Federal Court of Appeal | Cour d'appel fédérale

Date: 20210415

Docket: A-204-20

Citation: 2021 FCA 72

CORAM: **NOËL C.J.**
STRATAS J.A.
LASKIN J.A.

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellants

and

THE CANADIAN COUNCIL FOR REFUGEES, AMNESTY INTERNATIONAL, THE CANADIAN COUNCIL OF CHURCHES, ABC, DE [BY HER LITIGATION GUARDIAN ABC], AND FG [BY HER LITIGATION GUARDIAN ABC], MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI AND REDA YASSIN AL NAHASS and NEDIRA JEMAL MUSTEFA

Respondents

Heard by online video conference hosted by the Registry on February 23 and 24, 2021.

Judgment delivered at Ottawa, Ontario, on April 15, 2021.

REASONS FOR JUDGMENT BY: STRATAS J.A.

CONCURRED IN BY: NOËL C.J.
LASKIN J.A.

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REASONS FOR JUDGMENT

STRATAS J.A.

[1] The appellants ("Canada") appeal from the judgment of the Federal Court (*per* McDonald J.): 2020 FC 770, 448 D.L.R. (4th) 132. The respondents to the appeal (the "Claimants") cross-appeal. Broadly speaking, the appeal and the cross-appeal concern the constitutional validity of

certain legislative provisions that prevent certain refugee claimants from seeking refugee protection in Canada. To understand the nature of the appeal and cross-appeal, a brief description of the background is needed.

[2] As a general matter, refugee claimants arriving from a country designated as a safe country under the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the "Regulations") are ineligible to claim refugee protection in Canada: *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), para. 101(1)(*e*). Since 2004, the United States has been designated: Regulations, s. 159.3. This designation followed an agreement between the United States and Canada, commonly called the Safe Third Country Agreement.

[3] Since that time, many refugee claimants arriving from the United States have been ruled ineligible for refugee protection in Canada. Among these were the individual Claimants. They and certain advocacy organizations for refugees brought three judicial reviews in the Federal Court.

[4] In their applications for judicial review, the Claimants alleged that the designation of the United States under section 159.3 of the Regulations was outside of the authority granted by the Act (*i.e.*, was *ultra vires*). The Federal Court rejected that allegation.

[5] The Claimants also alleged that the designation of the United States as a safe third country under section 159.3 of the Regulations and the resulting ineligibility of refugee claimants in Canada under paragraph 101(1)(*e*) of the Act infringed the rights guaranteed by sections 7 and

15 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 and were not justified as a reasonable limit on rights under section 1.

[6] The Federal Court agreed that these two provisions infringed section 7 of the Charter and were not justified under section 1. It declared them of no force or effect under section 52 of the *Constitution Act, 1982*. Given this conclusion, the Federal Court found it unnecessary to deal with the section 15 issues.

[7] The Federal Court stayed its judgment for six months. This Court granted a further stay until final determination of this appeal: 2020 FCA 181.

[8] In its appeal, Canada focuses on the Federal Court's finding of unjustifiable infringement of section 7 of the Charter.

[9] In their cross-appeal, the Claimants focus on the Federal Court's decision not to deal with the issues concerning section 15 of the Charter. They also challenge the Federal Court's rejection of their *ultra vires* argument.

[10] For the reasons that follow, I would allow the appeal, dismiss the cross-appeal, set aside the judgment of the Federal Court and dismiss the applications for judicial review.

A. Preliminary issues

(1) Is the cross-appeal improper?

[11] Canada submits that the Claimants' cross-appeal is improper and should be summarily dismissed.

[12] Canada's submission is well founded. A cross-appeal lies when a party "seeks a different disposition of the [judgment] appealed from": Rule 341(1)(*b*) of the *Federal Courts Rules*, S.O.R./98-106. "Different disposition" means a remedy that will have real-life, practical consequences for the party cross-appealing. A cross-appeal does not lie simply because a party is dissatisfied with the reasons for judgment: *Ratiopharm Inc. v. Pfizer Canada Inc*., 2007 FCA 261, 367 N.R. 103 at paras. 6 and 12.

[13] In the Federal Court, two sets of Claimants sought a specific declaration that section 15 of the Charter was infringed. All of the Claimants sought a specific declaration that section 159.3 of the Regulations was *ultra vires*. The Federal Court did not grant these specific declarations.

[14] But the Federal Court's failure to grant these declarations does not have any real-life, practical consequences for the Claimants: they wanted the two provisions struck down and they were struck because they infringed section 7. The Claimants take issue with the Federal Court's reasons, not its judgment. Therefore, I would dismiss the cross-appeal.

(2) Are the section 15 and *vires* issues properly before this Court?

[15] Canada also submits that the section 15 and *vires* issues are not properly before this Court.

[16] This Court can hear and determine appeals under the Act when the Federal Court has certified a proper question for its consideration or where one of the narrow common law exceptions applies: s. 74(*d*). The Federal Court included section 15 in the certified question even though it did not deal with section 15. Because of this, Canada submits that the Federal Court should not have included section 15 in the certified question.

[17] We need not consider this submission. Canada accepts that, aside from the inclusion of section 15, this Court has a proper certified question before it concerning section 7 of the Charter. Once there is a proper certified question before the Court, all issues that might affect the outcome of the appeal, including, here, the section 15 and *vires* issues, are before the Court: *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 at para. 50 and authorities cited therein. The Claimants can advance any argument to sustain the judgment below: *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, 93 D.L.R. (4th) 36 at 621 S.C.R.

[18] As a result, all issues that were before the Federal Court are now before this Court.

B. The Safe Third Country Agreement, the legislative scheme and an administrative policy

(1) Description

[19] In 2002, Canada and the United States entered into an agreement, commonly called the Safe Third Country Agreement, to share responsibility for refugees: *Agreement between the Government of Canada and the Government of the United States of America For Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, United States and Canada, 5 December 2002 (entered into force on December 29, 2004).

[20] Under the Safe Third Country Agreement, refugee claimants must request refugee protection in the first country, Canada or the United States, that they arrive in unless they qualify for an exception. Exceptions include claimants who have family in Canada and unaccompanied minors. The Safe Third Country Agreement also does not apply to those who enter Canada irregularly or to most individuals who arrive by sea or by air.

[21] Thus, those who arrive in the United States must claim refugee status in the United States under United States law. They cannot leave the United States and claim refugee status in Canada at a land port of entry. If they do so, Canada can refuse to consider their refugee claim and, if they have no other legal basis for remaining in Canada, return them to the United States.

[22] Like all other international instruments, the Safe Third Country Agreement, by itself, does not have force of law in Canada. It must be implemented by Canadian legislation. That has happened.

[23] The legislative scheme is an interrelated one with many moving parts. It is supplemented by an Order in Council. And beneath it is an administrative policy that tells us how one aspect of this legislative scheme—continual reviews of the designation of a foreign country under subsection 102(3) of the Act—is supposed to work. In describing this legislative scheme, the Court draws in part upon its earlier analysis in *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136, leave to appeal to SCC refused, 32820 (5 February 2009).

[24] The legislative scheme reflects the philosophy that "where a refugee claimant could have sought protection in another safe country, it is reasonable and appropriate to require the refugee claimant to return and make use of that opportunity": Regulatory Impact Statement, (2004) C. Gaz II, Vol. 138, No. 22, 1622-1627 at 1622; S.O.R./2004-217, s. 2. By implementing this philosophy, Canada can share with other countries "the responsibility for providing protection to those in need, improve the efficacy of the refugee determination system and restore public confidence in that system" (at 1622).

[25] The legislative scheme begins with subsection 99(3) of the Act. It provides that those who arrive at a port of entry in Canada and intend to claim refugee status must make that claim to an immigration officer. Upon receiving the claim, the officer must determine whether it is eligible to be referred to the Refugee Protection Division for adjudication. One circumstance of

ineligibility is where “the claimant came directly or indirectly to Canada from a country designated by the regulations”: para. 101(1)(*e*) of the Act.

[26] Subsection 102(1) of the Act authorizes the making of regulations designating a country. A country can be designated having regard to four factors.

[27] The first factor is that the country has entered into a safe third country agreement or, in the words of paragraph 102(2)(*d*) of the Act, “an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection”. In this case, the Safe Third Country Agreement is such an agreement.

[28] Subsection 102(2) of the Act sets out the remaining three factors: “whether the country is a party to the Refugee Convention and to the Convention Against Torture”, the “policies and practices” of the country concerning “claims under the Refugee Convention and…obligations under the Convention Against Torture”, and the “human rights record” of the country.

[29] In 2004, the Governor in Council designated the United States under section 159.3 of the Regulations: S.O.R./2004-217, s. 2. At that time, it concluded that the United States met all four factors for designation under subsection 102(2): *Canadian Council for Refugees*.

[30] The power to designate a country based on the subsection 102(2) factors includes the power to revoke designation of a country based on those same factors: *Interpretation Act*, R.S.C. 1985, c. I-21, s. 31(4). Revocation of designation can be achieved by repealing the regulatory

provision designating the foreign country (here 159.3 of the Regulations). Revocation of designation might happen if the foreign country enacts new legislation, issues new executive orders, renders new judicial decisions or adopts administrative practices that bring it out of compliance with the subsection 102(2) factors.

[31] Recognizing the possibility of revocation based on non-compliance with the subsection 102(2) factors, Parliament created a mechanism to monitor the designated country's compliance on an ongoing basis. Subsection 102(3) of the Act provides the mechanism: "continuing review" of the foreign country's compliance with the four factors.

[32] Subsection 102(3) does not stand alone. It leaves certain questions unanswered. What does "continuing review" mean? What sort of "review"? Who should do it? What should be looked at in a review?

[33] In 2004, the Governor in Council made an Order in Council that answers some of these questions. In 2015, that Order in Council was replaced by a new one which is still in force: *Directives for Ensuring a Continuing Review of Factors Set Out in Subsection 102(2) of the Immigration and Refugee Protection Act with Respect to Countries Designated Under Paragraph 102(1)(A) of That Act (2015)*, P.C. 2015-0809 <online: https://orders-in-council.canada.ca/attachment.php?attach=31132&lang=en>. And an administrative policy also helps to answer them: Immigration, Refugees and Citizenship Canada, *Monitoring Framework for the U.S. Designation As a Safe Third Country*, June 2015 (Baril Affidavit, sworn October 11, 2019, Exhibit E, Appeal Book, Vol. 37, page 15662-15667).

[34] The 2015 Order in Council requires "a continuing review of factors set out in subsection 102(2)" to ensure the designation of the United States as a safe third country remains appropriate. The Minister of Citizenship and Immigration is to "undertake a review, on a continual basis, of the factors set out in subsection 102(2) of the *Immigration and Refugee Protection Act* with respect to the United States" by "monitoring those factors on a regular basis". The "Minister must report to the Governor in Council on that review when the circumstances warrant".

[35] Under the 2015 Order in Council, if the Minister's review of the subsection 102(2) factors favours continuing the designation, the Minister need not do anything. But if the Minister's review detects problems that warrant the Governor in Council's attention, the Minister must make a report to the Governor in Council. Upon receiving the report, the Governor in Council considers whether the designation of the foreign country should be revoked.

[36] Why was the Governor in Council given the responsibility to decide on matters of designation and revocation? Answering this question helps to shed light on the nature and content of the Governor in Council's decision: *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, [2012] 2 F.C.R. 312 at para. 76.

[37] The Governor in Council is the "Governor General of Canada acting by and with the advice of, or by and with the advice and consent of, or in conjunction with the Queen's Privy Council for Canada": *Interpretation Act*, R.S.C. 1985, c. I-21, subsection 35(1), and see also the *Constitution Act, 1867*, (UK), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, Appendix

II, No. 5, sections 11 and 13. All the Ministers of the Crown, not just the Minister, are active members of the Queen's Privy Council for Canada. They meet in a body known as Cabinet. Cabinet—sitting at the apex of the executive of the Canadian government—is "to a unique degree the grand co-ordinating body for the divergent provincial, sectional, religious, racial and other interests throughout the nation" and, by convention, it attempts to represent different geographic, linguistic, religious, and ethnic groups: Norman Ward, *Dawson's The Government of Canada*, 6th ed., (Toronto: University of Toronto Press, 1987) at pages 203-204; Richard French, "The Privy Council Office: Support for Cabinet Decision Making" in Richard Schultz, Orest M. Kruhlak and John C. Terry, eds., *The Canadian Political Process*, 3rd ed. (Toronto: Holt Rinehart and Winston of Canada, 1979) at pages 363-394. All the levers of government are present at the Cabinet table.

[38] In response to a report from the Minister raising concerns, the Governor in Council can consider whether to maintain the foreign country's designation or revoke it. But given its status, nature and powers, the Governor in Council can do much more. It can authorize diplomatic, state-to-state discussions with the government of the foreign country to try to fix anything that casts into doubt the country's compliance with the subsection 102(2) factors. From those discussions, it may learn of developments that could impact on the designation but it may also learn that the foreign country will address these developments through new initiatives. It can also amend the Regulations and tailor the exceptions under the scheme to address any new developments: para. 102(1)(*c*) of the Act and Article 6 of the Safe Third Country Agreement. It may have other policy considerations to consider. It may ask for further investigations to be made. This is not necessarily an exhaustive list.

[39] To assist in the conducting of subsection 102(3) reviews, an administrative policy has been developed. It is entitled, “Monitoring Framework for the U.S. Designation as a Safe Third Country”.

[40] The Monitoring Framework requires subsection 102(3) reviews to focus on systemic concerns in the United States, not isolated incidents. The reviews are “to track developments in the U.S.” that “would considerably weaken the level of human rights and refugee protection that the U.S. provides” and, thus, cast doubt “on its ability to continue to meet the criteria for designation as a safe third country”. It requires subsection 102(3) reviews to be conducted continually so that Immigration, Refugees and Citizenship Canada can “identify, in a timely manner, changes in the U.S.” that might affect “its status as a safe third country”. This furthers “responsible action and decision-making” on whether the designation of the United States remains appropriate.

[41] The Monitoring Framework requires subsection 102(3) reviews to examine two sets of indicators:

- *Indicators concerning significant changes in the United States refugee protection system*. These include how the United States applies the non-refoulement principle, how it applies exclusion clauses in the Refugee Convention (*e.g.*, clauses 1E and 1F), its consistency and quality of adjudication, whether refugee claimants have effective access to counsel, the United States’ practices of detention and the operation of its judicial system.

- *Indicators to monitor the human rights record of the United States*. These include the observance in the United States of the rights contained in "long-standing core U.N. human rights legal instruments": life, liberty and security of the person, access of refugee claimants to an independent judiciary, civic and political freedoms, the rights of non-citizens, and freedom from discrimination.

These help to ensure that subsection 102(3) reviews are detailed and thorough.

[42] Both indicators are to be examined using quantitative and qualitative information from a wide variety of governmental and non-governmental sources, such as documents from U.N. sources, publications of international human rights organizations and supra-national and regional organizations, international media, U.S. government publications and reports from reputable non-government organizations such as the Claimants, the Canadian Council for Refugees, Amnesty International and the Canadian Council of Churches.

[43] Other portions of the Act are potentially relevant and, thus, form part of this legislative scheme. Under the Act, Canadian immigration officers, upon finding a claimant is ineligible, have a number of powers and discretions. These include:

- Issuing a temporary residence permit under subsection 24(1) of the Act;

- Deferring removal upon request if the officer finds that exceptional circumstances exist based on evidence of risk of death, extreme sanction, or inhumane treatment:

Revell v. Canada (Citizenship and Immigration), 2019 FCA 262, [2020] 2 F.C.R. 355 at paras. 50-52; *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, [2012] 2 F.C.R. 133;

- Transferring the matter to Immigration, Refugees and Citizenship Canada when an officer determines there are exceptional circumstances. Based on humanitarian and compassionate considerations or public policy considerations, Immigration, Refugees and Citizenship Canada can decide whether to grant access to the Refugee Protection Division by waiving either the ineligibility finding under paragraph 101(1)(*e*) of the Act or the pre-removal risk assessment bar under paragraph 112(2)(*b*) of the Act: Act, ss. 25, 25.1 and 25.2.

[44] As well, refugee claimants have access to the Federal Court if they believe the circumstances of their removal warrant the Court's intervention: *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2020] 1 F.C.R. 699 at para. 87; *Brown v. Canada (Citizenship and Immigration)*, 2020 FCA 130 at paras. 158-159.

[45] This Court's case law shows that these powers and discretions can work to alleviate harsh effects caused by the Act: see *Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at paras. 13-23; *Tapambwa* at paras. 87-88; *Revell* at paras. 50-52; *Brown* at paras. 150-159.

(2) Assessment and conclusion

[46] Paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations are part of an interrelated legislative scheme. The two sections do not sit alone and in isolation. It is artificial to view and analyze them in the abstract, all the more so after a foreign country has been designated. After designation, subsection 102(3) reviews are to take place continually to ensure that designation remains appropriate.

[47] Put another way, if someone were to ask why a foreign country continued to be designated, say, in 2017 when the applications for judicial review in this case were brought, the answers are to be found not in the original designation in 2004 but in one or more subsection 102(3) reviews conducted up to that time, the failure to conduct reviews, the failure to conduct them properly or the failure to refer matters to the Governor in Council for assessment and decision, the findings and recommendations in those reviews, and the Governor in Council's reactions or non-reactions to those findings and recommendations. For the purposes of these reasons, all these activities shall be described as "subsection 102(3) reviews and related administrative conduct". At a higher level, one also could query whether subsection 102(3), the 2015 Order in Council, the Monitoring Framework and the reviews have been designed properly and have been working as they should.

C. The Claimants' Charter challenge is not properly constituted

(1) The true nature of the Claimants' Charter challenge

[48] Before us is an appeal from applications for judicial review in the Federal Court. We must begin by identifying the "real essence" and "essential character" of the applications. We do this by "reading [them] holistically and practically without fastening onto matters of form": *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 FCA 250, [2014] 2 F.C.R. 557 at paras. 49-50.

[49] All of the applications challenge the decision of an officer at an entry point who found the individual Claimants' claims for refugee protection to be ineligible for referral to the Refugee Protection Division under paragraph 101(1)(*e*) of the Act because of the designation of the United States under section 159.3 of the Regulations. All allege that the officer had no power to do that because those two provisions were invalid.

[50] Invalidity is alleged to stem from two problems, *ultra vires* and the Charter. The *ultra vires* issue will be canvassed later in these reasons.

[51] The Claimants say the two provisions cause effects that are contrary to section 7, section 15 or both. The Claimants also say the two provisions are not justified under section 1 and must be struck down under section 52 of the *Constitution Act, 1982*.

[52] The Claimants do not say that other provisions, statutory instruments or policies are invalid because they cause effects contrary to the Charter. In particular, the Claimants do not seek to invalidate subsection 102(3), the 2015 Order in Council or the Monitoring Framework. Nor do they say that these matters are part of the cause of any unconstitutional effects caused by the two provisions.

[53] As well, in their applications, the Claimants do not challenge any subsection 102(3) reviews and related administrative conduct. For example, they do not challenge or seek remedies concerning administrative conduct in relation to subsection 102(3) reviews, the outcome of reviews that left the designation in place, reports to the Governor in Council or the failure to report to the Governor in Council, or any decisions at any time by the Governor in Council to keep the designation in place. None of these things are said to be part of the cause of any unconstitutional effects. In their memorandum of fact and law, the Claimants do make submissions alleging inadequacies in the subsection 102(3) reviews, but only in support of their submission that the designation of the United States as a safe country is *ultra vires* the Act.

[54] Thus, the real essence and essential character of the Claimants' applications is a challenge to paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations, and only those two provisions. Alone and in isolation they are said to cause unconstitutional effects. Based on this, as we shall see, the evidentiary record that developed in the Federal Court concentrated on general effects of the designation of the United States, often described in terms of individual incidents rather than the subsection 102(3) reviews and related administrative conduct and their effect.

[55] The Claimants' applications do not fit with the nature of the legislative scheme. To reiterate, paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations do not sit alone and in isolation. They are part of an interrelated legislative scheme. And after designation, the real cause of any continued designation or decision to revoke it is the subsection 102(3) reviews and related administrative conduct.

(2) The nature of the Charter and the basic requirements for a challenge under it

[56] The Charter sets out rights and freedoms and guarantees them subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. But nowhere does the Charter invite courts to depart from their role as courts. Nor does it invite judges—career lawyers who happen to hold a judicial commission—to follow whatever procedures they wish. Rather, the Charter is a document of law, surrounded, suffused and sustained by law. In fact, tens of thousands of cases have been decided under it, a veritable mountain of guidance.

[57] From this mountain, certain immutable principles bind us all. One of the most basic is that Charter claimants must show that some state action—for example, legislation or administrative conduct by state officials—has caused an infringement of rights or freedoms. Inherent in this are two requirements: the Charter claimants must identify the state action responsible for the infringement, *i.e.*, demonstrate a causal link between the state action and the infringement, and place enough evidence before the Court to prove causation and infringement. See, *e.g.*, *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 18 D.L.R. (4th) 481 at

447 and 490 S.C.R.; *Symes v. Canada*, [1993] 4 S.C.R. 695, 110 D.L.R. (4th) 470 at 764-765 S.C.R.; *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307 at para. 60; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101 at paras. 73-78; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176 at paras. 126, 131-134; *R. v. Kokopenace*, 2015 SCC 28, [2015] 2 S.C.R. 398 at paras. 251-254 and cases cited therein. Common to these requirements is causation. Causation is key.

[58] From this, two practical rules have emerged in the jurisprudence:

(a) Legislative provisions in an interrelated legislative scheme cannot be taken in isolation and selectively challenged: *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134. The provisions, taken in isolation, may not have caused the Charter infringement. Other related provisions may be responsible or may prevent or cure any possible defects. This sort of artificial and narrow challenge often results in the creation of an unduly artificial and narrow evidentiary record.

(b) Where administrative action or administrative inaction under legislation is the cause of a rights infringement, it, not the legislation, must be challenged: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120. Challenging the legislation and ignoring the administrative action or administrative inaction will not satisfy the requirement of causation

> between the state action and the rights infringement. This can also lead to the development of an unduly artificial and narrow evidentiary record.

[59] In considering a Charter challenge, another basic principle must be kept front of mind: courts are courts and have to act like courts. Thus, courts can deal only with the challenge the Charter challengers have advanced and courts can work only with the evidence the parties have offered concerning that challenge. Courts cannot go beyond the challenge and address a different challenge. Nor can they help themselves to evidence as if they are a roving commission of inquiry. Instead, Courts dealing with a Charter challenge are "firmly grounded in the discipline of the common law methodology": Brian Morgan, "Proof of Facts in Charter Litigation," in Robert J. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths, 1987), 159 at 162, cited with approval by the Supreme Court in *MacKay v. Manitoba*, [1989] 2 S.C.R. 357, 61 D.L.R. (4th) 385 at 363 S.C.R. and *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, 73 D.L.R. (4th) 686 at 1099-1101 S.C.R.

(3) Application of these principles to the Claimants' Charter challenge

[60] The Claimants' Charter challenge offends the two practical rules. The fundamental requirement of causation that underlies both rules has not been met. This has also rendered the evidentiary record on key issues too thin to permit responsible adjudication. As a result, the Claimants' Charter challenge must be dismissed.

(a) Applying the two practical rules

(i) Legislative sections cannot be taken in artificial isolation and selectively challenged

[61] Assuming for the moment that there is a Charter infringement in this case, what caused it? As the analysis of the legislative scheme in section B of these reasons shows, subsection 102(3) reviews play a pivotal role in ensuring that continued designation remains appropriate. In this case, the cause of any infringement is not the designation of the United States 17 years ago but the subsection 102(3) reviews and related administrative conduct that has caused the designation to continue. It was incumbent on the Claimants to challenge that.

[62] But they did not do that. Instead, they plucked two provisions out of this complex, interrelated legislative scheme and have singled them out for attack. This was wrong. By attacking those two provisions and only those two—as if the rest of the legislative scheme and administrative conduct under that scheme does not exist—the Claimants have created a strawman and have asked us to decide on its constitutionality. This we cannot do. Courts deciding constitutional cases with big public impact do not deal with strawmen.

[63] This is fatal to the Claimants' challenge: *PHS Community Services*, above.

[64] In *PHS Community Services*, the Supreme Court considered the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. That Act is structurally similar to the Act in this case. Like this case, the relevant provisions of the *Controlled Drugs and Substances Act* consisted of a general

provision whose effects are mitigated by a provision elsewhere in the legislative scheme. Specifically, the *Controlled Drugs and Substances Act* prohibited the possession of certain drugs and substances (subsection 4(1)) but allowed the Minister of Health to grant exemptions from the prohibition (section 56).

[65] The Charter claimant in *PHS Community Services*, the Insite safe injection facility, challenged the general provision, subsection 4(1), arguing that it violated section 7 of the Charter and was not saved under section 1. Just like the Claimants here, Insite argued that the general provision was grossly disproportionate and overbroad.

[66] The Supreme Court unanimously dismissed Insite's Charter challenge. The challenge was directed against the general provision, subsection 4(1), "in isolation" rather than "in the context of other provisions… notably s. 56" (at para. 109). In words apposite to the Claimants' challenge in the case before us, the Supreme Court observed that if the general provision operated in isolation, with "no provision for exemptions", the "assertions that it is arbitrary, overbroad and disproportionate in its effects might gain some traction" (at para. 109). But the general prohibition did not operate that way. It worked hand in hand with the mitigating provision, section 56.

[67] The Supreme Court concluded that the "constitutional validity of s. 4(1) of the Act cannot be determined without considering the provisions in the Act designed to relieve against unconstitutional or unjust applications of that prohibition" (at para. 109). Subsection 4(1) was interrelated to and could not be separated from section 56. In the Supreme Court's view, section

56 acted “as a safety valve that prevents [the general provision] from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects” (at para. 113).

[68] Thus, the Charter challenge had to be brought against all relevant parts of the legislative scheme, not just the general provision in isolation. As this was not done, the challenge against the general provision was dismissed.

[69] But the Supreme Court went further. It held that the entire legislative scheme, consisting of the general provision and the safety valve, was constitutional (at para. 114). Any problem with constitutionality was “not in the statute but in the Minister’s exercise of the power the statute gives him to grant appropriate remedies” against any effect causing a Charter violation (at para. 114). Here, the Supreme Court suggests that the challenge in *PHS Community Services* properly lay against the Minister’s discretionary decision refusing an exemption from the general prohibition.

[70] Just as in *PHS Community Services*, paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations cannot be challenged in isolation. A safety valve in the legislative scheme in issue here is the review procedure under subsection 102(3). In this case, if there are effects contrary to the Charter, they stem not from paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations but from the subsection 102(3) reviews and related administrative conduct. This Court has previously dismissed challenges to the Act that artificially isolate provisions: *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R.

655 at para. 81; *Sogi v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 212, [2005] 1 F.C.R. 171 at para. 23.

[71] Fundamentally then, *PHS Community Services* holds that a Charter challenge must be directed to the state action—legislation or administrative conduct—that causes the Charter infringement. In this regard, it stands alongside and is bolstered by the Supreme Court authority on the requirement of causation cited at paragraph 57 of these reasons.

[72] In oral argument, the Claimants submit that *PHS Community Services* actually supports their position. After all, in *PHS Community Services*, the Supreme Court, using the Charter, ordered the Minister to grant Insite its exemption from the general prohibition. Counsel urges this Court to apply *PHS Community Services*, grant Charter relief here, and end the designation of the United States as a safe third country.

[73] However, *PHS Community Services* and this case are not identical. In *PHS Community Services*, the challengers sought a declaration of the constitutional invalidity of the general prohibition in the *Controlled Drugs and Substances Act* just like the Claimants here sought a declaration of the constitutional invalidity of two designation sections. But in *PHS Community Services*, the challengers went further than that. They challenged administrative conduct—the Minister's failure to grant exemptions—that caused individual rights breaches and sought individual remedies under section 24, including a declaration that the failure of the Minister to grant exemptions to individuals violated section 7 rights (at para. 116). Here, the Claimants have not done this.

[74] In paragraph 58 of these reasons, I mentioned that failing to challenge the matter that is the real cause of the infringement often leads to the development of an unduly artificial and narrow evidentiary record, one that does not speak to the real cause of the Charter infringement. This has happened here. The subsection 102(3) reviews and related administrative conduct are the real causes of the infringement, if there is one. But the evidence before us in this case on subsection 102(3) reviews and related administrative conduct is limited because they were not the focus of the Claimants' challenge. Much more evidence concerning subsection 102(3) reviews and related administrative conduct would have appeared in this record had they been the focus of the Claimants' challenge. We cannot be confident that this record, hobbled by the way the Claimants have cast their challenge, is sufficient for us to adjudicate the Charter issues responsibly.

[75] By way of illustration, the most recent reports from subsection 102(3) reviews were issued just before and after the Charter challenges in this case, in December 2016, March 2017 and February 2018, likely covering events right around the time of the challenges: Reasons of the Federal Court at para. 77. Yet, the Federal Court tells us that not even "the content of these reports was…in evidence": Reasons of the Federal Court at para. 78. All that the Federal Court could surmise (at para. 78) was that "reporting continued after the 2015 [Order in Council]". The reviews underlying these reports—to say nothing of the material administrative officials might have considered when preparing these reviews—could contain evidence of the sort described at paragraphs 34-42 and 47 of these reasons. In this case, much of this valuable evidence is missing or is in bits and pieces, highly redacted in many places due to assertions of privilege by Canada. But the Claimants advised us at the hearing that they did not object to or challenge these, in

effect acquiescing to Canada's non-disclosure. As a result, right where any Charter assessment must focus—the subsection 102(3) reviews and related administrative conduct, including any reports—lies a great big hole.

[76] The legal question for this Court "is whether the appeal record provides sufficient facts to permit the Court to adjudicate properly the issues raised": *R. v. Mills*, [1999] 3 S.C.R. 668, 180 D.L.R. (4th) 1 at para. 37. The answer is no. The evidentiary basis is too incomplete to allow for an informed Charter adjudication on what really matters in this case.

[77] The Claimants submit that the evidentiary record is voluminous and, thus, was adequate. Voluminous it was, particularly concerning the experiences of some refugee claimants in the United States and the experiences of some refugee claimants in Canada who were returned to the United States. But the value of evidence is not measured by the pound.

[78] As shall be seen in the discussion of the Federal Court's treatment of the section 7 issues, some of this evidence, although voluminous, is somewhat piecemeal and individualized and, thus, is problematic for drawing system-wide inferences concerning the situation in the United States. Immigration, Refugees and Citizenship Canada noted similar problems with a report, prepared by two of the Claimants, that urged the Minister to revoke the designation of the United States: Memorandum to the Minister entitled "Amnesty International and Canadian Counsel for Refugees Report Contesting the U.S. Designation as a Safe Third Country", dated July 7, 2017, Appeal Book, Vol. 39 at 16740 and 16741. Also some of the evidence consists of or is based on media reports whose reliability and admissibility is open to question. The evidentiary record

suffers from other problems too. But the biggest problem of all is that very little of it concerned the subsection 102(3) reviews and related administrative conduct, a storehouse of some of the best available evidence. As will be discussed shortly, if their Charter challenge were properly constituted, the Claimants could have pursued this evidence, asserted and maintained objections to non-disclosure and litigated the objections. And, as will also be discussed shortly, measures could have been taken to ensure that a judicial review would be available, effective, and fair.

[79] At one point in the hearing, the Claimants seemed to suggest that the requirement of a sufficient evidentiary record before the Court is just a technicality. A foundational case from the Supreme Court rejects this. The sufficiency of evidence is "not…a mere technicality" but is "a flaw that is fatal" because it "is essential to a proper consideration of Charter issues". Deciding Charter cases in "a factual vacuum" would "trivialize" the Charter and cause "ill-considered opinions" in cases "of fundamental importance to Canadian society" that "profoundly affect the lives of Canadians and all residents of Canada". No one can "expect a court to deal with [a Charter issue where there is]…a factual void". And "the unsupported hypotheses of enthusiastic counsel" cannot fill that void. See *MacKay* at 361-362 and 366 S.C.R.

[80] This especially matters where, as here, the allegation of unconstitutionality stems from the alleged effects of the impugned provision. In *Danson* at 1101 S.C.R., the Supreme Court put it this way:

> In general, any Charter challenge based upon allegations of the unconstitutional effects of impugned legislation must be accompanied by admissible evidence of the alleged effects. In the absence of such evidence, the courts are left to proceed in a vacuum, which, in constitutional cases as in nature, has always been abhorred.

[81] Time and time again, the Supreme Court has underscored the importance of a court having a full evidentiary record before deciding Charter cases. See *A.G. (Que.) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321 at 90-91 S.C.R.; *MacKay* at 361-362 S.C.R.; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, 35 D.L.R. (4th) 1 at 762, at 767-768 S.C.R.; *Danson* at 1101 S.C.R.; *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, 142 D.L.R. (4th) 385 at paras. 2-3 and 55; *R. v. Goltz*, [1991] 3 S.C.R. 485, 131 N.R. 1, at 515-516 S.C.R.; and at least 16 other, more recent Supreme Court authorities on point.

[82] This is just a subset of an older, broader rule, expressed in non-Charter constitutional cases that constitutional issues should not be decided unless a full and adequate evidentiary record is before the Court: *Northern Telecom v. Communications Workers*, [1980] 1 S.C.R. 115, 98 D.L.R. (3d) 1 at 139 S.C.R.

[83] Had the subsection 102(3) reviews and related administrative conduct been targeted in a Charter challenge or judicial review, the reports of the reviews, the reviews themselves and the information relied upon by officials involved in the reviews and, if relevant, by the Governor in Council would form the record placed before the Court, subject to privilege and other valid objection: *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297; and see discussion at paras. 106-120 below on tools the Court has to manage privilege and objection. Much of the record would have

been systemic evidence related to the United States' treatment of refugees, including evidence gathered on a state-to-state basis, based on the many detailed sources required to be examined in the Monitoring Framework—sources broader and more numerous than those that the non-governmental organizations who are Claimants in this case could access. As well, the subsection 102(3) reviews would have contained evaluations by administrators responsible for studying the matter—potentially important for the issues of rights breach and justification. Finally, assuming a challenge targets the most recent subsection 102(3) reviews and related administrative conduct, the underlying material would be relatively fresh. Freshness matters: the policies and practices of the United States and the conditions refugees encounter there can rapidly change.

(ii) Where administrative action or inaction under legislation is responsible for unconstitutional effects, the administrative action or inaction must be challenged, not the legislation

[84] A Charter remedy will be given only for state action that causes a Charter infringement. Where the state action is legislation and the effect of the legislation is to infringe Charter rights in an unjustifiable way, the legislation is liable to be struck. But if, in reality, administrative action or inaction under the legislation is alone responsible for the unjustified Charter infringement, the Charter challenge must focus on the administrative action or inaction, not the legislation: *PHS Community Services*; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416 at 1078-1079 S.C.R.; *Eaton*, above at paras. 2-3 and 55; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, 151 D.L.R. (4th) 577 at paras. 20-23; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 53; *New Brunswick (Minister of Health and Community Services) v. G.(J.)*,

[1999] 3 S.C.R. 46, 177 D.L.R. (4th) 124 at para. 97; *Little Sisters*, above at paras 134-135; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295 at paras. 83-84; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at para. 67; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773 at para. 174.

[85] *Little Sisters*, above is perhaps the foremost Supreme Court authority supporting the proposition that where administrative action or inaction is responsible for unconstitutional effects, the administrative action or inaction should be challenged.

[86] Little Sisters Book and Art Emporium imported erotic publications into Canada. Canada Customs regularly intercepted and prohibited the importations on the ground of obscenity. It launched a Charter challenge against the provisions of Customs legislation that authorized the interceptions.

[87] The majority of the Supreme Court asked itself whether the "source of the problem" was "the…legislation itself" or "the unconstitutional conduct of Customs officials exercising powers under constitutional legislation" (at para. 108).

[88] The majority of the Supreme Court held that the problem did not stem from the Customs legislation itself. In purpose and effect, it was not contrary to the Charter. It did not contemplate or authorize maladministration by officials with Canada Customs. Instead, the administrative decisions taken by Canada Customs under the legislation were the real source of any

constitutional infringement. In the words of the majority of the Supreme Court, the challengers' complaints were about "the statutory scheme as *operated* by officials rather than the statutory scheme itself" (at para. 77, emphasis in original). Occasional maladministration and misapplication by officials, by itself, affords "no reason to declare the legislation unconstitutional" (at para. 77). The proper recourse for Little Sisters was to challenge non-importation decisions by Canada Customs by way of judicial review.

[89] The case at bar is similar to *Little Sisters*. The alleged constitutional defect in this case stems from how administrators and officials are operating the legislative scheme, not the legislative scheme itself. If they are operating the legislative scheme properly, regular reviews under subsection 102(3) will be conducted against the four criteria in subsection 102(2) of the Act and the reviews, conducted in accordance with the Monitoring Framework, will be thorough. For good measure, officials at points of entry will have powers and discretions available to them to mitigate or eliminate any harsh effects.

[90] Thus, based on the record before us, the legislative scheme as a whole, assuming it is operated properly, is designed to protect fundamental human rights, including Charter rights. Based on the record before us, to the extent that detrimental effects are being suffered by persons being returned to the United States, the legislative scheme as a whole is not to blame. Rather, if anything, subsection 102(3) reviews and related administrative conduct may be to blame. But because the Claimants chose not to attack any administrative conduct, we have neither the ability nor the evidence before us to assess it.

[91] Before leaving this topic, one exchange between the Claimants and this Court deserves mention. The Court asked the Claimants questions regarding the nature of their Charter challenge and whether it had been properly constituted, *i.e.*, whether the Claimants had challenged the state action responsible for the Charter infringements they allege. In response, shortly after the mid-morning break on the second day of hearing, the Claimants submitted that all they had to do to succeed in their Charter challenge was to prove the presence of any Charter infringements and point to any sort of legislative action that had taken place in the years leading up to the infringements, nothing more. This is not supported by the law. It reads out the requirement at paragraph 57 of these reasons that a Charter challenger prove causation, the two practical rules identified at paragraph 58 of these reasons and discussed at paragraphs 61-73 and 84-91 of these reasons, the need for adequate evidence proving causation identified at paragraphs 74-83 of these reasons, and the tens of Supreme Court cases cited in this section of these reasons supporting all of these points.

(b) The Claimants' proper recourse

[92] The Claimants and Canada both submitted during the hearing that applications for judicial review targeting the subsection 102(3) reviews and related administrative conduct are not possible. In their view, there must be a formal decision, a formal order or a tangible record of a decision-point such as a report that has legal effect before there can be judicial review. They submit that there was no such thing here.

[93] I disagree. Applications for judicial review targeting the subsection 102(3) reviews and related administrative conduct are possible despite what the parties might believe.

[94] Applications for judicial review are possible where a matter—usually administrative conduct or inaction—affects legal rights, imposes legal obligations or causes real prejudicial effects: *Irving Shipbuilding Inc. v. Canada (Attorney General)*, 2009 FCA 116, [2010] 2 F.C.R. 488 at paras 21-25; *Democracy Watch v. Conflict of Interest and Ethics Commission*, 2009 FCA 15, 387 N.R. 365. As a result, there are examples of judicial reviews for administrative conduct or inaction falling short of formal decisions or orders: see, *e.g.*, *Saulnier v. Quebec Police Commission* (1975), [1976] 1 S.C.R. 572, 57 D.L.R. (3d) 545 at 578 S.C.R. (a recommendation to the Minister of Justice to demote an officer is reviewable); *Gestion Complexe Cousineau (1989) Inc. v. Canada (Minister of Public Works and Government Services)*, [1995] 2 F.C. 694, 125 D.L.R. (4th) 559 at 561-565 D.L.R. (F.C.A.) (the process for tendering and awarding a contract is reviewable); *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System)*, [1997] 3 S.C.R. 440, 151 D.L.R. (4th) 1 (notices from the commissioner of an inquiry that outline possible findings of misconduct are reviewable); *Chrétien v. Canada (Ex-Commissioner, Commission of Inquiry into the Sponsorship Program and Advertising Activities)*, 2008 FC 802, [2009] 2 F.C.R. 417 (issuance of a royal commission report with no legal consequences that made reputation-affecting findings concerning an individual is reviewable).

[95] This Court explained the legal basis for this as follows:

> Subsection 18.1(1) of the *Federal Courts Act* provides that an application for judicial review may be made by the Attorney General of Canada or by anyone

> directly affected by "the matter in respect of which relief is sought." A "matter" that can be subject of judicial review includes not only a "decision or order," but any matter in respect of which a remedy may be available under section 18 of the *Federal Courts Act*: *Krause v. Canada,* [1999] 2 F.C. 476 (C.A.). Subsection 18.1(3) sheds further light on this, referring to relief for an "act or thing," a failure, refusal or delay to do an "act or thing," a "decision," an "order" and a "proceeding." Finally, the rules that govern applications for judicial review apply to "applications for judicial review of administrative action," not just applications for judicial review of "decisions or orders": Rule 300 of the *Federal Courts Rules*.
>
> As far as "decisions" or "orders" are concerned, the only requirement is that any application for judicial review of them must be made within 30 days after they were first communicated: subsection 18.1(2) of the *Federal Courts Act*.

(*Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 at paras. 24-25.)

[96] Based on these authorities, the individual Claimants could have brought judicial reviews against the immigration officers' decisions that they were ineligible for refugee protection in Canada on the basis that they were or are actually eligible. In support of that, they could have sought *mandamus* requiring the Governor in Council to revoke the designation of the United States and a declaration that the Governor in Council should have revoked the designation of the United States at an earlier time. To the extent it is necessary, administrative law relief could also have been obtained concerning subsection 102(3) reviews and related administrative matters as long as those matters affect legal rights, impose legal obligations or cause real prejudicial effects in accordance with the *Irving* test. To the extent that any administrative decisions have been made along the way and need to be quashed, *certiorari* could have been sought. Both administrative law grounds and the Charter might have been offered in support of any of this administrative law relief. If the non-governmental organizations that are Claimants qualify for public interest standing, they could have sought any of this relief on those grounds.

[97] To the extent that any declaratory relief were sought, the Court would have determined its true essence and essential character. If it were akin to *mandamus* or *certiorari*, the Court would have required the prerequisites for those remedies to be met, including any standard of review, before granting any relief: *Hupacasath First Nation v. Canada (Foreign Affairs and International Trade Canada)*, 2015 FCA 4, 379 D.L.R. (4th) 737; *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, [2019] 2 F.C.R. 376 at paras. 17-22.

[98] In response to the Court's questioning, the Claimants submitted that judicial reviews under this legislative scheme would be ineffective. The Claimants pointed to Canada's ability to assert privileges over key documents or redact them and raised the spectre of Canada being able to immunize subsection 102(3) reviews from judicial review.

[99] Canada's position at the hearing did not lessen the Claimants' concerns about immunization. Canada maintained that it has an absolute and unqualified right to assert any of the various privileges at its disposal, such as Crown and public interest privilege under sections 38 and 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, regardless of the consequences, even if immunization of decision-making results.

[100] Both sides' positions are overstated.

[101] In this area, two principles collide. It is true that Canada can assert its privileges if supported by the facts and the law. But courts oppose the immunization of public decision-making from review. The collision of these two principles has led courts to devise ways to

reconcile the protection of necessary interests in confidentiality with the need for effective, meaningful and fair judicial review.

[102] For a long time now, Canadian courts have opposed attempts by public authorities to immunize administrators completely from judicial review, whether that be done by full privative clauses or the withholding of evidence or explanations essential for a meaningful review. The complete barring of review by a court by whatever means, whether by appeal or by judicial review, even on the issue whether an administrator has exceeded its legislative authority, is an unwarranted interference with the core, constitutional powers of the judiciary and the constitutional principle of the rule of law: *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 27-28; *Habtenkiel v. Canada (Citizenship and Immigration)*, 2014 FCA 180, [2015] 3 F.C.R. 327 at para. 38; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 24. Put positively, *Crevier* stands for the proposition that there must always be at least some prospect or degree of review: *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, 100 D.L.R. (4th) 658 at 601 S.C.R. (dissenting but not disputed by the majority on this point), citing, with approval, J. H. Grey, "Sections 96 to 100: A Defense" (1985), 1 Admin. L.J. 3 at 11. This principle is limited to the complete ousting of any review of an administrative decision, not legislative limitations on the availability or scope of review: see, *e.g.*, *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 102 D.L.R. (4th) 402 at 333 S.C.R.; *Capital Regional District v. Concerned Citizens of British Columbia et al.*, [1982] 2 S.C.R. 842, 141 D.L.R. (3d) 385; *Vavilov* at paras. 45-52.

[103] For this reason, full privative clauses that purport to immunize administrative decision-making entirely from review are read down to permit review, albeit usually on a deferential basis: see, *e.g.*, *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449.

[104] In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at para. 70. Put another way, all holders of public power must be accountable for their exercises of power, a principle that rests at the heart of our democratic governance and the rule of law: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority on this point); *Canada (Judicial Council) v. Girouard*, 2019 FCA 148, [2019] 3 F.C.R. 503 at para. 103; *Douglas v Canada (Attorney General)*, 2014 FC 299, [2015] 2 F.C.R. 911 at para. 119.

[105] The rationale against the complete immunization of administrative conduct from review is as fundamental as it can get:

> "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them—the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on—must obey the law: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385; *United States v. Nixon*, 418 U.S. 683 (1974); *Marbury v. Madison*, 5 U.S. 137 (1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being

> reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.
>
> Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power—no matter how lofty, no matter how important—must be subject to meaningful and fully independent review and accountability.

(*Canada (Citizenship and Immigration) v. Tennant*, 2018 FCA 132 at paras. 23-24; see also *Girouard v. Canada (Attorney General)*, 2018 FC 865, [2019] 1 F.C.R. 404 at paras. 6-7, aff'd 2019 FCA 148, [2019] 3 F.C.R. 503.)

[106] Courts are alert to attempts by public authorities and administrators to immunize their decision-making by withholding documents and information necessary for judicial review or by failing to give explanations and rationales for decision-making: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 at para. 51; *Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at para. 24; *Slansky* at para. 276 (dissenting but not disputed by the majority); see also Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 Can. J. Admin. L. & Prac. 87 at 113; and see the requirement for reasoned explanations behind administrative decision-making in *Vavilov* at paras. 83-87 and 91-104.

[107] To ensure that judicial reviews are available, effective and fair, both sides have many tools to compel the production of evidence or the provision of information such as production of the administrative record under Rule 317, subpoenas under Rule 41, and oral and documentary

discoveries when the judicial review can be treated like an action under subsection 18.4(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7: see the general discussion in *Tsleil-Waututh Nation* at 86-105; on subsection 18.4(2), see *Canada (Human Rights Commission) v. Saddle Lake Cree Nation*, 2018 FCA 228 at paras. 23-26 and *Meggeson v. Canada (Attorney General)*, 2012 FCA 175, 349 D.L.R. (4th) 416 at paras. 31-34. The Federal Courts have additional tools under the plenary powers they possess as courts: see *Dugré v. Canada (Attorney General)*, 2021 FCA 8 at para. 20 and cases cited therein.

[108] The primary tool available to parties is to request that the administrative decision-maker produce its record under Rule 317. In dealing with a request, administrative decision-makers can object to disclosing documents under Rule 318 based, for example, on privileges. After receiving submissions, the Court can rule on the objections. See, generally, *Lukács v. Canada (Transportation Agency)*, 2016 FCA 103 at paras. 5-18; and see *Bernard v. Public Service Alliance of Canada*, 2017 FCA 35 on the procedure for litigating objections.

[109] When dealing with privileges, the Court will scrutinize them carefully. Some privileges, such as public interest privilege, have demanding requirements that must be met: see, *e.g.*, *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24, [2018] 3 F.C.R. 633. When a claim of privilege over a document is before a Court under Rule 318, the Court is not always limited to the all-or-nothing choice of making an order requiring the document to be produced or keeping the document secret. Often the Court can craft an order that protects confidentiality interests while permitting sufficient access to confidential material to facilitate effective and meaningful judicial review: *Lukács* at paras. 12-18; see also *Canada Evidence Act*,

s. 37(5) and ss. 39.1(7) and (8). When the record assembled under Rules 317 and 318 is settled, it can be filed with the Court hearing the judicial review: on this, see *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 at paras. 7-24.

[110] There are cases where the Court cannot craft an order permitting some disclosure and so an assertion of privilege over an important document is entirely upheld. But the judicial review is not stopped in its tracks. The Court has some mechanisms to deal with this.

[111] Assertions of privileges over a challenger's constant and firm objection can lead to adverse inferences being drawn against the party asserting the privilege—and sometimes the adverse inference can be pivotal in the outcome of the judicial review: see, *e.g.*, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1 at paras. 165-166; and see discussion of this in *Tsleil-Waututh Nation* at para. 54.

[112] The assertion of privileges over a challenger's constant and firm objection can also lead to serious gaps in the evidentiary record that either leave the administrator unable to demonstrate the reasonableness of its decision to the reviewing court or undermine the requirement that there be a reasoned explanation for an administrator's decision. Either can lead to the quashing of the administrative decision: *Vavilov*, above; *Gitxaala Nation v. Canada*, 2016 FCA 187, [2016] 4 F.C.R. 418 at paras. 313-324.

[113] Despite the assertion of privileges, challengers and the Court do not necessarily have to be deprived of what they need for an effective, meaningful and fair judicial review.

[114] Public authorities and administrative decision-makers can sometimes prepare and disclose a summary of how they went about their task, what they took into account and why they acted the way they did, providing enough information to allow for an effective and meaningful judicial review. In law, the provision of such a summary in these circumstances does not waive privilege. For example, in *Coldwater First Nation v. Canada (Attorney General)*, 2020 FCA 34, 444 D.L.R. (4th) 298, a certificate under section 39 of the *Canada Evidence Act*—the most drastic privilege on the books—was issued to render secret the Governor in Council's deliberations and the sensitive documents and information it relied upon. But the Governor in Council provided a summary of its decision-making in the preambles to its Order in Council approving an infrastructure project. This was sufficient in the circumstances to make the judicial review effective, meaningful and fair.

[115] Of course, the summary must be adequate and accurate. Some evidence should be offered regarding who prepared the summary and how it was prepared. Some of the mechanisms, discussed immediately below, may facilitate the making of submissions concerning the adequacy and accuracy of the summary.

[116] The Federal Courts have mechanisms available to them that can reconcile the need for confidentiality while allowing for effective, meaningful and fair judicial review. And some statutory privileges are subject to exceptions and Courts can fashion flexible disclosure orders to

preserve confidentiality as much as possible: see for example *Canada Evidence Act*, s. 37(5) and ss. 39.1(7) and (8).

[117] Depending on the type of privilege and the circumstances, a reviewing court may be able to review the privileged documents and the summary to ensure adequacy and accuracy.

[118] For example, on motion by either side to the judicial review, the Court, using its powers under the *Federal Courts Rules*, its plenary powers, or both, can appoint the equivalent of an *amicus* who can receive unredacted or largely unredacted copies of privileged material and make submissions in the absence of the applicants on the challengers' behalf in a closed hearing. This is analogous to the use of a special advocate acting for the challengers in a national security judicial review: *Charkaoui v. Canada (Citizenship and Immigration)*, 2008 SCC 38, [2008] 2 S.C.R. 326.

[119] Sometimes measures short of that suffice. *Ex parte* hearings may be necessary and useful in some circumstances. In some cases, counsel for the applicants on judicial review can be permitted to receive confidential information on their undertaking to keep it confidential or a more restrictive undertaking not even to divulge it to their clients.

[120] The measures to which a court can resort are limited only by its creativity and the obligation to afford procedural fairness to the highest extent possible. Many variations of the measures discussed above can be imagined: see, *e.g.*, the creative order made for access to highly confidential Cabinet materials in the Charter challenge in *Health Services and Support-Facilities*

Subsector Bargaining Association v. British Columbia, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281, particularly Schedule 1 thereto; and see also this Court's approval of these mechanisms in *Vancouver Airport Authority* and *Lukács*.

[121] Judicial reviews can be prosecuted and decided quickly, especially if they are expedited: *Brown* at para. 159; *Teksavvy Solutions Inc. v. Bell Media Inc.*, 2020 FCA 108 at para. 22. Examples of speediness abound. The Federal Court often hears and decides urgent judicial reviews quickly: *Brown* at paras. 157-159. This Court can act quickly even in complex matters. For example, recently this Court issued 79 directions, orders, reasons and judgments over a handful of weeks to get a large judicial review ready for hearing: *Coldwater First Nation*. Where delay is unavoidable, interlocutory relief, including a stay, pending determination of a judicial review is possible: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[122] For years, the Federal Courts have entertained judicial reviews in the national security context. Sometimes they have to proceed quickly. They deal with some of the most sensitive and confidential information held by the Government of Canada. Nevertheless, by using many of the mechanisms described above and mechanisms analogous to these, the Federal Courts have reconciled the protection of necessary interests in confidentiality with the need for effective, meaningful and fair judicial review. With all the tools at the Federal Courts' disposal in the *Federal Courts Rules* and their plenary powers—and with the good faith and professionalism of all involved—that reconciliation can also happen here. The precise form it takes in specific cases

will be a matter for the parties to negotiate and argue and the Federal Court to consider and decide.

(c) Procedural fairness concerns in this case

[123] None of the parties to this appeal spent much time in their memoranda of fact and law characterizing the real essence and essential character of the applications or the implications of that. Nor did they spend much time analyzing the legislative scheme. As a result, the parties spent little time on the most relevant part of the legislative scheme in the post-designation context: the subsection 102(3) reviews and related administrative conduct.

[124] During our preparations for the hearing of the appeal, we noticed that relatively few submissions were made concerning subsection 102(3) reviews. And upon reviewing the evidentiary record before us, we found relatively little evidence concerning the conducting of subsection 102(3) reviews. What we did find was often heavily redacted.

[125] Uppermost in our minds as we were preparing was procedural fairness: the need to ensure the parties were aware of our concerns and had an opportunity to address them. We must decide cases on all the law that binds us, not just the law that the parties happen to put to us. But in doing this, we must be procedurally fair to the parties. See *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689. We took steps to ensure procedural fairness.

[126] We issued a direction inviting the parties to make additional submissions, particularly on the issue of the subsection 102(3) reviews:

> In addition to the parties' submissions in the memoranda of fact and law and the oral submissions they intend to make at the hearing of this appeal, the Court would appreciate submissions on an additional issue.
>
> At paras. 77-78 of its reasons, the Federal Court refers to reports of reviews conducted in December 2016, March 2017 and February 2018. Were these reviews conducted under subsection 102(3) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27? Some other assessments, which may or may not be reviews under subsection 102(3), appear in the record with passages redacted: see, *e.g.*, pp. 15993 and 16722.
>
> At the hearing of this appeal, the Court would appreciate oral submissions on the nature of the evidentiary record concerning subsection 102(3) reviews and the following three questions.
>
> Are all the subsection 102(3) reviews since the decision of this Court in 2008 before the Court in non-redacted form?
>
> If not, which reviews have not been included and what were the circumstances leading to the non-inclusion of reviews or the making of redactions in documents concerning the reviews?
>
> Finally, what effects do the answers to these questions have on this Court's adjudication of this appeal?
>
> The parties are invited to make submissions at the hearing of this appeal on these questions or on any issues related to these questions.

[127] At the appeal hearing, the parties offered detailed submissions on the issues described in the direction and related issues. They showed an understanding of the relevance of these issues and their implications for the outcome of the appeal.

[128] Further, during the hearing, the Court actively questioned the parties on these issues, often explaining the relevance and implications of its questions. Our questions explored:

- the real essence and essential character of the Claimants' applications;

- the role and significance of subsection 102(3) reviews and related administrative conduct;

- whether the Claimants should have challenged the entire legislative scheme, including subsection 102(3), and the related administrative conduct;

- whether the effects on refugee claimants described by the Claimants stemmed from the two provisions alone, the entire legislative scheme including subsection 102(3), or administrative action or inaction concerning subsection 102(3) reviews and the failure of the Governor in Council to revoke the designation of the United States as a safe third country;

- whether the gaps in the evidentiary record concerning subsection 102(3) reviews and related administrative conduct and the failure to challenge the entire legislative scheme or any administrative actions under it were fatal to this appeal;

- whether applications for judicial review were available for subsection 102(3) reviews and related administrative conduct.

[129] During this questioning, the Court put to the parties the leading Supreme Court authorities concerning these matters, including *PHS Community Services*, *Little Sisters* and

MacKay. The parties, represented by experienced constitutional litigators, were familiar with these authorities and gave us helpful submissions on them.

[130] The parties understood these issues, understood their significance for this appeal and gave complete responses to the Court. They did not ask for an opportunity to make further written submissions to the Court. None were needed, as the Court was satisfied with the completeness and the quality of the parties' responses.

(d) The Federal Court's decision

[131] The Federal Court dealt with the Charter challenge in the way it was put and defended. In so doing, its attention was diverted away from important features of the legislative scheme—in particular, the subsection 102(3) reviews and related administrative conduct and the centrality of these two things. As well, the principles of Charter litigation, discussed above, were not argued before it. These things led the Federal Court into reversible error. As a result, this Court can intervene.

D. The issues arising under section 7 of the Charter

[132] The analysis in section C of these reasons is sufficient to dismiss the Claimants' Charter challenge. However, for the guidance of those advancing section 7 claims in this area in the future, this Court will now highlight certain issues arising from the reasons of the Federal Court.

(1) The finding that those returned to the United States were automatically detained

[133] The Federal Court found that returnees are "immediately and automatically imprisoned by U.S. authorities" (at para. 103).

[134] The Claimants submit that appellate courts must defer to the factual findings of first-instance courts and the test for interference is the very high standard of palpable and overriding error. On this, they are correct: see, *e.g.*, *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352; *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 431 N.R. 286 at para. 46. However, where fact-finding has been done contrary to accepted legal principle or where a legal error "infected or tainted" a factual conclusion, the Court may interfere: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 at para. 35.

[135] The Federal Court took the evidence of ten individuals who said that they were detained upon returning to the United States (at paras. 95-98), evidence that United States officials required one returnee to surrender her cellphone (at para. 97) and evidence about the conditions and quality of one person's detention (at para. 96) and concluded that all who return to the United States are "immediately and automatically imprisoned" (at para. 103).

[136] The Federal Court also relied (at para. 98) on the evidence of lawyers who represent or advise returnees. Their testimony, taken at its highest, suggests that many, not all, detainees are detained.

[137] As a matter of law, inferences must be logical and must not go beyond the limits of the evidence before the Court: *Mahjoub*, above at para. 62; *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723, citing the widely accepted test in *R. v. Munoz* (2006), 86 O.R. (3d) 134, 38 C.R. (6th) 376 (S.C.J.) at paras. 23-31. Where a court draws inferences outside the range of inferences it could reasonably make, interference is warranted: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401 at para. 57.

[138] Logically, evidence about the conditions and quality of one person's detention and the confiscation of another person's cellphone says nothing about whether detention is immediate or automatic across the United States system. The evidence of the particular treatment of ten individuals—all selected by the Claimants—cannot itself provide a basis for making system-wide inferences. And evidence from lawyers selected by the Claimants that "most are detained" cannot support an inference that all coming in from the border with Canada are immediately and automatically detained.

[139] Only the opinion of experts testifying on system-wide phenomena, the content of United States law and its effects might suffice. In the Federal Court, the Claimants tendered the evidence of several experts on United States law and immigration practice to try to do just that. However, in this case, the experts' testimony did not support the Federal Court's conclusion. The experts testified that detention is discretionary, not mandatory, for most returnees: Hughes December 3, 2018 Cross-examination, Appeal Book, Vol. 27, tab 119, pp. 11292-11293; Witmer Cross-examination, Appeal Book, Vol. 33, tab 137, pp. 13763-13765; Anker Cross-examination, Appeal Book, Vol. 25, tab 109, p. 10127; Yale-Loeher Affidavit, Appeal Book, Vol. 47, tab 185,

pp. 20142-20144. The United States law cited by them confirms this point. And many experts had little knowledge about the application of United States refugee detention practices to returnees: Hughes December 3, 2018 Cross-examination, Appeal Book, Vol. 27, tab 119, pp. 11254-11255; Robinson Cross-examination, Appeal Book, Vol. 33, tab 141, pp. 13907-13910; Obser Cross-examination, Appeal Book, Vol. 32, tab 133, pp. 13526, 13538; Warden-Hertz Cross-examination, Appeal Book, Vol. 33, tab 139, pp. 13830-13831; and Benson Cross-examination, Appeal Book, Vol. 28, tab 122, pp. 11586-11587.

[140] The highest possible finding on this record is that returnees to the United States are exposed to a risk of discretionary detention. Refugee claimants in Canada are exposed to that sort of risk: Act, s. 55**.** This similarity suggests that sending refugee claimants to the United States is not against the principles of fundamental justice: *Canada (Attorney General) v. Barnaby*, 2015 SCC 31, [2015] 2 S.C.R. 563 at paras. 3-5.

[141] The evidence shows that returnees who are detained in the United States can seek release and release is often granted, either on bond or without: Witmer Cross-examination, Appeal Book, Vol. 33, tab 137, pp. 13762-13763, 13766; Irizarry Cross-examination, Appeal Book, Vol. 33, tab 143, pp. 14130, 14137-14142; Robinson Cross-examination, Appeal Book, Vol. 33, tab 141, p. 13918; Warden-Hertz Cross Examination, Appeal Book Vol. 33, tab 139, pp. 13863-13864, 13853-13855; Hughes Cross-examination, Appeal Book, Vol. 27, tab 119, pp. 11303-11304; Yale-Loehr October 12, 2018 Affidavit, Appeal Book, Vol. 47, tab 185, pp. 20146-20147.

[142] There is also evidence that some returnees have access to counsel while in detention. One of the individual Claimants testified that her detention conditions were unacceptable as she was cold and was held in solitary confinement for a week while awaiting a tuberculosis test. She suspected that her religious dietary needs were not accommodated. However, there is no evidence that these practices are widespread or regular.

(2) The finding that Canadian immigration officers' discretion to alleviate harsh effects is "illusory"

[143] In the Federal Court, Canada submitted that the two provisions, paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations, do not have the effect of infringing the Charter because certain "safety valves" exist that can stop any unconstitutional effects that might arise in extreme cases. The "safety valves" it cites are described at paragraph 43, above.

[144] The Federal Court rejected this submission on the ground that these safety valves were not "generally available" and, therefore, were "illusory": F.C. reasons at para. 130. As a matter of law, this is incorrect. It cannot be said that the safety valves are "not generally available".

[145] The evidentiary record in this case bears this out. Some of the applicants in this case used these "safety valves" to avoid removal. The ABC and the Homsi/Al-Nahass families applied immediately for judicial review of the officer's ineligibility decision and applied for a stay of removal. Counsel advises that the Homsi/Al-Nahass family has, so far, been successful in obtaining permanent resident status under section 25. In Ms. Mustefa's case, an immigration officer told her about the ability to review her ineligibility decision.

(3) The findings that detention conditions are cruel and unusual and cause psychological suffering

[146] Here again, broad, system-wide inferences concerning the United States from the limited nature of the individual incidents described in the record cannot be made.

[147] As well, "cruel and unusual" has a known meaning in Canadian law. It is enshrined in section 12 of the Charter and has a high threshold. Also high is the threshold for finding that psychological suffering engages section 7 of the Charter: *Kreishan v. Canada (Citizenship and Immigration)*, 2019 FCA 223, 438 D.L.R. (4th) 148. Neither threshold appears to have been applied.

[148] In *Kreishan*, this Court also noted (at para. 100) that psychological suffering is inherent in the plight of refugees fleeing their home country out of fear of persecution. Thus, one must ask whether sending refugee claimants back to the United States actually increased psychological suffering above this inherent level (at para. 93).

[149] It is unclear whether all of the expert evidence on this point was critically assessed. Much relied upon media reports: Appeal Book at 7250, 7412, 7456, 7460, 7895, 7900, 8414, 8419, 9531, 9831, 10017, 12861, 13278, 13281, 13285, 13290, 13299, 13321, 13325, 13331, 13337, 13341, 13344, 13382, 13472, 13480, 13484, 14410, 14415, 14510, 14572, and many others (full citations not included for brevity). For its part, Canada also added many media reports to the record: see Appeal Book, Vol. 43, tab 182 and the exhibits therein.

[150] On this practice, a note of caution needs to be sounded. Media reports often have to be relied upon in immigration matters in the absence of better evidence regarding country conditions. But here the media reports are being used to prove conditions in the United States in support of a Charter claim with serious ramifications where other, better types of evidence are readily available. In the context of this case, media reports are out of court descriptions of incidents by persons who often did not witness the incidents, reporting on what others observed or experienced. Thus, they are hearsay upon hearsay and sometimes even hearsay beyond that, often mixed with inadmissible lay opinion: Lederman, Bryant and Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada Inc., 2018) at 249. All the dangers of admitting this sort of evidence—inaccuracy, partiality and lack of opportunity for it to be tested and assessed—are present: Sopinka at 250-256. Charter cases with wide implications should not depend on what one finds in a newspaper.

(4) The principles of fundamental justice

[151] A Court must properly identify and define the principles of fundamental justice relevant to the case before it: *R. v. White*, [1999] 2 S.C.R. 417, 174 D.L.R. (4th) 111 at para. 38. And the principles must be applied with due regard to the context of the case: see *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350 at para. 20. This is particularly important in cases that involve removal to a foreign country: *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283 at para. 68.

[152] The Claimants submit that the relevant principles of fundamental justice are that the effects of laws should not be overbroad or grossly disproportionate to their purposes: *Bedford*, above. The Federal Court accepted that submission.

[153] But the effects, said to be overbroad and grossly disproportionate, are carried out in the United States, by United States officials, under United States law. For that to count under Canadian law, the actions of United States officials had to have sufficient causal connection to Canadian actions such that the effects in the United States were an "entirely foreseeable consequence" of Canadian state action: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 at para. 54. All that the Federal Court said here was that (at para. 94) there were "related harms". That falls short of the necessary threshold.

[154] The plain text of section 32 of the Charter provides that the Charter applies only to the "Parliament and government of Canada" and to the "legislature and government of each province", *i.e.*, Canadian state action: *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 33 D.L.R. (4th) 174. Nor does the Charter allow Courts to weigh in on the policy of other States and decide if it passes constitutional muster: *Canada v. Schmidt*, [1987] 1 S.C.R. 500, 39 D.L.R. (4th) 18 at 522-524 S.C.R.; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 84 D.L.R. (4th) 438 at 845-846 S.C.R.

[155] The Supreme Court has repeatedly emphasized that Canadian courts cannot apply Canadian constitutional standards to foreign legal systems and administrations as if they were Canadian:

- A court may not apply section 11(*h*) of the Charter to foreign trials: *Schmidt* at 523 S.C.R. This is true even when the government of Canada has extradited that individual to be tried in the foreign system.

- Section 8 of the Charter does not apply to a Canadian letter of request addressed to a foreign government for production of an individual's documents: *Schreiber v. Canada (Attorney General)*, [1998] 1 S.C.R. 841, 158 D.L.R. (4th) 577 at para. 31.

- Section 10(*b*) of the Charter does not apply to questioning by foreign state authorities concerning a person's immigration status and the circumstances of an offence committed by that person's boyfriend: *R. v. Harrer*, [1995] 3 S.C.R. 562; 128 D.L.R. (4th) 98. In this case (at para. 12), United States immigration officials and law enforcement officers could "in no way be considered as acting on behalf of" Canadian officials or governments.

- The Charter does not apply to the conduct of foreign police cooperating with Canadian police on an informal basis: *R. v. Terry*, [1996] 2 S.C.R. 207, 135 D.L.R. (4th) 214 at para. 19.

- Section 12 of the Charter does not apply to punishment someone might receive in a foreign state: *Reference Re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858, 84 D.L.R. (4th) 498; *Kindler* at 847 S.C.R.

- The Supreme Court has upheld extradition orders to face charges under foreign law with minimum sentences that would be unconstitutional in Canada: *United States of America v. Jamieson*, [1996] 1 S.C.R. 465, 197 N.R. 1, *United States v. Whitley*, [1996] 1 S.C.R. 467, 132 D.L.R. (4th) 575; *United States v. Ross*, [1996] 1 S.C.R. 469, 132 D.L.R. (4th) 383.

[156] These holdings of the Supreme Court are also supported by the fundamental principles of state sovereignty and international comity, which themselves likely inform the content of the principles of fundamental justice: *R. v. Cook*, [1998] 2 S.C.R. 597, 164 D.L.R. (4th) 1 at paras. 26, 39 and 44; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292 at paras. 33-56; *Terry*.

[157] The Federal Court was correct to note that Canada may not "avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else's hand": Reasons of the Federal Court at para. 100, citing *Suresh*. But this does not allow Canadian courts to assess the substance of United States law and practice through the domestic doctrines of overbreadth and gross disproportionality.

[158] The relevant Canadian state action in this case is the removal of individuals to the United States where they will face treatment under the United States legal system and administration. In such circumstances, Canadian courts will respond to the removal of individuals to foreign legal systems and administrations only where they will suffer effects that are so deplorable they "shock the conscience" of Canadians: *Kindler* at 847-849; *Burns* at paras. 66-69; *Suresh* at paras.

27, 49 and 56; *Barnaby* at para. 2; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127 at para. 44.

[159] Whether something shocks the conscience of Canadians is determined by considering Canadian legal norms, the practices of other democratic countries, and relevant international law: *Burns* at paras. 76-84. “Shocks the conscience” is a high threshold. It covers extreme things such as torture, stoning, mutilation or the death penalty: *Burns* at paras 8 and 69; *Suresh* at paras. 77-78. The threshold is so high that before 2001 the Supreme Court ruled that even the death penalty did not shock the conscience: *Kindler*; *Ng.*

[160] The meaning of “shocks the conscience” can also be understood by appreciating what it does not include. Removal to face criminal charges where “the system for the administration of justice in that country” is “substantially different from ours with different checks and balances” does not shock the conscience: *Schmidt* at 522-523 S.C.R. And removal to face foreign legal proceedings that are not substantially different from what could occur in Canada does not shock the conscience: *Barnaby*.

[161] In this case, there was no evidence that could support a finding that the treatment of returnees to the United States at the Canada-United States border “shocks the conscience”. There is evidence of individual cases of substandard treatment but nothing that rises to the very high level required by the “shocks the conscience” standard.

(5) The interpretation and application of overbreadth and gross disproportionality

[162] Paragraph 101(1)(*e*) of the Act and section 159.3 of the Regulations are not contrary to the doctrines of overbreadth or gross disproportionality. When these doctrines are applied properly—*i.e.*, applied only to Canadian state action and effects caused by that state action—there is a rational connection between the law's objectives and its effects and the effects are not so severe that they are not justified by the objective.

[163] A law is unconstitutionally overbroad if the means it employs prohibits or regulates conduct that has no relation whatsoever to the law's purpose: *Bedford* at para. 101; *R. v. Heywood*, [1994] 3 S.C.R. 761, 120 D.L.R. (4th) 348. To be unconstitutionally overbroad, there must be no rational connection between the purpose of the law and some of its impacts: *Bedford* at paras. 112, 117 and 119. This is a high standard to meet: *Bedford* at para. 119.

[164] The objective of the law in this case is the sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant articles of the Conventions and have an acceptable human rights record: *Canadian Council for Refugees* at para. 75.

[165] In this case, Canada's objective is achieved by making, with some exceptions, claimants arriving in Canada at a regular land border with the United States ineligible to claim refugee protection in Canada. As a result, claimants will very often, but not always, be returned to the United States where they face a risk of detention. The question is whether ineligibility to make a

refugee claim and the associated risk of detention for certain individuals arriving from the United States captures some conduct that bears no rational connection to the government's objectives.

[166] The rational connection is evident. Parliament sought to share responsibility for the consideration of refugee claims with the United States, a country that (at least in the eyes of the Canadian government) has signed and complies with the relevant Conventions and has an acceptable human rights record. It chose to do so by denying refugee claimants arriving from the United States access to the Refugee Protection Division. As the law denies individuals access based on the fact they have arrived from the United States, it bears a rational connection to the objective. The fact that some returned to the United States may be detained while making their claim there does not erode this connection.

[167] A law is grossly disproportionate if the means chosen to fix a problem have such a deleterious impact on an individual that they cannot be justified by the importance of fixing the problem. An example is a law that imposes life imprisonment for littering on the streets. The Supreme Court has said, keeping the streets clean is not important enough to justify imposing life imprisonment: *Bedford* at para. 120. As this doctrine requires courts to interfere with the weighing process of Parliament, it has been limited to only extreme cases: *Bedford* at para. 120.

[168] In this case, the means chosen, ineligibility to the Refugee Protection Division for refugee claimants arriving from the United States, is not disproportionate with the objective of sharing responsibility for the consideration of refugee claims with countries that are signatory to

and comply with the relevant articles of the Conventions and have an acceptable human rights record.

E. The issues arising under section 15 of the Charter

[169] For the benefit of future cases, a few words on the Claimants' challenge under section 15 of the Charter are warranted.

[170] The Federal Court found it unnecessary to deal with section 15. As a result, it made no factual findings relevant to the section 15 challenge.

[171] The Claimants submit that the Federal Court judge was obligated to deal with the section 15 challenge. I disagree. A Court has a discretion whether or not to deal with issues unnecessary to the outcome of the case: see, *e.g.*, *Steel v. Canada (Attorney General)*, 2011 FCA 153, [2013] 1 F.C.R. 143 at paras. 65-66 and 68; *Defence Construction Canada v. Ucanu Manufacturing Corp.*, 2017 FCA 133, [2018] 2 F.C.R. 269 at paras. 47-52.

[172] This applies to issues arising under section 15. Section 15 does not enjoy "superior status in a 'hierarchy' of rights": *Gosselin (Tutor of) v. Quebec (Attorney General)*, 2005 SCC 15, [2005] 1 S.C.R. 238 at para. 26. The Supreme Court has repeatedly rejected the notion that the Charter contains a hierarchy of rights or that one right should be regarded as inherently superior to another: *Reference re Same-Sex Marriage* at para. 50; *Dagenais v. Canadian*

Broadcasting Corp., [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12 at 877 S.C.R.; *Mills* at para. 61; *R. v. Crawford*, [1995] 1 S.C.R. 858, 96 C.C.C. (3d) 481 at paras. 34-35.

[173] Had it been necessary for this Court to decide the section 15 issues, it would have had to assess whether it should determine the issues itself or send them back to the Federal Court to determine. Where, as here, no factual findings have been made on the section 15 issues, it is generally best for us to send the matter back to the Federal Court because of its expertise in fact-finding: *Sandhu Singh Hamdard Trust v. Navsun Holdings Ltd.*, 2019 FCA 295 at para. 60; *Canada v. Piot*, 2019 FCA 53 at para. 114; *Pfizer Canada Inc.*, above at paras. 153-159. This is especially so here: the Federal Court expressed concern (at paras. 36-45) about some of the evidence tendered in support of the section 15 claim that might affect its weight.

[174] In commenting on section 15 of the Charter, I do not minimize its importance when assessing conduct under this legislative scheme. Nor do I minimize the importance of any other Charter rights or freedoms, the *Refugee Convention* and the *Convention Against Torture* under this legislative scheme. Far from it. “Anxious scrutiny” in this area is called for: *R. v. Secretary of State for the Home Department*, [2002] UKHL 36, [2003] 1 A.C. 920 at 941 A.C.

F. *Ultra vires*

[175] Regulations, as subordinate legislation, must be authorized by and be within the limits of a statute. When they are not, they are said to be *ultra vires* or beyond the power of those who made them.

[176] The Claimants submit that section 159.3 of the Regulations is *ultra vires*. They maintain that the Regulations were not authorized by the Act at the time of enactment. They also maintain that, over time, the Regulations were no longer authorized by the Act because the factors under subsection 102(2) of the Act no longer supported the designation of the United States as a safe country.

[177] This submission has no merit. This Court's decision in 2008 in *Canadian Council for Refugees* rejected it. No later cases from the Supreme Court have cast doubt on its conclusion. Thus, this Court is bound by it.

[178] In *Canadian Council for Refugees*, this Court held that the issue is "to identify the conditions precedent to the [Governor in Council's] exercise of its delegated authority [to designate the United States] and determine whether these conditions were satisfied at the time of promulgation" (at para. 64). This Court held that:

- the conditions precedent were the four factors in subsection 102(2) of the Act (at paras. 66, 75, 78);

- the delegated authority was set out in paragraph 101(1)(*e*) of the Act (at para. 72); and

- the time of promulgation, "the last relevant date for the assessment of the *vires* issue", was December 29, 2004; the assessment cannot be made "on the

> basis of facts, events or developments that are subsequent to the date of the promulgation" (at para. 89).

Based on these considerations, this Court concluded that the Governor in Council had the power to designate the United States a safe third country under section 159.3 of the Regulations.

[179] The Claimants submit that the designation of the United States became *ultra vires* because it was no longer supported by the subsection 102(2) factors. This overlooks that the assessment of *ultra vires* is done at the time of the designation: *Canadian Council of Refugees* at para. 89. It also overlooks the law on the books expressed in this legislative regime. The subsection 102(3) reviews and related administrative conduct is the mechanism by which the continuing compliance of the designation against the subsection 102(2) factors is assessed. The Claimants' submission on the *vires* issue falls to be considered as part of a judicial review brought against the subsection 102(3) reviews and related administrative conduct.

G. Proposed disposition

[180] For the foregoing reasons, I would allow the appeal, set aside the judgment dated July 22, 2020 of the Federal Court in files IMM-775-17. IMM-2229-17 and IMM-2977-17, and, giving

the judgment the Federal Court ought to have given, I would dismiss the applications for judicial review. I would dismiss the cross-appeal. As this is a matter arising under the Act and there are no special circumstances supporting an award of costs, I would make no award of costs.

"David Stratas"
J.A.

"I agree
Marc Noël Chief Justice"

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-204-20

APPEAL FROM A JUDGMENT DATED JULY 22, 2020 OF THE HONOURABLE JUSTICE MCDONALD, NOS. IMM-2977-17, IMM-2229-17 AND IMM-775-17

STYLE OF CAUSE:	THE MINISTER OF CITIZENSHIP AND IMMIGRATION *et al.* v. THE CANADIAN COUNCIL FOR REFUGEES *et al.*
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	FEBRUARY 23 AND 24, 2021
REASONS FOR JUDGMENT BY:	STRATAS J.A.
CONCURRED IN BY:	NOËL C.J. LASKIN J.A.
DATED:	APRIL 15, 2021

APPEARANCES:

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Jared Will Joshua Blum	FOR THE RESPONDENTS, MOHAMMAD MAJD MAHER HOMSI, HALA MAHER HOMSI, KARAM MAHER HOMSI, AND REDA YASSIN AL NAHASS

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