Federal Court Cour fédérale

Date: 20171012

Docket: IMM-3411-16

Citation: 2017 FC 905

Ottawa, Ontario, October 12, 2017

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

DAVID ROGER REVELL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

BC CIVIL LIBERTIES ASSOCIATION

Intervener

JUDGMENT AND REASONS

[1] The Applicant, David Revell, seeks judicial review of the decision of the Immigration Division (ID) of the Immigration and Refugee Board, dated July 28, 2016. The ID determined

that he was inadmissible to Canada on the grounds of serious criminality pursuant to paragraph 36(1)(a), and organized criminality pursuant to paragraph 37(1)(a), of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [the Act] and issued a deportation order.

[2] Mr. Revell does not dispute the allegations of inadmissibility. Rather, he challenges the provisions of the Act that provide for the deportation of long-term permanent residents like himself on the basis of serious or organized criminality as violating sections 7 and/or 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [*Charter*]. He submits that the serious consequences of his deportation – being uprooted from his family and life in Canada to be removed to the UK, a place he left as a child and has no ties – are grossly disproportionate to the objective of deporting him.

[3] Mr. Revell argues, among other things, that: his section 7 rights are engaged at the admissibility stage (i.e., the hearing to determine whether he is admissible to Canada) and by the finding of inadmissibility; the deprivation of his liberty and/or security of the person is not in accordance with the principles of fundamental justice, namely proportionality between the intent of the Act and the consequences of his deportation; there is no process or forum to conduct this proportionality assessment; and, his inevitable deportation will constitute cruel and unusual treatment contrary to section 12. He also argues that the ID erred in finding that it was bound by *Chiarelli v Canada (Minister of Employment and Immigration)*, [1992] 1 SCR 711, 90 DLR (4th) 289 [*Chiarelli* cited to SCR].

[4] Mr. Revell submits that the decision of the ID should be quashed. He submits that the issue of his admissibility should be remitted to the ID with a clear direction that the ID is not bound by *Chiarelli.* He further submits that the ID should be directed first, to find that section 7 is engaged by the finding of inadmissibility (as it did in the decision under review) and second, to assess whether the deprivation of his liberty and/or security of the person is in accordance with the principles of fundamental justice, specifically proportionality.

[5] In addition or alternatively, he submits that the Court should make the following declarations:

1. The combined effect of sections 25, 36(1), 37(1), 44(1), 44(2), 45, and 64 of the Act is inconsistent with the principles of fundamental justice because it does not provide for a proper assessment as to whether or not the removal of this long-term permanent resident would be grossly disproportionate;

2. His removal would be inconsistent with the principles of fundamental justice as being grossly disproportionate; [and/or],

3. His removal would be inconsistent with section 12 of the *Charter* as it would result in the imposition of "cruel, inhumane and degrading treatment" [*sic*].

[6] Mr. Revell raises several issues as described more fully below. As this is an application for judicial review, the primary issue is whether the ID erred.

[7] For the reasons that follow I find that the ID erred in finding that section 7 was engaged at the admissibility stage (i.e., determining Mr. Revell inadmissible to Canada and issuing a deportation order). Despite the ID's error in finding that section 7 was engaged at the admissibility stage and by Mr. Revell's circumstances, the ID did not err in finding that any deprivation of Mr. Revell's liberty and/or security of the person was in accordance with the principles of fundamental justice.

[8] The jurisprudence has established that section 7 is not engaged at the admissibility stage given that other stages remain in the deportation process. Moreover, the jurisprudence has established that deportation *per se* (i.e., in itself or without more) does not engage section 7.

[9] The ID did not err in finding that it was bound by *Chiarelli* to find that any deprivation of Mr. Revell's liberty or security of the person is in accordance with the principles of fundamental justice; the high threshold to derogate from binding jurisprudence has not been established.

[10] More generally, the current deportation regime and procedure is consistent with the principles of fundamental justice.

[11] Finally, the ID did not err in finding that Mr. Revell's deportation would not be cruel and unusual, whether or not it is characterized as treatment, and as a result, would not violate section 12.

I. Background

[12] The provisions of the Act at issue in this application for judicial review govern the deportation of permanent residents in certain circumstances.

[13] If an Immigration Officer is of the opinion that a permanent resident is inadmissible, the Officer may prepare a report pursuant to subsection 44(1), generally with a recommendation, that is then forwarded to the Minister's Delegate. The Minister's Delegate will consider whether the report is well-founded and if so, may refer the matter to the ID pursuant to subsection 44(2) for an admissibility hearing. This is commonly referred to as the "section 44 Report" or the "report stage". The ID is required to make a decision pursuant to section 45, including issuing a deportation order if satisfied that the permanent resident is inadmissible (paragraph 45(d)).

[14] A permanent resident may be found inadmissible to Canada on the ground of serious criminality if convicted of an offence or offences under an Act of Parliament for which a term of imprisonment of ten years or more *may* be imposed, or for which a term of imprisonment of six months or more *has* been imposed (paragraph 36(1)(a)). In addition, a permanent resident may be found inadmissible to Canada on the ground of organized criminality if he or she is a member of an organization believed on reasonable grounds to be or have been engaged in activity that is part of a pattern of criminal activity planned and organized by a group in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or engaging in activity that is part of such a pattern (paragraph 37(1)(a)).

[15] Pursuant to section 64 of the Act, there is no right of appeal of the ID decision for a person found inadmissible for organized crime or for serious criminality on the basis of a crime that was punished in Canada by at least six months imprisonment. In addition, a person found inadmissible for organized criminality cannot seek an exemption from the requirements of the Act on humanitarian and compassionate grounds [H&C application] pursuant to section 25.

[16] On March 28, 2008, Mr. Revell was convicted of possession for the purposes of trafficking and of trafficking in cocaine, pursuant to the *Controlled Drugs and Substances Act* [CDSA]. The charges followed an investigation into the activities of the East End Hell's Angels chapter in Kelowna, B.C. He was sentenced to five years in prison, but released on parole once eligible.

[17] In August 2008, the Canada Border Services Agency [CBSA] reported Mr. Revell pursuant to subsection 44(1) of the Act on the basis of serious criminality. Mr. Revell made submissions with the assistance of counsel regarding whether he should be referred to an admissibility hearing. In February 2009, the CBSA decided not to refer him to an admissibility hearing, although it did not communicate this to him. It appears that, due to an oversight, Mr. Revell did not receive a letter warning him that his 2008 conviction could be revisited for the purposes of his deportation if he re-offended. (Mr. Revell is not pursuing the argument he made before the ID that this amounted to an abuse of process.)

[18] At the same time, the CBSA was also investigating whether Mr. Revell was inadmissible for organized criminality. However, this investigation was not pursued at that time.

[19] In 2013, Mr. Revell pleaded guilty to assault with a weapon and assault causing bodily harm arising from several allegations by his then girlfriend. Both offences carry a maximum sentence of ten years imprisonment. Mr. Revell received a suspended sentence and two years of probation.

[20] Following Mr. Revell’s 2013 conviction, the CBSA sought submissions regarding whether he should be referred to an admissibility hearing. He was given an extension of time to retain Counsel and make submissions, which he did. The CBSA Officer made a detailed report dated February 3, 2015 and determined that Mr. Revell should be reported pursuant to subsection 44(1) of the Act on the basis of inadmissibility pursuant to paragraph 36(1)(a) for the 2013 assault convictions as well as pursuant to paragraph 37(1)(a) for the 2008 drug trafficking convictions. The Officer recommended that Mr. Revell be referred to a hearing to determine his admissibility to Canada. The Officer further recommended that the Minister proceed first on Mr. Revell’s inadmissibility pursuant to paragraph 37(1)(a).

[21] On February 6, 2015, the Minister’s Delegate found the CBSA Officer’s report to be well-founded and referred Mr. Revell to an admissibility hearing pursuant to subsection 44(2).

[22] Mr. Revell’s request for reconsideration of the Minister’s Delegate’s decision was denied. He then sought leave for judicial review of both the decision to refer him to an admissibility hearing pursuant to subsection 44(2) and the decision to refuse reconsideration. Leave was denied in both applications.

[23] The following year, in February 2016, Mr. Revell was reported and referred for an admissibility hearing on the basis of inadmissibility pursuant to paragraph 36(1)(a) for his 2008 drug trafficking conviction. Mr. Revell provided further submissions. The Officer considered the new submissions and noted that the detailed considerations set out in the February 2015 report remained applicable. The Officer acknowledged that a decision not to report Mr. Revell had been made in 2009, although no letter had been sent to advise him or warn him of the possible consequences of further convictions. With respect to Mr. Revell's submissions that pursuing his inadmissibility based on his 2008 conviction was an abuse of process, the Officer noted that Mr. Revell had been represented by Counsel at that time, he had been advised of the opportunity to make submissions and of the consequences of a section 44 report, including referral to an admissibility hearing, and that he had made such submissions. The Officer concluded that Mr. Revell would have known of the consequences of further convictions.

[24] On February 9 and 10, 2016, the ID held a two-day hearing regarding all of the section 44 referrals. Mr. Revell adduced evidence of the impact that deportation would have on him and his family. His extensive written submissions and post-hearing written submissions were considered by the ID.

[25] Mr. Revell was found inadmissible pursuant to both paragraphs 36(1)(a) (serious criminality) and 37(1)(a) (organized criminality). As a result, he has no right of appeal to the Immigration Appeal Division, nor can he make an H&C application for an exemption from the requirements of the Act.

II. The ID Decision Under Review

[26] As noted above, the ID found Mr. Revell inadmissible under both paragraphs 36(1)(a) and 37(1)(a) of the Act and issued a deportation order. The ID relied only on Mr. Revell's 2008 drug trafficking conviction, not on his 2013 assault conviction.

[27] The ID set out the allegations and noted Mr. Revell's background, including that he is a citizen of England who came to Canada in 1974 at the age of ten and is a permanent resident.

[28] The ID rejected Mr. Revell's submission that the CBSA's failure to issue a warning letter, following the first investigation in 2009 (relating to his 2008 drug trafficking charges), constituted an abuse of process. The ID noted that, ideally, a letter should have been sent, but concluded that the failure to do so was "not of such an egregious nature to lead to a finding of abuse of process."

[29] With respect to Mr. Revell's submissions that his section 7 rights were violated, the ID considered the evidence submitted, including Mr. Revell's testimony and that of family members, friends and psychologist, Dr. Karl Williams.

[30] The ID found that there "is little question that the consequences of deportation on Mr. Revell would be profound." The ID noted that: he has lived in Canada for 42 years; he has only known Canada as home; he has no relatives remaining in England; he has a close relationship with his three children and three grandchildren; he works in Provost, Alberta on a

schedule of two weeks on followed by six days off, and regularly returns to Kelowna to be with his family; and, he lives with his girlfriend of two years in Provost.

[31] The ID noted Mr. Revell's testimony that removal to England would be devastating because he would lose his family connections and his family would lose their father and grandfather. The ID cited Dr. Williams' report, which stated that there was "no doubt" that the forced separation of Mr. Revell from his family would be "devastating for him", and that without his family he "would be devoid of direction and purpose." The ID also noted that Mr. Revell's son, daughter, and girlfriend gave similar evidence: that it would "kill him" to be away from his family, that he would face significant depression, and that he may not survive the deportation due to emotional devastation. Mr. Revell testified that without his family and contacts he feared a downward emotional spiral.

[32] The ID noted that the application of section 7 requires a two-step analysis: first, to determine whether section 7 is engaged, and second, to determine if any deprivation of the section 7 right is in accordance with principles of fundamental justice.

[33] The ID relied on *Romans v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 466, [2001] FCJ No 740 (QL) [*Romans*], where Justice Dawson (then of the Federal Court Trial Division) found that deportation would deprive Mr. Romans of the right to make a fundamental personal choice and that the profound consequences of his deportation order engaged his section 7 rights. (Mr. Romans was a 35-year-old citizen of Jamaica and a permanent resident of Canada who had been in Canada since the age of two. He suffered from serious mental illness and a

substance abuse disorder, and had been ordered deported for serious criminality based on a lengthy criminal record.)

[34] The ID found that the same reasoning applied to the personal circumstances of Mr. Revell, again noting that he would be removed from his family and returned to England, where he would be a stranger with no safety net, and would face significant emotional and psychological hardship in starting over. The ID stated it had "no hesitation finding that his section 7 rights are engaged as he will be deprived of the right to make a personal choice of where to establish his home, free from state interference".

[35] The ID then considered whether this deprivation was in accordance with the principles of fundamental justice. The ID concluded that while the deportation order deprived Mr. Revell of his section 7 rights, it did so in accordance with the principles of fundamental justice. The ID again relied on *Romans*, where Justice Dawson found that the deprivation of Mr. Roman's section 7 right to security of the person was in accordance with the principles of fundamental justice, relying on *Chiarelli.*

[36] The ID acknowledged Mr. Revell's submission that the *Chiarelli* decision should be reassessed in light of trends in international jurisprudence over the intervening 25 years. The ID found that the international jurisprudence, which generally takes the position that long-term permanent residents have a right to remain in their country of residence, was inconsistent with the established Canadian jurisprudence and that *Chiarelli* remains the binding precedent.

[37] The ID also found that the deportation order would not violate section 12, in accordance with *Chiarelli*, which held that the deportation of a permanent resident who had committed a serious criminal offence was not cruel and unusual.

III. Overview of the Parties' Positions

A. The Applicant's Position

[38] Mr. Revell submits that the consequences of his deportation engage his section 7 rights. He claims that his removal to the UK would be grossly disproportionate to the intent of the Act, which is to protect public safety, stating that he does not pose such a risk. As a result, the deprivation of his section 7 rights is not in accordance with the principles of fundamental justice.

[39] Mr. Revell submits that the ID erred by relying on the Supreme Court of Canada's decision in *Chiarelli*. He argues that *Chiarelli* should be reconsidered as the threshold to do so, as established in *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 42, [2013] 3 SCR 1101 [*Bedford*], has been met. He submits that there are novel legal issues to be considered as a consequence of significant developments in the law and a change in the underlying circumstances, in particular: developments in international law and recognition by Canadian courts of its role in *Charter* interpretation; amendments to the Act that changed the removal process for permanent residents who are inadmissible; the recognition of gross disproportionality as a distinct principle of fundamental justice under section 7 of the *Charter*; and, evolving values and standards of decency in Canadian society which inform the notion of cruel and unusual treatment under section 12 of the *Charter*.

B. The British Columbia Civil Liberties Association's [BCCLA] Position

[40] The BCCLA submits that the Supreme Court of Canada's decisions in *Chiarelli* and subsequently in *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 SCR 539 [*Medovarski*] must be revisited because the Court's reliance on the common law principle that non-citizens do not have an unqualified right to enter or remain in the country to assess whether section 7 is engaged is inconsistent with contemporary principles of *Charter* interpretation. The contextual analysis to determine the scope and application of the principles of fundamental justice should be broader. The scope of the section 7 right must be determined from the perspective of the "rights-bearer" (in this case, Mr. Revell), not the state.

C. The Respondent's Position

[41] The Respondent submits that the jurisprudence is clear and is binding on the ID: section 7 is not engaged at the admissibility stage in these circumstances and, in any case, deportation would not be inconsistent with the principles of fundamental justice. The Respondent adds that Mr. Revell's deportation would not violate section 12.

[42] The Respondent argues, in the alternative, that if an assessment of proportionality between the consequences of deportation and the objectives of the Act is required, this has already occurred at least three times at the section 44 report stage, which resulted in the decision to refer Mr. Revell to an admissibility hearing. The Respondent notes that leave for judicial review of the 2015 decision to refer Mr. Revell to an admissibility hearing and of the refusal to

reconsider that decision was denied. The Respondent suggests that the present application is a collateral attack on that decision.

[43] The Respondent also suggests that Mr. Revell can pursue other options prior to his deportation, including seeking a stay of removal, at which time he could raise his *Charter* arguments.

IV. The Issues

[44] Mr. Revell raised several issues in his written submissions, some of which were slightly modified in his oral submissions. Mr. Revell also proposes several questions for certification (which are set out at the end of these reasons), some of which are general and/or hypothetical questions.

[45] The specific issues raised by Mr. Revell all relate to whether the ID erred in its findings and whether the provisions of the Act at issue, as they apply to the consequences of deportation for Mr. Revell – a long-term permanent resident who will be uprooted from his home and family, but will not face any risk of persecution or torture in the UK – violate his rights to liberty and/or security of the person and to protection from cruel and unusual treatment.

[46] I have slightly restated the issues raised by Mr. Revell based on his written and oral submissions, however, the issues continue to over-lap:

1. Are Mr. Revell's section 7 rights infringed by the ID's finding of inadmissibility and issuance of a deportation order given his circumstances as a long-term permanent resident

with no right of appeal and no right to seek an H&C exemption, and who does not assert a risk of persecution in his country of origin?

2. Did the ID err in finding that it remained bound by *stare decisis* to apply *Chiarelli?*

3. If *stare decisis* does not apply, do the principles of fundamental justice require that an independent tribunal be mandated to conduct a case-by-case assessment of all of the circumstances to determine if the deportation of Mr. Revell would be grossly disproportionate?

4. More generally, is the current deportation regime and procedure consistent with the principles of fundamental justice, and did the ID err in so finding?

5. Did the ID err in finding that the deportation process would not violate Mr. Revell's section 12 rights, as it would not constitute cruel and unusual treatment due to gross disproportionality?

V. The Standard of Review

[47] Mr. Revell submits that the reasonableness standard applies to the findings of facts about the impact of the deportation order on him and whether this impact engages his section 7 "interests". He submits that the ID reasonably found that section 7 was engaged and that the Court should show deference to this finding. He also submits that the ID was correct in this finding.

[48] Mr. Revell submits that questions related to the interpretation of the *Charter* and the interaction between the *Charter* and international law are reviewable on a standard of correctness (*Febles v Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324 at paras 24-25, [2014] 2 FCR 224, aff'd 2014 SCC 68, [2014] 3 SCR 431 [*Febles* (FCA)]; *Doré v Barreau duQuébec*, 2012 SCC 12 at para 43, [2012] 1 SCR 395 [*Doré*]).

[49] He submits that the issue of whether the application of section 7 is in accordance with the principles of fundamental justice (at stage 2) and whether section 12 has been violated are questions of constitutional law to be determined on the correctness standard.

[50] The Respondent submits that the standard of review, whether correctness or reasonableness, does not make any difference; the decision is both reasonable and correct.

[51] In my view, both parties' submissions lack clarity on the applicable standard of review.

[52] In *Doré*, the Supreme Court of Canada stated that when a tribunal is determining the constitutionality of a law the standard of review is correctness (at para 43). The Court noted, however, that this was not necessarily the case when determining whether the tribunal had taken sufficient account of *Charter* values in making a discretionary decision (at para 43).

[53] In this case, Mr. Revell claims that the provisions of the Act, as applied to him, violate his section 7 and 12 *Charter* rights. He is not claiming that *Charter* values or his *Charter* interests were not taken into account and were not proportionately balanced by an administrative

decision-maker. The applicable standard of review is correctness because he alleges that his+ Charter rights have been infringed.

[54] If Mr. Revell's section 7 rights are engaged by the finding of inadmissibility, the determination at the second stage, which assesses whether any deprivation of liberty or security of the person is in accordance with principles of fundamental justice, is also a question of constitutional law reviewed on the correctness standard.

VI. Are Mr. Revell's section 7 rights infringed by the ID's finding of inadmissibility and issuance of a deportation order given his circumstances as a long-term permanent resident with no right of appeal and no right to seek an H&C exemption, and who does not assert a risk of persecution in his country of origin?

[55] This issue requires consideration of three sub-issues:

- Whether section 7 can be engaged at the admissibility stage (the finding of inadmissibility and issuance of a deportation order);
- If so, whether section 7 is engaged in these circumstances; and,
- If section 7 is engaged in these circumstances, whether any deprivation of liberty or security of the person is in accordance with the principles of fundamental justice.

A. The Applicant's Submissions

[56] Mr. Revell argues that section 7 is engaged by the finding of inadmissibility and the issuance of a deportation order in his case. He submits that the jurisprudence does not preclude finding that section 7 is engaged at an earlier stage than actual deportation. Mr. Revell equates

the finding of inadmissibility with his deportation; he appears to view his deportation as inevitable.

[57] Mr. Revell argues that the ID's determination that section 7 is engaged in his circumstances should be given considerable deference because it is based on a careful assessment of the facts.

[58] Mr. Revell relies on *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*] which establishes that the liberty or security of the person interests can be engaged in a non-criminal context. In *Blencoe*, the Court found that the liberty interest is not restricted to freedom from physical restraint (such as imprisonment), and is engaged "where state compulsions or prohibitions affect important and fundamental life choices" (at paras 49-54) and that the security of person interest may encompass serious state-imposed psychological stress (at paras 56-57).

[59] He also relies on *Romans*, noting that Justice Dawson applied *Blencoe* to conclude that Mr. Romans' liberty interests were engaged by the deportation process as it prohibited him from making the "fundamental personal choice to remain in Canada", and that the consequences of the deportation order were profound (at para 22).

[60] Mr. Revell points out that in *Romans v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 272, [2001] FCJ No 1416 (QL) [*Romans FCA*] the Federal Court of Appeal accepted that section 7 was engaged by deportation "for the sake of discussion", although

the Court of Appeal also found that the deprivation of the section 7 right was in accordance with the principles of fundamental justice, based on *Chiarelli*.

[61] Mr. Revell notes that in *Chiarelli* the Supreme Court of Canada did not determine whether deportation engages section 7 rights. Although the Supreme Court of Canada stated that deportation "in itself" does not engage section 7 in *Medovarski* (at para 46), Mr. Revell argues that the Court relied on the existence of an H&C application to find that there was no breach of the principles of fundamental justice even if section 7 were engaged.

[62] Mr. Revell submits that the jurisprudence supports his position that section 7 is engaged by the consequences of his deportation. In addition to *Romans*, he points to *Powell v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1120, [2004] FCJ No 1538 (QL), aff'd 2005 FCA 202, 255 DLR (4th) 59 [*Powell*], where Justice Gibson concluded that section 7 rights were engaged in the deportation of a permanent resident on the basis of inadmissibility for serious criminality (at para 17). The Federal Court of Appeal affirmed the decision, but without deciding whether section 7 was engaged.

[63] Mr. Revell also points to several other cases to demonstrate that the section 7 liberty or security of the person interests may be engaged in a range of circumstances including: the determination of whether a person is a Convention Refugee in *Singh v Canada (Minister of Employment & Immigration)*, [1985] 1 SCR 177, 17 DLR (4th) 422 [*Singh*]; the determination of whether removal places a person at risk of torture upon return to his or her country in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3 [*Suresh*]; and

the impact of a security certificate in *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 SCR 350 [*Charkaoui*].

[64] Mr. Revell notes that in *Charkaoui* the Supreme Court of Canada clarified that while it had held in *Medovarski* that deportation "of a non-citizen in itself" does not engage section 7 (at para 16, emphasis added in *Charkaoui*), that did not mean that deportation in the immigration context was immune from section 7 scrutiny (at para 17). The Court noted that "some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture" may engage section 7 (at para 17).

[65] Mr. Revell acknowledges that in *B010 v Canada (Minister of Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 [*B010*], the Supreme Court of Canada stated that "s. 7 of the Charter is not engaged at the stage of determining admissibility" (at para 75). However, he submits that this is *obiter* and, when read in the context of the whole paragraph, the Court is simply affirming that the mere fact that the consequence of an inadmissibility determination is the issuance of a deportation order and is not, in itself, sufficient to engage section 7; more is required.

[66] Mr. Revell also relies on *Savuntharararasa v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 51, [2017] 1 FCR 318 [*Savuntharararasa*], where the Federal Court of Appeal cautioned that the Federal Court "must be mindful of the need to properly analyze at the first stage of the section 7 analysis whether the removals scheme imposes limits on the security of the person, thus engaging section 7 of the *Charter*" (at paras 28-30). He

submits that, although the Court found that section 7 is not engaged where there are subsequent proceedings to assess risk, the decision supports the view that an assessment of whether section 7 is engaged should be conducted at the earlier stage.

[67] Mr. Revell submits that if deportation poses a risk of persecution or torture, then the section 7 assessment can be conducted before removal at the Pre- Removal Risk Assessment [PRRA] stage. However, where there are other consequences which will not be assessed at the later stage, as in his case, the section 7 assessment must be conducted at an earlier stage and must assess broader risks. He submits that the ID is the appropriate tribunal to conduct a case-by-case assessment of the consequences of deportation and erred in not doing so.

[68] Mr. Revell notes that he grew up in Canada and all his family and social ties are in Canada; he has no ties or connections in England; he would not be able to return to Canada without permission; he cannot be sponsored by a spouse because he is inadmissible; he is not eligible to seek an exemption from the requirements of the Act on H&C grounds; and, the psychological evidence establishes that he will suffer serious harm upon removal. He argues that his liberty interest is engaged because the decision to stay with his family in the country where he grew up is a fundamental personal choice. He argues that his security of the person interest is engaged by the serious psychological harm that would be caused by his deportation, which goes beyond the "stress and anxiety" that was found insufficient to engage section 7 in *Blencoe*.

[69] Mr. Revell argues that the ID reasonably (and correctly) found that section 7 was engaged and that this finding should not be disturbed. However, the ID erred in finding that it

was bound by *Chiarelli* and that the deprivation of his liberty and security of the person was in accordance with principles of fundamental justice. Mr. Revell submits that the evidence demonstrates the devastating impact of deportation on him which is grossly disproportionate to the objective of deportation, which is to protect public safety.

B. The BCCLA's Submissions

[70] The BCCLA submits that the state inflicted harm of deportation, which will uproot Mr. Revell from his home and life in Canada, impairs his section 7 rights. Regardless of his citizenship, Canada is his home country.

[71] The BCCLA submits that the scope of the section 7 right must be considered from the perspective of the "rights-bearer" (in this case, Mr. Revell) and not the state. The BCCLA submits that in *Chiarelli,* the Court found that the contextual analysis required to determine whether section 7 is engaged, including the individual's circumstances and the circumstances of their offences, was not constitutionally relevant.

[72] The BCCLA submits that the Supreme Court's reliance on a single common law principle in *Chiarelli*, which the Court characterized as the "most fundamental principle of immigration law" – that "non-citizens do not have an unqualified right to enter or remain in the country" – to determine the scope of the principles of fundamental justice under section 7 of the *Charter* is inconsistent with contemporary principles of section 7 interpretation. Reliance on a common law principle cannot pre-empt an inquiry into the impact of state conduct on the rights of individuals and does not resolve whether deportation, in certain circumstances, violates

section 7 of the *Charter*. Moreover, Mr. Revell does not assert that non-citizens have an unqualified right to enter Canada. Therefore, reliance on this principle does not respond to his position, which is, that in the particular circumstances of his life and situation, deportation would violate his *Charter* rights.

[73] The BCCLA submits that both *Chiarelli and Medovarski* should be revisited.

C. The Respondent's Submissions

[74] The Respondent submits that the ID erred in relying on *Romans* to find that section 7 was engaged, despite that the Court had noted in *Romans* that the question of whether deportation engages section 7 of the *Charter* was "unsettled" (at para 16). The law has since been settled.

[75] The Respondent emphasizes that deportation *per se* does not engage section 7 of the *Charter*, as held in *Medovarski* and subsequent decisions. It is the risk of persecution or torture on removal, and not removal itself, that engages section 7. The Respondent further submits that section 7 of the *Charter* is not engaged at the admissibility stage and could only possibly come into play at the time of removal.

[76] The Respondent submits that *Chiarelli* remains binding and points to *Torre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 591, [2015] FCJ No 601 (QL), aff'd 2016 FCA 48, [2016] FCJ No 162 (QL) [*Torre*] and *Stables v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1319, [2013] 3 FCR 240 [*Stables*] where the Court reviewed the relevant jurisprudence, including *Chiarelli* and *Medovarski* and the Federal Court of Appeal's decision in

Poshteh v Canada (Minister of Citizenship and Immigration), 2005 FCA 85, [2005] 3 FCR 487 [*Poshteh*].

[77] The Respondent notes that the more recent jurisprudence reinforces that section 7 of the *Charter* is not engaged at the stage of determining admissibility (*Febles (FCA), B010, Poshteh, Stables*, *Torre* and *Brar v Canada (MPSEP),* 2016 FC 1214, [2016] FCJ No 1241 (QL) [*Brar*]).

[78] The Respondent reiterates that ‘something more’ than deportation is required to engage section 7 and that Mr. Revell’s personal circumstances would not be sufficient to constitute ‘something more’.

[79] The Respondent submits that the ID also erred in relying on the evidence of the psychological impact to find that Mr. Revell’s ability to make fundamental life choices was affected and as a result, his liberty and security interests were engaged; this type of impact does not engage section 7.

[80] The Respondent notes that in *Stables*, Justice de Montigny applied *Blencoe* and found that the psychological stress of prospective removal did not engage the security of the person interest, despite the fact that Mr. Stables immigrated from the United Kingdom to Canada over 40 years previously at the age of seven (at para 42).

[81] The Respondent also points to *Brar* at para 23, where Justice Mactavish distinguished the type of harm that engages section 7 of the *Charter* from the “typical consequences of

deportation", which include "family separation, loss of establishment and the need to become re-established in a country left years before".

[82] The Respondent submits that although the ID erred in finding that Mr. Revell's section 7 rights were engaged at the admissibility stage, nothing turns on this error because the ID correctly determined at the second stage of the analysis that deportation would be in accordance with the principles of fundamental justice.

D. Section 7 is not engaged at the admissibility stage (the finding of inadmissibility and issuance of a deportation order)

[83] The jurisprudence has established that a two-stage analysis is required to determine whether section 7 rights have been infringed; first, whether section 7 is engaged in the circumstances and second, whether any limits on the section 7 rights are in accordance with the principles of fundamental justice.

[84] The Supreme Court of Canada stated in *Blencoe* at para 47:

> […] before it is even possible to address the issue of whether the respondent's s. 7 rights were infringed in a manner not in accordance with the principles of fundamental justice, one must first establish that the interest in respect of which the respondent asserted his claim falls within the ambit of s. 7.

[85] The starting point is to address whether section 7 can be engaged by a finding of inadmissibility. A distinction must be drawn between an inadmissibility finding and actual deportation. Given that there are several steps in the process, a finding of inadmissibility does not automatically or immediately result in deportation.

[86] The more recent jurisprudence from the Supreme Court of Canada and the Federal Court of Appeal has held that an inadmissibility determination *does not* engage section 7. The jurisprudence has also firmly established that section 7 is not engaged by a deportation *per se* (in itself, without more). In addition, some jurisprudence appears to equate inadmissibility with deportation, and has blended the two principles from the appellate jurisprudence to find that inadmissibility *per se* (in itself, without more) does not engage section 7.

[87] In *Chiarelli,* the Supreme Court of Canada did not determine whether deportation amounted to a deprivation of life, liberty or security of person and thereby engaged section 7. The Court determined the matter solely on the basis that there was no breach of fundamental justice (at page 732). However, the Court agreed that the threshold question was whether deportation *per se* engages section 7, noting at page 731-732:

> The essence of the respondent's position is that ss. 27(1)(d)(ii) and 32(2) are contrary to principles of fundamental justice because they are mandatory and require that deportation be ordered without regard to the circumstances of the offence or the offender. The appellant correctly points out that the threshold question is whether deportation per se engages s. 7 , that is, whether it amounts to a deprivation of life, liberty or security of the person. The Federal Court of Appeal in *Hoang v. Canada (Minister of Employment & Immigration)* (1990), 13 Imm. L.R. (2d) 35, held that deportation for serious offences is not to be conceptualized as a deprivation of liberty. I do not find it necessary to answer this question, however, since I am of the view that there is no breach of fundamental justice.

[88] In 2005, in *Medovarski*, the Supreme Court of Canada reiterated the principles from *Chiarelli* and answered the question, stating at para 46:

> 46 The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: *Chiarelli v. Canada (Minister of Employment and*

> *Immigration)*, [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the *Canadian Charter of Rights and Freedoms*.
>
> [Emphasis added]

[89] In 2011, in *Stables*, the applicant, a long time permanent resident, made similar arguments to those advanced by Mr. Revell. Mr. Stables had arrived in Canada from the UK at the age of seven. He was found to be a member of the Hells Angels. The ID found him inadmissible to Canada pursuant to para 37(1)(a) and issued a deportation order. Mr. Stables did not contest the factual findings of the ID. Rather, he challenged the constitutionality of para 37(1)(a) and argued, among other things, that Ministerial relief had become illusory and, as a result, the inadmissibility provisions did not comply with subsection 2(b) or (d) or with section 7 of the *Charter*.

[90] Although the Court found that the application for judicial review could have been dismissed on the basis that Mr. Stables had not raised his *Charter* arguments before the ID, given that the ID had the jurisdiction to decide questions of law and address the *Charter* issues (at para 29), the Court proceeded to assess the merits of the *Charter* arguments. Justice de Montigny framed the issue as whether section 37 of the Act deprived Mr. Stables of his right to life, liberty and security of the person in a manner not in accordance with the principles of fundamental justice. In the present case, Mr. Revell raises the same issue.

[91] Justice de Montigny reiterated the established principle and clearly stated that a finding of *inadmissibility* "in and of itself" does not engage section 7, noting at paras 40-41:

> [40] It has been held, time and again, that a finding of inadmissibility does not, in and of itself, engage an individual's section 7 interests (see, for example, *Poshteh v Canada (MCI)*, 2005 FCA 85 at para 63, [2005] 3 FCR 487 [*Poshteh*]; *Barrera v Canada (MEI)*, [1993] 2 FC 3 at pp 15-16, 99 DLR (4th) 264. Even if it is true that the Applicant, not being a refugee, could be deported while he awaits the processing of his ministerial relief application, it would still not be sufficient to trigger the application of section 7 rights (*Medovarski v Canada (MCI)*, 2005 SCC 51 at para 46, [2005] 2 SCR 539; *Canada (MEI) v Chiarelli*, [1992] 1 SCR 711, at paras 12, 13; *Hoang v Canada (MEI)* 24 ACWS (3d) 1140 (FCA), 120 NR 193 (FCA)).
>
> [41] Such a finding is consistent with the basic constitutional foundation of Canadian immigration law, to wit, that only Canadian citizens have the absolute right to enter and remain in Canada. Non-citizens do not have an unqualified right to enter or remain in Canada, and their ability to do so is strictly dependant on their satisfaction of the admissibility criteria decided by Parliament.

[92] Justice de Montigny also referred to *Suresh*, where the Court found that removal to a country where a person would face torture engages section 7, but emphasized that it is the risk of torture and not removal which engages section 7 (at para 42) and that no such risks were advanced by Mr. Stables.

[93] Justice de Montigny added (also at para 42) that Mr. Stables did not assert any risks if returned to Scotland and that the stress of his impending removal would not be sufficient to engage his section 7 rights to security of the person, citing *Blencoe,* and noting that there was no evidence of "serious psychological incursion".

[94] In *Canada (Public Safety and Emergency Preparedness) v JP*, 2013 FCA 262, [2014] 4 FCR 371 [*JP*], the Federal Court of Appeal considered whether paragraph 37(1)(b)

(inadmissibility for people smuggling and trafficking in persons) engaged section 7 by precluding a refugee determination hearing. The Court agreed that deportation to torture may engage section 7 of the *Charter*, but noted that this issue did not arise in the case before them.

[95] Justice Mainville referred to the settled jurisprudence at paras 123-124 which has established that an inadmissibility finding does not engage section 7 because “such a finding is not the equivalent of removal or *refoulement*”.

[96] Justice Mainville explained at para 120 that, “ [a]n inadmissibility finding under paragraph 37(1)(b) does not in itself engage section 7 of the *Charter*, though I do not exclude that this *Charter* provision could eventually be engaged should the Minister exercise his discretion in a manner that leads to the deportation to torture of the concerned foreign national.”

[97] Justice Mainville concluded at para 125:

> [125] As a result, paragraph 37(1)(*b*) does not engage section 7 of the *Charter*. The issue of whether or not any of the respondents in these cases will be deported to a jurisdiction which could subject them personally to a danger of torture or to a risk to their life or to a risk of cruel and unusual punishment will, if necessary, be determined at a stage in the process under the *IRPA* which is subsequent to the inadmissibility finding. It is only at this subsequent stage that section 7 of the *Charter* may be engaged.
>
> [Emphasis added]

[98] In 2015, in *B010*, the Supreme Court found that the appellants, who were alleged to have engaged in human smuggling and were found inadmissible to Canada, were entitled to a new hearing based on the proper interpretation of paragraph 37(1)(b) of the Act. The Court went on to

address the appellants' *Charter* argument that their section 7 rights were infringed, clearly stating that section 7 is not engaged at the admissibility stage as other stages remain, adding at para 75 that section 7 is "typically" engaged at the PRRA stage:

> [75] The argument is of no assistance in any event, as s. 7 of the Charter is not engaged at the stage of determining admissibility to Canada under s. 37(1) . This Court recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the *IRPA* did not engage s. 7 , because "even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place" (para. 67). It is at this subsequent pre-removal risk assessment stage of the *IRPA* 's refugee protection process that s. 7 is typically engaged. The rationale from *Febles*, which concerned determinations of "exclusion" from refugee status, applies equally to determinations of "inadmissibility" to refugee status under the *IRPA* .

[99] Although the Supreme Court of Canada decided the appeal based on the statutory interpretation issue, the clear statement from the Supreme Court of Canada cannot be characterized, as Mr. Revell suggests, as simply *obiter* that carries less weight. Nor can Mr. Revell's interpretation of the passage – as simply an affirmation of the principle that more than the issuance of a deportation order is required to engage section 7 – be supported. The point is that other stages remain in the deportation process and it is only at the later stages that section 7 may be engaged.

[100] In 2015, in *Torre*, Mr. Torre, who was found inadmissible on the grounds of organized criminality, argued, among other things, that paragraph 37(1)(a) violated section 7, noting that he had no right of appeal nor was he eligible to seek H&C relief.

[101] Justice Tremblay-Lamer noted that the same arguments had been made in *Stables* where the Court had found that "a finding of inadmissibility does not, in and of itself, engage an individual's section 7 interests", rather it is the risk of torture upon removal that would engage section 7 (at paras 69-70, citing *Stables* at paras 40, 42).

[102] In *Torre*, Justice Tremblay-Lamer also relied on *JP*, noting at para 71:

> [71] Indeed, more recently, the Federal Court of Appeal confirmed in *JP*, above, that an inadmissibility hearing did not engage section 7 of the Charter because the foreign national was not going to be deported to a country that could subject him to a danger of torture. In fact, it is only at a subsequent stage of the inadmissibility finding that section 7 of the Charter may be engaged: *JP* at para 125.
>
> [Emphasis added]

[103] In 2016, on appeal of *Torre*, the Federal Court of Appeal found that the question certified by Justice Tremblay-Lamer regarding one of the other issues raised by Mr. Torre- whether the ID has authority to grant a stay of proceedings – did not to meet the test for certification *(Torre v Canada (Citizenship and Immigration)*, 2016 FCA 48, [2016] FCJ No 162 (QL) [*Torre (FCA)*]).

[104] The Court of Appeal went on to address the section 7 issue and clearly confirmed that the consideration of section 7 arises only at the stage of implementing, i.e., enforcing, the deportation order, noting at para 4:

> [4] In this case, the certified question does not meet those requirements. On the one hand, the appellant did not even attempt to demonstrate how his right to life, liberty and security of the person was violated by the investigation before the Immigration Division. A finding of inadmissibility alone does not suffice to infringe upon the rights granted by section 7. Only when a deportation order is implemented is it appropriate to determine

> whether an individual's right to liberty, security or even life will be put at risk by deporting him to his country of origin. When there is no infringement of any of the rights guaranteed by the Charter, the question whether relief may be granted under subsection 24(1) of this Charter is premature.
>
> [Emphasis added]

[105] More recently, in *Brar,* Justice Mactavish considered similar arguments to those raised by Mr. Revell, albeit in the context of judicial review of a section 44 report and referral to an admissibility hearing. Justice Mactavish expressed serious doubts about whether section 7 was engaged at all, noting the established jurisprudence, at para 21:

> [21] First of all, I have serious doubts that Mr. Brar's section 7 rights were engaged in this process. The jurisprudence is clear that deportation *per se* does not engage section 7 of the Charter, and that section 7 is, moreover, not engaged at the stage of determining admissibility to Canada: see, for example, *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras. 74-75, [2015] 3 S.C.R. 704; *Torre v. Canada (Citizenship and Immigration)*, 2015 FC 591, [2015] F.C.J. No. 601; *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319, [2013] 3 F.C.R. 240.

[106] *Savunthararasa*, relied on by Mr. Revell in support of his submission that section 7 rights should be considered and can be engaged at an earlier stage of the deportation process, does not, in my view, support that proposition. The Court of Appeal's comments in *Savunthararasa* focus on the later or last stages of removal – i.e. a request to defer removal.

[107] In *Savunthararasa*, the Court of Appeal considered whether this Court erred in its analysis of whether the removal process, more particularly, restrictions on the PRRA, infringed section 7. The Court of Appeal stated that the Court should consider which risks will be assessed

by the enforcement officer considering a request for a deferral of removal, and with respect to risks that would *not* be assessed at that stage, to consider whether section 7 is otherwise engaged. The Court of Appeal stated at paras 25-26:

> [25] Once the nature and scope of the risk faced has been clearly delineated, a judge should consider and make findings about which, if any, risks faced would not be assessed by an enforcement officer considering a request to defer removal.
>
> [26] If an applicant for deferral is found to face a risk of harm that would not be assessed by an enforcement officer, a judge should next consider whether in the circumstances section 7 of the Charter is engaged.
>
> [Emphasis added]

[108] In *Savunthararasa*, the Court of Appeal noted that in *Singh*, the Supreme Court of Canada found that security of the person encompassed freedom from the threat of punishment and from punishment, but had left open the question of whether a more expansive view of security of the person should be taken (at para 28). The Court of Appeal then stated at para 29:

> [29] Because the Court left this question open, in the context of a claim asserting a broader concept of security of the person, the Federal Court must be mindful of the need to properly analyze at the first stage of the section 7 analysis whether the removals scheme imposes limits on the security of the person, thus engaging section 7 of the Charter.

[109] *Savunthararasa* guides the Court to consider whether – at the stage of removal – the risks asserted would be considered by the enforcement officer (*i.e.*, the officer considering a request for deferral of removal) and whether these other risks, including broader claims of security of the person, would engage section 7. I do not regard *Savunthararasa* as derogating from the Federal Court of Appeal and Supreme Court of Canada jurisprudence (e.g. *B010, JP, Torre (FCA)*) and

directing or suggesting that the individual's broad security of the person interests should be assessed at an earlier stage. The passage at para 29 must be read in the context of those which precede it which clearly convey that the Court is referring to the removal stage or requests to defer removal.

[110] In the event that Mr. Revell seeks a deferral of removal at a later stage of his deportation process, he may choose to reiterate his submissions regarding *Savunthararasa.*

[111] Although some jurisprudence appears to equate a finding of inadmissibility and the issuance of a deportation order with deportation (i.e. removal), or does not note the distinction, the jurisprudence which makes the distinction clearly establishes that an inadmissibility finding does not engage section 7 because other stages remain in the process. The Supreme Court of Canada confirmed in *B010* that an inadmissibility finding does not engage section 7. The Federal Court of Appeal made the distinction and the same finding in *JP* and in *Torre (FCA)*. Moreover, the jurisprudence is clear and consistent in emphasizing that deportation *per se* – i.e., on its own, in itself, without more, such as the risk of torture – does not engage section 7.

[112] Mr. Revell has been found inadmissible and a deportation order has been issued, but he is not facing imminent deportation. Other steps remain in his deportation process. However, Mr. Revell appears to equate his inadmissibility finding with his deportation because, in his view, deportation is inevitable and the other steps in the process will not assess the type of consequences he faces and will not assess proportionality.

[113] The ID did not address the distinction between an inadmissibility finding and issuing a deportation order and deportation in the sense of removal. The ID did not indicate whether its finding that section 7 was engaged in the circumstances was based on an assumption that the subsequent steps in the deportation process would not prevent Mr. Revell's deportation. The ID may have failed to turn its mind to the subsequent steps and simply equated the inadmissibility finding with deportation.

[114] In any event, the ID erred in finding that Mr. Revell's section 7 rights were engaged at the admissibility stage. The ID failed to acknowledge the jurisprudence which has established that section 7 is not engaged at the stage of determining inadmissibility.

E. Deportation per se does not engage section 7; the ID erred in finding that Mr. Revell's circumstances engaged section 7

[115] Even if Mr. Revell's inadmissibility finding and deportation order were presumed to lead to his eventual deportation, or can be equated with deportation, section 7 may only be engaged if the consequences of the deportation go well beyond "deportation *per se*".

[116] In *Charkaoui*, the Court clarified that its comment in *Medovarski* did not mean that proceedings related to deportation in the immigration context are immune from section 7 scrutiny, as "some features associated with deportation" may engage section 7 (at para 17). The jurisprudence has established that the prospect of persecution (*Singh*) or torture (*Suresh*), or detention in the course of the security certificate process (*Charkaoui*) may engage section 7 rights. Significantly more than deportation is required; *i.e.*, removal, on its own, will not engage

section 7. The consequences or implications of removal must take the deportation beyond the "typical" consequences in order to engage section 7.

[117] Mr. Revell submits that the evidence demonstrates that the consequences of his removal are sufficiently serious and would engage his security of the person and liberty interests in accordance with *Blencoe*.

[118] In principle, psychological stress or harm can engage section 7 rights. However, the nature of the stress or other psychological impact must be the result of state actions and the impact must be serious.

[119] In *Blencoe,* the Supreme Court of Canada held that "[t]he liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint" (at para 49). The Court referred to earlier jurisprudence where it had held that the liberty interest is engaged where "state compulsions or prohibitions affect important and fundamental life choices" (at para 49).

[120] The Court also addressed the security of the person interests, noting, at para 56, that it "encompasses serious state imposed psychological stress". However, the Court clarified that not all state interference with a person's psychological integrity will engage section 7, emphasizing, at para 57, that the "psychological prejudice must be <u>serious</u>" (emphasis in original).

[121] In *Blencoe*, the Court concluded that psychological harm caused to Mr. Blencoe was not sufficiently serious and did not engage his section 7 rights, noting at para 97 that "[f]reedom

from the type of anxiety, stress and stigma suffered by the respondent in this case should not be elevated to the stature of a constitutionally protected s. 7 right."

[122] Similarly, in *Medovarski*, the Court rejected the submission that the stress of being removed from her partner infringed Ms. Medovarski's security of the person and liberty to make life choices.

[123] In *Brar,* the Court addressed similar arguments to those raised by Mr. Revell, albeit in the context of an application for judicial review of the section 44 report and the recommendation to refer Mr. Brar to an admissibility hearing. The Court found that the serious consequences alleged by Mr. Brar, who would be removed to India and would not face any risk of persecution or torture, were the typical consequences of deportation, noting at para 23:

> [23] There has never been any suggestion that Mr. Brar is at risk in India. Indeed, the types of harm that Mr. Brar asserts will befall him if he is removed from Canada are typical consequences of deportation including family separation, loss of establishment and the need to become re-established in a country left years before. This distinguishes Mr. Brar's situation from cases such as *Charkaoui*, above, where the named individual's liberty interests had been affected by his detention under a Security Certificate, and *Suresh v. Canada (Minister of Citizenship and Immigration),* 2002 SCC 1, [2002] 1 S.C.R. 3, where individuals faced the prospect of deportation to torture.

[124] The reality is that there will always be consequences of deportation beyond the fact of removal to the country of origin which are adverse and unwanted by the person affected and those that they may be leaving behind in Canada. However, the nature and degree of the consequences of deportation must go significantly beyond the typical consequences of deportation to engage section 7.

[125] The jurisprudence which has found that section 7 may be engaged by deportation highlights that the consequences of deportation must be significant and focuses on risks of detention, torture and persecution. These are not the type of risks faced by Mr. Revell.

[126] Although *Blencoe* establishes that security of the person and the liberty interest should be interpreted more broadly and encompass psychological harm, no examples have been provided to the Court of jurisprudence, other than *Romans*, where such an impact has been found to engage section 7 in the deportation context.

[127] With respect to Mr. Revell's security of the person interests, the evidence regarding the psychological impact of deportation falls short of establishing that Mr. Revell would come to some serious psychological harm or that he would harm himself. His family members predict a serious emotional impact. Dr. Williams states that "there can be no doubt that Mr. Revell's enforced separation from his family by virtue of deportation would be devastating for him" and "[w]ithout his family he would be devoid of direction and purpose." However, Dr. Williams' report also notes that while Mr. Revell would experience "enormous stress" if deported, "there is no evidence of a thought disorder", "his overall anxiety levels were normal", and "there is no evidence of diagnosable personality disorder or significant personality aberration".

[128] With respect to Mr. Revell's submission that his deportation will impact his liberty interest in that it will take away the freedom to choose to live in Canada, this is the reality of deportation.

[129] Removal from Canada – if and when it happens – will infringe Mr. Revell's ability to make a choice about where to live. He will be uprooted from his family, friends, and work and returned to the UK where he has no or few ties and this will cause him emotional distress. These are the unfortunate consequences of deportation – to be removed from work, family and friends and life in general in Canada.

[130] In finding that Mr. Revell's circumstances engaged section 7, the ID erred in relying only on *Romans* and in finding that in the circumstances, the finding of inadmissibility engaged Mr. Revell's liberty and security of the person rights. The ID did not address the jurisprudence which has found that deportation *per se* does not engage section 7 and that section 7 may be engaged where the consequences are more significant (e.g. where there is a risk of detention, torture or persecution).

F. If section 7 were engaged in these circumstances, any deprivation or limit on Mr. Revell's liberty and/or security of the person is in accordance with the principles of fundamental justice

[131] The ID's error in finding that section 7 could be engaged at the admissibility stage, which the ID may have erroneously equated with deportation, and its error in finding that section 7 was engaged in Mr. Revell's circumstances, does not require the decision to be quashed and remitted for redetermination given that, as explained below, the ID correctly found that any deprivation of liberty and/or security of the person was in accordance with the principles of fundamental justice.

[132] In *Chiarelli,* Mr. Chiarelli argued that the provisions of the Act which resulted in finding him inadmissible and in issuing a deportation order were contrary to the principles of fundamental justice because they were mandatory and did not have regard to his particular circumstances. The Court's contextual analysis to identify the scope of the principles of fundamental justice focused on the "principles and policies underlying immigration law" (at 733). The Court found that the "most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country". The Supreme Court of Canada found that the conditions imposed on a permanent resident, which include that he or she not be convicted of a serious offence, is a legitimate non-arbitrary choice by Parliament and that deportation of those who breach this condition is not a breach of principles of fundamental justice.

[133] In *Medovarski*, the Supreme Court of Canada found that deportation "in itself" cannot implicate the non-citizen's section 7 rights and added at para 47,

> 47 Even if liberty and security of the person were engaged, the unfairness is inadequate to constitute a breach of the principles of fundamental justice. The humanitarian and compassionate grounds raised by Medovarski are considered under s. 25(1) of the *IRPA* in determining whether a non-citizen should be admitted to Canada. The *Charter* ensures that this decision is fair: e.g.*, Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817. Moreover, *Chiarelli* held that the s. 7 principles of fundamental justice do not mandate the provision of a compassionate appeal from a decision to deport a permanent resident for serious criminality. There can be no expectation that the law will not change from time to time, nor did the Minister mislead Medovarski into thinking that her right of appeal would survive any change in the law. Thus for these reasons, and those discussed earlier, any unfairness wrought by the transition to new legislation does not reach the level of a Charter violation.

[134] Contrary to Mr. Revell's submission, the Court's finding in *Medovarski* – that the deportation did not engage section 7 – was not based on the availability of an H&C application for Ms. Medovarski. The Court relied on *Chiarelli* and reiterated that the principles of fundamental justice *do not* mandate the provision of a compassionate appeal. The fact that H&C relief is not available to Mr. Revell does not undermine the Court's finding that deportation does not breach principles of fundamental justice.

[135] In *Stables*, Justice de Montigny also rejected the argument that the Court has upheld the inadmissibility provisions due to the availability of ministerial relief, finding that pre-removal access to Ministerial relief is not a legal principle or principle of fundamental justice (at para 55).

[136] Justice de Montigny reviewed the steps in the deportation process, including the opportunity to make submissions at the section 44 stage, the hearing before the ID, the opportunity to apply for PRRA and the availability of an application for judicial review of the decision at each step. Justice de Montigny found, at para 56, that the process leading to removal – from the referral to an admissibility hearing to the enforcement of a deportation order – as a whole, is consistent with principles of fundamental justice.

[137] Justice de Montigny concluded that the deportation process did not infringe Mr. Stables section 7 rights because he would not face the risks section 7 is designed to protect against, noting at para 59,

> [59 I have already outlined the various steps that must be satisfied by the Respondent before an applicant can be removed for reason of inadmissibility. It is true that Mr. Stables, not being a Convention refugee, would have to demonstrate that he is a person

> in need of protection to benefit from the principle of non-refoulement set out at s. 115 of *IRPA*. That does not, however, detract from the fact that he will not be removed to a country where his life, liberty or security would be imperiled, and those are the very rights that section 7 of the Charter is meant to protect.
>
> [Emphasis added]

[138] In *Torre*, the Court found no breach of fundamental justice in analogous circumstances. Justice Tremblay-Lamer noted that although the applicant was precluded from making an H&C application, this was a "discretionary exceptional remedy. It does not set out a right or a principle of fundamental justice" (at para 76).

[139] In *Brar,* the Court considered the principles of fundamental justice in context of a judicial review of a section 44 report and referral for an admissibility hearing. Mr. Brar, a long-term permanent resident of Canada was convicted of offences in the United States. Mr. Brar did not assert that he would be at risk if returned to India, but argued that he would face serious consequences.

[140] Justice Mactavish addressed Mr. Brar's argument that his section 7 interests were engaged at the referral stage and that the Officer had to exercise his discretion in accordance with the principles of fundamental justice and balance the *Charter* values implicated against the statutory objectives of the Act.

[141] As noted above, Justice Mactavish cited the jurisprudence, including *B010, Torre and Stables*, and expressed serious doubts that section 7 could be engaged at that earlier stage and noted that it was well established that deportation *per se* did not engage section 7 (paras 21-25).

Nonetheless, Justice Mactavish went on to consider the second stage of the section 7 analysis, finding that even if Mr. Brar's section 7 rights were engaged, such rights are not absolute and "individuals can be deprived of their life, liberty or security of the person, provided that this occurs through a process that accords with the principles of fundamental justice" (para 26). Justice Mactavish concluded, at para 30, that the Officer's decision reflected "a proportionate balancing of the competing interests at stake" in accordance with *Doré*, at para 57.

[142] In the present case, all the same processes or steps outlined by Justice de Montigny in *Stables* at para 56 are or were open to Mr. Revell. Mr. Revell made submissions at the section 44 report stage on three occasions and the CBSA officer made detailed reports. He sought reconsideration and leave for judicial review, both of which were denied. He made extensive pre and post-hearing submissions to the ID and had an oral hearing. While the PRRA process, which would occur before his deportation, is not designed to assess the type of harm he submits he will suffer – that of his uprooting and the psychological impact of his removal – the PRRA assesses the risks that section 7 of the Charter seeks to protect against (*Stables*, para 59).

[143] The ID did not err in relying on *Chiarelli* to find that any deprivation of Mr. Revell's section 7 rights would be in accordance with the principles of fundamental justice. Although the ID did not refer to the more recent jurisprudence, its reliance on *Chiarelli* is further supported by the more recent jurisprudence, as noted above.

VII. Did the ID err in finding that it remained bound by *stare decisis* to apply *Chiarelli*?

A. *The Applicant's Submissions*

[144] Mr. Revell submits that the ID erred by concluding that it was bound by *Chiarelli* to find that his deportation was consistent with the principles of fundamental justice. He submits that in *Chiarelli*, the Supreme Court of Canada assessed fundamental justice in an outdated context defined only by the rights of non-citizens at common law, i.e., that non-citizens have no unqualified right to enter or remain in Canada.

[145] Mr. Revell points to *Bedford*, where the Supreme Court of Canada set out the circumstances in which a lower tribunal or court is not bound by previous *Charter* decisions (at para 42).

[146] Mr. Revell argues that major developments in *Charter* jurisprudence – including the recognition of gross disproportionality as a distinct principle of fundamental justice – and international law justify the reconsideration of *Chiarelli.*

[147] He adds that the changes in immigration law since *Chiarelli* must be taken into account. As a result of changes to the Act, he has no right to an equitable review either by way of an appeal to the Immigration Appeal Division or to consideration of an H&C exemption.

[148] Mr. Revell submits that the *Charter* must be interpreted in accordance with international law and can provide a basis for departing from otherwise binding jurisprudence. The Supreme

Court of Canada now recognizes that the *Charter* and other statutes should be interpreted and applied in compliance with international human rights norms and instruments. In *Chiarelli*, the Supreme Court did not consider applicable international human rights norms, which now recognize limits to the authority of states to remove non-citizens and have evolved to require a proportionality assessment prior to the removal of long-term permanent residents.

[149] Mr. Revell points to *Ontario (AG) v Fraser*, 2011 SCC 20 at para 92, [2011] 2 SCR 3 where the Supreme Court found that "*Charter* rights *must* be interpreted in light of Canadian values and Canada's international and human rights commitments" (emphasis in original).

[150] Mr. Revell acknowledges that the ID or the Court is not bound to follow decisions of International tribunals, which may be based on different facts and which may rely on articles of Conventions to which Canada is not a signatory. Rather, he submits that international jurisprudence supports his proposition that long-term permanent residents may not be deported without a proper proportionality assessment, and that sections 7 (and 12) of the *Charter* must provide at least that level of protection.

[151] Mr. Revell notes the jurisprudence of the European Court of Human Rights and the UN Human Rights Committee, which has found that, in certain circumstances, the deportation of long-term permanent residents will violate international human rights norms and that the state cannot remove a long-term resident without balancing the objectives of deportation with the consequences. He submits that this approach is consistent with the principle of gross disproportionality now recognized by Canadian Courts.

[152] Mr. Revell provides several examples where the UN Human Rights Committee found that deportation of long term permanent residents of a country required consideration of factors other than that removal reflects the enforcement of immigration laws.

[153] Mr. Revell also points to decisions of the European Court of Human Rights which rely on the protection of the right to respect for family life under Article 8 of the European Convention, and the prohibition of inhuman and degrading treatment in Article 3 of the Convention.

B. The BCCLA's Submissions

[154] The BCCLA submits that the ID had the authority to derogate from *Chiarelli* and erred in not doing so. The ID is a court of competent jurisdiction pursuant to subsection 24(1) of the *Charter*, has the power to decide questions of law, and has the jurisdiction to determine *Charter* issues (citing *Stables* at para 29). The BCCLA submits that the principle of *stare decisis* is not applicable given the significant developments in the law since *Chiarelli* and *Medovarski,* including: the removal of access to an H&C exemption for persons found inadmissible for serious criminality, the development of *Charter* jurisprudence, and developments in international human rights norms and jurisprudence.

[155] The BCCLA notes that in *Bedford* (at paras 43-44) and subsequently in *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 44, [2015] 1 SCR 331 [*Carter*], the Supreme Court of Canada highlighted that *stare decisis* is not a "straightjacket" and that lower courts may reconsider the settled rulings of higher courts in limited circumstances.

[156] The BCCLA also argues that the Supreme Court resorted to a societal interest justification in its section 7 analysis in *Chiarelli* in order to preclude consideration of the interests at stake from the perspective of the rights-bearer. The BCCLA submits that this approach is not consistent with contemporary section 7 jurisprudence *(Bedford* (at paras 125-127) and *Carter* (at paras 79-80)) which establishes that societal interests, including public safety, should be considered only in the context of a section 1 justification for violation of section 7 rights.

C. The Respondent's Submissions

[157] The Respondent submits that the ID did not err in finding that it was bound by *Chiarelli.* The circumstances to permit a lower court to derogate from this precedent have not been established.

[158] The Respondent acknowledges that *Chiarelli* pre-dates the inclusion in the interpretive provisions of paragraph 3(3)(f) of the Act, which provides that the Act is "to be construed and applied in a manner that…f) complies with international human rights instruments to which Canada is signatory". The Respondent emphasizes that paragraph 3(3)(f) is limited to international human rights instruments "to which Canada is a signatory".

[159] The Respondent also notes that in *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 FCA 80 at para 15, 280 DLR (4th) 736, leave to appeal to SCC refused, [2007] CSCR no 213, 2008 CanLII 46983, the Federal Court of Appeal endorsed the Federal Court's interpretation of paragraph 3(3)(f) of the Act as a "general, interpretive provision that does not

operate to incorporate international law into domestic law. The effect of that provision is not to give international law norms status equal or superior to domestic law, or to invalidate domestic law."

[160] The Respondent adds that a decision maker is not required to analyze international law instruments. It is sufficient if the decision maker addresses the substance of the issues raised (*Morales v Canada (Minister of Citizenship and Immigration)*, 2012 FC 164 at para 41, [2012] FCJ No 160 (QL)). In the present case, the ID acknowledged the trends in the international law with respect to long term permanent residents but correctly concluded that it was bound by the domestic law.

D. The ID did not err in finding that it was bound by Chiarelli

[161] In *Bedford* and *Carter*, the Supreme Court of Canada emphasized that *stare decisis* is the rule, but the Court recognized that there were limited exceptions which would permit lower courts to revisit and derogate from established and binding jurisprudence.

[162] In *Bedford*, at para 42, the Court stated:

> In my view, a trial judge can consider and decide [1] arguments based on Charter provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if [2] new legal issues are raised as a consequence of significant developments in the law, or if [3] there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.

[163] The Court noted, at paras 43 and 44, that "the common law principle of *stare decisis* is subordinate to the Constitution and cannot require a court to uphold a law which is unconstitutional". The Court clarified that "a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach", adding that the high threshold "balances the need for finality and stability with the recognition that when an appropriate case arises for revisiting precedent, a lower court must be able to perform its full role."

[164] In *Carter*, the Supreme Court of Canada relied on *Bedford*, reiterating the rationale for *stare decisis* and noting, at para 44, that Courts could derogate from binding jurisprudence in two circumstances;

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

[165] I agree with Mr. Revell and the BCCLA that the ID has the jurisdiction to decide questions of law and would have the authority to depart from otherwise binding jurisprudence if it were to find that the high threshold to depart from it is met. I note that Mr. Revell does not appear to have made this argument to the ID in any detail, i.e., that the threshold established in *Carter* and *Bedford* to derogate from binding jurisprudence has been met, as he now argues. Although he argued before the ID that *Chiarelli* should be reconsidered, he focused on the trends

in the international jurisprudence and argued that these trends should inform the interpretation of the *Charter.*

[166] The ID relied only on *Romans,* which had relied on *Chiarelli,* to find that any deprivation of liberty or security of the person was in accordance with the principles of fundamental justice. The ID did not address the issue now raised by Mr. Revell whether *Chiarelli* should be revisited in accordance with the high threshold established in *Bedford,* likely because Mr. Revell did not raise this specific argument in his submissions to the ID.

[167] In any event, whether the ID erred in relying on *Chiarelli* requires consideration of whether the high threshold to derogate from binding jurisprudence has been met. This in turn requires consideration of what was addressed in *Chiarelli* and what has changed since *Chiarelli* was decided: i.e., whether a new legal issue has been raised that was not considered in *Chiarelli*; and/or, whether the law and circumstances have changed to fundamentally shift the parameters of the debate, which in this case would be the deportation of long-term permanent residents found inadmissible to Canada for serious criminality.

[168] In *Chiarelli*, the Court addressed whether the deportation of Mr. Chiarelli, a permanent resident of Canada, was contrary to the principles of fundamental justice because the provisions of the Act at issue mandated deportation without regard to the circumstances of the offence or the offender. The issues raised by Mr. Revell are not significantly different.

[169] I do not agree with Mr. Revell and the BCCLA that the Supreme Court of Canada's contextual analysis in *Chiarelli* was too narrow and relied only on one common law principle to identify the scope of the principles of fundamental justice. The Court stated at page 733:

> Thus in determining the scope of principles of fundamental justice as they apply to this case, the Court must look to the principles and policies underlying immigration law. The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country. At common law an alien has no right to enter or remain in the country: *R. v. Governor of Pentonville Prison*, [1973] 2 All E.R. 741; *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376.

[170] In addition to this "fundamental principle", the Court noted the distinction between citizens and non-citizens recognized in sections 6 and 7 of the *Charter* stating, "[w]hile permanent residents are given the right to move to, take up residence in, and pursue the gaining of a livelihood in any province in s. 6(2), only citizens are accorded the right 'to enter, remain in and leave Canada' in s. 6(1)" (at page 733).

[171] The Court addressed the merits of Mr. Chiarelli's argument and found, at pages 733 and 734, that Parliament "has the right to adopt an immigration policy and to enact legislation prescribing the conditions under which non-citizens will be permitted to enter and remain in Canada." One of these conditions is that the permanent resident "not be convicted of an offence for which a term of imprisonment of five years or more may be imposed." The Court held that this condition was a "legitimate, non-arbitrary choice by Parliament of a situation in which it is not in the public interest to allow a non-citizen to remain in the country." The Court added that the threshold indicates "Parliament's intention to limit this condition to more serious types of offences." I note that at that time the threshold was imprisonment for five years or more, which

has now been increased to ten years, highlighting that the condition is now further limited to more serious offences.

[172] I do not share the BCCLA's view that the Court relied on a societal interest justification (i.e., the need to keep Canadian society safe from criminals) to find that there was no breach of the principles of fundamental justice. The Court did not conflate the section 7 analysis with a section 1 justification. The Court provided a rationale why the deportation scheme was not a violation of fundamental justice (at page 734) referring to, among other things, the provisions of the Act, the distinction between section 6 and 7 of the Charter, and the threshold of serious crime. The Court expressly acknowledged that the "personal circumstances of individuals who breach this condition may vary widely" and that the applicable offences and the factual circumstances surrounding their commission may also vary in gravity.

[173] The Court explained at page 734:

> However, there is one element common to all persons who fall within the class of permanent residents described in s. 27(1) (d)(ii). They have all deliberately violated an essential condition under which they were permitted to remain in Canada. In such a situation, there is no breach of fundamental justice in giving practical effect to the termination of their right to remain in Canada. In the case of a permanent resident, deportation is the only way in which to accomplish this. There is nothing inherently unjust about a mandatory order. The fact of a deliberate violation of the condition imposed by s. 27(1) (d)(ii) is sufficient to justify a deportation order. It is not necessary, in order to comply with fundamental justice, to look beyond this fact to other aggravating or mitigating circumstances.

[174] In *Bedford*, the Supreme Court of Canada noted that the principles of fundamental justice had significantly evolved since the advent of the *Charter* and that arbitrariness, overbreadth, and

gross disproportionality had evolved organically as Courts were faced with novel *Charter* claims (at paras 95 and 97).

[175] The Court explained the meaning of gross disproportionality at para 120:

> [120] Gross disproportionality asks a different question from arbitrariness and overbreadth. It targets the second fundamental evil: the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. The rule against gross disproportionality only applies in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure. This idea is captured by the hypothetical of a law with the purpose of keeping the streets clean that imposes a sentence of life imprisonment for spitting on the sidewalk. The connection between the draconian impact of the law and its object must be entirely outside the norms accepted in our free and democratic society.

[176] In *Carter*, at para 28, the Supreme Court of Canada found that the trial judge did not err in finding that *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519, 107 DLR (4th) 342 [*Rodriguez*], did not prevent her from reviewing the constitutionality of the impugned provisions, in part because the principle of gross disproportionality had not been identified at that time. The Court agreed that the law relating to the principle of gross disproportionality had "materially advanced since *Rodriguez*" (at para 46).

[177] Similarly, gross disproportionality had not been articulated by the Supreme Court of Canada as a principle of fundamental justice at the time of its decision in *Chiarelli.* However, in its examination of the existing principles of fundamental justice, *Chiarelli* addresses a concept analogous to that which underlies gross disproportionality i.e., whether the "seriousness of the deprivation is totally out of sync with the objective of the measure" (*Bedford* at para 120).

[178] In *Chiarelli*, the Court noted that non-citizens had only a qualified right to remain in Canada, including that they not be convicted of a serious criminal offence. The Court acknowledged that the personal circumstances of the permanent resident and the nature of the offence committed may vary widely. The Court's conclusion (at page 734) that the deliberate violation of the condition to not commit a serious offence justifies a deportation order and that it is not necessary to consider other aggravating of mitigating circumstances demonstrates that the Court considered similar concepts.

[179] Mr. Revell has not raised a new legal issue. The principles of fundamental justice in general and the same concepts underlying proportionality (or gross disproportionality) were addressed in *Chiarelli* and *Medovarski*. The principles of fundamental justice, which subsequently recognized gross proportionality as such a principle, have been squarely addressed in more recent jurisprudence. The subsequent recognition of gross disproportionality as a distinct principle of fundamental justice does not require *Chiarelli* to be revisited.

[180] Mr. Revell also points to trends in international law in support of his position that the deportation of a long term permanent resident requires an assessment of the proportionality between the consequences of deportation and its objectives. Mr. Revell could not advise the Court about the practical effect of the decisions of international bodies and acknowledged that domestic law prevails.

[181] I acknowledge that the Supreme Court of Canada has recognized that principles of international law may help inform the interpretation of *Charter* rights. However, I do not agree

that *Chiarelli* should be reconsidered because the Supreme Court of Canada did not consider international human rights norms, which have subsequently evolved to recognize limits on a state's ability to remove non-citizens, despite their serious criminality.

[182] As the Respondent notes, while *Chiarelli* pre-dates the inclusion in the interpretive provisions of paragraph 3(3)(f) of the Act, this provision is limited to international human rights instruments "to which Canada is a signatory". As found by the Federal Court of Appeal in *Charkaoui*, paragraph 3(3)(f) does not elevate international law to that of domestic law.

[183] The developments in international law do not require that the principles of fundamental justice be reinterpreted in the context of deportation and are not sufficient to justify departing from the principles established in the domestic law. The ID did not err in finding that *Chiarelli* should not be reconsidered in light of international trends and that the domestic law prevailed.

[184] A high threshold must be met to derogate from binding jurisprudence. This threshold has not been met.

[185] Proportionality or gross disproportionality is now recognized as a principle of fundamental justice, but similar concepts to gross disproportionality or proportionality and related factors were addressed in *Chiarelli*, and the same or similar arguments to those raised by Mr. Revell have been raised and addressed in subsequent jurisprudence. It cannot be said that it is a new legal issue to argue that deportation that engages section 7 is not in accordance with the principles of fundamental justice, including gross disproportionality.

[186] Although the Act has been amended in several respects since *Chiarelli* was decided, including that those found inadmissible for serious criminality are now precluded from seeking an appeal or seeking an H&C exemption, the jurisprudence has established that these options are not requirements of fundamental justice (*Medovarski, Stables, Torre*). The changes include increasing the threshold for inadmissibility based on serious criminality. Moreover, the basic principles stated in *Chiarelli,* including that the principles of fundamental justice are to be determined in the appropriate context, in this case, immigration law and policy, and the distinction in the *Charter* between the rights of citizens and non-citizens continue to apply.

[187] I do not find that the "parameters of the debate" have fundamentally shifted. The context remains immigration law and policy and the criteria for the deportation of a permanent resident who is found inadmissible for organized crime and/or serious criminality. Although international trends suggest that an assessment of the circumstances of a long-term permanent resident should be conducted, international trends do not trump the domestic law.

VIII. Is the current deportation regime and procedure consistent with principles of fundamental justice?

[188] Mr. Revell raised two related questions:

- If *stare decisis* does not apply, do the principles of fundamental justice require that an independent tribunal consider all of the circumstances to determine if his deportation of Mr. Revell would be grossly disproportionate?
- More generally, is the current deportation regime and procedure consistent with the principles of fundamental justice, and did the ID err in so finding?

[189] Given that I have found that *Chiarelli* remains binding as the criteria to derogate from it have not been met, only the more general question, which has been addressed to some extent above, will be considered.

A. The Applicant's submissions

[190] Mr. Revell submits that the current deportation process does not comply with the principles of fundamental justice because there is no process or competent authority to independently conduct a proportionality assessment between the consequences of deportation and the state's objective in deportation. He submits that the ID is the appropriate forum to assess proportionality.

[191] Mr. Revell reiterates that the state's conduct in deporting him would be grossly disproportionate to the objective of deportation. He submits that the same factors that supported the decision to not to refer him to an admissibility hearing in 2009 continue to apply, yet a different decision was reached in 2015. He submits that the only purpose of his deportation is the protection of society and asserts that he poses no such risk. He submits that when balanced against the profound impact of his separation from his family, home and work, and the resulting emotional devastation, his deportation is grossly disproportionate.

[192] Mr. Revell refutes the Respondent's argument that the section 44 report stage provided an assessment of proportionality. He notes that the scope of an officer's discretion at the Section 44 Report stage is limited and the duty of procedural fairness owed is at the low end of the spectrum.

[193] Mr. Revell argues that any process to assess whether his deportation engages his section 7 rights and whether this is grossly disproportionate must provide a much higher level of procedural fairness and must clearly establish the scope of the independent decision-maker's discretion. Mr. Revell submits that the section 44 process does not meet these criteria.

B. The Respondent's submissions

[194] The Respondent submits that regardless of whether section 7 is engaged and whether a proportionality assessment should be conducted at the second stage of the analysis to determine whether any deprivation is in accordance with principles of fundamental justice – which the Respondent strongly disputes – Mr. Revell has had the benefit of a proportionality assessment at the section 44 report stage and the process for Mr. Revell has been fundamentally just.

[195] The Respondent acknowledges that the scope of the Officer's discretion at the section 44 stage is the subject of debate, but submits that in Mr. Revell's case, the Officer exercised discretion and that that the section 44 assessment and report was the equivalent to or constituted the proportionality assessment that Mr. Revell seeks.

[196] The Respondent submits that on at least three occasions, in the context of the section 44 report and referral stage, Mr. Revell was invited to make submissions about his personal circumstances and did so with the benefit of Counsel. His submissions were fully considered and the Officer exercised his discretion, as reflected in the fact that he was not referred to an admissibility hearing in 2009. The detailed reports in 2014 and 2015 demonstrate that the Officer

considered all the material submitted including the psychologist's report and the letters from friends and family.

[197] Contrary to Mr. Revell's submission that the same factors were present in 2008 as in 2015, the Respondent notes that Mr. Revell's subsequent offences were a significant factor in finding him inadmissible in 2015.

[198] The Respondent submits that the section 44 Reports in 2014 and 2015 include detailed reasons which address Mr. Revell's extensive submissions and weigh the relevant considerations both for and against a finding of inadmissibility, including the nature and circumstances of his offences and the objectives of the Act. The Respondent points to several features of the Officer's assessment and Report, including the Officer's reference to the police occurrence report which provides the details of the significant cocaine operation in which Mr. Revell was involved and the Judge's comments at sentencing with respect to Mr. Revell's association with key members of the Hell's Angels and the nature of his drug trafficking offences.

[199] The section 44 report also reflects the Officer's consideration of several positive factors, including Mr. Revell's establishment in Canada, his family ties, his guilty plea, his adherence to the terms of his probation and his participation in a rehabilitation program.

[200] The Respondent acknowledges Dr. Williams' opinion that it would be stressful, even devastating, for Mr. Revell to leave Canada, but notes that Dr. William's opinion and report was based on one interview of two-three hours and was based only on what Mr. Revell told him. The

Respondent submits that Dr. William's opinion is "worlds away from describing any mental illness".

[201] The Respondent also relies extensively on *Brar* where Justice Mactavish equated the consideration of personal circumstances at the section 44 referral stage with an adequate proportionality assessment, and found this to be in accordance with Canadian and international law (at para 28).

[202] The Respondent adds that, in any event, the consequences of Mr. Revell's deportation would not be grossly disproportionate.

C. The current deportation regime and procedure is consistent with the principles of fundamental justice

[203] In Mr. Revell's case, the section 44 assessment was very thorough. As the Respondent notes, Mr. Revell has had at least three opportunities to raise the impact of his deportation in the context of the section 44 assessments and the reports demonstrate that the Officer considered both the positive and negative factors. However, the Respondent's extensive reliance on the section 44 assessment and report stage is not directly responsive to Mr. Revell's position that the ID should assess whether his section 7 rights are engaged and whether any deprivation is in accordance with principles of fundamental justice, in particular gross disproportionality, and without being bound by *Chiarelli.*

[204] The section 44 report and recommendation and the Minister's Delegate's decision to refer a person to an admissibility hearing, which is based on the section 44 report, is an administrative decision. To the extent that discretion is exercised by the Officer and the Minister's Delegate, the reasonableness of that decision would be reviewed in accordance with the *Doré* framework. *Doré* establishes that a reasonable decision is one which reflects a proportionate balancing of *Charter* interests and values.

[205] However, the section 44 report and the Minister's Delegate's decision to refer Mr. Revell to the admissibility hearing is *not* the subject of this judicial review. Mr. Revell made extensive submissions at the section 44 stage and he sought reconsideration of the decision to refer him to an admissibility hearing which was denied and he sought leave for judicial review of the decision and the denial of reconsideration, both of which were denied.

[206] Similarly, the Respondent's extensive reliance on *Brar* does not directly respond to Mr. Revell's submissions given that in *Brar* the Court judicially reviewed the decision of the Minister's Delegate at the section 44 report stage – an administrative decision – in accordance with the *Doré* framework and found that the decision reflected a proportionate balancing of Charter interests and values. However, in *Brar*, the Court relied on and reiterated the established principle that section 7 is not engaged by deportation on its own and that the deportation of a permanent resident inadmissible for serious criminality is in accordance with principles of fundamental justice.

[207] Mr. Revell's primary submission to the Court is that the current deportation process is not in accordance with the principles of fundamental justice because there is no process to assess whether his deportation (and that of others like him who are long-term permanent residents and who face risks or harm other than persecution or torture) would be in accordance with principles of fundamental justice due to gross disproportionality.

[208] As found above, the ID did not err in relying on *Chiarelli* to find that the current deportation process is in accordance with the principles of fundamental justice.

[209] In *Chiarelli*, the Supreme Court of Canada addressed similar arguments to those raised by Mr. Revell. The Court found that there "is nothing inherently unjust about a mandatory order" (at page 734). The Court emphasized that the threshold requirement of the seriousness of the criminal offence and the deliberate violation of the condition under which the permanent resident is permitted to remain in Canada is sufficient to ensure that the resulting inadmissibility and removal of a permanent resident will not breach principles of fundamental justice. The Court acknowledged that the principles of fundamental justice should be considered in the applicable context, which in *Chiarelli* and in this case is immigration law and policy.

[210] The principle of gross disproportionality has "materially advanced" since the time when *Chiarelli* was decided (*Bedford* at paras 95, 97), however, the recognition of gross disproportionality as a distinct principle of fundamental justice does not justify derogating from *Chiarelli.* As noted above, in *Chiarelli*, the Court addressed the underlying concepts or factors that would inform an assessment of proportionality.

[211] The more recent jurisprudence has established that the deportation process as a whole is in accordance with the principles of fundamental justice. As noted above, arguments that the deportation process was not in accordance with principles of fundamental justice were rejected in *Stables* (at para 56-59), *Torre* (at para 76) and *Brar* (at paras 26-32).

[212] In *Stables*, Justice de Montigny explained at para 56:

> [56] I agree with the Respondent that when considered as a whole, the process by which an applicant could face a finding of inadmissibility and consequent enforcement of a removal order reveals that the process is consistent with the principles of fundamental justice:
>
> - The Applicant is afforded the opportunity to advance submissions why a s. 44 report should not be prepared or referred to the Immigration Division for assessment;
> - The Applicant is afforded with a hearing before the Immigration Division on the merits of the inadmissibility allegation (s. 45 *IRPA*). The Immigration Division process affords the Applicant a hearing, before an impartial arbiter, a decision on the facts and the law, and the right to know and answer the case against him, the very things that fundamental justice would require in the circumstances;
> - Prior to removal, the Applicant is afforded an opportunity to apply for PRRA to assess any alleged risks in his or her country of origin (s. 112 *IRPA*);
> - Should the PRRA determine that the Applicant is a person in need of protection, his or her removal cannot proceed unless he or she is found to be a danger to the public (s. 115(2) *IRPA*);
> - Each of the above processes is subject to this Court’s oversight by way of judicial review.

[213] The ID did not err in finding that the deportation regime was in accordance with the principles of fundamental justice. The ID did not address the extensive arguments made to this

Court, but correctly found, that based on *Chiarelli*, the deportation order (to the extent that it deprived Mr. Chiarelli of section 7 rights) did so in accordance with the principles of fundamental justice.

IX. Did the ID err in finding that the deportation process would not violate Mr. Revell's section 12 rights and would not constitute cruel and unusual treatment, due to gross disproportionality?

A. *The Applicant's Submissions*

[214] Mr. Revell submits that the ID erred in holding that it was bound by *Chiarelli* and in failing to assess whether his deportation was grossly disproportionate in the circumstances, and as a result, violated section 12 of the *Charter*.

[215] He submits that the removal of a long-term permanent resident like himself, who has all of his connections to Canada, despite compelling evidence that he does not pose a risk to society, is grossly disproportionate to the state's objective in deporting him and is cruel and unusual treatment contrary to section 12 of the *Charter*.

[216] Mr. Revell contends that he is under the administrative control of the state and that the decision to deport him is a "treatment" within the meaning of section 12. He submits that, in light of Canadians' evolving standards of decency, the deportation of a permanent resident could be cruel and unusual treatment where the consequences are sufficiently severe as to be inconsistent with current values.

[217] Mr. Revell acknowledges that in *R v Smith*, [1987] 1 SCR 1045, 40 DLR (4th) 435, the Supreme Court established that to be "cruel and unusual" a punishment or treatment must be "so excessive as to outrage standards of decency" (at 1067). He points to *Canadian Doctors for Refugee Care et al v Canada (Attorney General)*, 2014 FC 651, [2015] 2 FCR 267 where the Federal Court set out several factors that Canadian courts have considered in determining whether treatment is cruel and unusual (at para 614) and submits that these factors support a finding that his deportation would be cruel and unusual.

B. The Respondent's Submissions

[218] The Respondent submits that the ID correctly found that it was bound by *Chiarelli* in finding that there was no violation of section 12 of the *Charter*. The Respondent submits that deportation does not constitute punishment and it is not necessary to determine whether deportation is treatment, given that the removal is not "cruel and unusual".

C. The ID did not err in finding that deportation would not violate section 12

[219] In *Chiarelli,* the Supreme Court of Canada considered Mr. Chiarelli's section 12 claim, noting at 735:

> The respondent alleges a violation of s. 12 for essentially the same reasons that he claims s. 7 is infringed. He submits that the combination of s. 27(1)(*d*)(ii) and 32(2) constitutes cruel and unusual punishment because they require that deportation be ordered without regard to the circumstances of the offence or the offender. He submits that in the case at bar, the deportation order is grossly disproportionate to all the circumstances and further, that the legislation in general is grossly disproportionate, having regard to the many "relatively less serious offences" which are covered by s. 27(1)(*d*)(ii).

[220] The Court found that deportation is not punishment. The Court noted, without deciding, that deportation may come within the scope of "treatment" in section 12 (at page 735) but found it unnecessary to determine because it was not cruel and unusual, explaining at page 736,

> The deportation of a permanent resident who has deliberately violated an essential condition of his or her being permitted to remain in Canada by committing a criminal offence punishable by imprisonment of five years or more, cannot be said to outrage standards of decency. On the contrary it would tend to outrage such standards if individuals granted conditional entry into Canada were permitted, without consequence, to violate those conditions deliberately.

[221] I am inclined to the view that deportation would constitute treatment, given the scope of that term. However, it remains unnecessary to determine this because the ID correctly found that, in the circumstances, the issuance of a deportation order to Mr. Revell would not be "cruel and unusual", as was held in *Chiarelli*.

[222] Although the standards of decency have evolved in many respects over the last 25 years, I am not of the view that the issuance of a deportation order by the ID would be considered "so excessive as to outrage standards of decency".

[223] As a long-term permanent resident, the deportation order may appear harsh, and perhaps slightly disproportionate, if as he claims, he is at a low risk to reoffend and does not present any risk to public safety and given that he has called Canada home since childhood. However, this does not rise to the level of being *grossly* disproportionate or cruel and unusual.

[224] In *Bedford* at para 120, the Supreme Court of Canada explained that gross disproportionality applies only "in extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure" or is "entirely outside the norms accepted in our free and democratic society".

[225] If removed from Canada, Mr. Revell will return to the UK, where he acknowledges he does not face any risk of persecution or other similar risks. Although he will be uprooted from his life and family in Canada and returned to the UK where he has few family members remaining, these are the unfortunate, but generally typical, consequences of deportation. As noted above, the evidence regarding the psychological impact of his uprooting from Canada falls far short of establishing that Mr. Revell would come to some serious psychological harm or that he would harm himself.

[226] The ID did not err in following *Chiarelli* and in finding that regardless of whether deportation is a "treatment", it is not cruel or unusual.

X. The Proposed Questions for Certification

[227] Mr. Revell submits that the Court should certify several questions so that higher Courts can address the issues and bring clarity to the law. The Respondent opposes all of the proposed questions on the basis that none would be dispositive of an appeal.

[228] Mr. Revell proposes that the following questions be certified:

1. Does the inadmissibility hearing engage the section 7 right to liberty and security of the person when the liberty and security infringements arise from the certain uprooting of the applicant from Canada, not the possible persecution or torture to the country of nationality.

2. Does the principle of *stare decisis* preclude this Court from reconsidering the findings of the Supreme Court of Canada in *Chiarelli?*

3. Are there circumstances in which the removal of a long term permanent resident violates the principle of gross disproportionality as described in *Bedford* and *Carter*?

4. Does the current removal process as applied to a long term permanent resident comply with the procedural requirements for fundamental justice?

5. Could the removal of a permanent resident be so grossly disproportionate so as to violate section 12?

[229] In *Torre (FCA),* the Court noted the established test for a certified question at para 3:

> [3] Under subsection 74(d) of IRPA, only a serious question of general importance may be certified and thus open the possibility of an appeal from a judgment following an application for judicial review. This requirement has been interpreted by the Court several times, and the law is now well settled: to be certified, a question must be dispositive of the appeal and transcend the interests of the immediate parties to the litigation due to its broad significance: *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* [1994], FCJ No. 1637 at paragraph 4, 176 N.R. 4; *Zhang v. Canada (Minister of Citizenship and Immigration),* 2013 FCA 168 at paragraph 9, [2013] FCJ No. 764. In other words, a certified question is not to be a reference of a question to this Court, and a certified question must have been raised and decided by the court below and have an impact on the result of the litigation: *Zazai v. Canada (Minister of Citizenship and*

> *Immigration),* 2004 FCA 89 at paragraphs 11–12, [2004] FCJ No. 368; *Lai v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FCA 21 at paragraph 4, [2015] FCJ No. 125.

[230] I agree that Questions 1 and 2 should be certified with some modification in the proposed wording.

[231] Question 1 focuses first on whether section 7 can be engaged at the stage of determining and finding a permanent resident inadmissible to Canada. As noted above, the jurisprudence has established that deportation *per se*, or on its own, does not engage section 7. The jurisprudence has also established that section 7 is not engaged at the admissibility stage. In the present case, I followed this jurisprudence and found that a determination of inadmissibility does not engage section 7 because there remain further steps in the process and an inadmissibility finding should not be equated with automatic deportation. However, some jurisprudence does not note this distinction. In the present case, the ID did not indicate whether it equated inadmissibility with deportation (i.e., removal) or whether it assumed that Mr. Revell would be deported, regardless of the subsequent steps in the process before removal.

[232] Question 1 also focuses on the nature of the consequences or harm that could engage section 7, particularly where there is no risk of persecution or torture.

[233] Clarity in the law would be beneficial. If a finding of inadmissibility does not engage section 7, and/or if the nature of the consequences of Mr. Revell's deportation does not engage section 7, this would dispose of Mr. Revell's appeal.

[234] Question 2 focuses on whether the ID erred in finding it was bound by *Chiarelli*. I have noted that Mr. Revell did not argue in any detail that he had met the criteria for the ID to derogate from *Chiarelli* based on the high threshold established in *Bedford* and *Carter*, but, in any event, found that the threshold was not met. Determination of this issue would dispose of Mr. Revell's appeal and would address an issue of broad importance with respect to the jurisprudence which has continued to guide issues regarding deportation of persons found inadmissible to Canada.

[235] Questions 3, 4 and 5 will not be certified. Question 3 is a broad question which is not linked to Mr. Revell's circumstances in particular and would not be dispositive.

[236] Question 4 is also a broad question related to the Act as a whole. Moreover, Mr. Revell did not focus on the procedural requirements of fundamental justice, except to argue that his proposal for an independent assessment of whether any deprivation of liberty is in accordance with the principles of fundamental justice, in particular, proportionality, should provide for a higher level of procedural fairness than exists at the section 44 stage.

[237] Question 5 is also a broad and hypothetical question not linked to Mr. Revell's circumstances.

XI. Post- Script

[238] I am aware of the decision of Justice Manson issued on September 11, 2017 in *Brar v Canada (Minister of Citizenship and Immigration)* 2017 FC 820 (*Brar 2*). In *Brar 2*, Mr. Brar

sought judicial review of an interlocutory decision of the Immigration Division of the Immigration and Refugee Board.

[239] Justice Manson found that Mr. Brar's argument with respect to section 7 of the Charter was a collateral attack on the decision of Justice Mactavish in *Brar.* Justice Manson further found that even if it were not a collateral attack, section 7 was not engaged at the admissibility stage in Mr. Brar's case, noting that Justice Mactavish had already determined that there was no breach of fundamental justice (see para 21- 22).

[240] With respect to Mr. Brar's section 12 arguments, Justice Manson found that the arguments were premature; section 12 cannot be invoked before the final stage of deportation (para 32). Justice Manson added that Mr. Brar would not be precluded from raising his section 12 arguments at a later stage, for example in the context of any application for judicial review of any removal order (at para 34).

[241] In the present case, I have found that the ID did not err in finding that the issuance of a deportation order would not violate Section 12. In *Brar 2*, Justice Manson found that the ID did not err in its interlocutory ruling that section 12 is not engaged at the admissibility stage and in refusing to allow Mr. Brar to make this Charter argument at that stage.

[242] The decision in *Brar 2* addresses the issues raised in the context of that case. Moreover, it is not inconsistent with the decision I have reached in the present case, which is based on the issues raised, submissions of the parties and the governing jurisprudence.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. The following questions are certified:

    a. Is section 7 engaged at the stage of determining whether a permanent resident is inadmissible to Canada and if so, would section 7 be engaged where the deprivation of the right to liberty and security of the person of a permanent resident arises from their uprooting from Canada, and not from possible persecution or torture in the country of nationality?

    b. Does the principle of *stare decisis* preclude this Court from reconsidering the findings of the Supreme Court of Canada in *Chiarelli,* which established that the deportation of a permanent resident who has been convicted of serious criminal offence, despite that the circumstances of the permanent resident and the offence committed may vary, is in accordance with the principles of fundamental justice. In other words, have the criteria to depart from binding jurisprudence been met in the present case?

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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