test which, "sensitive to the context of the particular case," does not require that the impugned government action – here, the eligibility determination – be the only or the dominant cause of the claimant's prejudice. It is also consistent with the Supreme Court's own approach in *Charkaoui*, where it raised the impact of the security certificate process on Charkaoui's security of the person, recognizing that s. 7 was engaged because this process raised "important issues of liberty and security" despite the fact that removal from Canada was not inevitable at the stage of the proceedings subject to constitutional scrutiny in that case – the designated judge's assessment of the security certificate's reasonableness.

The approach to the engagement of s. 7 that underlies *Jekula* and the Supreme Court's obiter comments in *B010* is *not*, as required by *Bedford*, sensitive to the context of the particular case. It artificially reduces the "immigration context" to a set of discrete processes whose impact on non-citizens' liberty and security of the person can be analyzed independently and in isolation from the overarching regime of immigration control to which they are subjected under *IRPA*. In *Canadian Doctors for Refugee Care v Canada (Attorney General)*,<sup>195</sup> Federal Court Justice Anne Mactavish described the immigration context in more realistic terms. One of the issues in that case was whether the Government of Canada's decision to withdraw health care coverage for certain refugee claimants constituted "treatment" for the purposes of the prohibition in s. 12 of the *Charter* against subjecting individuals to "any cruel and unusual treatment or punishment." Justice Mactavish noted that to constitute "treatment", positive actions, inaction or prohibitions by the state affecting a rights claimant had to be part of an active state process involving an exercise of state control over that individual:<sup>196</sup>

In this case, those seeking the protection of Canada are under immigration jurisdiction, and as such are effectively under the administrative control of the state. Some claimants may be detained, and obligations such as reporting requirements may be imposed upon others. In addition, their rights and opportunities (such as their right to work or their ability to receive social assistance benefits) may be limited in a number of different ways by the state. Indeed, their entitlement to a range of benefits is wholly dependent upon decisions made by various branches of the Government of Canada as to their right to seek protection, and the ultimate success of their claims for protection.<sup>197</sup>

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<sup>194</sup> *Nguyen, supra* note 65 at para 10.

<sup>195</sup> *Canadian Doctors for Refugee Care, supra* note 99.

<sup>196</sup> *Ibid* at paras 582–583.

<sup>197</sup> *Ibid* at para 585.

Canada's immigration law can more realistically be seen as an instrument of social control, with deportation as a "method of continual control" of non-citizens' behaviour.<sup>198</sup> Under this model, proceedings under *IRPA* can be usefully compared to a system of railway lines, some of which, as Justice Evans observes, ultimately lead to removal from Canada. Along the way, switches or turnouts could allow the train to move from the mainline, heading towards removal, to a secondary line or even to a siding. These correspond to various proceedings, like eligibility, that provide opportunities to avoid removal through a process by which they may gain refugee protection or that require decision-makers to consider additional factors that could weigh against removal and that might not be considered at a later stage. As Justice Marceau recognized, when these switches are closed and a non-citizen is denied access to these proceedings, the likelihood of removal and the risk of deprivation of life, liberty or security of the person increase. This increased risk meets the standard of causation required by the Supreme Court in *Bedford* to establish engagement of s. 7.

What may animate decisions like *Jekula* is the courts' concern that if they recognize that s. 7 is engaged by decisions made at each and every stage prior to removal, non-citizens will seek to judicially review every decision on the ground that it infringes their rights to liberty and security of the person, paralyzing *IRPA*'s enforcement. This is by no means the inevitable or even likely outcome of recognizing s. 7 engagement through a principled application of the s. 7 framework developed by the Supreme Court in other contexts, including the *Bedford* standard of causation. The Federal Court has the discretion to refuse to entertain an application for judicial review where an adequate alternative remedy in the form of an internal or external appeal or other statutory mechanism is available to the applicant.<sup>199</sup> Rather than holding that s. 7 is not engaged in immigration and refugee protection proceedings that do not immediately precede removal, a position inconsistent with the standard of causation adopted by the Supreme Court, a court could decline to entertain an application for judicial review based on s. 7 of the *Charter* on the ground that the applicant's s. 7 rights to life, liberty or security of the person would be considered in a subsequent adequate alternative proceeding. However, before dismissing an application on this ground, the court would have to satisfy itself that this proceeding was "adequate", providing the non-citizen with a fair hearing before a decision maker with the independence and statutory authority to substantially address life, liberty and security of the person claims and to provide an appropriate remedy.<sup>200</sup>

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<sup>198</sup> Kanstroom, *supra* note 118 at 1898.

<sup>199</sup> David J Mullan, "The Discretionary Nature of Judicial Review" in RJ Sharpe & K Roach, eds, *Taking Remedies Seriously: 2009* (Montréal: Canadian Institute for the Administration of Justice, 2010) 420 at 432. Parliament has preserved the traditionally discretionary nature of judicial review through its use of permissive language in s 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7.

#### IV. Conclusion

The Supreme Court's current approach to the application of s. 7 in the immigration and refugee protection context is inconsistent with its approach to s. 7 engagement in other legal regimes. No principled and transparent reasons have yet been offered to justify this discrepancy. Liberty is engaged in removal proceedings under *IRPA* because this statute effectively establishes an administrative regime to control non-citizens in large measure through the threat of their forced removal from Canada and exposes them to the possibility of detention in order to carry out this threat. Moreover, deportation may in certain circumstances engage non-citizens' liberty in its broad sense by preventing them from making fundamental personal choices that go beyond the bare assertion of a right to mobility. Non-citizens' security of the person is engaged where deportation would place them at risk of physical or serious and profound psychological harm, including that caused by the resulting interference with their profoundly intimate and personal choices, regardless of whether this also involves the breach of their statutory rights. Finally, as in other contexts where there is a risk of state deprivation of liberty or security of the person, and consistently with the relaxed standard of causation adopted by the Supreme Court in *Bedford*, courts should recognize that these s. 7 interests are engaged in the early stages of the administrative process and not only at the stage most proximate to deportation.

Will a principled approach to the application of s. 7 make any real difference for non-citizens seeking to challenge their removal from Canada? After all, in a legion of cases, including *Chiarelli* and *Medovarski*, courts have held that, even assuming that liberty and security of the person are engaged, the removal of non-citizens would not breach any principle of fundamental justice. As Binnie and LeBel JJ. observed in *Chaoulli*:

Claimants whose life, liberty or security of the person is put at risk are entitled to relief only to the extent that their complaint arises from a breach of an identifiable principle of fundamental justice. The real control over the scope and operation of s. 7 is to be found in the requirement that the applicant identify a violation of a principle of fundamental justice.<sup>201</sup>

At its most basic level, my argument is that courts should consistently apply the same principles to define the scope of the life, liberty and security of the person interests of citizens and non-citizens because these relate to our basic and common humanity – the same essential insight that underlies Justice Wilson's decision, in *Singh*, that s. 7 applies to every human being present in Canada and thus amenable to Canadian law.<sup>202</sup> A review of the jurisprudence on the application of s. 7 in the

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<sup>200</sup> For a recent review of courts' discretionary remedial powers on judicial review, see Gerald Heckman, "Developments in Remedial Discretion on Judicial Review: Prematurity and Adequate Alternative Remedies" (2017) 30:1 CJALP 1.

<sup>201</sup> *Chaoulli*, *supra* note 14 at para 199.

<sup>202</sup> The United Nations Committee on Human Rights has stated that "[a]liens have the full right to liberty and security of the person" and that while the International Covenant on Civil and Political Rights does not "recognize their right to enter or reside in the territory of a state party," they may enjoy its protection

immigration and refugee protection context reveals no principled or compelling justification for a contrary view. Once they recognize that s. 7 is engaged by the deportation of non-citizens, courts can address the real question: whether deportation is fundamentally just in individual cases. It is to this question that I devote my concluding remarks.

While it may be true that the scope of fundamental justice – whether the deprivation of a non-citizen’s liberty or security of the person by the state is just or unjust – is influenced by the “immigration context,”<sup>203</sup> including the power of the state, subject to international norms, to decide who it will admit to its territory, the impact of “context” on fundamental justice has its limits. Principles of fundamental justice “set out minimum requirements that a law that negatively impacts on a person’s life, liberty or security must meet”<sup>204</sup> and are about “the basic values underpinning our constitutional order”: “The s. 7 analysis is concerned with capturing inherently bad laws: that is, laws that take away life, liberty or security of the person in a way that runs afoul of our basic values. The principles of fundamental justice are an attempt to capture those values.”<sup>205</sup>

In *Bedford*, the Court was concerned with the basic values against arbitrariness, overbreadth and gross disproportionality. Laws or state acts run afoul of these basic values when the means by which the state seeks to attain its objective is fundamentally flawed because its effects on s. 7 interests are not rationally connected, in whole or in part, or grossly disproportionate to their objective. While the immigration context may supply the various state objectives against which rational connection and proportionality are to be measured, it does not alter the basic values at play. The Court’s view that Parliament’s choice to deport a non-citizen convicted of a serious crime is not arbitrary<sup>206</sup> may be defensible in light of the *IRPA*’s objective of maintaining the security of Canadian society.<sup>207</sup> However, the conclusion that fundamental justice does not require consideration of any mitigating circumstances beyond the non-citizen’s conviction overlooks the fact that deportation may impact his s. 7 interests in a manner grossly disproportionate to the

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“even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise”: Human Rights Committee, General Comment 15, The Position of Aliens under the Covenant (27th sess 1986), available in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies (1994) UN Doc HRI/GEN/I/Rev. 9 at 189, paras 5, 7.

<sup>203</sup> *Chiarelli*, *supra* note 46 at 733.

<sup>204</sup> *Bedford*, *supra* note 34 at para 94.

<sup>205</sup> *Ibid* at para 96.

<sup>206</sup> *Chiarelli*, *supra* note 46 at 734.

<sup>207</sup> *IRPA*, *supra* note 25 at s 3(h); *Medovarski*, *supra* note 4 at paras 9–10.

state's purpose and violate a basic value underpinning Canada's constitutional order.<sup>208</sup>

The impact of context on procedural norms of fundamental justice is similarly limited. The principles of fundamental justice demand, at a minimum, compliance with the common law duty of procedural fairness. The specific procedural safeguards they require depend on several factors linked to the "context of the statute involved and the rights affected."<sup>209</sup> The Supreme Court has stated, for example, that to conform to fundamental justice, security certificate procedures "must reflect the exigencies of the security context"<sup>210</sup> and the need to protect information and evidence critical to national security,<sup>211</sup> militating in favour of more limited disclosure to the named person. However, it has recognized that "the seriousness of the individual interests at stake"<sup>212</sup> also form part of the contextual analysis and that the principles of fundamental justice cannot be reduced to the point where they "cease to provide the protection of due process that lies at the heart of s. 7 of the *Charter*."<sup>213</sup>

Liberty and security of the person may be engaged where individuals are subjected to the threat of detention or other statutory compulsions or to laws or government acts that adversely impact their physical and psychological well-being or interfere with inherently personal choices that go to the core of what it means to enjoy individual dignity and independence. The fact that the legal authority for such compulsions and government acts is found in the *IRPA* should have no bearing on whether s. 7 of the *Charter* is engaged. Canadian courts should recognize non-citizens' full right to liberty and security of the person under the *Charter* and focus on the key question in immigration and refugee protection decision making: whether the state has interfered with those fundamental interests pursuant to a fair process and in a manner rationally connected and proportionate to the objectives of Canada's immigration laws.

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<sup>208</sup> See Galloway & Lieu, *supra* note 91 at 659.

<sup>209</sup> *Suresh*, *supra* note 23 at paras 113, 115. These include the nature of the decision made and the procedures followed in making it; the role of the particular decision within the statutory scheme, including the existence of an appeal; the importance of the decision to the individual affected; the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and the choice of procedure made by the agency itself.

<sup>210</sup> *Charkaoui*, *supra* note 5 at para 27.

<sup>211</sup> *Canada (Citizenship and Immigration) v Harkat*, 2014 SCC 37 at para 42, [2014] 2 SCR 33.

<sup>212</sup> *Charkaoui*, *supra* note 5 at para 25.

<sup>213</sup> *Ibid* at para 27.