Federal Court of Appeal  Cour d'appel fédérale

Date: 20191018

Docket: A-316-17

Citation: 2019 FCA 262

CORAM: **STRATAS J.A.**
NEAR J.A.
DE MONTIGNY J.A.

BETWEEN:

DAVID ROGER REVELL

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

and

CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC (CSALC) AND SOUTH ASIAN LEGAL CLINIC OF ONTARIO (SALCO)

Interveners

Heard at Vancouver, British Columbia, on January 16, 2019.

Judgment delivered at Ottawa, Ontario, on October 18, 2019.

REASONS FOR JUDGMENT BY:	DE MONTIGNY J.A.
CONCURRED IN BY:	STRATAS J.A.
	NEAR J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY J.A.

[1] The appellant, Mr. Revell, appeals from a decision of the Federal Court (Justice Kane) dated October 12, 2017 (*Revell v. Canada (Citizenship and Immigration*), 2017 FC 905, [2018] 3 F.C.R. 255 [FC Reasons]), which dismissed his application for judicial review of a decision of the Immigration Division (ID) of the Immigration and Refugee Board (IRB), dated July 28, 2016 (*Canada (Minister of Public Safety and Emergency Preparedness) v. Revell*, [2016] I.D.D. No. 44 [ID Decision]). The ID determined he was inadmissible to Canada on the grounds of serious criminality under paragraph 36(1)(*a*) and organized criminality under paragraph 37(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act or IRPA), and issued a deportation order.

[2] The Federal Court certified the two following serious questions of general importance:

> 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?

[3] For the reasons that follow, I am of the view that the Federal Court Judge did not err in answering these two questions in the negative, and would accordingly dismiss the appeal without costs.

I. Background

[4] A permanent resident may be found inadmissible to Canada on various grounds. Of particular relevance on this appeal are paragraphs 36(1)(*a*) and 37(1)(*a*) of the Act, which provide as follows:

36 (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
(*a*) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;	*a*) être déclaré coupable au Canada d'une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans ou d'une infraction à une loi fédérale pour laquelle un emprisonnement de plus de six mois est infligé;
37 (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	**37** (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(*a*) being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of	*a*) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au

an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern;	Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

[5] Inadmissibility on either of these bases (*i.e.*, serious criminality and organized criminality) can lead to loss of status and removal from Canada. The Act outlines a comprehensive scheme for the adjudication and enforcement of allegations that a permanent resident is inadmissible.

[6] Subsection 44(1) of the Act provides that if a Canada Border Services Agency (CBSA) officer is of the view that a permanent resident is inadmissible, that officer may prepare a report setting out the relevant facts and transmit it to the Minister of Public Safety and Emergency Preparedness (the Minister). If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the ID, under subsection 44(2) of the Act, for an admissibility hearing. However, even if the Minister is of the opinion that the report of the CBSA officer is well-founded, he or she still retains some discretion not to refer it to the ID (see, notably, *Tran v. Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, [2017] 2 S.C.R. 289 at para. 6 [*Tran*]).

[7] If the Minister does refer the report to the ID, an admissibility hearing is held for the permanent resident. The ID must then recognize that person's right to enter Canada, authorize him or her to enter Canada for further examination, or make a removal order against that person (IRPA, ss. 45(*a*), (*c*) and (*d*)). Inadmissibility decisions by the ID are generally appealable to the Immigration Appeal Division (IAD). However, there is no right to appeal by a foreign national

or permanent resident who has been found to be inadmissible on grounds of serious criminality or organized criminality (s. 64-(1)). When there is no right to appeal, a removal order comes into force on the day of its issuance (para. 49(1)(*a*)). The permanent resident loses his or her status and reverts to being a foreign national (para. 46(1)(*c*)).

[8] If the foreign national who has been found inadmissible on grounds of serious criminality or organized criminality wishes to remain in Canada, three avenues remain open to them: a temporary residence permit, a humanitarian and compassionate discretionary exemption, and a Ministerial declaration. Section 24 allows foreign nationals found inadmissible to apply to an officer for an exceptional temporary resident permit allowing them to remain in Canada for a finite period of time.

[9] Section 25 allows foreign nationals found inadmissible to apply to the Minister of Citizenship and Immigration for a discretionary exemption from their inadmissibility on humanitarian and compassionate (H&C) grounds. Unlike the temporary residence permit, the exemption allows them to remain in Canada permanently. Although it is available to foreign nationals who are inadmissible for subsection 36(1) serious criminality irrespective of their sentence, it is not available to those who are inadmissible under subsection 37(1) organized criminality.

[10] Section 42.1 provides that the Minister of Public Safety and Emergency Preparedness may declare that subsection 37(1) organized criminality does not constitute inadmissibility in respect of a foreign national if he or she is satisfied that this exception is not contrary to the

national interest. This declaration may be made on his or her own initiative or on the basis of an application. Under subsection 42.1(3), in determining whether or not to make this declaration the Minister may only consider "national security and public safety considerations" but he or she "is not limited to considering the danger that the foreign national presents to the public or the security of Canada" in the analysis. When section 42.1 relief is granted, the foreign national becomes eligible to make an H&C application under section 25.

[11] Before a removal order is enforced, a foreign national can apply for a Pre-Removal Risk Assessment (PRRA) (ss. 112-113). This process seeks to determine whether the removal of a person to his or her country of nationality would subject that person to a danger of torture, to a risk to their life or, in certain circumstances, to a risk of cruel and unusual treatment (s. 97(1)). A positive PRRA stays removal from Canada.

[12] While section 48 of the Act directs that removal orders be enforced as soon as possible, the person concerned may request that it be deferred. CBSA retains a limited discretion to defer (see *Lewis v. Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, [2018] 2 F.C.R. 229 at para. 54 [*Lewis*]).

[13] The particular facts underpinning the present case are aptly summarized by the Federal Court at paragraphs 16 to 25 of the decision below. As a result, I shall only mention the most salient of these facts.

[14] The appellant is a 55 year old British citizen who immigrated to Canada in 1974 at the age of ten. Since that time, he has lived in Canada as a permanent resident and has never applied for Canadian citizenship. The appellant has three adult children residing in Canada. He claims that he has not maintained any significant ties to England and has no friends or family there, except for one elderly aunt. He lives and works in Provost, Alberta, where he is employed as an oil well technician.

[15] In March 2008, the appellant was charged with possessing cocaine for the purposes of trafficking, committing that offence at the direction of or in association with a criminal group, and trafficking cocaine. The charges followed an investigation into the activities of the East End Hells Angels chapter in Kelowna, B.C. The appellant was ultimately found guilty of the drug possession and drug trafficking charges, and was acquitted of the criminal organization charge. The appellant was sentenced to five years in prison, and was released on parole once eligible.

[16] In June 2008, a CBSA officer reported the appellant under subsection 44(1) of the Act for serious criminality. The appellant then made submissions, with the assistance of counsel, as to why a removal order should not be made against him. On February 16, 2009, the Minister's Delegate decided, upon consideration of the appellant's personal circumstances at the time, to exercise his discretion under subsection 44(2) of the Act. The report was not referred to the ID for an admissibility hearing. It appears, however, that due to an oversight, the appellant did not receive a letter warning him that his 2008 conviction could be revisited for the purposes of removal if he were to reoffend.

[17] In 2013, the appellant pleaded guilty to assault with a weapon and assault causing bodily harm arising from allegations by his then girlfriend. Both offences carry a maximum sentence of ten years in prison. He ultimately received a suspended sentence and two years of probation.

[18] In October and November 2014, a CBSA officer notified Mr. Revell that CBSA was considering subsection 44(1) reports against him for inadmissibility for serious criminality under paragraph 36(1)(*a*) as a result of his assault convictions, and for engaging in organized crime under paragraph 37(1)(*a*) as a result of revisiting his 2008 conviction. The CBSA officer sought submissions from the appellant as to whether he should be referred to an admissibility hearing; the appellant made submissions, with the assistance of his counsel.

[19] On February 3, 2015, the CBSA officer made subsection 44(1) reports against Mr. Revell for inadmissibility under paragraph 36(1)(*a*) for the 2013 convictions, and under paragraph 37(1)(*a*) for the 2008 convictions. Having considered the appellant's submissions and countervailing factors, the CBSA officer suggested that the subsection 44(1) reports be referred to the ID for an admissibility hearing.

[20] On February 6, 2015, the Minister's Delegate found the CBSA officer's report to be well-founded and referred the appellant to an admissibility hearing pursuant to subsection 44(2) of the Act. The appellant's request for reconsideration was denied. He then sought leave for judicial review of both the referral decision and the decision to refuse reconsideration, but was unsuccessful.

[21] In February 2016, a third subsection 44(1) report was filed against the appellant on the basis of inadmissibility under paragraph 36(1)(*a*) of the Act in relation to the 2008 drug trafficking convictions. The appellant again made new submissions regarding why a removal order should not be issued against him. The Minister's Delegate considered these submissions before referring the matter to the ID for an admissibility hearing.

[22] On February 9 and 10, 2016, the ID held a hearing regarding the three subsection 44(1) reports.

II. Decisions Below

A. *The Immigration Division's Decision*

[23] Before the ID, the appellant conceded he was inadmissible on the basis of organized criminality and serious criminality, but claimed abuse of process. He further argued that sections 44 and 45 of the Act unjustifiably infringed his right under sections 7 and 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the Charter).

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
[…]	[…]
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	12. Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

[24] The ID rejected the appellant's submission that the immigration authorities' failure to issue a warning letter following the first investigation in 2009 constituted an abuse of process. While of the view that a letter should have been sent, the ID nonetheless found that the failure to do so was "not of such an egregious nature to lead to a finding of abuse of process" (ID Decision, at para. 20).

[25] Moving on to the Charter arguments, 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 the alleged deprivation is in accordance with principles of fundamental justice (ID Decision, *ibid.* at para. 28). Relying on the Federal Court's decision in *Romans v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 466, 203 F.T.R. 108 [*Romans* FC], aff'd 2001 FCA 272, 281 NR 357 [*Romans* FCA], the ID found, in light of the evidence, that the appellant's 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" (ID Decision at para. 31).

[26] In the second step of the analysis, the ID then considered whether this deprivation of section 7 rights was in accordance with the principles of fundamental justice. In light of *Romans* FC and *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711, 135 N.R. 161 [*Chiarelli*], the ID answered this question in the affirmative (ID Decision at para. 35). It further rejected the appellant's submission that the *Chiarelli* decision should be reassessed in light of recent trends in international law, as it found these trends to be inconsistent with the established Canadian jurisprudence on the matter (*ibid.* at para. 34).

[27] Lastly, the ID found, again on the basis of *Chiarelli*, that the deportation order was not cruel and unusual because it did not outrage standards of decency. It therefore did not violate section 12 of the Charter (*ibid.* at para. 41).

B. *The Federal Court's Decision*

[28] Applying the correctness standard of review (FC Reasons at paras. 53-54), the Judge found that the ID erred at step one of the analysis, both in finding that section 7 could be engaged by the inadmissibility adjudication process (*ibid.* at para. 114), and in finding that section 7 was engaged in Mr. Revell's circumstances (*ibid.* at para. 130). She noted that it is only at the later stages of the deportation process that section 7 may be engaged (*ibid.* at para. 99). She also found that Mr. Revell had not established any risk of persecution, torture or detention if deported, and that his circumstances fell short of establishing his claim that he would suffer serious psychological harm if he were to return to England.

[29] The Judge held, however, that the ID was correct at the second stage of the analysis. It was right to conclude that even if section 7 of the Charter were to be engaged, the principles of fundamental justice were observed in Mr. Revell's case *(ibid.* at para. 143). The Judge was of the view that the threshold for departing from the *Chiarelli* decision was not met here, and that the ID did not err in finding it was bound by this decision (*ibid.* at para. 184).

[30] Lastly, the Judge also held that, if deportation is indeed a "treatment" under section 12, it is not cruel and unusual due to gross disproportionality in this case (*ibid.* at para. 226).

III. Issues

[31] As previously mentioned, the Federal Court certified one question pertaining to the moment where section 7 of the Charter is engaged, and one question pertaining to the binding character of *Chiarelli*. In my view, and based on the parties' submissions, the present appeal turns on six questions, which can be formulated as follows:

A. Is section 7 of the Charter engaged at the admissibility hearing stage?

B. If so, is section 7 engaged by the uprooting of a long-term permanent resident absent possible persecution or torture in the country of nationality?

C. Does the principle of *stare decisis* preclude this Court from reconsidering the findings of the Supreme Court of Canada in *Chiarelli*? In other words, have the criteria to depart from binding jurisprudence been met in the present case?

D. If so, is the impugned legislative scheme consistent with the principles of fundamental justice?

E. Does the impugned legislative scheme infringe upon the appellant's rights under section 12 of the Charter?

F. Would these infringements be justified under section 1 of the Charter?

[32] Some of these issues were also raised, albeit in a slightly different factual setting, in a companion case in which judgment is also being delivered today (*Moretto v. Canada*, 2019 FCA 261 [*Moretto*]). The appeals in these cases were heard one after the other by the same panel of the Court.

IV. Standard of review

[33] On appeal from a decision of the Federal Court sitting in judicial review of a decision of an administrative decision-maker, the applicable framework is that of *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47. This framework requires this Court to "step into the shoes" of the Federal Court to determine whether it identified the appropriate standard of review and whether it applied this standard properly.

[34] While I do not subscribe to the whole of the Federal Court's reasoning with respect to standard of review, I nevertheless find it properly identified the applicable standard of review as that of correctness. A tribunal's analysis as to whether a law is Charter compliant attracts a correctness standard (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 58; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at paras. 36, 43; *Begum v. Canada (Citizenship and Immigration)*, 2018 FCA 181, 297 A.C.W.S. (3d) 622 at para. 36 [*Begum*]). As this Court noted in *Thomson v. Canada (Attorney General)*, 2016 FCA 253, 272 A.C.W.S. (3d) 230 at para. 24, "the case law recognizes that, with the exception of discretionary decisions, the correctness standard applies to reviews of tribunals' adjudications of constitutional issues, including *Charter* claims" (see also *Sawyer v. TransCanada Pipeline Limited*, 2017 FCA 159, 281 A.C.W.S. (3d) 413 at paras. 7-8).

V. Analysis

A. *Is section 7 of the Charter engaged at the admissibility hearing stage?*

[35] Mr. Revell argues that his section 7 rights are engaged at the inadmissibility adjudication stage. In support of that contention, he points to the fact that a removal order comes into force on the day of its issuance if no right of appeal is available (IRPA at para. 49(1)(*a*)). He claims that the inadmissibility adjudication stage is therefore sufficiently proximate to deportation to engage section 7.

[36] He further submits that the Judge erred in determining that section 7 cannot be engaged at the inadmissibility stage so long as other steps remain available prior to removal. In his view, the Judge applied an incorrect "necessary link" test in arriving at this determination. He submits that the correct test is that articulated in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 [*Bedford*]. Following *Bedford,* section 7 of the Charter is engaged once a "sufficient causal connection" can be established between the state-caused effect and the prejudice allegedly suffered. In the appellant's view, on a proper application of the *Bedford* standard the ID's adjudicative process in this case is not too remote to trigger section 7. The IAD appeals and H&C applications are not available to Mr. Revell, and the PRRA officer lacks jurisdiction to consider his uprooting and its attendant psychological stress. Thus, the ID process is especially proximate to removal in his case. Finally, the appellant also claims that the Judge's approach is inconsistent with the Supreme Court's approach in criminal and extradition law, where section 7 is said to permeate the whole process.

[37] The Judge was justified to find that there is extensive case law to the effect that the rights enshrined in section 7 of the Charter are not infringed by deportation *per se,* without more. I shall return to that point when dealing with the second issue raised in this appeal. Suffice it to say for now that ever since the decision in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 [*Medovarski*], the Supreme Court has consistently held that the mere fact of removing an individual to his or her country of origin is not sufficient to breach the right to life, liberty or security of that person.

[38] The Judge was similarly right to note, at paragraphs 83 and following of her reasons, that there is extensive case law from this Court establishing that an inadmissibility finding is distinct from effecting removal and that, as other steps remain in the process, a finding of inadmissibility does not automatically or immediately result in deportation and therefore does not engage section 7 of the Charter. Despite some conflicting decisions in the early days following the decision of the Supreme Court in *Chiarelli*, this Court has consistently held since *Medovarski* and *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 [*Charkaoui*] that section 7 is not engaged at the stage of determining inadmissibility (see *Poshteh v. Canada (Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487 at para. 63; *Canada (Public Safety and Emergency Preparedness) v. J.P.*, 2013 FCA 262, [2014] 4 F.C.R. 371 at paras. 123, 125 [*J.P.*], reviewed on other grounds in *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704 [*B010*]; *Torre v. Canada (Citizenship and Immigration)*, 2016 FCA 48, 263 A.C.W.S. (3d) 729 at para. 4, leave to appeal to SCC refused, 36936 (21 August 2016); *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34,

304 A.C.W.S. (3d) 376 at paras. 81-82, leave to appeal to SCC refused, 38589 (11 July 2019); *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223 at paras. 118-127).

[39] In *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431 [*Febles*], the Court considered section 98 of the IRPA, which excludes from refugee protection all persons referred to in Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees, July 28, 1951, [1969] Can. T.S. No. 6 (Refugee Convention)*, namely "all persons who have committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee" (at para. 60). At issue was whether, as argued by Mr. Febles, the exclusion was confined to fugitives from justice and whether post-crime events like rehabilitation or expiation were relevant, or whether, as submitted by the Minister, a broader interpretation should be adopted such that the Article 1F(b) serious criminality exclusion is triggered whenever the refugee claimant has committed a serious non-political crime before coming to Canada.

[40] It is true that the majority in *Febles* did not expressly find that section 7 of the Charter has no role to play in the context of section 98 of the IRPA because the life or security of excluded persons is not engaged at that stage. A careful reading of paragraph 67, however, inescapably leads to the conclusion that the rights protected by section 7 of the Charter are triggered at a later stage, when removal is actually contemplated. In my view, there is no other way to read the following comments:

> There is similarly no role to play for the *Charter* in interpreting s. 98 of the *IRPA*. … Moreover, as the Court of Appeal held, s. 98 of the *IRPA* is consistent with the *Charter*. As stated at para. 10 of these reasons, 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 (ss. 97, 112, 113(d)(i) and 114(1)(b) of the *IRPA*). On such an application, the Minister would be required to balance the risks faced by the appellant if removed against the danger the appellant would present to the Canadian public if not removed (s. 113(d) of the *IRPA*). Section 7 of the *Charter* may also prevent the Minister from issuing a removal order to a country where *Charter*-protected rights may be in jeopardy…

[41] This reading of *Febles* is borne out by the *obiter* comments of the Chief Justice (writing for a unanimous Court) one year later in *B010.* Having concluded that the appellants in that case were not caught by paragraph 37(1)(*b*) of the IRPA, because that provision was meant to target people smugglers, *i.e.*, "procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime", as opposed to those who "merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety" (at para. 72), the Court went on to address the alternative argument that paragraph 37(1)(*b*) was overbroad in the following terms (at para. 75):

> The argument [that para. 37(1)(*b*) is overbroad and violates s. 7 of the *Charter*] 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*] … 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.*

[42] The appellant does not directly address this jurisprudence in his submissions. Rather, he argues that its underlying principle runs counter to the low causation standard for engaging section 7 set out in *Bedford*. This thesis is best explained by Professor Gerald Heckman in

Revisiting the Application of Section 7 of the Charter in Immigration and Refugee Protection, (2017) 68 UNBLJ 312 (at p. 351):

> The argument [of prematurity] appears to be that s. 7 is not engaged at [the ID stage] because there are steps later in the process more directly and foreseeable linked to a deprivation of a non-citizen's s. 7 interests where the person's circumstances can be scrutinized to ensure that this deprivation complies with the principles of fundamental justice. This reasoning implies a standard of causation more onerous than the "sufficient causal connection" standard adopted by the Supreme Court in *Bedford*. It requires that state action be a foreseeable and necessary cause of the prejudice to the person's s. 7 interests - a standard expressly rejected in *Bedford*…

[43] I note, first, that this very same argument was raised and squarely rejected by this Court in *J.P.*, and also dismissed on appeal (albeit in *obiter*) in *B010* (at para. 75). The decision of the Supreme Court in that case and in *Febles* postdate *Bedford*, and it is fair to assume that the Court was aware of its previous decision and did not see any inconsistency between its holdings. There are, indeed, compelling and principled reasons to find no such inconsistency.

[44] First, the statements from *Bedford* relied upon by the appellant and Professor Heckman in his paper deal with whether there is a sufficient causal connection between the state action and a deprivation of rights, so as to determine whether the state (as opposed to third parties or other states) is responsible for the deprivation. At issue in that case was the constitutionality of the *Criminal Code* provisions preventing prostitutes from implementing certain safety measures (such as hiring security guards or screening potential clients) that could protect them from violence. The Attorney General had argued section 7 was not engaged because there was no "active and foreseeable" and "direct" causal connection between these provisions and the risks faced by the prostitutes. It is in this particular context that the Supreme Court came to the

conclusion that the proper standard for causation was not the one urged by the Attorney General, but the "sufficient causal connection" test. Applying that test, the Court found that section 7 of the Charter was engaged because the prohibitions at issue imposed dangerous conditions on prostitution by preventing people engaged in a risky but legal activity from taking steps to protect themselves from those risks.

[45] I take *Bedford* to stand for the proposition that there must be a sufficient link between the impugned legislation (or state action) and the infringement of an individual's right for section 7 to be engaged. In other words, *Bedford* speaks to the cause of the prejudice, not to its foreseeability, as is the case here. What is uncertain here is not whether the state will eventually be responsible for the deportation if it actually occurs, but whether the likelihood of it is real enough to take it outside the realm of pure speculation and engage the rights protected by section 7 of the Charter. The Supreme Court and this Court have held in a long line of cases that the nexus between the ineligibility determination and deportation is not close enough to trigger the right to life, liberty, and security. As mentioned earlier, an admissibility hearing is but one step in a complex, multi-tiered inadmissibility determination and removal regime under the IRPA. Section 7 of the Charter cannot be interpreted as requiring that an assessment of a person's right be made at every step of the process. In a nutshell, I am of the view that *Bedford* has not displaced the extensive jurisprudence affirming that an inadmissibility finding is distinct from effecting removal.

[46] The appellant claims that inadmissibility findings are especially proximate to deportation for permanent residents like him, for whom Parliament has eliminated the possibility of an IAD

appeal and has barred H&C applications. Indeed, once the ID determines that a permanent resident is inadmissible, such individuals revert to “foreign national” status and become legally vulnerable to an enforceable removal order pursuant to paragraph 49(1)(*a*) of the IRPA. That being said, foreign nationals in Mr. Revell’s position have access to other administrative processes to challenge their removal, as mentioned in paragraphs 10 to 12 of these reasons.

[47] Of particular relevance in this case is subsection 42.1(1) of the IRPA, which allows a permanent resident who has been found inadmissible for having engaged in organized crime to apply to the Minister of Public Safety and Emergency Preparedness for discretionary relief from that inadmissibility on the basis that such relief is not contrary to the national interest. The Minister may also, on his own initiative, declare that the ground of organized criminality of a foreign national does not constitute inadmissibility if he is satisfied that it is not contrary to the national interest (s. 42.1(2)); in determining whether to make such declaration, the Minister may consider national security and public safety considerations, including, but not limited to, the danger that the applicant presents to the public in Canada (s. 42.1(3)).

[48] If such relief is granted, a foreign national is then eligible to make an H&C application under section 25 of the IRPA. If the relief is not granted, the foreign national may nevertheless apply for an exceptional temporary resident permit allowing him or her to remain in Canada for a finite period of time; this permit is discretionary and may be renewed (the IRPA, s. 24).

[49] Even if declared inadmissible, a foreign national may still apply for a PRRA to determine whether they would be at risk in the country of return, including exposure to a risk of torture, risk

to their life, or risk of cruel and unusual treatment or punishment. If positive, the PRRA decision has the effect of staying the applicant's removal order (ss. 96-97, 112-113 of the IRPA; *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2007] 3 F.C.R. 169 at paras. 16-18 [*Covarrubias*]). In the case at bar, this mechanism was of no avail to the appellant, since his assertion of psychological harm resulting from his deportation falls outside the scope of a PRRA officer's jurisdiction.

[50] Finally, the person subject to removal may request that it be deferred. Admittedly, the CBSA officer to whom such a request is made has only limited discretion to determine when it is possible, pursuant to section 48 of the IRPA, for a removal order to be executed. The circumstances that will typically be taken into consideration include illness or other impediments to removal, the short term best interests of children, or the existence of pending immigration applications that were made on a timely basis. Removal may also be deferred where it will expose the applicant to the risk of death, extreme sanction or inhumane treatment (see *Lewis*, at paras. 55, 58; *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311 at paras. 49-51; *Canada (Minister of Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, [2012] 2 F.C.R. 133 at paras. 43-44 [*Shpati*]).

[51] At each and every step of this process, an applicant is entitled to make submissions and to be represented by counsel, may challenge any decision by way of an application for judicial review before the Federal Court, and may seek a stay of removal pending the determination of such an application. More importantly for Mr. Revell, this Court has made it clear that the Federal Court has more leeway than an enforcement officer when considering a request for a

stay. Upon judicial review of a decision by an enforcement officer not to defer removal, the Federal Court is empowered to (and in my view must) assess any risk of harm that has been overlooked by the enforcement officer in order to determine whether the rights protected by section 7 of the Charter are engaged (see *Shpati*, at paras. 49-51; *Atawnah v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 144, [2017] 1 F.C.R. 153 at paras. 18-23; *Savunthararasa v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 51, [2017] 1 F.C.R. 318 at para. 26 [*Savunthararasa*]).

[52] There are thus a number of safety valves in the IRPA ensuring that the deportation process as a whole is in accordance with the principles of fundamental justice. The admissibility hearing before the ID is clearly not the last step in that complex process, and every person, including the applicant, is provided with an opportunity to have his or her Charter rights fully assessed before being removed from Canada. The Judge did not err in finding that Mr. Revell could reiterate the submissions that could not be entertained by the PRRA officer if and when he seeks a deferral of his removal at a later stage of his deportation process (FC Reasons at para. 110).

[53] Relying once again on Professor Heckman's article, the appellant submits that the approach to the engagement of section 7 in the context of deportation does not sit well with the reasoning of Canadian courts in the related areas of extradition law and criminal law. In these areas, section 7 rights are engaged from the outset of proceedings where there is a possibility of detention (see also H. Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of*

Rights and Freedoms (Toronto: Irwin Law, 2012), at p. 81). On this point, I would make two observations.

[54] First, one must never forget that Charter rights take their colour from the context. It bears repeating 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" (*Chiarelli* at p. 733). Therefore Parliament can impose conditions on a permanent resident's right to remain in Canada, and can legitimately remove a permanent resident from the country if they have deliberately violated an essential condition under which they were permitted to enter and remain in Canada. A finding of inadmissibility is an administrative determination that a non-citizen failed to respect the conditions under which he or she was permitted to remain in Canada. Inadmissibility proceedings are therefore not criminal or quasi-criminal in nature, and courts have consistently held that the deportation of a person found criminally inadmissible to Canada is not imposed as a punishment (see *Tran* at para. 43; *Chiarelli* at pp. 735-736; *Hurd v. Canada (Minister of Employment and Immigration)*, [1989] 2 FC 594, 90 N.R. 31 at paras. 22-27; *Solis v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 407, 189 D.L.R. (4th) 268 at para. 25). In contrast, the extradition process is meant to assist a foreign state to bring an individual to trial when there is sufficient evidence to justify committal for trial in Canada. It comes closer to criminal law than to administrative law, and cannot be analogized to deportation under the IRPA for the purposes of determining when section 7 rights come into play.

[55] My second observation relates to the nature of the section 7 rights to be considered. There is no doubt that the procedural aspects of section 7 are engaged as soon as a person's right to life,

liberty or security are put at risk by state action. In other words, the process leading to the potential infringement of these rights must be fair and in accordance with the basic tenets of our judicial system. It is in that sense that section 7 can be said to permeate the entire extradition and criminal process, and the same can probably be said of the inadmissibility and removal process under the IRPA. As a result, the fact that a person is liable to be removed constitutionally entitles that person to a fair hearing, with an opportunity to make representations, before an impartial decision-maker.

[56] However, this is not the same as saying that a person's substantive rights to life, liberty, and security must be considered at every step of the process. The jurisprudence in the immigration context is clear: section 7 rights are considered at the removal or pre-removal detention stage. The Supreme Court drew a similar distinction in the extradition context in *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R 587 at paragraph 34:

> Section 7 permeates the entire extradition process and is engaged, although for different purposes, at both stages of the proceedings. After committal, if a committal order is issued, the Minister must examine the desirability of surrendering the fugitive in light of many considerations, such as Canada's international obligations under the applicable treaty and principles of comity, but also including the need to respect the fugitive's constitutional rights. At the committal stage, the presiding judge must ensure that the committal order, if it is to issue, is the product of a fair judicial process.

[57] For all of the foregoing reasons, I am of the view that the Judge did not err in dismissing Mr. Revell's section 7 arguments as being premature and in finding that an inadmissibility determination does not engage section 7. This finding is sufficient to dispose of the appeal. I will nevertheless address the questions identified above in order to provide a complete answer to the certified questions.

B. *If so, is section 7 engaged by the uprooting of a long-term permanent resident absent possible persecution or torture in the country of nationality?*

[58] The appellant claims that, while deportation *per se* does not engage section 7 liberty and security rights (*Medovarski*), it may still do so when coupled with sufficiently serious consequences to the person (*Charkaoui*). Relying on *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 [*Blencoe*], the appellant argues that the exceptional psychological harm associated with his uprooting from Canada amounts to such sufficiently serious consequences that his section 7 security interests are engaged. He also appears to consider that his liberty interests are infringed by the finding of inadmissibility.

[59] The respondent counters these arguments by noting that, in *Medovarski*, the Court explicitly rejected the idea that the interference with a permanent resident's "liberty to make fundamental decisions" and the "state-imposed psychological stress" accompanying deportation amount to a deprivation of liberty and/or security under section 7 of the Charter (*Medovarski* at para. 45). In the respondent's view, the record in this case does not disclose the kind of psychological harm that would go beyond the normal consequences of deportation. Deportation of a permanent resident will inevitably "uproot" them from their life in Canada, but it is well settled that such "uprooting" does not engage the rights covered by section 7.

[60] To establish an infringement of his section 7 rights, Mr. Revell bears the burden of showing, first, that the impugned law or state action interferes or could interfere with one of his rights (the "engagement" stage), and, second, that such interference is not in accordance with the principles of fundamental justice. At the first step of the analysis, it is not necessary to

demonstrate a direct causal connection, but only a "sufficient causal connection" (*Bedford* at para. 75). As explained by the Supreme Court, "[a] sufficient causal connection standard does not require that the impugned government action or law be the only or the dominant cause of the prejudice suffered by the claimant, and is satisfied by a reasonable inference, drawn on a balance of probabilities" (*ibid.* at para. 76). The Supreme Court went on to add that a sufficient causal connection must be "sensitive to the context of the particular case" and must be based on a real, as opposed to a speculative, link (*ibid.*).

[61] In *Medovarski*, the claimant had similarly argued that deportation would remove "her liberty to make fundamental decisions that affect her personal life, including her choice to remain with her partner", and that her security would also be infringed "by the state-imposed psychological stress of being deported" (at para. 45). At issue in that case was the discontinuance of the right to appeal a removal order resulting from serious criminality following the enactment of the IRPA. The Court flatly rejected the claimant's argument in the following terms (at para. 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*]…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*.

(See also *Lewis* at para. 63.)

[62] The reasoning followed in the above-quoted excerpt is somewhat unsatisfactory. As noted by the Judge, the Supreme Court in *Chiarelli* did not determine whether deportation *per se* triggers the interests protected in section 7 and amounted to a deprivation of life, liberty or security of the person, because it found no breach of the principles of fundamental justice. Be

that as it may, the Court never resiled from that reasoning and applied it unwaveringly in subsequent cases (see *Febles* and *B010*). At the most, the Court qualified its statement and clarified that *Medovarski* does not stand for the proposition that proceedings related to deportation in the immigration context will never infringe section 7 rights. As the Court stated in *Charkaoui* at paragraphs 16-17:

> …The government argues, relying on [*Medovarski*], … that s. 7 does not apply because this is an immigration matter. The comment from that case on which the government relies was made in response to a claim that to deport a non-citizen violates s. 7 of the *Charter*. In considering this claim, the Court … noted … that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada". The Court added: "Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7" …
>
> *Medovarski* thus does not stand for the proposition that proceedings related to deportation in the immigration context are immune from s. 7 scrutiny. While the deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so. [Emphasis in the original]

[63] Relying on this last sentence from the Supreme Court's decision in *Charkaoui*, the appellant argues that the psychological harm associated with the "uprooting" of a permanent resident of more than forty years to a country with which he has no ties is one such "feature associated with deportation" that could engage section 7. The alleged consequences of the appellant's removal on his section 7 liberty and security interests must therefore be considered to determine whether they go beyond the "typical" consequences of removal.

(1) Liberty

[64] In *Blencoe*, the Supreme Court 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). Rather, it is engaged whenever "state compulsions or prohibitions affect important and fundamental life choices" (*ibid.*). However, this right is not unlimited, nor does it include every personal decision an individual may wish to make (*Begum* at para. 96). Only those choices that are "fundamentally or inherently personal" fall within the ambit of the right to liberty. As the Supreme Court made clear in *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844, 152 D.L.R. (4th) 577 at para. 66:

> …[T]he right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. … I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea … that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence…

(See also *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 85 [*Malmo-Levine*]; *Association of Justice Counsel v. Canada (Attorney General)*, 2017 SCC 55, [2017] 2 S.C.R. 456 at para. 49; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385 [*Morgentaler*].)

[65] In the present case, grounding its decision on that of the Federal Court in *Romans* FC (at para. 22), the ID found that the appellant's section 7 liberty right is engaged "as he will be

deprived of the right to make a personal choice of where to establish his home, free from state interference" (ID Decision at para. 31). The Judge overturned the ID's conclusion in this regard, on the basis that the *Romans* FC decision did not accord with the holding in *Medovarski* that deportation of a non-citizen does not, in itself, implicate the liberty interests protected by section 7 (FC Reasons at para. 130).

[66] I see no reason to interfere with this conclusion of the Judge. The ID erred in law in relying on the reasoning of the Federal Court in *Romans* FC, as this reasoning runs counter to the approach adopted by the Supreme Court in *Medovarski*. The appellant has not demonstrated, nor really argued before this Court, that the consequences of his deportation on his liberty interests are more significant than the consequences generally associated with deportation, which have been found not to engage section 7. Apart from the fact that he would leave behind his children, his grandchildren, and his partner, and that he is a "stranger" to England, Mr. Revell has not established any particular circumstances that would go beyond the typical impacts of removal. The limits that would be imposed on the appellant's ability to make a choice about where to live are no greater, in my view, than those imposed on the claimant's ability in *Medovarski* to choose to remain with her partner in Canada. This case is thus dispositive.

[67] The appellant suggests that the section 7 liberty interests could be engaged in a hypothetical case where the deportation would prevent a non-resident from nurturing or caring for their minor children or accessing medical treatment with potentially life-threatening consequences. Yet these circumstances have no evidentiary foundation or bearing here. Charter cases should not be considered in a factual vacuum (*Mackay v. Manitoba*, [1989] 2 S.C.R. 35 at

361-362, 61 D.L.R. (4th) 385). The appellant bears the burden of proving facts that establish that his Charter rights are implicated, and of doing so based on an actual evidentiary record (*Ernst v. Alberta Energy Regulator*, 2017 SCC 1, [2017] 1 S.C.R. 3 at para. 22; *Savunthararasa* at paras. 16, 22). He cannot rely on mere speculation to make out a deprivation under section 7 of the Charter.

[68] It is also worth pointing out that, while this Court affirmed the decision of the Federal Court in *Romans* FC, it expressly declined to make a determination as to whether section 7 of the Charter was engaged (*Romans* FCA at para. 1). It simply found that the judge had been right not to intervene, as the deportation was in accordance with the principles of fundamental justice (*ibid.* at para. 4). A similar approach was followed in *Powell v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 202, 255 D.L.R. (4th) 59.

[69] To the extent that Mr. Revell tries to ground his section 7 claim on his need to access medical treatment, his argument must be rejected. There is no evidence that any required medical care would not be available in England. Finally, I also note that courts have consistently rejected the notion of a freestanding constitutional right to health care (see *Covarrubias* at para. 36; *Toussaint v. Canada (Attorney General)*, 2011 FCA 213, 343 D.L.R. (4th) 677 at paras. 76-80; *Canadian Doctors for Refugee Care v. Canada (Attorney General)*, 2014 FC 651, 458 F.T.R. 1 at para. 510).

[70] For all of the foregoing reasons, I am therefore of the view that the appellant’s argument that deportation would infringe his right to liberty must fail.

(2) Security

[71] Security of the person encompasses both the physical and psychological integrity of the individual. This principle, first developed in the criminal law context, was later extended to other situations where the state *interferes* with personal autonomy and a person's ability to control his or her own integrity (see, e.g., *Morgentaler* at pp. 56, 173; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 at p. 587, 107 D.L.R. (4th) 342 [*Rodriguez*]; *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at p. 1177, 68 Man. R. (2d) 1; *Blencoe* at para. 55). For example, in *New Brunswick (Minister of Health and Community Services) v. G.(J.)*, [1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 [*G.(J.)*], the Court found that the state's removal of a child from parental custody constituted direct state interference with the psychological integrity of a parent. As was clearly stated for the majority by Chief Justice Lamer in *G.(J.)* at paragraphs 59-60:

> …It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected…
>
> For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.

[72] In *Blencoe* at paragraph 57, the majority reiterated that for section 7 to be engaged as a result of psychological stress, the state involvement must be significant:

> Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in *Morgentaler, supra*, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G.(J.),* at para 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations…[Emphasis in the original]

(See also *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paras. 125-126 [*Kazemi*]; *Begum* at para. 104.)

[73] In the case at bar, it is not entirely clear from its reasons whether the ID found that the security interests of the appellant were engaged. It noted that the appellant would "face the significant emotional and psychological hardship of starting over from nothing", and referred to his section 7 rights generally (ID Decision at para. 31). However, its heavy reliance on *Romans* FC, which only dealt with liberty, and its general conclusion that the appellant "will be deprived of the right to make a personal choice of where to establish his home" seem to indicate the appellant's security interests were not engaged. Based on this reading of the ID Decision, the appellant's submission that we are bound by the ID's conclusions with respect to his security interests cannot hold. There was simply no conclusion in this regard.

[74] In contrast to the ID, the Federal Court dealt with the question explicitly. It rejected the idea that the appellant's security of the person interest was engaged in the present case, on the basis that "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" (FC Reasons at para. 127). In short, the Federal Court found that the evidence before the ID did not show a level of state-imposed stress serious enough to meet the threshold set out in *G.(J.)* and *Blencoe*.

[75] Although the standard of review for constitutional questions is correctness, "the extricable findings of fact and the assessment of the evidence upon which the constitutional analysis is premised are entitled to deference" (*Begum* at para. 36; see also *Mouvement laïque Québécois v. Saguenay (City)*, 2015 SCC 57, [2015] 3 S.C.R. 615 at para. 50). Such findings are assessed for reasonableness (*Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407 at para. 26).

[76] It is with some reluctance that I feel constrained to uphold the Federal Court reasoning in respect of Mr. Revell's security interest. Taking into account his particular circumstances, it is not at all clear to me that the consequences for Mr. Revell of being removed fall within the normal and inevitable consequences of removal. It bears reproducing here some of the findings made by the ID in this regard:

> 21. (…) There is little question that the consequences of deportation on Mr. Revell would be profound. He has lived in Canada for 42 years and has only known Canada as home. He arrived from England when he was 10 years old and he is now 52. For all intents and purposes he has no relatives remaining in England and since arriving in Canada has visited England only once, approximately 18 years ago.
>
> …
>
> 24. As Mr. Revell has grown older his family has grown significantly more important to him. He believes that removal to England with [*sic*] be devastating

> for him because he will lose that family connection. Equally they would suffer the loss of their father and grandfather. The psychologist wrote in his report:
>
> > Indeed, there can be no doubt that Mr. Revell's enforced separation from his family by virtue of deportation would be devastating for him. He is highly attached to his children and grandchildren, and a preponderance of his focus and recreation apparently revolves around the younger members of his family. Without his family he would be devoid of direction and purpose.
>
> 25. His son, John, his daughter, his girlfriend and another friend all gave evidence to the same effect: it would "kill him" to be away from his children and grandchildren; that he will face significant depression, that he may not survive the deportation from emotional devastation.
>
> 26. Mr. Revell confirmed in his testimony that without his family and without contacts he fears a downward emotional spiral, if deported to England. His concern is an inability to start his life again at his age without any support system.

[77] The point at which the psychological impact of state action meets the threshold to trigger section 7 rights is obviously not easily determined. As Chief Justice Lamer put it in *G.(J.)*, "[d]elineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science" (at para. 59). That being said, I would be inclined to think that uprooting an individual from the country where he has spent the better part of his life (and all of his adult life) and deporting him to a country that he barely knows and where he has no significant relationships, where his prospects of employment are at best grim, and where it is highly unlikely that he will ever be able to reunite with his immediate family, goes beyond the normal consequences of removal. The harms alleged here are arguably far greater than the ones the Supreme Court referred to in *G.(J.)* as the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action" (*ibid.*). Contrary to the situation that was considered in *Stables v. Canada (Citizenship and Immigration)*, 2011 FC 1319, 400 F.T.R. 135 [*Stables*], there is evidence tending to show that the stresses Mr. Revell would

experience if removed to his country of origin would be far greater than the normal consequences of deportation.

[78] However, the decision of the Supreme Court in *Medovarski* remains: deportation and its attendant psychological stresses do not engage the section 7 security of the person interest. I am thus prevented from concluding that Mr. Revell's security interest is engaged by deportation, even when accompanied by typical or grave state-imposed psychological stress. I appreciate that the Court only devoted one paragraph to that issue, and that the gist of the appeal was not whether the psychological stress of being deported engaged section 7 but rather what interpretation should be given to the newly enacted section 196 of the Act. It is also true that the Court did not explicitly consider the particular circumstances of the appellants in that case. One could therefore try to distinguish it on the basis that Ms. Medovarski had been in Canada for less than five years when a removal order was issued against her, as opposed to more than forty years here. However, as noted by the respondent, the other claimant in *Medovarski* (Mr. Esteban) had lived in Canada for over 20 years and had immigrated at age 11. I am not convinced that these are sufficient bases on which to reject the application to the present appeal of the principle for which this case stands.

[79] The Supreme Court has never seen fit to stray from the basic premise underlying *Medovarski*, merely stressing that deportation in itself will not be sufficient to engage liberty and security interests (*Charkaoui* at para. 16-17). This is a far cry from a repudiation of its core finding. As a result, I feel bound to conclude that the predicaments which Mr. Revell will face if

deported to England, as harsh as they may be, do not amount to a deprivation of his right to security under section 7 of the Charter.

C. *Does the principle of stare decisis preclude this Court from reconsidering the findings of the Supreme Court of Canada in Chiarelli? In other words, have the criteria to depart from binding jurisprudence been met in the present case?*

[80] Even if Mr. Revell had succeeded in showing an infringement of his section 7 rights, he would still bear the burden of showing that the legislative provisions under which he was found inadmissible are not consistent with the principles of fundamental justice. In that respect, Mr. Revell's argument is essentially that the regime is grossly disproportionate because it is over-inclusive and does not provide a sufficient personalized assessment for long-term residents such as himself.

[81] As noted by the Judge (FC Reasons at paras. 168, 179), the issues raised by Mr. Revell are not significantly different from those advanced in *Chiarelli* and *Medovarski*. In both of those cases, the Supreme Court dealt with the argument that the provisions of the Act mandating deportation were contrary to the principles of fundamental justice because the personal circumstances of the offender or the particulars of the offence were not taken into consideration. As a result, she found that these cases were a complete answer to Mr. Revell's submissions.

[82] The Judge also dealt with Mr. Revell's argument that the Court is not bound to follow *Chiarelli*, since major developments in Charter jurisprudence and international law justify the reconsideration of that case and meet the high threshold for departure. After a careful analysis of

that argument, the Judge found that the "parameters of the debate" have not fundamentally shifted, and that the basic principles stated in *Chiarelli* continue to apply despite the amendments made to the Act and the developments in international law.

[83] The appellant now argues before us that the threshold for departing from binding precedent is clearly met, since the evolution of the analysis of the principles of fundamental justice represents a significant development in the law. The modern test requires the Court to identify the legislative objective/purpose underlying the scheme, compare this purpose against the law's effects, and adopt a personalized analysis to determine whether the law is grossly disproportionate, overbroad or arbitrary. In the appellant's view, the Court in *Chiarelli* applied, at best, an embryonic form of the arbitrariness principle, and utterly failed to consider section 7 gross disproportionality. He argues that the Judge erred in concluding that, while the idea of gross disproportionality had not yet been articulated, the Court in *Chiarelli* nonetheless used a "concept analogous to that which underlies [it]" in its analysis of the principles of fundamental justice. The appellant also claims that the Charter must be interpreted in accordance with international law. Finally, he argues that the *Chiarelli* section 12 analysis is, for similar reasons, not equivalent to the modern one.

[84] The Supreme Court has set a high threshold for a lower court to reconsider settled precedents from a higher court. In *Bedford*, a unanimous Court addressed the issue in the following terms (at paras. 42 and 44):

> In my view, a trial judge can consider and decide 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 new legal issues are raised as a

> consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate.
>
> …
>
> …the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence. This 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.

[85] The Supreme Court took up the issue once again in the subsequent case of *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331 [*Carter*]. Relying on *Bedford*, it reiterated that (at para. 44):

> 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"…

[86] In both of these cases, the Supreme Court found that this threshold was met on the basis, notably, of the significant developments in the section 7 jurisprudence (*Carter* at para. 46; *Bedford* at para. 45).

[87] In the case at bar, the ID rejected the appellant's submission that the *Chiarelli* decision should be reassessed in light of recent trends in international law, as it found these trends to be inconsistent with the established Canadian jurisprudence on the matter (ID Decision at para. 34).

[88] In addition to upholding the ID's conclusion in this regard, the Federal Court likewise dismissed the appellant's alternative argument, seemingly not raised in his submissions before the ID, that recent developments in Charter jurisprudence justified that *Chiarelli* be revisited. Specifically, the Judge held that the Court in *Chiarelli* did not, as argued by the appellant, conflate the section 7 analysis with the section 1 justification (FC Reasons at para. 172), and that, while the idea of gross disproportionality had not yet been articulated at that time, the Court still addressed a "concept analogous to that which underlies it" in its fundamental justice analysis. The Federal Court Judge wrote:

> [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 or 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.

[89] Several arguments are raised to challenge this finding. They will be considered in turn.

[90] It is well established that the initial step in the overbreadth analysis is to ascertain the purpose of the law. The appellant makes the case that the Supreme Court in *Chiarelli* failed to

identify the legislative purpose underlying the legal requirement that a mandatory deportation order apply to all permanent residents captured by the impugned criminal inadmissibility period.

[91] In *R. v. Moriarty*, 2015 SCC 55, [2015] 3 S.C.R. 485 [*Moriarty*], and subsequently in *R. v. Safarzadeh-Markhali*, 2016 SCC 14, [2016] 1 S.C.R. 180 [*Safarzadeh-Markhali*], the Supreme Court held that, for the purpose of the section 7 analysis, the articulation of the purpose of an impugned provision or legislative scheme "should focus on the ends of the legislation rather than on its means, be at an appropriate level of generality and capture the main thrust of the law in precise and succinct terms" (*Moriarty* at para. 26). It further added that the law's purpose is distinct from the means used to achieve that purpose, and that the two must be treated separately (*Moriarty* at para. 27; *Safarzadeh-Markhali* at para. 26). With respect to the level of generality appropriate for the articulation of a law's purpose, the Supreme Court held in *Moriarty* (at para. 28) that it:

> …resides between the statement of an "animating social value" - which is too general - and a narrow articulation, which can include a virtual repetition of the challenged provision, divorced from its context - which risks being too specific…

(See also *Safarzadeh-Markhali* at para. 27.)

[92] Therefore, the statement of purpose should be both precise and succinct (*Moriarty* at para. 29; *Safarzadeh-Markhali* at para. 28).

[93] I agree with the appellant that the purpose of the impugned scheme cannot be assumed to be the establishment of "conditions under which non-citizens will be permitted to enter and remain in Canada" (*Chiarelli*, at p. 734), since this would merely summarize the means of the

legislation. When the section 7 analysis in *Chiarelli* is read as a whole, however, it seems clear to me that the Court interpreted the purpose of the Act as to prevent non-citizens convicted of serious offences from remaining in the country and, more generally, to prevent Canada from "becom[ing] a haven for criminals and others whom we legitimately do not wish to have among us" (*ibid.* at p. 733, quoting from *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779 at p. 834, 84 D.L.R. (4th) 438).

[94] This purpose is indeed consistent with the stated objectives relating to immigration as found in the Act itself. Pursuant to its paragraphs 3(1)(*h*) and (*i*), two of the objectives of the Act with respect to immigration are "to protect public health and safety and to maintain the security of Canadian society" and "to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks". In *Medovarski*, the Supreme Court returned more thoroughly to the intent of the Act and relied on this provision to determine the objectives of the Act (at para. 10):

> The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security: e.g., see s. 3(1)(*i*) of the *IRPA* versus s. 3(*j*) of the former Act; s. 3(1)(*e*) of the *IRPA* versus s. 3(*d*) of the former Act; s. 3(1)(*h*) of the *IRPA* versus s. 3(*i*) of the former Act. Viewed collectively, the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act.

[95] In my view, this statement of purpose articulated by the Supreme Court in *Chiarelli* meets the requirements of a proper objective.

[96] The appellant claims, secondly, that the approach taken by the Court in *Chiarelli* is inconsistent with the modern approach to section 7 as it does not consider the impact of the state conduct on the individual, and fails to adopt the personalized analysis that fundamental justice now requires. According to the appellant, it does not matter that all those who are captured by the law share some common characteristic, *i.e.,* deliberately violating the terms on which his or her permanent resident status was granted; the focus, rather, should be whether the law overshoots its purpose and infringes some individuals' rights in a grossly disproportionate manner, thereby going far beyond what is necessary to achieve its objective.

[97] I agree with the appellant that section 7 requires an individualized analysis, and that a grossly disproportionate, overbroad, or arbitrary effect on one person is sufficient to establish a breach of section 7 (see *Bedford* at para. 122). I also accept that the approach to the principles of fundamental justice has significantly evolved since the birth of the Charter and the decision of the Supreme Court in *Chiarelli*. I part company, however, with the appellant's conclusion that the high threshold to depart from the *Chiarelli* and *Medovarski* line of cases has been met.

[98] As the Supreme Court stated in *Bedford* at paragraph 120 :

> 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.

(See also *Carter* at para. 89: “The standard is high: the law’s object and its impact may be incommensurate without reaching the standard for gross disproportionality”. [Emphasis in the original])

[99] It is clear that the Supreme Court in *Chiarelli* turned its mind to the proportionality of the legislative scheme pursuant to which non-citizens convicted of an offence punishable by a term of imprisonment of five years or more may be deported. While the notion of “gross disproportionality” may not have been as refined then as it is now, the Court was clearly alive to its substance, as can be gleaned from the following excerpt in C*hiarelli* (at p. 734):

> One of the conditions Parliament has imposed on a permanent resident’s right to remain in Canada is that he or she not be convicted of an offence for which a term of imprisonment of five years or more may be imposed. This condition represents 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 requirement that the offence be subject to a term of imprisonment of five years indicates Parliament’s intention to limit this condition to more serious types of offences. (…) In such a situation [where permanent residents have deliberately violated an essential condition under which they were permitted to remain in Canada], 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….

[100] As for the requirement that the personal circumstances of those captured by the impugned law be considered, I agree with the Judge that it was equally considered by the Supreme Court in *Chiarelli*. The Court explicitly acknowledged that the “personal circumstances of individuals who breach this condition may vary widely”, and that “the offences which are referred to in subpara. 27(1)(*d*)(ii) [now para. 36(1)(*a*) of the Act] also vary in gravity”, yet concluded that it was not necessary to look beyond the deliberate violation of the condition imposed by that

provision to other aggravating or mitigating circumstances in order to comply with fundamental justice (*ibid.*).

[101] In so doing, the Supreme Court did not overlook the need to approach the principles of fundamental justice through a personalized analysis. Quite the contrary, the Court considered the argument but rejected it on the basis that the seriousness of the offences referred to in subparagraph 27(1)(*d*)(ii) overrides any other consideration, and that deportation is an appropriate response to the violation of an essential condition of a permanent resident's right to remain in Canada. Considering that the seriousness of the offences to which paragraph 36(1)(*a*) of the Act now refers is even greater than at the time *Chiarelli* was decided (conviction for an offence punishable by a maximum term of imprisonment of at least 10 years), the reasoning of the Court is, if anything, even more applicable today.

[102] As a result, I am unable to find that the Judge erred by declining to revisit *Chiarelli*, Mr. Revell has not raised a new legal issue, the parameters of the debate have not shifted, and the reasoning in *Chiarelli* (and in *Medovarski*) is for all intents and purposes equivalent to the "gross disproportionality" analysis later developed in *Bedford.* Considering the high threshold that has been set to reconsider settled rulings of the Supreme Court, I would be loath to reconsider these cases and to feel free not to follow them, especially where the Supreme Court's recent jurisprudence has not demonstrated a willingness to depart from them. Indeed, the Supreme Court most recently reiterated that the new evidence exception to the vertical *stare decisis* principle set out in *Bedford* is to be interpreted narrowly, and that lower courts must apply the

decisions of higher courts "subject to extraordinary exceptions": see *R v Comeau*, 2018 SCC 15, [2018] 1 S.C.R. 342, at para 26.

[103] The same conclusion applies with respect to section 12 of the Charter. Mr. Revell has not raised a new legal issue, the parameters of the debate have not shifted, and the Supreme Court specifically addressed the "gross disproportionality" argument within the context of section 12 of the Charter in *Chiarelli.* Responding to the argument that subparagraph 27(1)(*d*)(ii) leaves no room to consider the circumstances of the offence or the offender and covers relatively less serious offences, the Court wrote (at p. 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.

[104] While the disproportionality analysis under sections 7 and 12 may be distinct, the standard of "gross disproportionality" under the former must be the same as that which applies under the latter (see *Malmo-Levine* at para. 160; *Safarzadeh-Markhali* at para. 72; *R. v. Lloyd* 2016 SCC 13, [2016] 1 S.C.R. 130 [*Lloyd*] at paras. 41-42).

[105] Once again, I see no reason to depart from this finding. Mr. Revell's arguments essentially replicate those made by Mr. Chiarelli, and the law with respect to the "gross disproportionality" of a punishment or treatment for the purposes of section 12 of the Charter has not significantly evolved since the seminal decision of *R. v. Smith*, [1987] 1 S.C.R. 1045, 40 D.L.R. (4th) 435 [*Smith*], to which the Court referred with approval in *Lloyd* (at para. 24).

[106] Accordingly, as the criteria for departing from binding jurisprudence have not been met, I feel bound to follow *Chiarelli* and *Medovarski*.

D. *If so, is the impugned legislative scheme consistent with the principles of fundamental justice?*

[107] Even assuming, for the sake of argument, that this Court is not bound to follow *Chiarelli* and *Medovarski,* I would still be of the view that paragraphs 36(1)(*a*) and 37(1)(*a*) do not offend the principles of fundamental justice, when read in the context of the whole legislative scheme with respect to the removal of inadmissible persons.

[108] The appellant submits that the purpose of the Act's admissibility scheme is to remove non-citizens who pose material risks to the public, where materiality is assessed with reference to the severity of the offences, and whose continued presence in Canada does not serve the Act's goals, which include family unification and integration. In light of this purpose, the appellant claims that the scheme yields grossly disproportionate results in a case like his. In his view, the uprooting of an individual who does not pose a real danger to the public does little or nothing to improve public safety and security, and results in severe psychological hardship. The appellant states that these effects are completely out of sync with the objective of the measure in a way that is not addressed by the Act, which provides no mechanism for him to obtain relief from removal by arguing that the strict application of subsection 36(1) would impair his section 7 entitlements,. He further states that both the section 44 referral discretion and the discretion of the enforcement officer to defer the execution of an enforceable deportation order are insufficient to address the lacuna in the scheme.

[109] In the respondent's view, the Judge was right to conclude that we are not in one of the "extreme cases" where the law works a "gross disproportionality". The respondent argues that the removal of permanent residents found inadmissible on the grounds of serious criminality does serve the purpose of the scheme, which it describes as the promotion of safety, security and the integrity of the conditions of residency in Canada, and that the scheme's effects on the appellant, being the usual consequences of deportation, fall within "the norms accepted in our free and democratic society" (*Bedford* at para. 120). The respondent also points out that the admissibility hearing must be considered in the context of the whole regime, which was deemed consistent with fundamental justice in recent jurisprudence of this Court and of the Federal Court. The respondent further argues that the personalized assessment that the appellant is asking for was in fact conducted in his case at the referral stage.

[110] I cannot agree with the appellant's stated purpose of the legislative scheme. I have already discussed the issue in the context of the previous section relating to the binding nature of *Chiarelli* and *Medovarski* (*supra*, at para. 94 of these reasons). It is clear to me, for the reasons given by the Supreme Court in this last case, that the protection of the safety of Canadians and the corollary facilitation of the removal of non-citizens who constitute a risk to society on the basis of their conduct is the preeminent objective of the removal scheme in the Act. This was reiterated in *Tran*, where the Court emphasized that a permanent resident's obligation to behave lawfully while in Canada not only serves the Act's objectives related to security, but is also essential to the broader goals of the Act (at para 40):

> …[T]he *IRPA* aims to permit Canada to obtain the benefits of immigration, while recognizing the need for security and outlining the obligations of permanent residents. The Minister emphasizes the *IRPA*'s security objective. Yet, as the Chief Justice explained in *Medovarski*, the security objective in the IRPA "is

> given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada and by emphasizing the obligation of permanent residents to behave lawfully while in Canada" (para. 10). The obligation under the *IRPA* to behave lawfully includes not engaging in "serious criminality" as defined in s. 36(1). So long as this obligation is met, the *IRPA*'s objectives related to "successful integration" will remain relevant to permanent residents, and the *IRPA*'s objectives related to the "benefits of immigration" and "security" will be furthered.

[111] In light of these pronouncements from the Supreme Court, I have a hard time accepting the appellant's argument, which suggests that promoting family unity and the integration of permanent residents into the community are to be given equal weight to public safety and security in assessing the purpose of the inadmissibility adjudication scheme. As noted by the Supreme Court in *Medovarski*, it is clear from the Act itself and from the legislative hearings preceding its enactment that the speedy removal of those who pose a security risk to Canada was the priority, and was instrumental to the achievement of the Act's other goals.

[112] I am further of the view that the appellant mischaracterizes his argument when he claims that the impugned scheme produces grossly disproportionate effects. He submits that the broad types of offences captured by the serious criminality provision (s. 36(1)) leads to permanent residents presenting no risk to the public being removed. It seems to me that this relates to the notion of overbreadth rather than to gross disproportionality. As was noted in *Carter*, the overbreadth inquiry asks "whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object" (at para. 85). This is the gist of the appellant's argument, as I understand it, rather than whether the negative impacts of the removal on his rights are completely out of sync with the object of the law.

[113] In order to answer this question, the Court must consider the scope of the impugned provisions. Paragraph 36(1)(*a*) of the Act provides that a permanent resident is inadmissible on grounds of serious criminality if he or she is convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years, or for which a term of imprisonment of more than six months has been imposed. As for paragraph 37(1)(*a*), it holds that a permanent resident is inadmissible on the grounds of organized criminality for essentially being a member of a criminal organization.

[114] In support of his claim that the broad scope of these provisions could lead them to capture permanent residents that do not actually pose a risk to the community, the appellant gives the hypothetical situation (loosely adapted from *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 at para. 74), of a long-term permanent resident with a renal condition and numerous family ties to Canada being removed after having been convicted and given a six-month sentence for the possession of an unloaded restricted firearm near ammunition (s. 95(1) of the *Criminal Code*). The appellant in the companion case *Moretto*, released concurrently with the present case, also notes that the use of a forged passport, stopping mail with intent, identity fraud, theft or forgery of a credit card, unauthorized use of a computer, and theft from mail, also fall within the serious criminality offences covered by paragraph 36(1)(*a*) of the Act.

[115] Even if one accepts that permanent residents convicted of these offences would not actually pose a risk to the community and that the conducts captured by these provisions bear no relation to the purpose of paragraph 36(1)(*a*), I would nonetheless conclude that the availability of the numerous safety valves provided by the Act provide a genuine opportunity for an

individual's circumstances to be considered. These safety valves save the paragraphs in question from any charge of overbreadth by effectively narrowing their scope.

[116] In the present case, the appellant's risk of reoffending, the nature and seriousness of his criminal convictions, and his continued risk to society, were considered extensively by the CBSA at the referral stage. These factors were weighed, amongst other things, against the appellant's deep ties to Canada, his family situation, and the possible impact removal would have on him (see Appeal Book, vol. 10 at pp. 2702-2711; vol. 12 at pp. 3148-3152; vol. 13 at pp. 3353-3375). To the extent that the appellant believes it was unreasonable for the Minister's Delegate to find, in 2015, that he posed a public safety risk, he could, and did, raise this in his application for leave and judicial review of the referral decision. He was unsuccessful in this regard. In my view, this whole process acts as a safety valve that prevents the Act from applying where such applications would be overbroad (see *Brar v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1214, 273 A.C.W.S. (3d) 603 at paras. 26-30).

[117] I cannot accept the appellant's argument that the Minister's referral discretion under section 44 is analogous to the prosecutorial discretion considered in *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754 at paras. 73-77.Rather, the Minister's discretion under section 44, , is more akin to the discretionary licensing process that the Supreme Court found sufficient to cure an over-inclusive criminal ban in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134 [*PHS*] at paras. 112-114. Unlike prosecutorial discretion, which is not reviewable absent abuse of process (*R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167 at para. 36), the exercise by the Minister of his discretion to refer the matter

to the Immigration Division for an admissibility hearing is reviewable on both substantive and procedural grounds (*Sharma v. Canada*, 2016 FCA 319, [2017] 3 F.C.R. 492 at para. 15). The mere fact that this process allows for some discretion is not a bar to its acting as a safety valve to ensure that unconstitutional results will be avoided (see *PHS* at paras. 112-114).

[118] As for the appellant's argument that the maximum term for a given offence and the term actually imposed are imperfect tools for assessing risk, it must similarly be dismissed. As the Supreme Court has stated, consideration of the length of an imprisonment sentence is a "useful guideline", and "crimes attracting a maximum sentence of ten years or more in Canada will generally be sufficiently serious to warrant exclusion" from refugee protection (or, in this case, admissibility to reside in Canada) (*Febles* at para. 62, albeit in a slightly different context). In my view, the processes provided for by the Act to assess admissibility ensure that this ten-year rule is not "applied in a mechanistic, decontextualized, or unjust manner" (*ibid*.).

[119] In support of his claim, the appellant also points to the Supreme Court's statement in *Tran* that the "length of the sentence alone is not an accurate yardstick with which to measure the seriousness of the criminality of the permanent resident" (at para. 25). This is mistaken. Read in context, it is clear that what the Court meant was that it is an "unreliable indicator of 'serious criminality' when comparing jail sentences to conditional sentences" (para. 28; emphasis added). The same is true of other quotes from *Tran* that are relied upon by the appellant, which deal with the unrelated issue of whether, in adopting subsection 36(1), Parliament had weighed the benefits of a retrospect application against its potential for unfairness (*Tran* at para. 50).

[120] The appellant has not convinced me that subsections 36(1) of the IRPA are overbroad in relation to the purpose of the Act. To the extent that the appellant also argues gross disproportionality, his claim must similarly be rejected. The appellant submits that the deportation of a long-term resident like him with all his emotional ties to Canada is grossly disproportionate to the purpose of the Act. While the appellant is right to say that the possible consequences of deportation are serious for him, I cannot agree that they are "totally out of sync" with the objective of the scheme (*Bedford* at para. 120), that is to "protect the safety of Canadian society by facilitating the removal of permanent residents…who constitute a risk to society on the basis of their conduct" (*Stables* at para. 14). While deportation may not be the least impairing option to achieve this purpose, this is not the question at this stage of the analysis. I agree with the Judge that, while deportation "may appear harsh, and perhaps slightly disproportionate" for a long-term permanent resident, "this does not rise to the level of being grossly disproportionate" (FC Reasons at para. 223, emphasis in the original).

[121] In any event, even assuming that there could be cases where the application of the impugned provisions would raise the spectre of gross disproportionality, I share the Judge's view that the process as a whole offers a meaningful opportunity for an individual's circumstances to be considered so that unconstitutional results may be avoided. As noted above, the appellant's circumstances, such as the length of his residency in Canada and his family situation, were extensively considered at the referral stage, and were weighed against such counterbalancing interests as the seriousness of his offences and his continued risk to society. In addition, the appellant had the benefit of a quasi-judicial hearing before the ID to address the merits of the inadmissibility allegations and of a PRRA, two avenues subject to judicial review before the

Federal Court. Throughout the stages of this process, the appellant was provided with several chances to remain in Canada based on an individualized assessment of his circumstances. He could also request that his removal be deferred.

[122] For these reasons, I find that the impugned provisions, in the context of the legislative scheme as a whole, are consistent with fundamental justice.

E. *Does the impugned legislative scheme infringe upon the appellant's rights under section 12 of the Charter?*

[123] Section 12 of the Charter provides that "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment". There are two questions that must be resolved in determining whether a breach of section 12 of the Charter has been made out. The first is whether the person alleging infringement is being subjected to "treatment" or "punishment" within the meaning of section 12 of the Charter. Here, the appellant alleges that deportation is a "treatment". The second is whether any such treatment or punishment is "cruel and unusual". Answering the second question in the appellant's favour would require departure from the Supreme Court's finding in *Chiarelli* (at p. 736) that the deportation of a permanent resident who has deliberately violated a condition of their residence in Canada is not "cruel and unusual" for the purposes of section 12 of the Charter.

[124] The Supreme Court has often stressed that the bar for establishing a breach of section 12 of the Charter is a high one (*Lloyd* at para. 24). For this bar to be met, the impugned treatment "must be more than merely disproportionate or excessive" with regard to its purpose (*R. v. Boudreault*, 2018 SCC 58, 429 D.L.R. (4th) 583 at para. 45 [*Boudreault*]), This threshold is no

lower than "gross disproportionality" under section 7 of the Charter (*Lloyd* at paras. 41-42; *Malmo-Levine* at para. 160; *R. v. Safarzadeh-Markhali* at para. 72). In other words, the impugned treatment must be "so excessive as to outrage standards of decency" and "abhorrent or intolerable" to society (*Lloyd* at para. 24; *Smith* at p. 1072; *R. v. Morrisey*, 2000 SCC 39, [2000] 2 S.C.R. 90 at para. 26; *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96 at para. 14). It is only on "rare and unique occasions" that a treatment will infringe section 12, as the test is "very properly stringent and demanding" (*Boudreault* at para. 45, citing *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385 at p. 1417, 121 N.R. 198).

[125] The appellant's submissions are premised on the idea that the decision to deport him is a "treatment" within the meaning of section 12 of the Charter. While the Judge declined to make a final determination in this regard, she said she was inclined to that view (FC Reasons at para. 221). I agree with the Judge that, while this question needs not be answered here, the scope given to the word "treatment" is probably broad enough to include deportation. In *Chiarelli*, the Court held, albeit without deciding, that deportation may, indeed, "come within the scope of a 'treatment' in [section] 12", notably in light of the dictionary definition of that term (at p. 735). In *Rodriguez* the Court made these further comments (at p. 610):

> While the deportation order in *Chiarelli* was not penal in nature as it did not result from any particular offence having been committed, it was nonetheless imposed by the state in the context of enforcing a state administrative structure - in that case, the immigration system and its body of regulation. The respondent…in that case, who had not complied with the requirements imposed by the regulatory scheme, was dealt with in accordance with the precepts of the administrative system. In that regard, any "treatment" was still within the bounds of the state's control over the individual within the system set up by the state.

[126] However, as noted above, I agree with the Judge that no final determination is required on this issue, insofar as the appellant has not demonstrated this treatment to be "cruel and unusual".

[127] With respect to the second part of the section 12 analysis, the appellant argues that the removal of a long-term permanent resident like himself, even though he does not pose a risk to society, is grossly disproportionate to the state's objectives. Acceptance of this argument would require a departure from the findings in *Chiarelli* (see p. 736). The appellant claims that *Chiarelli* need not be followed for reasons similar to the ones he advanced under section 7. He points, to Canadians' evolving standards of decency and to international jurisprudence for guidance respecting the evolution of social norms that inform Charter rights.

[128] I agree with the respondent that, insofar as the appellant's section 12 arguments are about the alleged consequences he would face if he is deported to England, they are premature for the same reasons as those concerning section 7. As noted above, the Act draws a distinction between an inadmissibility decision and actually effecting removal (see *Barrera v. Canada (Minister of Employment and Immigration)*, [1993] 2 F.C. 3, 99 D.L.R. (4th) 264).

[129] Even if this were not the case, I would still find, for essentially the same reasons as those set out earlier with respect to "gross disproportionality" in the context of my section 7 analysis, that the appellant has not made out a breach of section 12 of the Charter. I agree with the Judge that, while it may be "slightly disproportionate" to deport the appellant if he is at low risk of reoffending (FC Reasons at para. 223), this does not reach the high bar for a finding of cruel or

unusual treatment. As noted above, the various processes in the inadmissibility determination and removal regime allow for individual circumstances to be considered, and protect against grossly disproportionate results.

[130] Finally, the appellant refers to international jurisprudence in support of his claim that there has been an evolution of social norms since *Chiarelli*, and a recognition that deportation of a long-term resident may infringe section 12 when it yields inhumane results and causes serious consequences for the person. He refers, in particular, to cases of the European Court of Human Rights interpreting Articles 3 (which prohibits cruel, inhumane or degrading treatment) and 8 (right to respect for private and family life) of the European Convention on Human Rights and to the "Views" adopted by the Human Rights Committee of the United Nations with respect to complaints made on the basis of Articles 17 (right not to be subjected to arbitrary or unlawful interference with family) and 23(1) (the family is entitled to protection by society and the State) of the International Covenant on Civil and Political Rights.

[131] In that respect, I wish to make some observations. First, Canada is still a dualist system in terms of reception of international law. As such, even those treaties to which Canada is a party will not be binding in Canadian law unless they are given effect through domestic law. For that reason, the mere existence of an international obligation may well bind Canada at international law, but will not be enforceable in a Canadian court of law (*Francis v. The Queen*, [1956] S.C.R. 618 at p. 621, 3 D.L.R. (2d) 641; *Kazemi* at para. 60).

[132] That being said, the strict approach to international law has evolved since 1987, and it is now trite law that Canada's commitments under international law should inform how we interpret the Charter. The rationale behind this shift is that "the Charter should generally be presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified" (*Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313 at p. 349, 38 D.L.R. (4th) 161 at 185; *Health Services and Support Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391 at para. 70; *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, [2015] 1 S.C.R. 245 at para. 157 [*Saskatchewan Federation of Labour*] (Rothstein and Wagner JJ., dissenting on other issues)). It is on that basis that the Supreme Court found, in *Kazemi*, that international conventions may assist in recognizing new principles of fundamental justice, but are not sufficient in and of themselves to establish such principles (nor, for that matter, to determine what is cruel and unusual punishment or treatment).

[133] Moreover, the "Views" of the Human Rights Committee are not legally binding in domestic or international law. As the Supreme Court found in *Kazemi* (at paras. 147-148), the General Comments of the Committee may be of assistance in the interpretation of the Covenant, but they do not override adjudicative interpretations. Indeed, the absence of any enforcement mechanisms in the Convention or in the Optional Protocol to the Convention has been described as one of the weaknesses of that system (*Ahani v. Canada (Attorney General)*, [2002] O.J. No. 31, 58 O.R.(3d) 107 (C.A.) at paras. 31-39).

[134] As for the European Convention on Human Rights (ECHR), it is clearly not binding on Canada. Moreover, it is interesting to note that the decisions of the ECHR to which Mr. Revell refers all relate to Article 8 (right to respect for private and family life), to which there is no equivalent in the Charter, and not to Article 3 (prohibition on torture and inhumane or degrading treatment or punishment). Finally, I note that the criteria developed by the ECHR in the balancing between the preservation of family unity and/or private life and the maintenance of public order are quite similar to those applied by the Minister's Delegate at the section 44 report stage (*e.g.* the nature and seriousness of the criminal offence, the length of the stay in the host country, the solidity of social, cultural and family ties with the host country and with the country of destination, the time elapsed since the offence was committed and the conduct during that period, the applicant's family situation and the solidity of the family ties, the best interests of children and the difficulties which the spouse would encounter in the country of origin of the applicant).

[135] In the end, I am unable to accept that the *Chiarelli* decision should be reconsidered simply because it did not consider international human rights norms, which norms have allegedly evolved to recognize limits on a state's ability to remove non-citizens. While principles of international law may inform the interpretation of the Charter, international developments are not sufficient, in and of themselves, to justify departing from the principles established in Canadian law.

[136] The appellant relied, by way of analogy, on the decision of *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, and its focus on the recognition, in that case, of a trend against the

death penalty. In my view, this analogy is mistaken. The appellant is far from having shown an international trend of this magnitude against deportation. Decisions like that of the United Nations Human Rights Committee (UNHRC) in *A.B v. Canada*, CCPR/C\117\D/2387\10/4, cited by the respondent here, would seem to shed doubt on that claim. In that case, the UNHRC has recognized that the Act provides mechanisms to ensure that, despite family separation (which is protected by a specific provision in the International Covenant on Civil and Political Rights), the deportation of a non-citizen for serious criminality would not be disproportionate to the legitimate aim of preventing further crimes and protecting the public.

[137] Moreover, it bears emphasizing that while the Supreme Court recognized in *Saskatchewan Federation of Labour* that Canada's commitments under international law should inform our interpretation of Charter rights, it was in no way the basis upon which it agreed to revisit the *Alberta Reference (Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 S.C.R. 313, 38 D.L.R. (4th) 161. Rather, it was because of the "fundamental shift in the scope of s. 2(d)" since that time that, according to the Court, "the trial judge was entitled to depart from precedent and consider the issue" anew (*Saskatchewan Federation of Labour* at para. 32). In other words, while international law may be useful after it is decided that a binding precedent should be revisited, it seems to me it should only play a minor role in determining whether to revisit them.

F. *Would these infringements be justified under section 1 of the Charter?*

[138] Having found that the appellant has not been subjected to any infringement of his rights under sections 7 or 12 of the Charter, it is not necessary to consider the section 1 arguments.

VI. Conclusion

[139] For all of the above reasons, I would dismiss the appeal. The parties have not sought costs and therefore none will be awarded. I would answer the certified questions as follows:

Question 1:

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?

Answer to Question 1:

An inadmissibility determination does not engage section 7 of the Charter, and even if it does, the deportation of the appellant in the specific circumstances of this case would

not infringe his section 7 right to liberty or security or be inconsistent with the principles of fundamental justice.

Question 2:

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?

Answer to Question 2:

The criteria to depart from binding jurisprudence have not been met in the present case, and, therefore, this Court is bound to conclude that paragraphs 36(1)(*a*) and 37(1)(*a*) of the IRPA are consistent with section 7 of the Charter.

"Yves de Montigny"
J.A.

"I agree.
David Stratas J.A."

"I agree.
D. G. Near J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-316-17
STYLE OF CAUSE:	DAVID ROGER REVELL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND CHINESE AND SOUTHEAST ASIAN LEGAL CLINIC (CSALC) AND SOUTH ASIAN LEGAL CLINIC OF ONTARIO (SALCO)
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CONCURRED IN BY:	STRATAS J.A. NEAR J.A.
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