Court File: IMM-5481-23

FEDERAL COURT

B E T W E E N:

ROMAN SLEPCSIK

Applicant

-and-

**MINISTER OF CITIZENSHIP & IMMIGRATION,
MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS
and THE ATTORNEY GENERAL OF CANADA**

Respondents

-and-

**CANADIAN CIVIL LIBERTIES ASSOCIATION and
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

Interveners

AND BETWEEN:

Court File No: IMM-5466-23

ROMAN SLEPCSIK

Applicant

-and-

MINISTER OF CITIZENSHIP & IMMIGRATION,

Respondent

-and-

**CANADIAN CIVIL LIBERTIES ASSOCIATION and
DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS**

Interveners

MEMORANDUM OF FACT AND LAW OF THE INTERVENER (Asper Centre)
Pursuant to the Order of Justice Brown, delivered on May 2, 2024

PART I- OVERVIEW

1. The central question for the Court in this Application is whether ss. 40.1, 46(1)(c.1), and all related and consequent provisions of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), offend the *Canadian Charter of Rights and Freedoms (*the *"Charter")*, including the s. 12 protection against "cruel and unusual treatment or punishment".
2. The nature and scope of s. 12 rights has received limited treatment in the immigration and refugee law context. The right to be free from cruel and unusual punishment or treatment have been developed primarily in the criminal law, most notably in relation to mandatory minimum sentences.
3. Applying the Supreme Court's recent jurisprudence on the markers of gross disproportionality, the David Asper Centre for Constitutional Rights (the "Asper Centre") submits that the automatic loss of Permanent Residence under ss. 40.1 and 46(1)(c.1) of the *IRPA* amounts to cruel and unusual treatment contrary to s. 12 of the *Charter*.[1] In reasonably foreseeable cases, the impugned provisions are grossly disproportionate to what would be appropriate: the provisions capture conduct that is both harmless and deeply personal; and the revocation of permanent residence undermines human dignity and offends the underlying purposes of the *IRPA*.
4. The Asper Centre accepts and adopts the facts as stated by the Applicant and stresses the far-reaching implications of the Court's decision in this matter.

PART II – ISSUES

[1] See *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at 735 [*Chiarelli*]. adapting the test for gross disproportionality established by the Supreme Court in *R v Boudreault,* 2018 SCC 58[1]to the immigration and refugee law context.

5. The Asper Centre confines its submissions to the question of whether the automatic loss of permanent residence following a finding of cessation under s. 108 (1)(a) amounts to cruel and unusual treatment contrary to s. 12 of the *Charter*.

PART III – ARGUMENT

A. Section 12 of the *Charter*

6. The recognized scope of the s. 12 right not to be subjected to cruel and unusual treatment or punishment includes protections against (1) punishments that are grossly disproportionate "to what would have been appropriate";[2] and (2) punishments that are intrinsically incompatible with human dignity.[3]

7. The jurisprudence that has developed the rights recognized under s. 12 of the *Charter* deals almost exclusively with sentencing for criminal offences. Outside the detention context, and a brief analysis in the 1992 case of *Canada (Minister of Employment and Immigration) v. Chiarelli,*[4] there is no Supreme Court jurisprudence on the application of s. 12 in immigration and refugee law.

8. The Federal Court in *Canadian Doctors for Refugee Care v. Canada (Attorney General)* found that substantial reductions in refugee medical care was "treatment" in the meaning of s. 12 and rose to the level of cruel and unusual for purposes of the s. 12 analysis. The Federal Court of Appeal in *Moretto v. Canada (Citizenship and Immigration)* and *Revell v. Canada*

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[2] *R. v. Bissonnette*, 2022 SCC 23 at para. 61, citing *R. v. Smith (Edward Dewey)*, [1987] 1 SCR 1045 at p. 1072.
[3] *R. v. Bissonnette*, 2022 SCC 23 (CanLII) at paras 6, 60-70.
[4] *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 SCR 711.

(Citizenship and Immigration) found the s. 12 claim to be premature, and summarily dismissed the claim of gross disproportionality in obiter.[5]

9. Structured development of the s. 12 analysis in this context is critical: the consequences imposed by the state in the immigration and refugee setting frequently have an air of, and impacts similar to, punishment.

B. The revocation of Permanent Residence under the impugned provisions is "punishment" within the meaning of s, 12, or alternatively, it is "treatment"

10. The meaning of "punishment" under s. 12 of the *Charter* has developed uniquely in relation to criminal offences. In punishment, the state action "(1) . . . is a consequence of conviction that forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence, and either (2) . . . is imposed in furtherance of the purpose and principles of sentencing, or (3) . . . has a significant impact on an offender's liberty or security interests".[6]

11. In the Asper Centre's submission, the automatic revocation of permanent residence under the impugned provisions is "punishment" within the meaning of s. 12. As the Applicant note, the provisions were introduced expressly in response to perceived wrong-doing: the target is individuals who had "done something to demonstrate essentially that they defrauded our asylum system."[7] Applying the definition of punishment articulated by the Supreme Court in *K.R.J.*, the provisions are state action intended to form (1) "part of the arsenal of sanctions"

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[5] *Canadian Doctors For Refugee Care v. Canada (Attorney General),* 2014 FC 651 (CanLII), [2015] 2 FCR 267; *Moretto v. Canada (Citizenship and Immigration)*, 2019 FCA 261 (CanLII), [2020] 2 FCR 422; *Revell v. Canada (Citizenship and Immigration),* 2019 FCA 262 (CanLII), [2020] 2 FCR 355 at paras 125-126.

[6] *R. v. K.R.J.*, 2016 SCC 31 (CanLII), [2016] 1 SCR 906 at para 41.

[7] Applicants' Further Affidavits, Affidavit of Antje Ellermann, p. 59 at para. 9 ["Ellermann Affidavit"]; See also Citizenship and Immigration Canada, Backgrounder – Deterring Abuse of the Refugee System, 16 February 2012. http://www.cic.gc.ca/english/department/media/backgrounders/2012/2012-02-16k.asp.

for fraud; (2) imposed in furtherance of public confidence in the immigration system; and (3) producing a significant impact on a rights-holder's liberty or security interests.[8]

12. Alternatively, the impugned provisions constitute "treatment" within the meaning of s. 12: as in the *Canadian Doctors for Refugee Care* case, the decision to revoke permanent residence was not a "neutral" decision with only "incidental impact on historically marginalized individuals".[9] The provisions were introduced to tackle situations in which "it is clear that someone received refugee status in Canada through fraud or misrepresentation and is not actually persecuted in his or her country of origin*."*[10] The impugned provisions impose a consequence on specific individuals, in furtherance of a crack-down on perceived fraud.

C. The impugned provisions are grossly disproportionate in foreseeable cases

a. The reasonable hypothetical rights holder

13. The first step in the gross disproportionality analysis is the identification of the individual to be analyzed: this can be a party to the litigation, or a reasonable hypothetical rights-holder.[11] The reasonable hypothetical rights-holder is a key consideration in this case.

14. The role of the reasonable hypothetical rights-holder in the s. 12 analysis is well-established in the Supreme Court jurisprudence: in *Smith*, the Court expressly endorsed the use of reasonable hypotheticals to test the constitutionality of a mandatory minimum sentence. The Court struck the impugned provisions not because the mandatory minimum sentence was grossly disproportionate in the case of the appellant, but because it was grossly

[8] *R. v. K.R.J.*, 2016 SCC 31 (CanLII), [2016] 1 SCR 906 at para 41.
[9] *Canadian Doctors For Refugee Care v. Canada (Attorney General),* 2014 FC 651 (CanLII), [2015] 2 FCR 267.
[10] Applicants' Further Affidavits, Affidavit of Antje Ellermann, p. 59 at para. 9 ["Ellermann Affidavit"].
[11] *R. v. Hills*, 2023 SCC 2.

disproportionate for the hypothetical young Canadian, driving back into Canada with a small amount of marijuana.[12]

15. Since *Smith*, the Court has routinely considered the reasonable hypothetical rights holder in its assessment of gross disproportionality. In *Nur*, then-Chief Justice McLachlin wrote that the use of reasonable hypotheticals was "at the heart of th[e] case" and confirmed that foreseeable hypotheticals are a protected core of the s. 12 analysis:[13]

> The question is simply whether it is reasonably foreseeable that the mandatory minimum sentence will impose sentences that are grossly disproportionate to some peoples' situations, resulting in a violation of s. 12. The terminology of "reasonable hypothetical" may be helpful in this regard, but the focus remains squarely on whether the sentence would be grossly disproportionate in reasonably foreseeable cases.[14]

16. The SCC's recent decision in *Hills* provides an extensive history, justification and defence of the Court's use of reasonable hypotheticals, noting, *inter alia*: "this Court has consistently accepted that punishments can be impugned not only on the basis that they infringe the s. 12 rights of a particular offender, but also on the basis that they infringe those of a reasonably foreseeable offender."[15] Citing to *Nur*, the Court stressed that "excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would run counter to the settled authority of this Court and artificially constrain the inquiry into the law's constitutionality."[16]

17. The justification for the use of reasonable hypotheticals in *Charter* analysis reaches back to the dicta of Justice Dickson in *Big M Drugmart*:

> Section 52 of the *Constitution Act, 1982* entrenches not only the supremacy of the Constitution but also commands that "any law that is inconsistent with the provisions

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[12] *R. v. Smith (Edward Dewey)*, [1987] 1 SCR 1045.
[13] *R. v. Nur*, 2015 SCC 15 at para 47.
[14] *R. v. Nur*, 2015 SCC 15 at para. 57.
[15] *R. v. Hills*, 2023 SCC 2. at para 68.
[16] *R. v. Hills*, 2023 SCC 2 at para 71; *R. v. Nur*, 2015 SCC 15 at para 49.

> of the Constitution is, to the extent of the inconsistency, of no force or effect". If the only way to challenge an unconstitutional law were on the basis of the precise facts before the court, bad laws might remain on the books indefinitely. This violates the rule of law. No one should be subjected to an unconstitutional law: *Big M*, at p. 313.[17]

18. In effect, it is the nature of the law, not the situation of the rights-holder before the Court, that is in issue in *Charter* litigation.[18] Reasonable hypotheticals allow the Court to examine the law before the illustrative set of facts is raised, preventing future rights violations.[19]

19. A reasonable hypothetical rights-holder's experience of the impugned provision must be reasonably foreseeable. It must arise from the reach of the law and catch conduct that the law could reasonably be expected to catch.[20] In *Hills*, the Court clarified that reported cases may be considered in the analysis,[21] with or without modified facts.[22] As the Supreme Court noted in *Nur*:

> Reported cases illustrate the range of real-life conduct captured by the offence… Not only is the situation in a reported case reasonably foreseeable, it has happened. Reported cases allow us to know what conduct the offence captures in real life.[23]

20. Personal characteristics may be considered in the reasonably hypothetical, as long as they are not tailored to create remote or far-fetched examples.[24]

21. In the Asper Centre's submission, there is no principled reason not to apply the Supreme Court's dicta on reasonable hypotheticals to the case at bar: neither the dicta itself, nor the underlying rationale, can be said to apply exclusively to the analysis of mandatory minimum sentences. Indeed, reasonable hypotheticals have been applied to assess the constitutionality

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[17] *R. v. Nur*, 2015 SCC 15 at para 51 citing *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295.
[18] *R. v. Nur*, 2015 SCC 15; *R. v. Big M Drug Mart Ltd.*, [1985] 1 SCR 295.
[19] *R. v. Hills*, 2023 SCC 2; *R. v. Nur*, 2015 SCC 15.
[20] *R. v. Nur*, 2015 SCC 15.
[21] *R. v. Hills*, 2023 SCC 2.
[22] *R. v. Nur*, 2015 SCC 15.
[23] *R. v. Nur*, 2015 SCC 15 at para 72.
[24] *R. v. Hills*, 2023 SCC 2 at para 77.

of punishments other than imprisonment, as well as to provisions under the *IRPA* in *R. v. Appulonappa*.[25]

22. The impugned treatment in this case (loss of permanent residence) applies automatically after a finding of re-availment under 108(1)(a). There is therefore a predictable outcome for rights-holders subject to the impugned provisions, and the situation of rights-holders who are foreseeably affected by the impugned provisions are justifiably central in this court's gross disproportionality inquiry.

23. Drawing from reported cases, the Asper Centre will focus the gross disproportionality inquiry on individuals whose refugee status is cessated for re-availment arising from visits to the country of origin for significant family events such as deaths, births, weddings, and to reunite briefly with close family members, such as sons and daughters. Included are individuals who fled persecution from non-state actors and took measures to protect themselves during their visits to the country of origin. They have been in Canada for eight to 12 years, and have significant family, professional and community ties to Canada.[26] These scenarios from reported cases are amply echoed in the Applicant's affidavit evidence from individuals and lawyers regarding actual cessation proceedings.[27]

24. For the reasons that follow, the revocation of permanent residence is grossly disproportionate in the case of these hypothetical cessated refugees. As the Supreme Court has repeatedly affirmed, a law that gives rise to grossly disproportionate outcomes in some cases, offends s. 12 of the *Charter*.

b. Gross Disproportionality

[25] (mandatory sex-offender registration in *R. v. Ndholvu*, 2022 SCC 38; mandatory victim surcharges for drug offences in *R. v. Boudreault*, 2018 SCC 58) and to the IRPA (see *R. v. Appulonappa*, 2015 SCC 59).
[26] X (Re), 2019 CanLII 132742 (CA IRB).
[27] Applicant's further memorandum of Fact and Law at paras. 6 and 7.

25. On the test developed in the criminal law context, a court assessing a treatment or punishment for gross disproportionality will analyze: (1) the scope and reach of the impugned provisions; (2) the effects of the punishment on the actual or a hypothetical rights-holder; and (3) whether the punishment was founded on recognized sentencing principles.[28]

26. The first factor is focused on the conduct that is targeted and captured by the impugned provision: what behaviour triggers the treatment or punishment. The second factor speaks to the treatment or punishment itself, and its impact on individuals. The final factor invokes societal norms. No individual factor is determinative of the analysis, and the factors are not "required parts of a rigid test."[29] The core question is: is this treatment or punishment grossly disproportionate, having regard to its triggers, its impacts, and social expectations. In our submission, the axes across which the Court assesses gross disproportionality should be the same whether the object of analysis is punishment or treatment.

c. Human dignity underpins the gross disproportionality analysis

27. In interpreting the *Charter*, the Supreme Court of Canada has recognized that "respect for the inherent dignity of the human person" is a value essential to a free and democratic society.[30] All the rights guaranteed by the *Charter* have as their "lodestar the promotion of human dignity."[31] Per *Blencoe v. British Columbia (Human Rights Commission)*:

> The *Charter* and the rights it guarantees are inextricably bound to concepts of human dignity. Indeed, notions of human dignity underlie almost every right guaranteed by the *Charter* (*Morgentaler*, [1988] 1 S.C.R. 30, supra, at pp. 164-66, per Wilson J.).[32]

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[28] *R. v. Boudreault*, 2018 SCC 58 at paras 47-48; *R. v. Hills*, 2023 SCC 2 at para 122; *R. v. Smith*, 1987 CanLII 64 (SCC), [1987] 1 S.C.R. 1045, at p. 1072; *R. v. Nur*, 2015 SCC 15 at para. 58 and *R v Lloyd*, 2016 SCC 13 at paras 26-33. Note: In *Boudreault*, the first factor is phrased as whether the punishment was necessary to achieve a valid penal purpose. The formulation in *Hills* is preferred in this analysis.

[29] *R. v. Boudreault*, 2018 SCC 58 at para 48; affirmed in *R. v. Hills*, 2023 SCC 2 at para 121.

[30] *R v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103.

[31] *R. v. Kapp*, 2008 SCC 41 at para 21.

[32] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307 at paras 76-78.

28. In her article "A Role for Human Dignity under the *Canadian Charter of Rights and Freedoms"*, Professor Emily Kidd White notes the diverse conceptions of human dignity in the jurisprudence, with the "common thread" that "human dignity protects against state action and legislation that treats a human being as less than a human being."[33] Human dignity, she clarifies, is not a legal test, but an interpretive device that can assist in new factual situations "where the equal status of an individual or group is called into question".[34] Human dignity is a value concerned with "status diminutions", offended by laws that devalue, degrade, harm, or marginalize an individual or group.[35]

d. Applying the Gross Disproportionality Test, Prong 1: The Scope and Reach of the Offence

29. The first prong of the gross disproportionality analysis is described by the SCC in *Hills* as an assessment of the scope and reach of the offence.[36] It is an assessment of the conduct captured by the provision that triggers the impugned treatment or punishment. It is a "major feature" of the gross disproportionality analysis.[37]

30. The application of this prong to the conduct captured by various mandatory minimum sentencing provisions is particularly apt to case at bar: the SCC notes that mandatory minimum sentences for offences "that can be committed in many ways and under many

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[33] Emily Kidd White, "A Role for Human Dignity under the *Canadian Charter of Rights and Freedoms*" in Paul Daly, Richard Albert, and Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2018) 310.
[34] Emily Kidd White, "A Role for Human Dignity under the *Canadian Charter of Rights and Freedoms*" in Paul Daly, Richard Albert, and Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2018) 310.
[35] Emily Kidd White, "A Role for Human Dignity under the *Canadian Charter of Rights and Freedoms*" in Paul Daly, Richard Albert, and Vanessa MacDonnell, eds, *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2018) 310.
[36] *R. v. Hills*, 2023 SCC 2.
[37] *R. v. Hills*, 2023 SCC 2 at para 125.

different circumstances by a wide range of people" will be vulnerable to constitutional challenge:[38] the offence may capture conduct of varying gravity and offender culpability, but nonetheless attract the mandatory minimum sentence, giving rise to gross disproportionality in some cases.[39] The problem is that the same, often severe, punishment applies to the full breadth of conduct captured by the offence. As the Court summarized in *Hills*, citing to *Nur*:

> … the wider the scope of the offence, the more likely there is a circumstance where the mandatory minimum will impose a lengthy term of imprisonment on conduct that involves lesser risk to the public and little moral fault (*Nur*, at para. 83). In those cases, the sentence is liable to capture conduct that clearly does not merit the mandatory minimum.[40]

31. In the case at bar, this prong enables an assessment of the type and range of conduct that attracts the application of the cessation provisions for re-availment, triggering the revocation of permanent residence.

32. Two problems emerge: first, as is the case with the mandatory minimum sentencing provisions, the conduct giving rise to cessation for re-availment varies widely. In enacting the provisions, then Minister Jason Kenny highlighted the fraudulent abuse of Canada's refugee determination system. However, the reported caselaw, the situation of the Applicant, and the extensive affidavits by cessated refugees and their lawyers in the Applicant's record demonstrates that visits to the country of origin for funerals, marriages or births may also trigger cessation for re-availment, and thus, the loss of permanent residence. In those cases, there is no moral culpability, no harm to anyone, and yet the treatment imposed is harsh and dramatic. The problem is not only the severity of the treatment or punishment: the problem is also that this treatment applies automatically, regardless of the type of conduct giving rise to

[38] *R v Lloyd*, 2016 SCC 13 at para 3. See also paras 24, 27 and 35-36.
[39] *R v Lloyd*, 2016 SCC 13 at para 24; *R. v. Smith (Edward Dewey)*, [1987] 1 SCR 1045 at p. 1078.
[40] *R. v. Hills*, 2023 SCC 2.

the finding of re-availment. The same harsh treatment applies to all conduct giving rise to re-availment. In the case of individuals who returned to the country of origin for important family events, and in respect of whom there is no evidence of fraud, the revocation of permanent residence is grossly disproportionate.

33. Second, a problem distinct to the immigration and refugee law context arises: much of the punishment-attracting conduct is not a justifiable target of state intervention. The cases that have shaped the jurisprudence have related to criminal conduct, and have not prompted an inquiry into whether there might be something cruel and unusual about the state interfering in fundamentally personal decisions. In the case at bar, the first prong of the analysis raises the question of whether the conduct itself can justifiably attract coercive treatment or punishment by the state.

34. Human dignity, per the Supreme Court's holding in *R v Morgentaler,* requires "the right to make fundamental personal decisions without interference from the state".[41] As the Supreme Court noted in *Blencoe:*

> Dignity has never been recognized by this Court as an independent right but has rather been viewed as finding expression in rights, such as equality, privacy or protection from state compulsion. In cases such as *Morgentaler*, *Rodriguez and B. (R.)*, [1995] 1 S.C.R. 315, dignity was linked to personal autonomy over one's body or interference with fundamental personal choices. Indeed, dignity is often involved where the ability to make fundamental choices is at stake.[42]

35. This aspect of human dignity is what R James Fyfe calls the "dignity-as-liberty" framework: human dignity is understood as "a function of human autonomy" or as being tied "to the

[41] *R v. Morgentaler*, 1988 CanLII 90 (SCC), [1998] 1 SCR 30 at p. 166.
[42] *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 (CanLII), [2000] 2 S.C.R. 307 at para 77.

freedom to make the various life choices, decisions and preferences that enable humans to shape their lives, develop and gain understanding".[43]

36. In the submission of the Asper Centre, it is not consistent with human dignity for the state to impose severe consequences for the conduct attracting loss of permanent residence in this case. A punishment that is neither excessive, nor inherently problematic, may still be cruel and unusual if it is imposed in relation to conduct that is fundamentally personal: the conduct attracting revocation of permanent residency includes voluntary re-availment (i.e. a visit to the country of origin). In practice, the conduct attracting the state treatment – loss of permanent residence – is often a visit to a dying loved one, a marriage or a funeral.

37. In *X (Re)*, 2014 CanLII 66637 (CA IRB), a 2014 decision of the Refugee Protection Division ("RPD"), a Pakistani woman was deemed to have re-availed herself of her home country's protection after returning to Pakistan for her wedding and extending her stay due to familial obligations.[44] She was not found to have committed fraud. Her refugee status was ceased, and she was subject to the retroactive application of s. 46(1)(c.1) of the IRPA, revoking the Permanent Resident status she acquired in 2006.[45] She had been in Canada since 2005, nearly 10 years.[46]

38. Likewise, in a 2021 decision of the RPD, a woman was found to have re-availed herself of the protection of her country of origin, after she returned to care for her ill mother, to be present following her mother's death, and to receive medical treatments.[47] This woman was

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[43] R James Fyfe, "Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada" (2007) 70 *Saskatchewan Law Review* 1, at p.3.
[44] *X (Re)*, 2014 CanLII 66637 (CA IRB) at paras 50-52.
[45] *X (Re)*, 2014 CanLII 66637 (CA IRB) at paras 14, 23, 35.
[46] *X (Re)*, 2014 CanLII 66637 (CA IRB) at paras 2-6.
[47] *Canada (Ministre de l'Immigration, des Réfugiés et de la Citoyenneté) et X, Re*, 2021 CarswellNat 11682 at paras 25, 37, and 62.

not found to have lied in her refugee claim. Yet she faced automatic loss of PR status and inadmissibility under the impugned provisions.

39. State intervention in these profoundly personal aspects of life is not consistent with the respect for human dignity underlying s. 12.

40. The impugned provisions undermine refugees' human dignity by constraining their capacity to make decisions of fundamental personal importance. Under the impugned provisions, decisions to care for an ailing family member in the country of origin, to see one's parent on their death bed, to be present at the funeral of a beloved grandparent, or get married in accordance with one's religious or cultural traditions, come with the potential for catastrophic consequences.[48] The undeniable impact of this reality on autonomy, and thus, on human dignity is "psychologically corrosive."[49] It treats their "own identity and will as irrelevant".[50] Attendance at the funeral of a loved one is treated with the same harshness as would be fraud.

e. Applying the Gross Disproportionality Test, Prong 2: The effects of the punishment

41. The second prong of the gross disproportionality analysis turns the focus to the impact of the impugned punishment on affected individuals. At this stage of the analysis, the SCC has recognized that the personal characteristics of a reasonably foreseeable rights-holder may be relevant.[51]

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[48] For example, see *X (Re)*, 2014 CanLII 66637 (CA IRB); *X (Re)*, 2016 CanLII 102866 (CA IRB); *X (Re)*, 2018 CanLII 97568 (CA IRB); *X (Re)*, 2019 CanLII 132742 (CA IRB); *X (Re)*, 2022 CanLII 138139 (CA IRB).
[49] *Bacon v. Surrey Pre-trial Services Centre,* [2010] B.C.J. No. 1080, 2010 BCSC 805, at para. 300 (B.C.S.C.)
[50] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015) at p. 221.
[51] *R. v. Hills*, 2023 SCC 2.

42. In *Quebec (Attorney General) v. 9147-0732 Québec inc*., the SCC clarified that the purpose of s. 12 is "to prevent the state from inflicting physical or mental pain and suffering through degrading and dehumanizing treatment or punishment. It is meant to protect human dignity and respect the inherent worth of individuals".[52] The Court was unanimous on this point.

43. In the case at bar, the revocation of permanent residence has dramatic and wide-ranging impacts on refugees' human dignity. The reasonably foreseeable rights-holder is a survivor of trauma, possibly managing Post-Traumatic Stress Disorder. She has overcome considerable barriers to settle in Canada, learn a new language, make social connections, get re-licensed in her profession, and build a family and a community.

44. For this individual, the effects of the impugned provisions are nothing short of an upheaval of every aspect of life: loss of the right to enter and remain in Canada, and therefore, to remain in her home, with her community and her family; loss of the right to work; and loss of many social benefits. The initiation of cessation proceedings with the threat of permanent residence revocation imposes extraordinary psychological stress, exacerbating pre-existing trauma.[53]

45. These effects are deeply connected to her dignity: regardless of how long she has been in Canada, and how genuine her protection needs were and are, her humanity is not recognized. She is not a full human being and is instead a refugee. The law engages with her on the basis of her legal status, not her human status. Her need for international protection, no matter how long ago, defines her under the impugned provisions. She is treated differently than any other permanent resident who did not arrive in Canada as a refugee.

46. The impugned provisions apply the harsh consequence of revocation regardless of the individual's specific circumstances.

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[52] *Quebec (Attorney General) v. 9147-0732 Quebec inc*., 2020 SCC 32 (CanLII), [2020] 3 SCR 426 at para 51.
[53] See Applicant's Further Memorandum of Fact and Law at paras 6-19.

47. These are the "status diminutions" to which Professor Kidd White refers: the life that the rights-holder has built has no value in this process. The cessation process degrades her, subjects her to the will of the state, vitiates her power to make decisions about her life. Profound interference with her psychological integrity harms her. She is inevitably marginalized by the loss of immigration status and the right to work.

48. If the purpose of the impugned provisions is to tackle fraud, then the *Act* uses any "re-availment" as a proxy for fraud. The provisions effectively endorse a presumption of guilt (if in rhetoric only) for refugees who return to their country of origin, regardless of the circumstances: fraud need not even be established or alleged. The message is that the refugee's behaviours, even many years after the adjudication of refugee status, justifiably give rise to suspicion. The regime emphasizes the contingency of her belonging.

f. Applying the Gross Disproportionality Test, Prong 3: Recognized Principles

49. The third prong of the gross disproportionality analysis is whether punishment was founded on recognized sentencing principles. Sentencing principles contain purposes for punishing a person guilty of criminal conduct. As the SCC reasoned in *Hills*,

> Whether a sentence "outrage[s] standards of decency", is abhorrent or intolerable, "shock[s] the conscience" or undermines human dignity is a normative question (see *Bissonnette*, at para. 65). Such a conclusion does not turn on a court's opinion of whether a majority of Canadians support the penalty. Rather, the views of Canadian society on the appropriate punishment must be assessed through the values and objectives that underlie our sentencing and *Charter* jurisprudence.[54]

50. Similarly, the *IRPA* provides objectives for the Canadian refugee system. Just as a grossly disproportionate sentence may be a cruel and unusual punishment, loss of status or removal

[54] *R. v. Hills*, 2023 SCC 2 at para 110.

from Canada under the *IRPA* for reasons inconsistent with the Act's refugee-related objectives may be cruel and unusual treatment.[55]

51. The refugee-related purposes of the *IRPA* include fulfilling Canada's international legal obligations with respect to refugees and facilitating the reunification of refugees with their family members in Canada.[56] Canada's primary international legal obligations to refugees are contained in the United Nations' *Convention Relating to the Status of Refugees* (the "*Convention*"), which includes Article 34 that parties to the *Convention* "shall as far as possible facilitate the assimilation and naturalization of refugees".[57] The impugned provisions undermine that principle entirely.[58]

52. The impugned provisions are also inconsistent with the purpose set out in s. 3(2)(f) of the Act, which provides that one of the core objectives is "to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada".[59] The impugned provisions threaten to separate cessated refugees from their family members in Canada. The case of the individual Applicant, Mr.Slepcsik, is illustrative of these impacts. Under the impugned *IRPA* provisions, Mr. Slepcsik lost his permanent residence in Canada after 24 years.[60]

D. Conclusion on Gross Disproportionality

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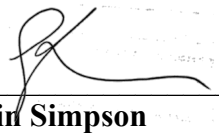
[55] *R. v. Nur*, 2015 SCC 15 at para 39, citing *R v Smith*, [1987] 1 SCR 1045 at 1073; *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at 735.
[56] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 3(2)(b) and 3(2)(f) [*IRPA*].
[57] United Nations, "Convention Relating to the Status of Refugees: Status as at 11-28-2023 09:15:35 EDT" (November 28, 2023), online: https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en#top.
[58] *R v. Gerbrandt*, 2021 ABCA 346 at para 73.
[59] *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 3(2)(b) and 3(2)(f) [*IRPA*].
[60] See para 6 of the Applicant's Further Memorandum of Law.

53. Per the SCC's jurisprudence on s. 12, a grossly disproportionate outcome in a reasonably foreseeable case offends s. 12 of the *Charter.* On the basis of the conduct captured by the re-availment provisions, and the severity of the treatment or punishment, the Asper Centre submits that the revocation of permanent residence is grossly disproportionate to what is necessary, in the case of the hypothetical litigants whose facts are documented in recorded caselaw, and in the affidavits in the Applicant's record. These cases ground a strong argument that the impugned provisions impose punishment or treatment that is cruel and unusual, and offend s. 12 of the *Charter.*

PART IV – ORDER SOUGHT

54. The Asper Centre takes no position on the outcome of the application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th Day of May, 2024.



Erin Simpson
Counsel for the Intervenor

IMM-5481-23

FEDERAL COURT

B E T W E E N :

ROMAN SLEPCSIK

Applicant

and

MINISTER OF CITIZENSHIP & IMMIGRATION, MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS AND THE ATTORNEY GENERAL OF CANADA

Respondents

and

CANADIAN CIVIL LIBERTIES ASSOCIATION DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

A N D B E T W E E N :

IMM-5466-23

ROMAN SLEPCSIK

Applicant

and

MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

and

CANADIAN CIVIL LIBERTIES ASSOCIATION DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

Interveners

FACTUM OF THE INTERVENER
