Charter: A Course Podcast S4E4 – Charter Applicability to Non-Citizens

Transcripts are auto-generated

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Prasanna Balasundaram (pull quote) 00:00

Until very recently, we had Charter protection at the outset of the process for refugees in the context of their claims for refugee protections. And we had Charter protection at the very end of the process for non-citizens who were facing removal from Canada. But all of the various processes in between were not...

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subject to Charter protections. And so, there was a whole series of very important applications, very important procedures that may actually end up with a non-citizen facing removal in which there really was not meaningful Charter protection. And at least the possibility has opened up recently with the Supreme Court's decision in the Canadian Council of Refugees. So, it's a really interesting time to be practicing in this area. I think there's a lot of possibility now.

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to advance Charter claims on behalf of non-citizens in a way that we haven't seen for the last few decades.

Intro Music:

Charter a course, I will charter a course If we can just get the country to trust us. Charter a course, southeast, west and north, and along the way we may find justice. Charter a course, I will charter a course If we can just get the country to trust us

01:21

Charter a course, southeast, west and north. And a long the way we may find justice.

Cheryl Milne:

Hello and welcome to the fourth season of Charter a Course, a podcast created by the David Asper Center for Constitutional Rights at the University of Toronto. I'm Cheryl Milne, your host, and the

Executive Director of the Asper Center. We focus on current Canadian constitutional law issues, highlighting aspects of constitutional litigation,

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and exploring the meaning of our rights under the Canadian Charter of Rights and Freedoms. Whether you are a law student, a lawyer, or a curious person, we hope you'll learn about an aspect of Canadian constitutional law and litigation that interests you. Who has rights under the Charter of Rights and Freedoms? While the Charter is intended to protect everyone in Canada equally, many believe that non-citizens have not benefited from such coverage. Refugees, new immigrants, permanent residents,

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and other non-citizens have often faced significant hurdles in Canada, with some instances amounting to a direct violation of their constitutional rights. Is Canada capable of deporting non-citizens who pose a threat to national security, even if such individuals would likely be tortured upon returning to their country of origin? Is this an affront to their Section 7 guarantee to life, liberty and security? How do courts balance international human rights requirements with Charter rights when dealing with non-citizens...

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if at all. These are the difficult questions we will attempt to tackle today with the help of our first guest, Professor Audrey Macklin. Later, in the practice corner, we will be joined by Prasanna Balasundaram, the Director of Downtown Legal Services. Using his legal experience fighting for non-citizens, we will examine the real-world challenges that lawyers face when representing these individuals. For our first segment, we are privileged to be joined by Professor Audrey Macklin, who has...

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been deeply involved in studying issues of citizenship within Canada. Professor Macklin's primary research interests involve migration, citizenship, feminist and cultural analysis, and human rights. Currently, Professor Macklin is a professor at the University of Toronto Faculty of Law. She holds law degrees from both Yale and the University of Toronto. Thank you so much for joining us. Let's start with some of the background issue and who is the Charter envisioned to protect and why.

Audrey Macklin:

Well, the Charter...

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protects everyone, that's what it says. A few provisions of the Charter are specific to citizens and those concerned, for example, the right to vote or to stand for public office. But apart from that, there really isn't any specification of the legal status that someone has to hold in order to be protected by the charter. That raised the question of whether the Charter indeed protected everyone and...

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how that would be interpreted and applied. In 1985, the Supreme Court of Canada addressed that question in Singh and Canada. So that was a case involving people who were seeking refugee protection in Canada. They arrived in Canada, they asked for refugee protection, and the system at that time allowed them to be interviewed by an immigration officer who would pass on their written statement to a committee who on the basis of that written statement would make a decision.

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about whether to grant refugee protection or not. If the decision was positive, that was great. They got refugee protection and were enrolled in a pathway to permanent residence and citizenship. But if they were refused, they may or may not have the opportunity to appeal. They challenged that process as unfair, and they did it under Section 7 of the Charter, which of course guarantees to everyone...

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the right to life, liberty and security of the person, and the right not to be deprived thereof, except in accordance with fundamental justice. And their argument was that that regime was unfair to them as a matter of process, because the people who made the decision about them never heard from them directly and apparently found against them, but without an opportunity for those people to respond to the concerns or the findings or the...

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suspicions that led to their rejection. So that was the basis upon which they challenged it. But when it reached the Supreme Court of Canada, there were a couple of very important issues to be determined in advance. And one was, are people who seek refugee protection, who aren't citizens of Canada, who aren't permanent residents of Canada, but are, in effect, standing at the border asking for protection, do they count under the Charter? Are they everyone? And this was important...

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because the government took the position that they weren't, that the Charter didn't protect them as outsiders to Canada, as it were. Jurisprudence in other countries, like the US Supreme Court, had really excluded non-citizens seeking entry or otherwise claiming rights protection under immigration law to constitutional rights through something called the plenary power doctrine. So, it was really important to determine whether they even mattered under the Charter.

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And a majority of the Supreme Court of Canada said yes. The word everyone in section seven applies at a minimum to everyone who is physically present in Canada and thereby subject to Canadian law. And for that reason then, refugee claimants who had been allowed into Canada for the purpose of making the refugee claim were indeed protected under section seven of the charter. Importantly, one question that is left unanswered by that is...

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whether one has to be physically present in Canada in order to claim charter rights. And because the case, in a sense, didn't require that question to be answered, the question has remained, to some extent, unanswered. The finding of the court with respect to the Section 7 right was indeed that refugee claimants do have the protection of life, liberty and security of the person and the right not to be deprived thereof, and that...

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Even the law in Canada did provide for refugee protection, but the process by which it was going to be determined was not procedurally fair. So, it's important to understand that the court there didn't have to decide whether a refugee has a Charter right to refugee protection, that is, a right not to be sent back to a country where they may face persecution. And the court didn't have to decide it because Canadian law already said...

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They did. What they had to determine was whether the process by which that was determined was fair, and the court decided that it was not. It did not comply with principles of fundamental justice, and in particular, did not give people who were seeking refugee protection the opportunity to know and reply to the government's case against them. And so, in the result, a majority, well, actually it was a 3-3 split, a majority, but it has become, in effect, the controlling judgment...

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did decide that everyone includes non-citizens, anyone who is physically present on Canadian territory, and that exposing somebody to the risk of being returned to face persecution engages life, liberty and security of the person. And in making that decision, fundamental justice requires that they have notice and an opportunity to reply and contest the government's case against them.

Cheryl Milne:

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Four years after Singh, the Supreme Court in Andrews and the Law Society of British Columbia further broadened the Charter of Protection afforded to non-citizens by recognizing non-citizenship as an analogous ground under Section 15 in terms of the grounds for discrimination. The courts appear to be continuing to confirm the broad protection provided by the Charter to non-citizens, to some perhaps that even appeared non-citizens were in the same constitutional group as citizens themselves.

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Yet three years later in Canada, in Chiarelli, the Supreme Court held that non-citizens did not possess an unqualified right to enter or remain within Canada. So, can you give us a little sense about how these cases all get reconciled and really how this notion of the rights of citizens have been kind of shaped by these, particularly these three cases?

Audrey Macklin:

It's really important to contrast what was at stake in Andrews and what was at stake in Chiarelli...

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Andrews was not about immigration law. It was not about the entitlement of a non-citizen to enter or remain in Canada. It was about somebody who was a permanent resident in Canada and what their rights were within Canada to, in this case, practice a profession and whether their rights to do so should be regarded as equivalent to those of people who are citizens.

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And that was the basis of the Section 15 claim. Whether someone who is not a citizen, but indeed somebody who was a permanent resident in Canada, whether equality required that they have equal access to, in this case, practicing law. And that was what the Supreme Court of Canada

decided as a matter of equality jurisprudence. Yes, they did. Importantly, that is not the same as a decision about whether non-citizens...

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have a claim to discrimination when in the process of determining whether they will be entitled to enter and remain in Canada, the government makes a decision about them. And in that context, indeed, the court has been quite restrictive. Certainly, if you think about it, equality is both an impossibly obvious and an obviously impossible subject for immigration law.

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It's impossibly obvious because inequality between citizens and non-citizens is both stark and foundational to the way we think about the modern state system. Right? The fundamental inequality between citizens who have a right to enter and remain in Canada and non-citizens who have no such right to enter and remain in Canada is profound and determinative of so much in terms of access to any other rights and indeed, one's life chances and so on.

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So, inequality is impossibly obvious when thinking about immigration law. It's also obviously impossible for the legal system to truly confront, precisely because it is foundational to the way the global system of nation-states is organized. The idea of sovereign states and the idea of membership in those sovereign states being somehow controlled.

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and defined by those nation states with certain rights and entitlements flowing from them, is something that is so taken for granted that to actually consider it in its full implications and take it on as a matter of inequality would have profound implications, ones that frankly no court is entirely willing to take on. So that brings us to thinking about Chiarelli. Chiarelli was an immigration case. This was about somebody who was not...

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a refugee, but somebody who had been residing in Canada for a long time as a permanent resident, and lost his permanent resident status on account of organized criminality, which is a ground for losing permanent resident status under immigration law, and then faced removal from Canada. And part of the argument there was, again, that the process by which this person was going to be determined to be inadmissible and ultimately removed from Canada was unfair.

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And here, the court was asked then to consider whether that process was unfair. But instead of, in a sense, proceeding to that question, they short-circuited it entirely by saying that, well, it doesn't really matter if it was unfair or not, because the first principle of immigration law is that no one has an absolute right to enter or remain. So, in effect, whether or not the process for deciding whether they could remain or not was...

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fair or unfair, there was no right at stake here that they could reclaim. Now, this is a very troubling decision in a number of ways. So, one way of understanding it is in comparison to Singh, who was a refugee claimant, where what was at stake was potential persecution in another country, Chiarelli did not have that kind of obvious threat to life, liberty and security of the person at stake.

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On the other hand, you know, being forcibly, as it were, apprehended, detained, and thrown out of the place one has lived, right, is a profound exercise of coercive power of the state. Profoundly affects one's liberty and security of the person, whether or not you think it's justified. And yet the court was unwilling to see that as engaging life, liberty or security of the person.

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And they did so by saying, you know, even if it does, this principle of fundamental justice is that nobody has an absolute right to enter and remain. And I will just say briefly, what you see the court doing there is very familiar in terms of what other states do as well, but what they move from is saying, well, if no one has a right to enter, and they don't under the Charter, only citizens have the right to enter and remain, therefore, states, individuals who are not citizens have no right to enter and remain,

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Therefore, they have no charter rights to claim. And that kind of is getting it backwards. That is to say, it's not that even if someone has no right to enter, it does not follow that removing them doesn't violate some right that they have. Right? The state doesn't have a right to exclude, the state has a power to exclude. And the way it exercises that power is subject to the Charter. So, unfortunately, in Chiarelli, what the Supreme Court of Canada...

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did was kind of smuggle in a state's right into the Charter, which is completely backwards. Under the Charter, people have rights, states don't. But really what they did is say the state has the right to exclude, and so Chiarelli can't complain about anything if the state is exercising its right to exclude. What it leaves open for the future, but only, you know, what it leaves open for the future is what happens if the consequences of removal are so dire that they bring into play.

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another Charter right.

Cheryl Milne:

So there's a couple of things happening here in my mind. One is around the section, you mentioned section six, mobility rights. We have a previous episode where we talk about mobility rights, where citizenship is embedded in that right, so there is this difference. But also, that the whole concept of who everyone is under the Charter is really put to the test in the immigration context. Is that a fair kind of way of describing it?

Audrey Macklin:

It is fair.

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In other countries, so I gave the example of the United States, they just say that for purposes of immigration law, non-citizens don't count. They aren't part of that community of legal subjects protected by the Bill of Rights. The European Court of Human Rights, in interpreting the Convention of Human Rights, takes a different position, and they do say that the Convention does apply to them. In Canada, what we say is that, yes, non-citizens...

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in Canada at least, are everyone and the Charter does protect them. But then the actual protection that the Charter provides is so winnowed down and so narrowed and stripped away that one can say that yes, they are protected by the Charter but in fact content of the protection that is afforded to non-citizens is very slender indeed. Why? Because they're not citizens. So, you can see the circularity of it.

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But that's the kind of logic that the Charter jurisprudence, with respect to immigration law, pursues.

Cheryl Milne:

Now, you've already sort of alluded to this, but sort of many non-citizens, particularly refugees, come to Canada to escape horrible living conditions in their own states. So consequently, deportation from Canada would threaten Section 7 rights, as you mentioned, which guarantee...

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right to life, liberty and security of the person, except in accordance with the principles of fundamental justice. So then, as you were talking about this in terms of the right of Canada to exclude or to deport, like, is it unconstitutional for the government to deport refugees who would be faced with this kind of hardship, or even worse, tortured upon return to their native country?

Audrey Macklin:

Interestingly, the Supreme Court of Canada has not squarely faced this question.

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Namely, would Canada violate its Charter obligations were it to deport a refugee to face persecution in their country of origin? They haven't addressed it squarely. There was some early jurisprudence that was very discouraging on that front, but more recently there has been some jurisprudence that seems to point more favorably to it, both in Mason and subsequently in the STCA judgment on this point. Still not determined.

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You know, I think there are hints here and there, and I want to be optimistic about that. But where the court has spoken is about the removal of somebody who is a refugee or could be a refugee to face not just persecution, but actual torture, where that refugee is also classified as somebody who allegedly poses a threat to the national security of Canada. So here you have circumstances where the person concerned...

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may indeed face persecution or torture, and normally in that situation, there's nothing on the other side of it. Why wouldn't, the state should be protecting the person? But in some cases, particularly

following 9-11 and so on, the countervailing argument was that the person poses a threat to national security, and that outweighs the high probability...

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of persecution or even torture that that person faces. And this was confronted by the Supreme Court of Canada in a case called Suresh in 2001, where Suresh was a refugee. He was en route to permanent residence status. He was then accused of being somebody who was a member of the so-called Tamil Tigers or affiliated with the Tamil Tigers through a fundraising organization. He was named as someone...

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who was a threat to the security of Canada on alleged terrorist grounds. And on that basis, he was going to be removed to Sri Lanka, which has a very, at the time, a very high rate of torture. But the argument was, doesn't matter. He's a threat to the national security of Canada. He's a terrorist and therefore, we are justified in deporting him to be tortured. So, this went to the Supreme Court of Canada. And the arguments...

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obviously turned both on the Charter and on international human rights law, which among other things, prohibits the deportation of any person, refugee or otherwise, to face torture or cruel and inhumane degrading treatment or punishment. And so, the Supreme Court of Canada ultimately decided that the way they put it, in general, it would violate Section 7 to deport a person to torture, unless there are exceptional circumstances...

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which of course read back by the Department of Justice and all its subsequent litigation meant we can deport people to be tortured if there are exceptional circumstances and this case and every case constitutes an exceptional circumstance. And that is really a judgment, I think, that stands to the great shame of Canada. It has not been followed by any other court in any other country. There is at least one case in Canada where a lower court, a justice of the federal court...

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used Suresh to order the deportation of an individual to face what was acknowledged to be a high risk, a substantial risk of torture.

Cheryl Milne:

You know, it's kind of shameful to think that Canada kind of stands out for that kind of a decision. I mean, you mentioned that in Suresh that international law plays a role to some extent, and, you know, they all, all of these immigration cases present...

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the international themes and treaties that Canada has entered. We like to think that Canada is a respecter of human rights on the international stage. We've ratified numerous international human rights documents. However, the Supreme Court of Canada kind of is inconsistent in how it seems to apply the international human rights to protect non-citizens under the Charter. And why is this? And are...

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international human rights subject to Charter rights in deciding such cases? Like, how does the court actually utilize the international obligations in making these decisions?

Audrey Macklin:

Well, I think, as you know, the Canadian Charter is presumed to be inspired by the post-war international human rights movement. There is an idea that international human rights law informs the text of the Charter, but also...

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should inform its interpretation and application. That typically is underwritten by a kind of hubris that assumes that, of course, we already do that, and that Canada really has very little to learn from international human rights law at this point. We are at the vanguard of it instead. But I will say, just to back up and talk about Suresh for a moment, it is striking that Suresh was a unanimous decision. And indeed, one of the judges in Suresh went on to become the UN High Commissioner for Human Rights. And I've always wondered how that could possibly be reconciled.

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A subsequent decision by the European Court of Human Rights called Saadi in Italy directly confronted, again, this question. Can somebody alleged to be a terrorist, a security threat, be deported to face torture? And the European Court was resolute in saying absolutely not. There are no exceptions to the prohibition on deportation to torture. There are simply no exceptions. And they didn't even...

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cite, mention, address Suresh, which I think is an indication of what a complete outlier Canada is in this. So, on the one hand, Canada is a little bit self-congratulatory, and on the other hand, in many cases it is at the forefront of human rights compliance, but certainly not with respect to deportation to torture. Now there are at least two ways in which in immigration law international human rights is brought in. Three ways really....

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thinking about the Charter. One is, before you even get to the Charter, our Immigration and Refugee Protection Act directs that that statute should be interpreted and applied in conformity with Canada's international human rights, and indeed international legal obligations. So, you've already got international law inserted at that level. And then you get to the Refugee Convention, which Canada has signed and ratified, which...

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has been in the text of the definition incorporated into Canadian law, as well as the provision about refoulement. Then above that, once you reach the Charter, of course, you have these claims by the Supreme Court of Canada that Canada should be read in light of Canada's international human rights obligations and should be understood to provide protection at least as great as that provided by international human rights law. So, if you get back to Suresh, though, what you see is Supreme Court of Canada reviews international law,

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with respect to deportation to torture, and is compelled, because there's really very little room to maneuver, compelled to reach the conclusion that international law prohibits absolutely deportation to torture. It arrives at that conclusion. Genuflex briefly before it.

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and then ignores it. And then just says, well, that's nice, we've interpreted international law, now we're going to move on to the Charter. And under the Charter, we say, mostly it shouldn't deport to torture unless there are exceptional circumstances. Well, that's just contrary to international law. But they don't accept, Suresh is distinctive in this sense, they don't attempt to reconcile it. They don't say that international law is ambiguous and we're interpreting it, or they don't say we should use international law unless it conflicts with statute law in Canada. They don't use any...

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principles of interpretation, they simply say, yeah, prohibited under international law, close the door on that, and now we're going to reach this conclusion.

Cheryl Milne:

It's kind of shocking to think that the charter, which we say, I mean, upholds all these international obligations, because that, I mean, it is, at the very least, the Charter rights are supposed to be the same as these international obligations, yet we have this kind of fiddling with the concepts a little bit.

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I have two follow-up questions. One, you made reference to a term that I think we just should define for our listeners, which is non-refoulement. Can you just describe what that means?

Audrey Macklin:

Sure. Non-refoulement is just a term of art in refugee law for the expulsion or removal of someone who meets the definition of a refugee to a country where they will face a well-founded fear of persecution.

Cheryl Milne:

And my second question is...

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So, would you say that, in conclusion to what you were just talking about, do other courts draw, sort of outside of Canada, so internationally, upon international law, more actively when deciding cases involving non-citizens? And we probably set the US aside as the worst of the outliers or one of the worst of the outliers, but is that an accurate description?

Audrey Macklin:

Well, the European Convention on Human Rights...

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mirrors many of the provisions that are in international human rights instruments. So, in some sense, you could say that the European Court applies what we understand to be international human rights principles or norms as well. I will say that apart from the extreme case of deportation to torture, where Canada's an outlier, almost all apex courts in interpreting international law...

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and to some extent international law provides some support for this, are very, very reluctant to constrain the power of states to exclude and expel non-citizens. This power to control who enters is understood as, in some way, definitive of what it means to be a sovereign country. Countries are sovereign to the extent that they can control their borders. That's the way the story goes.

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And as you know, if you just, you know, any casual look at the media shows how incredibly controversial issues around immigration are. And so, it turns out that courts have proved quite timid and quite reluctant to really protect the rights of non-citizens to the full extent that human rights seems to require.

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And I think that really has something to do with the way that they have internalized the idea that the state power to exclude is somehow more important than the human rights of those who stand beyond the state, outside the nation. And that that power to exclude, which is sometimes expressed as a right to exclude, will be used to trim down....

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the human rights of those who might seek to enter and remain who are non-citizens. And we see that played out again and again and again, whether it's the Chiarelli doctrine in Canada, the idea that first principle is of Section 7 fundamental justice, apparently, is that non-citizens have no right to enter and remain, what's called the plenary power in the United States, or in the European Court of Human Rights, what someone has called the kind of...

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Strasbourg Two-Step, where, yes, non-citizens have certain rights, in that case perhaps to family reunification, to protection against refoulement, deportation to torture, but wait, states have a right to control who enters. And they're going to be balancing those two, and the state's right to control is going to come out on top.

Cheryl Milne:

So, I now want to turn to a case that actually the Asper Center was involved in, which is the challenge to the Safe Third Country Agreement. And the agreement itself with the US...

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has been scrutinized and challenged as being unconstitutional. It forces US and Canadian bound refugees to process their refugee claim in the country in which they first arrived, essentially. I'm probably oversimplifying in describing this, but so that's a refugee is unable to enter Canada from a US land or waterway border and make a refugee claim. Instead, such individuals would be returned to the United States to make their claim there.

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The crux of this agreement relies upon Canada's designation of the United States as a refugee safe country. So those criticizing the Safe Third Country Agreement claim the United States is not a safe country for refugees, and that deporting refugees to the US is a direct violation of their Section 7 rights. And the intervention that the Asper Center made, along with LEAF and West Coast LEAF, was that it was discriminatory under Section 15.

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And that's still yet to be determined by the court because it was sent back. So, in 2020, the federal court agreed with that on the section seven ruling, or agreed that it was a section seven violation. The federal court of appeal overturned that, and then it was upheld in part by the Supreme Court of Canada on the section seven arguments and sent back on the section 15. So could you...

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summarize or share your thoughts on the rulings and ultimately what the Supreme Court of Canada decided in that case.

Audrey Macklin:

So, Canada is not alone in this particular dilemma. Canada signed the Refugee Convention. It made a promise to the international legal community that if people reached its borders and made a refugee claim and met the definition of a refugee, they would not be returned.

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When the Refugee Convention was drafted, it didn't occur to the drafters that one could return somebody to a country other than where they were a citizen, because no other country has an obligation to accept them. But with the advent of the Safe Third Country agreements, countries sort of took advantage of that silence to say, OK, so we can't return a refugee to a country where they might face persecution, namely the country they fled from,

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but the convention doesn't say anything about sending them somewhere else. So, Canada says, hey, we're not refouling people, we're just sending them to the United States. And we're confident that the United States will determine fairly whether they're a refugee or not, and not refoule them if they are. So, this turns on whether that other country is truly safe. Now, to understand, to back up for a second and think about the logic of this,

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Why would the United States take responsibility for determining refugee claims of people who had reached Canada? After all, it's not the United States' particular job either. And so, to really appreciate why these agreements exist, you have to know that safe third country agreements are predicated on the idea that the state closest to the place where the person fled should determine the refugee claim. Right? So...

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If you think about that and you know that 85% of the world's refugees are in the global south, then you can see how Canada is a harder country to get to because it's so far. You have to pass through other countries. So, you're bound to pass through another place en route to Canada if you're traveling overland. Well, so if Canada can say, we should send you back to the first safe country you pass through, they send to the United States because it's closer typically, for example, to Central America.

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But the United States, of course, is all primed to do the same thing, right? And to send people back to Mexico, and from Mexico to Guatemala, and so on and so forth. So, this is all a strategy to contain refugee claimants and prevent them from being able to get to a place of safety. So that's really an important background to understand about safe third country agreements. That they are predicated on the idea that proximity to the country of origin is somehow the norm.

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and the right way to determine who should take responsibility for determining refugee claims. So, with that in mind, Canada is sending people to the United States. But it's required that it be safe. And the argument here was that it was not safe. Now, the federal court at the first level heard the evidence about the treatment of asylum seekers in the United States, about conditions of detention, which was often automatic, if not always,

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the ways in which people were treated in detention, the access of people to legal counsel, which makes a very big difference in whether one can obtain refugee protection, rules that say if you don't make a refugee claim in the first year, then you can never make a refugee claim, rules that discriminate, and this is the case that Asper took on, rules that make it much more difficult for women...

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seeking protection from domestic violence to make a refugee claim, also true of people fleeing gang violence. The first-level court, the federal court, heard that evidence and decided the facts, which is their job. And they decided on the facts that indeed U.S. practices around detention violated principles that in Canada would be Charter violations. They breached standards of international law. The United States was not safe...

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in that respect, and the predicate then for that made the safe third country Charter compliant was not met. By the time this reached the Supreme Court of Canada, the Supreme Court of Canada did a few things. First, confronted with findings of fact from the trial judge, it did something quite unusual. It changed the facts. It just said, we don't like the facts that they found, we're going to take that evidence and we're going to come to a different conclusion. I point that out because you can see that...

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when it's not, it is primarily the rights of refugees that are at stake here, but when courts go to extraordinary effort to not to interfere in the power of the state to exclude, it's important to notice what kind of damage is done to our own legal system, our principles and the rule of law. And in this case, what you see is a kind of departure from what we take for granted, which is, of course, appellate courts can't...

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revisit the findings of fact. They weren't there to hear or determine the evidence.

Cheryl Milne:

It's also contrary to what the Supreme Court of Canada has said in cases like Bedford and Carter, which is that the trial judge is, even if it's just a paper record, is owed deference. That they shouldn't be re-examining the facts and reweighing them.

Audrey Macklin:

Well, that's exactly what the court did here, and so I think that's important to notice, that when you do violence to rights,

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Sometimes that also does violence to the very legal system upon which we all depend. And I say that because it's important for people to think not just about what happens to immigrants and refugees, but what happens to our legal system in the course of straining to avoid having to find that non-citizens might have rights claims to enter or remain as refugees in this case. So that's one example, and there are others.

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Something else that the court did was certainly open the door in a positive way to possibly recognizing in a future case that there is a right to refugee protection under the Charter. And so, I want to mention that, acknowledge it with some relief, and say, you know, of course, determination of that may wait for another day, has to wait for another day. But something else the court did here, which again has wider ramifications, is they said,

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Even if it is the case that people are sent back, transferred from Canada back to the United States, without an actual consideration of how the system might violate their rights, that's okay because we have these things called safety valves. And so even if the rule itself appears to allow for a violation of rights, that is to say, sending somebody back,

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to a system that through its detention process, through other processes, will not be safe for them, that's okay, because in individual cases, there are safety valves. And meaning that an individual can raise, in their particular case, evidence of how, in their unique situation, sending them back to the United States would be unsafe. And so, they mention things like humanitarian and compassionate discretion, which is a broad form of discretion under the Immigration Act.

39:48

or something called a pre-removal risk assessment or a temporary resident permit. I won't sort of belabor the definition of each of these but suffice to say that when the Safe Third Country Agreement is applied, it is a border official who, within a matter of hours or possibly a couple of days, turns somebody back to the United States. There is no opportunity for access to a lawyer. These are people who arrive...

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in desperate situations, they often don't speak English or French, they certainly don't know what potential remedial options exist in a discretionary way under Canadian law. And furthermore, in the history of the Safe Third Country Agreement, not once has any immigration officer ever applied any of these remedial discretionary so-called safety valves. However, here's what happens. In this case, in order to get the case to court, a coalition of lawyers

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had to work extremely hard in this particular case to do a lot of advanced planning and coordination with American counterparts and with the Department of Justice in order to put in place very temporary measures that would enable the case to be brought to court because obviously in the ordinary situation, there's never an opportunity. People are transferred back to the United States before they can ever get to a Canadian court. So, the court notices that, well, you say,

41:13

there are no safety valves, but hey, how did these people end up before the court? So it's a kind of sucker punch that the court uses. They take these extraordinary efforts, never before used and certainly not available on an ordinary basis, and say, hey, can't be so bad, there must be, obviously, forms of relief available because the litigants are here. And this, in turn, is sort of a contradiction of lots of prior jurisprudence under the Charter in other domains...

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domains that aren't about immigration law. And this is the sort of thing that gives rise to what is called immigration exceptionalism concerns, that rights, procedural and substantive, that seem to apply in other domains of law, do not apply in the realm of immigration, precisely because of this idea that ultimately matters of who enters and who can remain in Canada are...

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a matter of sovereign prerogative, a matter of executive control, and the court should be very reluctant to intervene in that. So that's a kind of backstory of the Safe Third Country Agreement, a kind of rewriting of the facts to launder the findings of fact that say that, in fact, that the United States is not safe, followed by the kind of invention or the application of the idea of safety valves in a context where they are,

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litigants argued, and as everybody knows, are entirely illusory. So those are quite dispiriting findings about the Safe Third Country Agreement. If I had to emphasize the positive, it would be, as I said, the affirmation against some earlier negative jurisprudence that would seem to make possible an argument that refugee protection may indeed be protected under Life, Liberty and Security, Section 7 of the Charter.

Cheryl Milne:

43:09

And if I can just toot the Asper Centre horn a little bit on this one. I mean, just for the listeners, this case is still ongoing because what happened at the first level is the court made the finding that there was a Section 7 violation and then decided that they didn't need to rule on Section 15 because they struck down the agreement or the provisions that enacted the agreement.

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And when we tried to argue at the Federal Court of Appeal that that was an error, that they should have made the rulings, the applications judge should have ruled on Section 15, the Federal Court of Appeal said, no, no, no, that's just judicial restraint, they don't need to do that. Fortunately, the Supreme Court of Canada did say that that was an error, and so have sent it back to be heard on the Section 15 issues. So new evidence is being put forward and it's going to be argued again on the discrimination claim around

44:02

escaping domestic violence and the impact of women in particular.

Audrey Macklin:

And that's terrific. And it will be an opportunity, I think, among many other things, to bring forward to the court these sorts of questions. So, somebody is arriving at the border. They don't necessarily speak English or French. It may be a woman who's bringing children with her. It's a desperate and dire situation. She is confronted by a border official who is not somebody trained in refugee adjudication.

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She doesn't have access to a counsel. She faces potential transfer back to the United States on the basis of the United States being a safe country within a matter of hours. So, who has got the burden here of showing that the United States is not a safe country for a woman fleeing domestic violence? Does she have the burden of proving to that CBSA Canada Border Services agency officer that in fact she has experienced domestic violence, that in fact the US law is unsafe, makes it unsafe for her?

45:01

And what is her recourse at that point? Who is going to be there to hear? Who's going to, as it were, adjudicate that? Is it the CBSA officer? Where's the oversight? How exactly is that supposed to happen? Certainly, there are no obvious safety valves in place. And if the CBSA officer says, I don't believe you, I think you're making it up. Or, you haven't shown me that the United States isn't safe for you. You haven't brought me jurisprudence, factual evidence, documentation...

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to demonstrate that? What then? So these are the kinds of practical issues in addition to the principled question that I think are important to put before a court to really ask them to think hard and test the consequences of this judgment.

Cheryl Milne:

So as a final question, and as a way of summarizing this discussion, you have written about the reluctance of courts in Canada and other countries to meaningfully protect the constitutional rights of non-citizens under immigration law.

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And we've been talking about the Charter applying to everyone, but we've been zeroing in on the fact that citizenship plays some sort of role in defining who everyone is under the Charter. What do you think accounts for the judicial reluctance? Not only at the Supreme Court of Canada level, but I mean, it's also in the US Supreme Court, the UK Supreme Court, the European Court of Human Rights, and elsewhere for this....

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reluctance to protect the constitutional or human rights of non-citizens, particularly in the immigration context?

Audrey Macklin:

I think what's at work is the idea that sovereignty depends on and is defined by the power to exclude people, and that a state is sovereign to the extent that it has that power, and that that is a sovereign power that rests with the executive of the state. And indeed, what's interesting, or one of the interesting things,

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presented as a right. It's not just the power of the state to exclude, but the right of the state to exclude. And when you call something a right, some of the work that is done by calling it a right is that it requires no justification beyond itself. Why am I excluding? Why is the state excluding? Because it has a right to. That's the end of the story. If you understand that what...

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is really going on here is that the state has a power to exclude. It has many powers. It has the power to imprison people. It has the power to regulate transportation. It has, the state has many powers. Nobody doubts that. But the power of a state is always constrained by the rights of individuals. And that doesn't mean that the state...

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can't ever control entry to Canada, but it means that in exercising its power, it has to do so in conformity with the human rights of the people who are affected. And we need to understand, generally, that when we think about rights and their impact, we think about them from the perspective of the person...

48:06

who is impacted by it, not from the state's perspective. So, one of the curiosities of Chiarelli, for example, is that we say the first rule of immigration law is that no individual has a right to enter and remain, as if the status of the person as the state views them is determinative of the right. But in other domains, we say it's the impact of the state action on an individual that's determinative. Right? The fact that somebody might be...

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coercively picked up, deprived of their liberty, detained, imprisoned, and so on, is how we understand the impact of a rights violation, not this person's a criminal, therefore the state has a right to punish them. But in immigration law, it's the perspective of the state that dominates. So, I think these are the things that contribute to this and make courts very, they've internalized this, and indeed they articulate it. And I think that's what makes it very hard for...

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non-citizens to be truly recognized as rights-bearing subjects under the Charter, under the US Bill of Rights, under the European Convention of Human Rights, and international human rights law goes some distance to recognizing this and trying to alleviate it. And to the extent that it does, the Canadian Supreme Court has really tried to marginalize it. And that's, I think, disappointing.

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But it is up to us to keep reminding the court of the damage it does, the harm it does, not just to non-citizens, but to legality, to the rule of law, and to all of us, when it doesn't live up to the highest principles that it espouses on behalf of all of us.

Cheryl Milne:

Well, thank you very much, Audrey. You've really helped us kind of understand that certainly under the Charter, when we talk about everyone having rights under the Charter, that everyone is a...

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nuanced concept, particularly when it comes to rights of immigrants and refugee claimants in Canada. And I want to thank you very much for explaining this for us.

Audrey Macklin:

Glad to be here. Thank you.

Cheryl Milne:

We've been talking with Professor Audrey Macklin from the Faculty of Law at University of Toronto. Coming up on our practice corner, we're going to be talking to Prasanna Balasundaram, who is the executive director of...

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Downtown Legal Services who actually represented some of the individuals in the Safe Third Country Agreement challenge. And so, we'll be talking a bit more about the particular aspects of representing non-citizens in that context.

Cheryl Milne:

50:46

Welcome back and thank you for joining us for this episode's Practice Corner. Having explored the case law on Charter applicability to non-citizens, we now want to explore the challenges that lawyers face when working with those clients. I'm pleased to welcome Prasanna Balasundaram, the Director of Downtown Legal Services, the Faculty of Law's in-house legal clinic serving low-income people in the Toronto area. Prasanna's work focuses on immigration and refugee law.

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As such, he is constantly working to help non-citizens with their legal issues. He's also been involved in constitutional challenges to the Designated Country of Origin regime, the Safe Third Country Agreement, and has worked to reunite Guantanamo Bay detainees with their Canadian families. Welcome, Prasanna.

Prasanna Balasundaram:

Thanks so much for having me, Cheryl. I'm really pleased to be able to join you in this conversation.

Cheryl Milne:

So am I. This is really kind of fun for us to be chatting. We're both directors here at the law school, and it's nice to...

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chat with a colleague. We started off this podcast with this central question of who the Charter is envisioned to protect. The answer of course is everyone in Canada, citizen or not. In your experience representing non-citizens is this as true in practice as it is in theory?

Prasanna Balasundaram:

Unfortunately, no, it is not as true in practice as it is in theory. As you may be aware...

52:08

It was really the Singh decision in the mid-80s that set sort of a high watermark in holding that the charter applied, particularly Section 7 applied to everyone in Canada. And that was a high watermark with respect to being able to advance the Charter rights of refugees in particular. It's what gave rise to the Refugee Protection Division at the Immigration Refugee Board and...

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ensured that all refugees would have an oral hearing with respect to their claim for protection. However, the subsequent years, decades rather, with respect to the development of the jurisprudence, was not as progressive as what we had in Singh in the mid-80s. And really what you saw was a constraining of access to Charter rights for non-citizens. And until very recently...

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We had Charter protection at the outset of the process for refugees, as I mentioned, in the context of their claims for refugee protections. And we had Charter protection at the very end of the process for non-citizens who were facing removal from Canada. But all of the various processes in between were not subject to Charter protections. And so, there was a whole series of very important...

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applications, very important procedures that may actually end up with a non-citizen facing removal in which there really was not meaningful Charter protection. And at least the possibility has opened up recently with the Supreme Court's decision in the Canadian Council of Refugees. So, it's a really interesting time to be practicing in this area. I think there's a lot of possibility now to advance Charter claims on behalf of non-citizens...

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in a way that we haven't seen for the last few decades.

Cheryl Milne:

I want to talk about the predominant ways in which non-citizens face discrimination. Can you recall or describe for us a particularly impactful instance where you had to deal with a non-citizen whose charter rights were being breached?

Prasanna Balasundaram:

Sure. So let me just start by saying, I think the predominant way in which non-citizens face discrimination is procedural.

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So, there's some pretty well entrenched case law that has its origins in the United Kingdom that was subsequently imported over to Canada, which holds that non-citizens do not have an unqualified right to enter or remain in Canada. And this really has permeated sort of the thinking with respect to procedural rights afforded to non-citizens in the context of

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various applications and processes. So, what you often find is non-citizens in situations where their liberty interest is engaged or their security of person interest is engaged but are subject to far less robust procedural protections than what a citizen might expect to face in a similar circumstance. And so...

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Really the challenge has been to try and draw parallels between what, for example, the criminal justice process affords or what the extradition process affords in engaging those similar Section 7 interests and trying to expand the possibility of parallel procedural protections in various processes that non-citizens are involved in. And so, in response to the second part of your question,

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Sort of the most impactful instance that I can think of is actually a very recent case that DLS was involved in. And as you know, the Asper Center was also involved in, in terms of coming forward on a very important intervention. The case is called Slepcsik. It's Slepcsik and the Minister of

Citizenship and Immigration. And this case had to do with the constitutionality of the automatic loss of permanent residence...

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when a refugee status has been cessated by the Refugee Protection Division. So, some very quick background. In international law, as well as in domestic law, the state is able to essentially revoke a refugee's Convention Refugee protection status if there are certain circumstances that are met. And one of those circumstances is if the state can establish that the refugee...

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has re-availed themselves of the protection of their home country. And that can sometimes be met by the refugee traveling on a passport issued by their home country. It may be met by the refugee traveling home for some very compelling personal reasons, like attending the funeral of a parent, caring for a sick loved one. So, these are the circumstances in which a state can move to revoke a convention refugee's status.

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There is no dispute as to the state's ability to do that. The constitutional problem arises because in 2013, Canada passed a law that attached the loss of permanent residence to the loss of convention refugee status. So, where people had come to Canada, been recognized as convention refugees and gone on to receive permanent residence status,

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all of a sudden that permanent residence status was automatically stripped when the underlying convention refugee protection status was cessated. And so, we have situations, and this is the situation of our client, where someone has been in Canada for a long time. In the case of our client, he's been in Canada for 27 years, he's been a permanent resident in Canada for 25 years...

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has established himself here, has two adult Canadian citizen daughters who he raised. He's a grandfather now. He worked here for decades. He paid his taxes. He was very integrated into Canadian society. But because he had traveled back to care for some loved ones and attend his mother's and uncle's funerals, his refugee status was cessated and he automatically lost permanent residence...

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status. Now, the constitutional issue specifically arises because that loss of permanent residence is automatic. It is by operation of law. There is no administrative decision maker that has the discretion to look into the individual circumstances of the person affected and determine whether or not PR status should be stripped. And so, as you can imagine,

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Someone who's been here for 25, 27, 28 years, so well established here. There are security of person interests engaged. There's a deep psychological impact if you suddenly have the home that you know be pulled out from underneath you and you're facing permanent removal to a country that you have not been in and not essentially been your home for 25, 30 years.

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And so that's the real constitutional problem that we're trying to underscore for the court. And I initially said, you know, the predominant way is procedural in terms of the discrimination. And so that's the hope here is to say, you can't have a process in which you're stripping away someone's permanent residence status without some form of procedure aimed to understand whether or not...

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that is fair. You know, if in other contexts, citizens who face the possibility of losing their driver's license, I mean, even face the possibility of losing their library card, have some opportunity to contest that and some opportunity to argue why they should be able to maintain those things. And here you have a situation where a person is really losing their home and without the ability to contest that.

Cheryl Milne:

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It seems so contrary to what we want to do in terms of accommodating refugees and ensure that they come to Canada and feel safe here and can be productive and establish sort of a permanent home. I understand that some of the reason is, you know, what is behind this is a suspicion that refugees aren't legitimate, that they're maybe trying to defraud Canada.

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But if someone's been here for 30 years, it seems that's an unlikely situation.

Prasanna Balasundaram:

100%, Cheryl. So, we have in our record on that particular challenge, comments from the minister at the time that clearly demonstrate the purpose of introducing this connection between the loss of convention refugee status and the automatic loss of PR was animated by this concern of bogus refugees.

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This idea that there were refugees who came to Canada, made fraudulent claims, received PR status, and then immediately returned to their home countries, where they would enjoy sort of the benefits of being tied to Canada, including obtaining certain social benefits and such. It's exactly as you say. That, however legitimate pursuing that aspect of fraud might be,

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this government or rather this law is clearly overbroad in capturing long-term permanent residents who clearly have demonstrated that there is no aspect of fraud related to their claim. And so that's part of the fundamental justice arguments is that they're over broad and we hope that there will be some traction there on that point.

Cheryl Milne:

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And the Asper Center has intervened on the issue of Section 12, that it is cruel and unusual treatment for the government to automatically cessate or remove the permanent residency without really tearing people apart from their families.

Prasanna Balasundaram:

That's exactly right, and it's a very important intervention. Again, part of that...

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underscores the lack of procedural protection afforded to refugees and non-citizens. As I mentioned, you know, what is at stake is really a loss of home for the people that have been affected, and yet there is no procedure afforded to contesting that. And really, I think that drives home this idea of cruel and unusual treatment of these non-citizens in that context.

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So yeah, it's a very important intervention on the Asper Centre's part. And I think it really contextualizes the specific claim that our client is making.

Cheryl Milne:

So, you've also represented people who have been subjected to the Safe Third Country Agreement and turned away at the border or where there was attempts to turn them away at the Canada-US border. You know, there are these kinds of urgent matters that come up. There are...

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Language issues, there's lots of issues. So, what are some of the biggest challenges you face when representing non-citizens who have had their Charter rights breached?

Prasanna Balasundaram:

I think sort of the biggest challenge until very recently, as I mentioned, has been the jurisprudential landscape. There were just really very few pockets within which you could reasonably advance a Charter claim with the hope of some success.

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And as I said, I think we're in a moment now where there is a great deal of hope. And so, I think that challenge at least has been somewhat addressed, but it remains to be seen sort of how the courts are going to treat the development of the jurisprudence in the next really three to five years. The second challenge I would say is evidentiary. As you mentioned, these are...

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situations that arise sometimes in the context of some very quick administrative decisions in which there are very significant decisions being made. So someone being turned away at the border who has the potential of facing refoulement and having their life and security of person interests engaged at that moment.

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And so, there's an evidentiary challenge there in terms of counsel, being able to meaningfully connect with the person to try and understand their situation, to draft compelling affidavits that

really capture all of the complexity of that individual person's circumstances. To do so oftentimes where you're using an interpreter, you're not physically present with the client.

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So, there's sort of, as you can imagine, inherent sort of challenges in that particular circumstance. And really, I think, because the jurisprudential landscape has been quite challenging, counsel who've been attempting to advance claims for non-citizens really have to develop a much deeper, robust evidentiary record in the hopes that that would have sort of the persuasive effect on the court. And so you're relying on expert...

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experts to come forward. You know, we're fortunate we've had Professor Macklin come forward as an expert on various topics of international refugee practice or comparative international refugee practice. But we are oftentimes relying on healthcare professionals to underscore the mental health impact. We have to usually come together and put this evidentiary record within relatively short...

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timelines. And one of the challenges associated with that is really it's the state that has access to a lot of data with respect to the treatment of non-citizens. So even something as simple as the number of removals at the border as a result of the Safe Third Country Agreement or other practices and policies that are in place.

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And so, accessing that data to really try and flesh out the full scope of a problem can be challenging. And so that's one of the other, I think, big challenges that we encounter.

Cheryl Milne:

So you mentioned the Safe Third Country Agreement case, the challenge there. We spoke with Professor Audrey Macklin about the case and sort of the legal arguments. Could you tell us about your work on that challenge?

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and your views on its constitutionality relative to, well, section seven, the Supreme Court did decide on that issue, but we have the section 15 issue now is still being litigated.

Prasanna Balasundaram:

Yeah, so in terms of our involvement in that case, our clinic represented two of the individual applicants in that case. So, we represented a woman who was fleeing...

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gender-based violence in El Salvador. And we were also representing a young woman who was, had a well-founded fear of persecution on the basis of her ethnicity, as well as imputed political opinion with respect to a potential return to Ethiopia. And so, we were involved from the outset on that challenge. We worked closely with the public interest standing parties.

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So, the Canadian Council for Refugees, the Canadian Council of Churches and Amnesty International. We worked closely and collaboratively with counsel for the Public Interest Parties in terms of developing the record, in terms of formulating the legal arguments. And we went up from the federal court to the federal court of appeal and ultimately to the Supreme Court of Canada. And...

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I'd say sort of there were some positives and negatives to come out of the Supreme Court decision. The negative, of course, was that we weren't successful in establishing that there was a Section 7 violation by virtue of the operation of the Safe Third Country Agreement. But I think there were some silver linings there. The Supreme Court clarified...

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the application of Section 7 in the refugee and immigration context. You'll recall at the outset I'd said sort of the development of the jurisprudence was such that it had pushed Section 7 engagement to the very end of the process where someone was facing imminent removal from Canada. The Supreme Court said, hey, actually, this was based on a misunderstanding of some of the commentary that we had noted in some cases before the Supreme Court...

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and properly clarified that engagement could occur prior to removal, and in that way, brought the jurisprudence in line with the broader Section 7 jurisprudence with respect to how criminal law operates and extradition operates. So, they reaffirmed the application of the Bedford framework to engagement. And they also properly sort of clarified where...

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certain safety valves should be evaluated. So, as you know, Cheryl, the Immigration and Refugee Protection Act is a complex interrelated scheme. And so, the Supreme Court said, hey, if you're looking at certain applications and processes, you want to see whether or not they prevent engagement in the engagement prong of the framework. And then you might want to look at safety valves in the context of...

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curative provisions that may cure a potential Charter breach when you're looking at the fundamental justice prong of the framework. And so that, I think, did a lot to open up the potential for Charter claims in this area. I think one of the question marks is really how to properly evaluate curative...

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provisions in the IRPA. So really the idea of safety valves took on prominence as the case went up through the appellate courts. So, it was a federal court of appeal in particular that really focused on the availability of safety valves. And so, this was something that the Supreme Court took up. And there wasn't, unfortunately, a great deal of evidence on...

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the meaningful availability of safety valves in the record. Our evidentiary record was robust. It was sort of the best record that we could put together at the time, but we didn't really anticipate sort of the prominence with which safety valves would play a role in the ultimate disposition of the case. And so, what that opens up is really, you know, I think some litigation that is...

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going to happen to determine, you know, the effectiveness of these safety valves and the degree to which safety valves can temper some of the constitutional issues that the safe third country agreement and other aspects of the IRPA may raise.

Cheryl Milne:

So just to maybe oversimplify a little bit, when we're talking about safety valves, we're really talking about ways in which a claimant could...

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have the government kind of look at their circumstances and re-evaluate. So, sort of some other, like we talked about, I think, with Professor Macklin, an application for humanitarian compassionate considerations to waive certain requirements or some other kind of hearing that even though they're down a certain track where they might be removed, they might have an opportunity to convince the government they shouldn't be. And that's kind of what we're talking about, about safety valves. Is that right?

Prasanna Balasundaram:

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That's exactly right. So, a humanitarian and compassionate application, that's been pointed to as an important safety valve, but there are question marks as to whether they are available. So, there are certain specific statutory bars that come down in certain contexts that prevent people from accessing H & C's. Then there's also a question of meaningful accessibility. So, H & C's

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can be quite onerous to put together, they're time consuming to put together, and there's been a great deal of delay in the processing of those applications. So, there's again a question mark about sort of whether those are meaningful. There are other safety valves that the courts have pointed to. So, for example, one of them is a temporary resident permit. And again, the question is really,

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whether a temporary resident permit can be a meaningful safety valve in the context of, for example, someone having lost their permanent resident status. Is that an equivalent sort of, does that temper the constitutional problem that might be raised by that loss of PR when by its very nature a temporary residence permit is temporary? So, there are question marks there.

Cheryl Milne:

A number of our listeners are law students...

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and I think they'd be very interested to hear about how you engage law students in the work that Downtown Legal Services does. It's a clinic within the law faculty and so by its very nature, law students are engaged in all of the work that the clinic does. So, can you just talk about how students have been engaged in cases like the Safe Third Country Challenge?

Prasanna Balasundaram:

Sure. They have been engaged at every step of the process.

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So, in the Safe Third Country Agreement Challenge, students were involved in the very initial calls around whether or not the clients that we were representing would be appropriate test case litigants, along with counsel for the public interest parties. They were involved in discussions around the strategy and timing of bringing that particular challenge forward.

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They were deeply involved in some of the initial research questions as to the viability of that particular challenge. Deeply, deeply involved in interviewing, drafting affidavits that were submitted as part of the evidentiary record. This ranged, of course, from preparing the affidavits of our clients, but also helping the Public Interest counsel in terms of doing research and...

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and helping draft some of the expert affidavits that were ultimately submitted. I'm just going to take that one back just to clarify that they were involved in assisting the experts in terms of preparing their affidavits. They were involved in preparing our affiants for cross-examination. They attended cross-examination, involved in doing research and drafting on the factums. And of course they were present...

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at the hearings at every stage of the proceedings. So, it was an incredible experience for the students that were involved. Given how many years it took for that challenge to kind of move up, there were really cohorts of students that were involved. And to this day, you know, I'll get messages from students that were involved and just kind of reminiscing about what an incredible experience that was and how grateful they were...

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to be involved in. And I have to say, as a lawyer working in this area, you know, I benefited greatly from having students be so deeply involved. I mean, there are students who are learning constitutional law at school, at law school rather, and so their understanding of the law is current.

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They have the benefit of all of the great work that you do Cheryl at the Asper Centre and really are exposed to sort of the cutting edge of advancing Charter rights. And so, they bring this to DLS and I benefit from that because I'm exposed to sort of fresh insights, thinking from other areas of Charter jurisprudence that we can then pull on and draw into advancing the Charter rights of non-citizens. So...

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It was a phenomenal experience.

Cheryl Milne:

It's great the way our students have really crossed over. I know in the early days the ASPR Center students were learning how to do ATIP requests, which are access to information requests of the federal government to find out how many people had been turned away at the border and just, and how the review process was working for the Safe Third Country Agreement. And so, the students at the Asper Center were learning about how to do these kinds of

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of requests, which are part of the background research you need to do to decide whether to do a constitutional case. So, it was really nice to see. And they also actually helped with our intervention. So, there are lots of crossover between what we've done and what DLS has done. For those in our audience hoping to follow in your career's fascinating steps, could you speak about how you ended up in your area of law and why?

Prasanna Balasundaram:

Sure. So, first of all,

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The practice of refugee and immigration law is a very personal one for me. My family arrived in Canada as refugees. I was a young child when my parents were before the Refugee Protection Division making their claim for refugee protection. I recall my father testifying about his experiences in Sri Lanka and I remember sort of how elated we all were when we were recognized...

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as refugees and realized that we would be able to remain in Canada and continue building the lives that we had started to build here. I feel very grateful and fortunate to have been protected by Canada and sort of allowed to build a life that I have here. And so, in law school, when I was thinking of areas of law that I wanted to do while I was interested in refugee and immigration law academically...

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pulled to labor and employment law initially, and that's where I started my career. And I have to say in the early years of my practice, it wasn't something that I particularly enjoyed. And it isn't a knock on the practice of labor and employment law at all. It was just a combination of sort of what I had imagined it to be versus the reality of what it was, as well as sort of...

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some extenuating circumstances and the big one being when I was in my early years of practice, the MV Sunsea and the Ocean Lady, which were two boats that were carrying Tamil migrants, arrived off the coast of British Columbia. And so, I saw a lot of folks in the community sort of rally to provide support. I saw some incredible lawyers come forward to represent...

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them in what ended up being quite contested, protracted proceedings that involved sort of challenging immigration detention and challenging some of the state's evidence that was used to justify that. And I realized, oh, you know, that's the sort of work I would like to be doing, but I really didn't have sort of the skill set to do that. And so, I thought, you know, I was still within a few years of legal practice. And it seemed like...

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that was the right time to make a change for me. So, I ended up moving into refugee and immigration practice, as well as a little bit of crim practice as a sole practitioner. It was primarily Legal Aid Ontario funded. I did that for a number of years, and then I was fortunate to be able to get a job as a supervising lawyer here at DLS, where I've remained for the past almost 11 years now.

Cheryl Milne:

01:22:03

Well, it's a good testament to the fact that you can always switch gears and pivot to when a particular area of law doesn't really light you up and make you excited about the work. Another time we can talk about my couple of years doing real estate law, which seems like completely out of character for what I do now. But thank you so much, Prasanna, for sharing your experience and joining us today.

Prasanna Balasundaram:

01:22:31

Thank you so much Cheryl. I'm sure you know it was a great loss to the real estate bar, but we're so glad That you made the decision that you did, and we all get to benefit from that. So, thank you.

Cheryl Milne:

01:22:47

Well, that's the end of another episode of Charter A Course, which I hope you enjoyed as much as I did, especially chatting with U of T Faculty of Law colleagues. Thank you again to Professor Audrey Macklin, who joined us earlier, and a special thanks to law student, Vlad Mirel, who worked on the background research and development of this episode as a recent summer student with the Asper Center. Thanks, as always, to Tal Schreier, our producer, and thanks to our listeners for being here with us.

01:23:12

Stay tuned for new episodes coming soon on the application of the Charter to quasi-government bodies like hospitals and universities, Section 25 of the Charter and Section 35 of the Constitution as they impact the rights of Indigenous peoples in Canada. Until then, take care.

Outro Music:

Charter a course, I will Charter a course, if we can just get the country to trust us. Charter a course, Southeast, West and North.

01:23:39

And along the way we may find justice. Chater a course, I will charter a course if we can just get the country to trust us. Charter a course, southeast west and north and along the way we may find justice...

-END-