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# Thinkable: The Charter and Refugee Law after *Appulonappa* and *B010*

Colin Grey\*

## I. INTRODUCTION

*Appulonappa*<sup>1</sup> and its companion case, *B010*,<sup>2</sup> lie at the confluence of many debates about global migration and its governance. Both cases arose following the arrival in Canada of hundreds of Sri Lankan Tamils on two cargo boats, the *M.V. Ocean Lady* in October 2009 and the *M.V. Sun Sea* in August 2010. These were asylum seekers who came to Canada on dangerous vessels because more secure, less costly routes were shut to them.<sup>3</sup> They were also illegal immigrants whose success entering Canada might fuel more migrant smuggling, a transnational criminal phenomenon with the potential to undermine national security.<sup>4</sup> Safe to say, the former Conservative government adopted the latter view and proceeded accordingly.<sup>5</sup> And it was a blow to the government's enforcement-minded response when the Supreme Court unanimously

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<sup>1</sup> *R. v. Appulonappa*, [2015] S.C.J. No. 59, 2015 SCC 59 (S.C.C.), varg [2014] B.C.J. No. 762 (B.C.C.A.) [hereinafter "*Appulonappa*"].

<sup>2</sup> *B010 v. Canada (Citizenship and Immigration)*, [2015] S.C.J. No. 58, 2015 SCC 58 (S.C.C.), revg [2013] F.C.J. No. 322 (F.C.A.) [hereinafter "*B010*"].

<sup>3</sup> For such a view of anti-smuggling measures, see Scott Watson, "The Criminalization of Human and Humanitarian Smuggling" (2015) 1:1 *Migration, Mobility & Displacement* 39.

<sup>4</sup> See Benjamin Perrin, "Migrant Smuggling: Canada's Response to a Global Criminal Enterprise" (2013) 1:2 *International Journal of Social Science* 139, at 144-45.

<sup>5</sup> For background on the government's response to the *Sun Sea* and (despite the title) *Ocean Lady*, see Canadian Council of Refugees, *Sun Sea: Five years later* (August 2015), online: <<http://ccrweb.ca/sites/ccrweb.ca/files/sun-sea-five-years-later.pdf>>; Douglas Quan, "Five years after the MV Sun Sea's arrival, crackdown on 'irregular arrivals' draws praise, scorn" *National Post* (August 6, 2015).

found that the government could neither prosecute (in *Appulonappa*) nor find inadmissible (in *B010*) asylum seekers for helping one another enter the country illegally, nor could it take such actions against humanitarian workers or family members acting from non-financial motives.

In what follows, I am not concerned with whether these decisions are wise or just, nor with whether they properly reflect Canada's international obligations with respect to human rights, refugees and the international struggle against migrant smuggling. My concern is instead with their impact on immigration constitutionalism in Canada. "Constitutionalism" is a high-flown, contested term. Because my main concern is with the cases, and not the theory of constitutionalism as such, all I can do here is stipulate that by it, I refer to an ideal according to which enforceable norms, such as those propounded in the form of immigration law, are subjected to the discipline of legal justification, through the medium of various institutional forms and practices, including judicial review based on a written bill of rights like the *Canadian Charter of Rights and Freedoms*.<sup>6</sup> Simplifying greatly, I will assume that the ideal of constitutionalism is more robust the more it allows for the possibility of further legal justification:<sup>7</sup> the more responses it yields to each successive "why?". A more robust constitutionalism continues to offer answers to such questions, down to a fundamental level. A weaker constitutionalism shuts down such questioning with a peremptory "because". A robust constitutionalism also provides greater assurance that exercises of government power, here the power to control immigration, are not arbitrary. The more justification is made available, the greater authority of the constituted legal system.<sup>8</sup>

In the context of immigration constitutionalism, we are distinctively concerned with the justification of, hence the authority, of the legal norms of immigration governance. I will argue that the Supreme Court's recent decisions are disappointing for those who favour a robust immigration constitutionalism. To begin, the outcomes in *Appulonappa* and *B010* do not rest on any enduring constitutional principles and may be upended —

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<sup>6</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>7</sup> See Mark Walters, "The Unwritten Constitution as a Legal Concept" in David Dyzenhaus & Malcolm Thornburn, eds, *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016) 33, at 49. Note that my claim in this article is that the Supreme Court has, in various ways, limited the possibility of robust immigration constitutionalism. I do not ask (1) whether it is desirable or required to extend the ideal of constitutionalism to immigration governance; (2) whether it is possible to extend constitutionalism to this domain.

<sup>8</sup> For a clear articulation of the relationship between constitutionalism and authority, see Alan Brudner, *Constitutional Goods* (New York: Oxford University Press, 2004), at 39-43.

indeed, as I will explain in the next section, may already have been upended — by legislative changes (Section 2); here the focus is on the Court’s instrumentalist methodology for determining the demands of fundamental justice under section 7 of the Charter. In the remaining three sections, I focus on the issue of when the guarantee of fundamental justice found in section 7 is engaged in the immigration context. On this point, *BO10* repeated statements from the Supreme Court’s 2014 decision in *Febles*<sup>9</sup> in a way that seemed to contradict, without explanation, the Supreme Court’s 1985 landmark holding in *Singh*<sup>10</sup> that it would be “unthinkable” if section 7 did not provide fundamental justice in the adjudication of refugee protection claims (Sections 3 and 4). Finally, I will argue that this retreat from *Singh* has several structural implications that dim the prospects for a robust immigration constitutionalism going forward (Section 5).

At the outset, it may help the reader unfamiliar with the *Immigration and Refugee Protection Act*<sup>11</sup> (“the IRPA” or “the Act”) to explain two aspects of its design. First, relevant to section 2, the IRPA contains various grounds of inadmissibility, part of its overall policy with respect to non-citizens’ rights to enter and remain in Canada.<sup>12</sup> Less well known, it also contains a number of criminal offences intended to support that same policy.<sup>13</sup> *Appulonappa* and *BO10* both address legislative provisions that target migrant smuggling. However, the relevant provisions in either case target smuggling through the different lenses, respectively, of criminal law and immigration law. One way of coming to an understanding of the Supreme Court’s decisions in the two cases is as a response to the question of how these different parts of the scheme relate to one another.

Second, relevant to sections 3 to 5, the IRPA is marked by a series of interwoven decision chains, such that different officials at different junctures make related, sometimes identical, substantive decisions. Of particular importance here, decisions related to refugee protection may be made (1) when an officer of Citizenship and Immigration<sup>14</sup> (“CIC”)

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<sup>9</sup> *Febles v. Canada (Citizenship and Immigration)*, [2014] S.C.J. No. 68, 2014 SCC 68 (S.C.C.), affg [2012] F.C.J. No. 1609 (F.C.A.) [hereinafter “*Febles*”].

<sup>10</sup> *Singh v. Canada (Minister of Employment and Immigration)*, [1985] S.C.J. No. 11, [1985] 1 S.C.R. 177 (S.C.C.), affd [1986] F.C.J. No. 450 (F.C.A.) [hereinafter “*Singh*”].

<sup>11</sup> S.C. 2001, c. 27.

<sup>12</sup> IRPA, Part 1, Division 4.

<sup>13</sup> IRPA, Part 3.

<sup>14</sup> IRPA, ss. 99 to 101. Note that the “applied title” for the Department of Citizenship and Immigration is now “Immigration, Refugees and Citizenship Canada” (“IRCC”). Similarly, the Minister of Citizenship and Immigration is now referred to as the “Minister of Immigration,

decides if a refugee protection claim is eligible to be referred to the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board (“IRB”); (2) when either of the RPD or Refugee Appeal Division (“RAD”), also part of the IRB, pronounce on a claim;<sup>15</sup> (3) when either a CIC officer or a delegate of the Minister of Public Safety and Emergency Preparedness decide on a subsequent pre-removal risk assessment (“PRRA”), a largely paper-based process available to most non-citizens prior to removal;<sup>16</sup> (4) when a Canada Border Services Agency (“CBSA”) enforcement officer is asked to defer the removal of a non-citizen for reasons of risk;<sup>17</sup> and (5) on judicial review by the Federal Courts of any of these decisions.<sup>18</sup> In conception, seemingly, the RPD and the RAD, independent tribunals with competence to decide Charter issues and greater procedural protections, are the centrepieces of this overall scheme. Eligibility determinations serve a gatekeeping function governing access to these tribunals. Later PRRA and deferral decisions provide additional safeguards to ensure Canada’s compliance with the international law principle of *non-refoulement*, which imposes an obligation not to return individuals to countries where they would be at risk of certain kinds of serious harm. However, as I will argue, the net effect of *B010* and *Febles* is to shift constitutional accountability to these latter stages.

## II. THE CASES: *APPULONAPPA* AND *B010*

### 1. *Appulonappa*

*Appulonappa* involved a constitutional challenge by the captain and three crewmembers of the *Ocean Lady* to the former section 117 of the IRPA. This provision sets out the criminal offence of “organizing entry into Canada” — otherwise referred to as migrant, human, or people smuggling — under which the four men were charged. Invoking section 7

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Refugees and Citizenship”. However the legal titles remain the “Department of Citizenship and Immigration”, as found in the *Department of Citizenship and Immigration Act*, S.C. 1994, c. 31, and the “Minister of Citizenship and Immigration”, as found in the IRPA. In this article, I employ the legal titles. I thank David Vinokur for the information used in this footnote.

<sup>15</sup> IRPA, para. 95(1)(b).

<sup>16</sup> IRPA, ss. 112-114.

<sup>17</sup> Authority for this discretion has been located in IRPA, s. 48. See *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 295, [2001] 3 F.C.R. 682 (F.C.T.D.) [hereinafter “*Wang*”].

<sup>18</sup> Access to judicial review is governed by IRPA, ss. 72-74, as well as by the *Federal Courts Act*, R.S.C. 1985, c. F-7.

of the Charter, the accused argued that section 117 violated the substantive principle of fundamental justice that a law must not be overbroad.<sup>19</sup> To apply the anti-overbreadth principle you ask “whether a law that takes away rights in a way that generally supports the object of the law, goes too far by denying the rights of some individuals in a way that bears no relation to the object”.<sup>20</sup> Accordingly, the accused argued that the former section 117 went too far by potentially capturing not just those who smuggled people into Canada “for a financial or other material benefit”<sup>21</sup> (such as the appellants themselves) but also “people who assist close family members to come to Canada and humanitarians who assist those fleeing persecution to come to Canada, in each case without required documents”.<sup>22</sup>

A unanimous Supreme Court accepted this argument. Writing for the Court, the Chief Justice reasoned that “the true purpose of s. 117 is to combat people smuggling”, and “people smuggling” (as defined in *B010*, more on which below) excludes “mere humanitarian conduct, mutual assistance or aid to family members”.<sup>23</sup> Given this “true purpose”, the provision cast its net too widely. The constitutional infirmity could not be saved under section 1 of the Charter,<sup>24</sup> so the Chief Justice read down the provision to exclude “(1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents”.<sup>25</sup>

In evaluating this result, it is worth emphasizing that *Appulonappa* dealt with the former section 117. The easy assumption may be that the new section 117 would also be read down to exclude the same three categories of persons. But this is not in fact a safe assumption, owing to the means-ends analytical approach the Supreme Court has adopted to section 7 in recent years.

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<sup>19</sup> *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761 (S.C.C.), affg [1982] B.C.J. No. 2596 (B.C.C.A.); *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, at paras. 101-102, 112-119 (S.C.C.), varg [2012] O.J. No. 1296 (Ont. C.A.) [hereinafter “*Bedford*”]; *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5, at paras. 85-88 (S.C.C.), revg [2013] B.C.J. No. 2227 (B.C.C.A.); Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law: 2012), at 133-36.

<sup>20</sup> *Carter, id.*, at para. 85.

<sup>21</sup> This phrasing comes from *B010, supra*, note 2, at paras. 5 and 76.

<sup>22</sup> *Appulonappa, supra*, note 1, at para. 25. The challenge was raised in a *voir dire* at trial: *R. v. Appulonappa*, [2013] B.C.J. No. 35, 2013 BCSC 31 (B.C.S.C.), revd [2014] B.C.J. No. 762, 2014 BCCA 163 (B.C.C.A.).

<sup>23</sup> *Id.*, at paras. 34 and 48.

<sup>24</sup> *Id.*, at paras. 79-82.

<sup>25</sup> *Id.*, at para. 84. For some discussion, see *B010, supra*, note 2, at para. 60.

Changes to subsection 117(1) significantly broaden the mental (*mens rea*) and physical (*actus reus*) elements of the offence.<sup>26</sup> In addition, new aggravating factors now require more severe penalties if the offence “was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group”.<sup>27</sup> If profit, the involvement of a criminal organization, or the involvement of a terrorist group are aggravating factors, it seems to follow straightforwardly that an unaggravated offence does not require such elements and, more importantly, that it was not meant to. Such modifications render more plausible the Crown’s unsuccessful argument in *Appulonappa* that the purpose of section 117 is “to prevent all organizing and assisting of unlawful entry of others into Canada, including assistance to close family members and humanitarian assistance”.<sup>28</sup>

The broader view of the objective of section 117 is also supported by other amendments to the IRPA, which create a new statutory context that arguably places an even greater premium on the Act’s enforcement and control objectives. For example, section 20.1 of the IRPA seems to allow the designation of a group of asylum seekers helping one another come to Canada “irregularly”, with designation leading to significant consequences, such as mandatory detention for all those 16 or older.<sup>29</sup> If such a significant consequence, among others,<sup>30</sup> can be visited upon asylum seekers engaged in mutual aid, on what basis can it be said that the new section 117 was not intended to have a similar scope?

All of which is to say that it is unclear whether the Supreme Court’s conclusion provides dependable guidance on the constitutionality of the new section 117. I am inclined to think that it does not; that *Appulonappa*

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<sup>26</sup> For ease of reference, I reproduce the old and new versions of s. 117 of the IRPA, with the changes underlined:

**Former section 117**  
117 (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

**New section 117**  
117 (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

For discussion of these amendments, see Perrin, “Migrant Smuggling”, *supra*, note 4, at 144-45.

<sup>27</sup> IRPA, s. 117(3.1)(a)(ii), (3.2)(a)(ii).

<sup>28</sup> *Appulonappa*, *supra*, note 1, at para. 13. This was the government’s stated position, accepted by the British Columbia Court of Appeal: *supra*, note 22, at paras. 5, 41.

<sup>29</sup> IRPA, s. 55(3.1).

<sup>30</sup> Other consequences added to the IRPA include longer waits for detention reviews (IRPA, s. 57.1) and a less favourable refugee determination process, through the denial of a right of appeal to the RAD (IRPA, s. 110(2)(a)), as well as the denial of an automatic stay of removal pending judicial review (*Immigration and Refugee Protection Regulations*, SOR/2002-227, s. 231).

is a case, like the Supreme Court's decision in *Agraira*, where legislative changes render the Supreme Court's decision dead letter.<sup>31</sup> The new section 117 seems to have a new end, and a new end makes all the difference in the means-end analysis. As I will now explain, this conclusion also has implications for our understanding of *B010*.

## 2. *B010*

*Appulonappa* involved the crew of the *Ocean Lady*. *B010* involved *Sun Sea* passengers who had taken on positions of varying responsibility after the ship's original crew had abandoned it. These were "asylum seekers" engaged in "mutual aid": *B010* worked in the engine room; the co-appellant *B306* was a cook and lookout; another co-appellant, *J.P.*, acted as assistant navigator. A fourth, non-*Sun Sea* appellant, Jesus Rodríguez Hernández, is a Cuban national convicted about a decade ago of smuggling 48 Cubans into the United States. The Immigration Division ("ID") of the IRB found all four men inadmissible under paragraph 37(1)(b) of the IRPA, that is, "on grounds of organized criminality for ... engaging, in the context of transnational crime, in activities such as people smuggling".<sup>32</sup> One result of this finding is that none were eligible to have their refugee protection claims referred to the RPD.<sup>33</sup>

The determinative issue in *B010* was one of statutory interpretation. The Chief Justice, again writing for the full Court, found that the words "organized criminality" and "people smuggling" in "the context of transnational crime" did not *per se* exclude the possibility of smuggling other than for pecuniary motives.<sup>34</sup> However, taking into account the

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<sup>31</sup> *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] S.C.J. No. 36, 2013 SCC 36 (S.C.C.), affg [2011] F.C.J. No. 407 (F.C.A.). In *Agraira*, the Supreme Court found that the words "national interest" that governed the Minister of Public Safety's power to grant discretionary relief from inadmissibility on security grounds, under the former s. 34(2) of the IRPA, was not limited to taking into account national security and public safety. Rather, the discretionary power encompassed broader considerations such as the values underlying the Charter and Canada's democratic character: *id.* at paras. 65, 78. *Agraira* was released by the Court on June 20, 2013. On June 19, 2013, however, the *Faster Removal of Foreign Criminals Act*, S.C. 2013, c. 16 had received royal assent. Among other changes, this legislation limited the Minister's discretionary relief powers to exclude considerations beyond national security and public safety: "the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada." (See *id.*, at s. 18; now IRPA, s. 42.1(3)). In other words, the amendment reinstated the very interpretation of the Minister's discretionary power that had been rejected by the Supreme Court.

<sup>32</sup> IRPA, s. 37(1)(b).

<sup>33</sup> IRPA, s. 101(1)(f).

<sup>34</sup> *B010*, *supra*, note 2, at paras. 33-35.



broader statutory context, the Parliamentary record, and Canada's international legal obligations,<sup>35</sup> she ultimately concluded that not-for-profit smuggling was not captured.<sup>36</sup> "The tools of statutory interpretation", she wrote, "all point inexorably to the conclusion that s. 37(1)(b) applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of organized transnational crime."<sup>37</sup> Accordingly, the four cases were remitted to the ID for redetermination.<sup>38</sup>

The Charter entered into the Chief Justice's analysis in two places, both times briefly but importantly. First, the Court dismissed the respondent Ministers' argument that paragraph 37(1)(b) should be read broadly to include smuggling other than for profit in order to mirror the offence contained in section 117 of the IRPA. This is significant because the arguments in the four cases consolidated at the Supreme Court had all, in the lower courts, focused on whether paragraph 37(1)(b) should be interpreted in light of section 117.<sup>39</sup> However, referring to her conclusion in *Appulonappa*, the Chief Justice dismissed this issue summarily on the ground that "[a] provision that is unconstitutionally overbroad cannot be used to widen a narrower provision."<sup>40</sup>

But: If the amendments to section 117 have made it such that it no longer needs to be read down to be Charter-compliant, constitutional considerations likely no longer block recourse to section 117 in the interpretation of paragraph 37(1)(b). Going forward, the potential broadening of the purpose

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<sup>35</sup> That is, Canada's obligations under the 1951 *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 art. 33 (entered into force April 22, 1954); its *Protocol Relating to the Status of Refugees*, January 31, 1967, 606 U.N.T.S. 267, art. 1(2), Can. T.S. 1969 No. 29 (entered into force October 4, 1967) [together, "the Refugee Convention"], as well as the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime*, November 15, 2000, 2241 U.N.T.S. 507 (entered into force January 28, 2004).

<sup>36</sup> *B010*, *supra*, note 2, at para. 72.

<sup>37</sup> *Id.*, at para. 76.

<sup>38</sup> *Id.*, at para. 77. Mr. Hernandez had also been found inadmissible for serious criminality under IRPA, s. 36(1)(b).

<sup>39</sup> Thus the certified questions that allowed the appeals to proceed to the Federal Court of Appeal asked whether it was appropriate to resort to s. 117 in interpreting s. 37(1)(b) of the IRPA: *Canada (Minister of Public Safety and Emergency Preparedness) v. P. (J.)*, [2013] F.C.J. No. 1236, 2013 FCA 262, at para. 40 (F.C.A.), *revd* [2015] S.C.J. No. 58 (S.C.C.) [hereinafter "*J.P.*"]; *B010 v. Canada (Citizenship and Immigration)*, [2013] F.C.J. No. 322, 2013 FCA 87, at para. 4 (F.C.A.), *revd* [2015] S.C.J. No. 58 (S.C.C.). (Under the IRPA, to appeal a decision of the Federal Court to the Federal Court of Appeal, the Federal Court must certify a question of general importance: IRPA, s. 74(d).)

<sup>40</sup> *B010*, *supra*, note 2, at 40.

of the new section 117 may broaden the interpretation of paragraph 37(1)(b) as well.

I do not want to overstate this claim. The Chief Justice, as I have noted, gave several reasons in support of her conclusion with respect to the scope of paragraph 37(1)(b). If the new section 117 is now Charter-compliant, the question becomes whether this fact overcomes the various considerations pulling in the other direction. In other words, it is simply no longer “inexorably” clear that the Chief Justice’s interpretation remains valid. This uncertainty, once again, arises from a section 7 methodology that does not look behind Parliamentary intent. This methodology leads to a weaker constitutionalism because, effectively, the justification of a statute stops with the characterization of its legislative intent.<sup>41</sup> That is where a last “why” encounters the Court’s final “because”.

There is a response to this claim of weakness. It is that further justification is available; only its institutional locus shifts to the political deliberation that takes place within Parliament and in the wider public sphere. In the domestic realm where democratic legitimacy is secured by the participation and representation of citizens, this is a strong though perhaps not decisive reply. As non-citizens, however, migrants are formally excluded from domestic processes of democratic deliberation. Therefore democratic justification can less plausibly be defended as a form of constitutionalism when it comes to immigration governance. In this domain, it instead looks like the imposition by fiat of one group’s political decisions on outsiders. Hence, a robust constitutionalism in the domain of immigration governance would have to defend the soundness of Parliament’s choices and to be prepared to pass judgment on those choices; in this case, for instance by stating that fundamental justice disallows the prosecution of asylum seekers who help one another enter a country illegally. That this was not done leaves the door open to the kinds of prosecutions and findings of inadmissibility that the Court sought to rule out.

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<sup>41</sup> Others have criticized this methodology on the basis that the courts are not adequately constrained in their characterization of statutory intent. This lack of constraint allows them to indulge in “‘result-driven’ reasoning to achieve a desired outcome”: Hart Schwartz, “Circularity, Tautology, and Gamesmanship: ‘Purpose’ based Proportionality-Correspondence Analysis in Sections 15 and 7 of the *Charter*” (2015) 35 N.J.C.L. 105, at 108. My argument is that the amendments to s. 117 also suggest the contrary weakness. By demurring on any constitutional inquiry into a statute’s ends, the means-ends analysis makes the constitutional outcome overly contingent on Parliament’s intent.

### III. *B010*, *FEBLES* AND FOUR READINGS OF *SINGH*

Thus the first mention of the Charter in *B010* was to the now possibly irrelevant conclusion in *Appulonappa*. The second place the Charter surfaced was when the Chief Justice addressed an alternative argument that the inadmissibility ground in paragraph 37(1)(b) of the IRPA is constitutionally overbroad, as was argued with respect to section 117 in *Appulonappa*. The Chief Justice found it unnecessary to address this argument in light of her conclusion on the statutory interpretation issue. However, she added in *obiter* that section 7 cannot be used to interpret paragraph 37(1)(b) of the IRPA. This is because the determination of inadmissibility, even though it may lead to ineligibility to have one's refugee protection claim heard by RPD, did not engage section 7.

As authority for this statement, she relied on a holding made a year earlier from her majority opinion in *Febles*.<sup>42</sup> *Febles* was a judicial review of an RPD decision involving the interpretation of article 1F(b) of the Refugee Convention, a clause that excludes from protection persons who prior to arrival have committed a "serious non-political crime".<sup>43</sup> The Chief Justice found that article 1F(b) was not limited to fugitives from justice. In addition, factors such as "post-crime events, like rehabilitation or expiation" or current dangerousness could not figure in the evaluation of a crime's seriousness. Rather, the "seriousness" of a crime was fixed at the time of its commission.<sup>44</sup>

As in *B010*, in *Febles* the Charter was only raised as a supporting argument. In her opinion,<sup>45</sup> the Chief Justice addressed that argument by holding that section 7 of the Charter has "no role to play" in interpreting the Refugee Convention's exclusion clauses, as those clauses belong to an international instrument.<sup>46</sup> Further, the Charter had no interpretative purchase with respect to section 98 of the IRPA, the provision incorporating

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<sup>42</sup> *Supra*, note 9.

<sup>43</sup> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that: ... (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee ..." See art. 1F(b) of the Refugee Convention, *supra*, note 35.

<sup>44</sup> *Febles*, *supra*, note 9, at paras. 3 and 60.

<sup>45</sup> The Chief Justice wrote for five judges of a seven-member panel. Justice Abella, joined by Cromwell J, wrote a vigorous dissent but did not comment on the Charter issue: *Febles*, *supra*, note 9.

<sup>46</sup> *Id.*, at para. 64.

the exclusion clauses into the Act, because it lacks ambiguity.<sup>47</sup> Finally — and these are the important passages for the discussion that follows — the Chief Justice said that section 98 would in any event be consistent with the Charter because of the availability of a stay of removal through the PRRA process:

... On such an application, the Minister would be required to balance the risks faced by the appellant if removed against the danger the appellant would present to the Canadian public if not removed ... . Section 7 of the *Charter* may also prevent the Minister from issuing a removal order to a country where *Charter*-protected rights may be in jeopardy: *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 58.<sup>48</sup>

She went on:

While the appellant would prefer to be granted refugee protection than have to apply for a stay of removal, the *Charter* does not give a positive right to refugee protection.<sup>49</sup>

Although in *Febles* the Chief Justice did not say how the availability of a PRRA answered the Charter argument, in *BO10* she clarified that it was because section 7 was not engaged prior to that stage:

... This Court recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the *IRPA* did not engage s. 7, because “even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place” (para. 67). It is at this subsequent pre-removal risk assessment stage of the *IRPA*’s refugee protection process that s. 7 is typically engaged. The rationale from *Febles*, which concerned determinations of “exclusion” from refugee status, applies equally to determinations of ‘inadmissibility’ to refugee status under the *IRPA*.<sup>50</sup>

That is, if section 7 is not engaged before the RPD, it follows that it is not engaged by a decision regarding inadmissibility that would render someone ineligible to go before the RPD. The answer to constitutional concerns in both cases is the eventual access to a PRRA.

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<sup>47</sup> Section 98 of the *IRPA* states that: “A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.” Articles 1E and 1F of the Convention are set out in a Schedule to the *IRPA*.

<sup>48</sup> *Febles*, *supra*, note 9, at para. 67.

<sup>49</sup> *Id.*, at para. 68.

<sup>50</sup> *BO10*, *supra*, note 2, at para. 75.

Read together, these passages may surprise those who believe that the *Singh* decision from 1985 stands for the proposition that section 7 is engaged by the determination of refugee protection claims<sup>51</sup> and that fundamental justice requires disclosure of the case to meet and oral hearings to deal with credibility issues.<sup>52</sup> After all, in *Singh Wilson J.*, writing for three judges of a six-member panel, was “prepared to accept” that section 7 applied to every person physically present in Canada<sup>53</sup> and that it was engaged in the case of refugee protection claimants because the right to security of the person encompasses “freedom from the threat of physical punishment or suffering as well as freedom from such punishment itself”.<sup>54</sup> She added:

... [I]f the appellants had been found to be Convention refugees ... they would have been entitled as a matter of law to the incidents of that status provided for in the Act. Given the potential consequences for the appellants of a denial of [Convention refugee] status if they are in fact persons with a “well-founded fear of persecution”, it seems to me

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<sup>51</sup> See Pearl Eliadis, “The Swing from *Singh*: The Narrowing Application of the *Charter* in Immigration Law” (1995) 26 Imm. L.R. (2d) 130, at 130-31 (“The first important principle emerging from *Singh* is that persons physically present in Canada are entitled to have their claims adjudicated in accordance with the principles of fundamental justice.”); James C. Hathaway & R. Alexander Neve, “Fundamental Justice and the Deflection of Refugees from Canada” (1996) 34 Osgoode Hall L.J. 213-270, at para. 16 (“The Supreme Court of Canada determined in *Singh v. Canada (Employment and Immigration)* that the *Charter* requires that refugee claimants physically present in Canada be given an adequate opportunity to state their case, normally in the form of an oral hearing.”); Martin Jones & Sasha Baglay, *Refugee Law* (Toronto, Irwin Law Inc., 2007), at 38 (“The most well-known case involving section 7 is *Singh v. Canada*, which established a right to an oral hearing for refugee claimants in Canada.”); Sean Rehaag, “Judicial Review of Refugee Determinations: The Luck of the Draw?” (2012) 38 Queen’s L.J. 1, at n. 5 (“As a matter of constitutional law, refugee claimants are entitled to a hearing whenever credibility is at stake.”); Catherine Dauvergne, “How the Charter Has Failed Non-Citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence” (2013) 58:3 McGill L.J. 663, at para. 10 (Justice Wilson “concluded that the rights and interests at stake in refugee determination were sufficiently serious that deprivation of those rights ‘must amount to deprivation of security of the person within the meaning of s. 7.’ She further stated that, as a principle of fundamental justice, serious issues of credibility must be determined on the basis of an oral hearing.”) I note that Hathaway and Neve, as well as Jones and Baglay, go on to discuss the ways in which sub-Supreme Federal Court jurisprudence drifted from this understanding of *Singh*, a drift I discuss in Section 4, below.

<sup>52</sup> *Singh*, *supra*, note 10, at para. 59 (oral hearings) and para. 62 (discovery).

<sup>53</sup> *Id.*, at para. 35. This was the only holding from *Singh* cited by the Chief Justice in any of *Febles*, *B010*, or *Appulonappa*, having been noted in *Appulonappa*, *supra*, note 1, at para. 23. Justice Wilson wrote for herself, Dickson C.J.C. and Lamer J. (as he then was). There is a long tradition of ignoring the equally authoritative concurring decision of the other three justices, which reached largely the same result relying on the *Canadian Bill of Rights*, S.C. 1960, c. 44. In the case of this article, I continue in this tradition because of my focus on the Charter.

<sup>54</sup> *Id.*, at para. 47.

unthinkable that the *Charter* would not apply to entitle them to fundamental justice in the adjudication of their status.<sup>55</sup>

When studying this passage, a reader should keep in mind here that refugee “status” refers to the assemblage of rights and obligations incident to being found to be a refugee. Beyond the right against removal to a place where a person would be at risk (as noted, this is the principle of *non-refoulement*),<sup>56</sup> status includes also a host of other rights meant to ensure that refugees, stripped of the protection of their state of origin, may continue to lead meaningful lives, including in Canada a path to permanent residence and eventually citizenship.<sup>57</sup>

Under the IRPA, this assemblage of rights comes with “protected person” status that is conferred when one is granted “refugee protection” by the RPD or RAD. Protected person status can also be conferred through a PRRA application, but — importantly — not for persons who have been found inadmissible on criminality- or security-related grounds (as in *B010*) or excluded from refugee protection under article 1F (as in *Febles*); in such cases, a finding of risk only leads to a stay of removal.<sup>58</sup> Thus the Chief Justice’s pronouncements in *Febles* and *B010* suggest that claims for refugee status do not engage section 7 of the Charter. On its face, this conclusion seems to directly contradict *Singh*. What seemed unthinkable to Wilson J. seems to have become thinkable.

Whether this is actually the case — whether there is an actual contradiction — depends on what *Singh* says. Here matters are not as clear as they might be.

As the first decision applying the Charter to immigration matters, *Singh* was being written against a history of *Canadian Bill of Rights*<sup>59</sup> case law in which the courts had routinely relied on the fact that “immigration is a privilege and not a right”<sup>60</sup> to dismiss rights claims by non-citizens. This *Bill of Rights* case law reflected long-standing Anglo-American doctrine that accorded broad, perhaps unlimited, discretion in the setting and execution of their immigration policy. In other words, Wilson J. was starting from the base line that “[a]t common law no alien

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<sup>55</sup> *Id.*, at para. 52.

<sup>56</sup> Refugee Convention, *supra*, note 35, at art. 33; IRPA, s. 115.

<sup>57</sup> The Refugee Convention does not strictly enjoin signatory states to offer naturalization to refugees: Refugee Convention, *supra*, note 35, at art. 34.

<sup>58</sup> IRPA, s. 95(1)(b), (c), (2).

<sup>59</sup> *Supra*, note 53.

<sup>60</sup> *Singh*, *supra*, note 10, at para. 49, citing Walter Tamopolsky, *The Canadian Bill of Rights*, 2d ed. (Toronto: McLelland and Stewart Ltd., 1975), at 273.

has any right to enter this country except by leave of the Crown; and the Crown can refuse leave without giving any reason. ... He has no right whatever to remain here.”<sup>61</sup> At its strongest, this doctrine amounts to denying the imperative of justifying immigration decisions to migrants beyond ascertaining that a given decision conforms with statute and policy. Put otherwise, the traditional doctrine may rest on the proposition that immigration law and policy lie beyond the reach of anything but a weak rule-of-law (or rule-by-law) constitutionalism, under which the inquiry ends once it is ascertained that an official action conforms to the statute or lies within the range of a statutorily authorized discretion.<sup>62</sup> It stamps immigration governance as a reserved domain for arbitrariness.

Against this, *Singh* held out the promise of bringing immigration governance within the embrace of a robust constitutionalism.<sup>63</sup> In theory if not in practice (no such argument appears to have been made), *Singh* even held the potential to lead to the recognition of a Charter right to asylum. This would be the “positive right to refugee protection” expressly rejected by the Court in *Febles*.<sup>64</sup> But, as I will now argue, in a way that is deeply ironic, *Singh*’s promise of a more robust immigration constitutionalism is undermined by gaps in Wilson J.’s own analysis.

Justice Wilson’s attempt to chart a path between the radical possibility of a right to refugee protection and the traditional common law doctrine led to cross-cutting ambiguities in her reasoning that yield several readings of *Singh*. Two ambiguities in particular come out in trying to answer the question of whether there is a conflict between *Singh*, on the one hand, and *Febles* and *B010*, on the other. The first has to do with whether section 7 is engaged because (a1) a statutory right to such protection was provided under the *Immigration Act*, such that if no such

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<sup>61</sup> *R. v. Governor of Pentonville Prison*, [1973] 2 All E.R. 741, at 747 (C.A.), per Lord Denning M.R. This passage was cited as authority in *Prata v. Canada (Minister of Manpower and Immigration)*, [1976] S.C.J. No. 38, [1976] 1 S.C.R. 376, at 380 (S.C.C.), affg [1972] F.C.J. No. 129 (F.C.A.) and then again in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] S.C.J. No. 27, [1992] 1 S.C.R. 711, at para. 24 (S.C.C.), revg [1990] F.C.J. No. 157 (F.C.A.) [hereinafter “*Chiarelli*”]. A classic statement is found in *Attorney-General for Canada v. Cain*, [1904-07] All E.R. Rep. 582, [1906] A.C. 542 (P.C.).

<sup>62</sup> David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge: Cambridge University Press, 2006) at 6-7, also 146-47.

<sup>63</sup> Pearl Eliadis and Audrey Macklin both note that in the cases that followed *Singh*, most notably *Chiarelli*, the Court has failed to subject the common law doctrine to Charter scrutiny: Eliadis, “The Swing from *Singh*”, *supra*, note 51, at 139ff.; Audrey Macklin, “The Common Law, the Constitution, and the Alien” (manuscript on file with author).

<sup>64</sup> *Supra*, note 9. This is not such an outlandish suggestion, since such a right existed in West Germany at the time: see Kay Hailbronner, “Fifty Years of the Basic Law — Migration, Citizenship, and Asylum” (2000) 53 S.M.U.L.R. 519.

statutory rights were granted, section 7 would not have been engaged; or because (a2) of the interest in receiving protection, irrespective of the rights accorded in the statute. The first of these possibilities (a1) rests on the fact that throughout her decision, Wilson J. is at pains to point out that Parliament itself saw fit to accord refugees several rights in the *Immigration Act, 1976*.<sup>65</sup> The second (a2) rests on Wilson J.'s emphasis on consequences in the passage quoted above. More importantly, it rests on her rejection in another part of her decision of the distinction between rights and privileges.<sup>66</sup> As noted, prior to the Charter this distinction had been relied on to support analyses according to which a non-citizen could assert no rights beyond those expressly provided by statute. That is, because entry and sojourn were historically considered "privileges" at common law, no extra-statutory rights protected non-citizens' interests.<sup>67</sup> It follows that, although Wilson J. expressly stated that she did not have "to engage in a larger inquiry into the substantive rights conferred in the Act",<sup>68</sup> her rejection of the rights-privilege dichotomy implies the availability of such an inquiry.

The second ambiguity is between whether section 7 was said to be engaged in *Singh* by (b1) the possibility of removal to a country where the claimant would face "a threat of physical punishment or suffering";<sup>69</sup> or by (b2) the possibility of the denial of refugee status (now the status of "protected person" conferred upon being granted "refugee protection") to a claimant. Here the first possibility (b1) rests on the manner in which Wilson J. emphasizes the consequences of removal, as the key impact of

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<sup>65</sup> For instance, when she writes: "It seems to me that in attempting to decide whether the appellants have been deprived of the right to life, liberty and security of the person within the meaning of s. 7 of the *Charter*, we must begin by determining what rights the appellants have under the *Immigration Act, 1976*." See *Singh, supra*, note 10, at para. 41. Other key passages are found *id.*, at para. 52 ("if the appellants had been found to be Convention refugees as defined in s. 2(1) of the *Immigration Act, 1976* they would have been entitled as a matter of law to the incidents of that status provided for in the Act"; this passage in fact immediately precedes the "unthinkable" passage quoted above in the main text); *id.* at para. 55 ("On these appeals this Court is being asked by the appellants to accept that the substantive rights of Convention refugees have been determined by the *Immigration Act, 1976* itself and the Court need concern itself only with the question whether the procedural scheme set up by the Act for the determination of that status is consistent with the requirements of fundamental justice articulated in s. 7 of the *Charter*"); and sundry less significant references to the rights in the former *Immigration Act, 1976*.

<sup>66</sup> *Id.*, at para. 50.

<sup>67</sup> The classic discussion of the rights-privileges distinction is found in William W. van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law" (1968) 81 Harv. L. Rev. 1439.

<sup>68</sup> *Singh, supra*, note 10, at para. 55.

<sup>69</sup> *Id.*, at para. 47.



the rejection of status. I believe it also relies, implicitly, on what many would consider the implausibility of the suggestion that a non-citizen might have a Charter-protected right to seek a status implying eventual access to citizenship. The second possibility (b2) rests on Wilson J.'s repeated reliance on the one hand on the entirety of rights accorded to refugees under the *Immigration Act, 1976* at the time;<sup>70</sup> her reference in the key passage quoted above to refugee status, in addition to the consequences of removal itself; and the fact that a decision to deny refugee status was not then, as it is not now, the final decision that would have to be made prior to removal, so that the issue at stake before Wilson J. really was status and not removal.<sup>71</sup>

At the risk of being artificially schematic, these two dimensions of ambiguity yield the following table, illustrating four possible readings of how Wilson J. found section 7 to be engaged by refugee claims:

**Table 1: Four Readings of *Singh***

<b>Section 7 is engaged by ...</b>	... the risk upon removal (b1)	... the chance of not receiving refugee status (b2)
... the <i>statutory rights</i> conferred under the Act (a1)	... the possible denial of the <i>statutory right</i> not to be removed. (a1, b1)	... the possible denial of the <i>statutory right</i> to refugee status. (a1, b2)
... the <i>interests</i> at stake (a2)	... the (negative) <i>interest</i> against being removed to a risk situation. (a2, b1)	... the (affirmative) <i>interest</i> in receiving refugee status. (a2, b2)

<sup>70</sup> *Id.*, at paras. 14 and 55. Hathaway and Neve emphasize this aspect of the decision, *supra*, note 51, at para. 33.

<sup>71</sup> At the time, a claim for refugee protection interrupted proceedings with respect to removal. Once a non-citizen made a claim for refugee protection during an immigration inquiry into his or her inadmissibility, the inquiry was adjourned for the determination of the claim. It was only if a claim was denied that the inquiry resumed and the subsequent decision regarding inadmissibility would be made. See *Singh*, *supra*, note 10, at para. 14. I thank David Vinokur for helpful discussion of the scheme at the time.

In this table, the lower right-hand cell (a2, b2) would represent the greatest limitation on Canada's power to control immigration, and also the most robust form of immigration constitutionalism. If section 7 was engaged by the *interest* in receiving refugee *status*, then any limitation on the right to claim refugee status at any time and to have one's claim heard by a tribunal might engage section 7 and hence require a showing of conformity with fundamental justice.<sup>72</sup> What is more, the lower right-hand cell is not obviously confinable to refugee claims alone. First, many non-citizens fighting inadmissibility and removal either claim to be refugees or have been found to be them. Second, even if that were not the case, a focus on status, and the range of interests associated with it, may suggest that significant interests short of the threat of persecution may engage section 7. So we can see how the most robust reading of *Singh* potentially points to a world in which most deportation decisions would have to be defended by a showing that they were fundamentally just.

*Febles* and *B010* contradict the two readings found in the right-hand column of Table 1 ((a1, b2) and (a2, b2)); they therefore reject the radical possibility that section 7 is engaged by the potential deprivation of refugee status. However skeptical one might be of this possibility, it does not need to be said that, from the point of view of constitutionalism, a constitutional outcome ideally should be explained. The Chief Justice's statement that "[w]hile the appellant would prefer to be granted refugee protection than have to apply for a stay of removal, the *Charter* does not give a positive right to refugee protection"<sup>73</sup> is not so much an explanation as an instance of brazen question-begging.

Further, *Febles* and *B010* could rest either on statutory rights to protection against removal or on the interest in not being removed to a situation of risk. That is, they themselves are ambiguous as between the top and bottom cells of the left-hand column of Table 1 (as between (a1, b1) and (a2, b1)). Here it should be recalled that in *Febles*, the Chief Justice only said that section 7 "may ... prevent the Minister from issuing a removal order to a country where *Charter*-protected rights may be in jeopardy".<sup>74</sup> For reasons I will now explain, however, it seems

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<sup>72</sup> Arguments along these lines were in fact attempted and rejected shortly after *Singh*. See, e.g., *Bendahmane v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 31, 8 F.T.R. 241 (F.C.T.D.), rev'd on other grounds [1989] F.C.J. No. 304, [1989] 3 F.C. 16 (F.C.A.); but see *Tonato v. Canada (Minister of Employment and Immigration)*, [1985] F.C.J. No. 92, [1985] 1 F.C. 925 (F.C.T.D.).

<sup>73</sup> *Febles*, *supra*, note 9, at para. 68.

<sup>74</sup> *Supra*, note 48 (emphasis added).

unlikely that this statement was meant to imply that section 7 protection against removal to risk is contingent on a statutory right.

#### IV. TOWARD A WEAK READING OF *SINGH*

I offer this explanation in the course of a truncated account of how we got from *Singh* to *Febles* and *B010*. This is a complex story to which I cannot do justice here, but which I will describe as the product of three developments.

The first development is the introduction in 1989, as part of a delayed statutory response to *Singh*, of ineligibility provisions that aimed, initially, at preventing repeat claims being made within a short time frame, claims by persons who had been granted refugee protection in other countries, and other provisions aimed at the perceived mischief of so-called “asylum shopping”; amendments that came into force in 1992 added ineligibility if a claimant had transited through a “safe third country” and, crucially, for past criminal offences.<sup>75</sup> (Note that, before February 1993, there was no subsequent review for risk corresponding to today’s PRRA;<sup>76</sup> further, before 1995, it had not been found that enforcement officers had discretion to defer removal.<sup>77</sup>)

If *Singh* stands for the proposition that the denial of refugee status or the potential consequences of removal to a risk situation, in the absence of corresponding statutory rights, engages section 7, then it seems clear that ineligibility provisions would do so as well. However, while some cases seemed to go the other way,<sup>78</sup> it was established in short order that

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<sup>75</sup> For an argument that ineligibility grounds of this kind are unconstitutional, see Mark Anthony Drumbl, “Canada’s New Immigration Act: An Affront to the *Charter* and Canada’s Collective Conscience?” (1994) 24 R.D.U.S. 385.

<sup>76</sup> The *Immigration Regulations*, 1978, SOR/78-172, as amended by SOR/93-44 established the Post-Determination Refugee Claimants in Canada Class — precursor to the PRRA — effective February 1, 1993; *Bochnakov v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 271, 91 F.T.R. 93, at para. 2 (F.C.T.D.).

<sup>77</sup> *Poyanipur v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1785, 116 F.T.R. 4 (F.C.T.D.); see also *Wang*, *supra*, note 17.

<sup>78</sup> See *Noor v. Canada (Minister of Employment and Immigration)*, [1989] Q.J. No. 722, at para. 67 (Que. S.C.), revd [1990] J.Q. no 289 (Que. C.A.). Other decisions had relied on s. 7 to invalidate formal bars to refugee determination or redetermination, which were similar in effect to ineligibility provisions in that they disentitled a non-citizen to claim refugee protection. Thus *Kaur v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 1100, [1990] 2 F.C. 209 (F.C.A.) and *Mattia v. Canada (Minister of Employment and Immigration)*, [1987] F.C.J. No. 247, [1987] 3 F.C. 492 (F.C.T.D.) found that s. 7 mandated that an immigration inquiry be reopened so that a non-citizen could make a claim for refugee status if he or she had been prevented from doing so because of duress or mental illness. In *Bains v. Canada (Minister of Employment and*

ineligibility determinations by themselves and in general did not engage section 7 of the Charter.

Most important in this regard was the 1991 Federal Court of Appeal case *Berrahma*, a case involving a refugee protection claimant ineligible to make a claim because he had been rejected less than 90 days earlier.<sup>79</sup> Rather than determining whether that ineligibility criterion or determination complied with fundamental justice, in *Berrahma* Marceau J.A. simply found that section 7 was not engaged. He reasoned that section 7 did not impose a positive duty on the government “to provide protection to everyone whose life or liberty may be at risk, still less to provide a refuge for all inhabitants of the globe who may fear for their lives or security”; rather “for it to be applicable, there must be a specific act, legislation, not merely a failure to act.”<sup>80</sup> In *Singh*, he continued, section 7 was engaged because “[Mr.] Singh was denied a status which the law gave him the right to claim without having any opportunity of showing that he met the conditions for obtaining it, whereas the ineligible claimant is not denied a status he is entitled to claim.”<sup>81</sup>

We are here in the upper row of Table 1 ((a1, b1) and (a1, b2)), the most conservative readings of *Singh*. Note just how thoroughly this reading of *Singh* evades constitutionalism. If a statutory entitlement is necessary to engage section 7, then it is within Parliament’s power to evade obligations of fundamental justice toward refugees simply by omitting refugee protection and rights against removal from immigration legislation.

*Berrahma* has been repeatedly affirmed for the proposition that neither ineligibility provisions nor determinations engage section 7 of the Charter.<sup>82</sup> However, the courts have retreated from its strongest implications.

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*Immigration*), [1989] F.C.J. No. 613, [1989] 3 F.C. 487 (F.C.A.), the Federal Court of Appeal found that s. 7 required that the Immigration Appeal Board (I.A.B.) have the discretion to grant extensions of time to applicants seeking the redetermination of the Minister’s decision on their claim.

<sup>79</sup> *Berrahma v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 180, 132 N.R. 202 (F.C.A.).

<sup>80</sup> *Id.*, at para. 11.

<sup>81</sup> *Id.*, at para. 12.

<sup>82</sup> See *Nguyen v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 47, [1993] 1 F.C. 696, at para. 8 (F.C.A.), leave to appeal refused [1993] S.C.C.A. No. 103 (S.C.C.) [hereinafter “*Nguyen*”]; *Hernandez v. Canada (Solicitor General)*, [1993] F.C.J. No. 950, at para. 13 (F.C.T.D.); *Gervasoni v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 475, 110 F.T.R. 297 (F.C.T.D.); *Jekula v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1503, [1999] 1 F.C. 266 (F.C.T.D.) [hereinafter “*Jekula*”]; *Raza v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1826, [1999] 2 F.C. 185 (F.C.T.D.); *Soe v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 913, 2007 FC 671 (F.C.); *J.P.*, *supra*, note 39, at para. 123. At times the courts have nonetheless said that, in the circumstances of a case,

This may be on account of two important Supreme Court decisions that followed soon after. The first of these was *Kindler*,<sup>83</sup> which found that extradition to face the death penalty engaged section 7 but did not violate the principles of fundamental justice. In a concurring opinion supporting this conclusion, La Forest J. invoked the common law principle of broad state discretion over immigration matters: “The Government has the right and duty to keep out and to expel aliens from this country if it considers it advisable to do so.”<sup>84</sup> Next, in *Chiarelli*,<sup>85</sup> the Supreme Court — citing *Kindler* but ignoring *Singh* — held that the deportation of a long-time permanent resident, who was not a refugee or a refugee claimant, on grounds of criminality did not violate the principles of fundamental justice. This result flowed from the observation, often repeated since, that the principles of fundamental justice in the immigration context had to be determined in light of the “most fundamental principle of immigration law”, namely “that non-citizens do not have an unqualified right to enter or remain in the country”.<sup>86</sup>

Once *Kindler* and *Chiarelli* were decided, the courts increasingly gave them analytical prominence over *Singh*; this is the second development that led to *Singh*’s weakening. This prominence is important for a number of reasons. Most obvious, by endorsing the traditional common law principle regarding immigration matters, *Kindler* and *Chiarelli* suggested that whatever *Singh* stood for, it could not be that section 7 mandates the grant of permanent status to refugees. *Kindler* and *Chiarelli* further seemed to affirm that *Singh* could have no bearing on the deportation of non-citizen criminals, at least outside the refugee context.<sup>87</sup> It is of great importance, then, that two Federal Court of Appeal decisions that followed soon after seemed to demand a reconciliation of *Singh*’s assertion of the Charter rights of refugees, on the one hand, and *Kindler* and *Chiarelli*’s reassertion of the traditional immigration law power on the other.

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s. 7 may be engaged: see *Canada (Minister of Employment and Immigration) v. Agbasi*, [1993] F.C.J. No. 113, [1993] 2 F.C. 620 (F.C.T.D.).

<sup>83</sup> *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63, [1991] 2 S.C.R. 779 (S.C.C.) [hereinafter “*Kindler*”]. *Kindler* was decided on September 26, 1991; *Berrahma* had been decided on February 21, 1991.

<sup>84</sup> *Id.*, at para. 133 (*per* La Forest J.).

<sup>85</sup> *Chiarelli*, *supra*, note 61.

<sup>86</sup> *Id.*, at para. 24.

<sup>87</sup> In *Kindler*, *supra*, note 83, at para. 133, La Forest J. also added: “I am aware that on humane grounds, provision is now made for the admission of political refugees, but that, of course, has no relevance here.”

*Barrera*<sup>88</sup> was a judicial review by the Federal Court of Appeal of a decision to issue a deportation order on criminal grounds against a Chilean national who had been recognized as a refugee. Justice MacGuigan dealt with a section 7 argument summarily, without considering the fact that Mr. Barrera was a refugee, on the basis that deportation of criminal non-citizens did not engage the right to liberty; he did not consider security of the person or the potential relevance of *Singh*.<sup>89</sup> Mr. Barrera's refugee status was instead approached as potentially giving rise to a problem with respect to the guarantee against cruel and unusual treatment found in section 12 of the Charter. On this point, MacGuigan J.A. found Mr. Barrera's Charter challenge premature because "it is only a return to Chile which could conceivably put the appellant in any s. 12 danger, and it is only the Minister who has the statutory power to subject him to that danger."<sup>90</sup>

In the context of section 12 jurisprudence, this finding makes some sense, as the Supreme Court had found in *Kindler* that section 12 requires a stronger link between the impugned government action and the potential harm than challenges under section 7.<sup>91</sup> But the idea of prematurity was applied the next year by the Federal Court of Appeal in *Nguyen* in the context of section 7.<sup>92</sup>

*Nguyen* involved a non-citizen who sought to claim refugee status at a hearing into his inadmissibility but was found ineligible to make a claim due to convictions for serious offences. Justice Marceau found that the constitutionality of the finding that Mr. Nguyen was removable on criminal grounds was "easy to verify" following *Kindler* and *Chiarelli*.<sup>93</sup> He then found section 7 was not engaged by the ineligibility decision. Contrary to the approach he had taken in *Berrahma*, he now relied on prematurity: "a declaration of ineligibility does not imply or lead, in itself, to any positive act which may affect life, liberty or security of the person."<sup>94</sup> This makes less sense than the use of prematurity under

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<sup>88</sup> *Barrera v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 1127, [1993] 2 F.C. 3 (F.C.A.). In this case, the Appeal Division relied on an unreported Trial Division case, *Donoso v. Canada (Minister of Employment and Immigration)*, since reported at [1989] F.C.J. No. 645, 30 F.T.R. 241 (F.C.T.D.), for the principle of prematurity.

<sup>89</sup> *Id.*, at para. 11.

<sup>90</sup> *Id.*

<sup>91</sup> *Kindler*, *supra*, note 83, at para. 169 (*per* McLachlin J.); *United States v. Burns*, [2001] S.C.J. No. 8, 2001 SCC 7, at paras. 54-57 (S.C.C.), affg [1997] B.C.J. No. 1558 (B.C.C.A.).

<sup>92</sup> *Nguyen*, *supra*, note 82, at para. 8.

<sup>93</sup> *Id.*, at para. 7 (F.C.) ("The constitutional validity of the [inadmissibility] decision ... is easy to verify, especially following the judgments of the Supreme Court in *Kindler* ... and *Chiarelli* ...").

<sup>94</sup> *Id.*, at para. 8 (F.C.). Justice Marceau changed his gloss on *Singh*, saying that Wilson J.'s finding of s. 7 engagement in that case was based on the fact that the "right to claim refugee status"

section 12, given that Wilson J. in *Singh* had found that the right to security of the person was engaged by a mere “threat” and given that the potential for an eventual infringement engages section 7 throughout criminal and extradition proceedings.<sup>95</sup>

Justice Marceau’s analysis in *Nguyen* included two further nuances. The first is that, although he found that neither the inadmissibility nor the ineligibility decisions in isolation engaged section 7, the two decisions in combination did; he went on to find, however, that there was no violation of substantive or procedural principles of fundamental justice.<sup>96</sup> Then, at the end of his opinion, he added the following remark:

It would be my opinion, however, that the Minister would act in direct violation of the *Charter* if he purported to execute a deportation order by forcing the individual concerned back to a country where, on the evidence, torture and possibly death will be inflicted. It would be, it seems to me, ... at the very least, an outrage to public standards of decency, in violation of the principles of fundamental justice under section 7 of the *Charter*.<sup>97</sup>

This passage is, at least, in tension with his reasoning in *Berrahma*, acknowledging as it does a principle of fundamental justice that is not statutorily contingent. Why the shift? Without wishing to make a strong explanatory claim here (since other extradition cases had already found that surrender decisions engaged section 7 prior to *Berrahma*<sup>98</sup>), it is

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had been previously granted. So now s. 7 was engaged not by the right to refugee protection made available by statute, but by the fact that the right to claim such status had already been granted.

<sup>95</sup> See Stewart, *supra*, note 19, at 236 and 272. Given space constraints, I do not consider here whether this broader availability of s. 7 in the criminal and extradition contexts should be extended to the immigration context (see my comment, *supra*, note 7). The point is only that the concrete result is that outcomes in the immigration context are less justified than outcomes in the criminal and extradition contexts.

<sup>96</sup> *Nguyen*, *supra*, note 82. Justice Marceau attributed this style of reasoning to the Supreme Court in *Chiarelli*, *supra*, note 61. See also *Chiarelli v. Canada (Minister of Employment and Immigration)*, [1990] F.C.J. No. 157, [1990] 2 F.C. 299 (F.C.A.), revd [1992] S.C.J. No. 27 (S.C.C.); *Grewal v. Canada (Minister of Employment and Immigration)*, [1991] F.C.J. No. 913, [1992] 1 F.C. 581 (F.C.A.); *Kaberuka v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 1093, [1995] 3 F.C. 252 (F.C.T.D.) [hereinafter “*Kaberuka*”]. More recently, see the decision of Mactavish J. in *Atawnah v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2015] F.C.J. No. 782, 2015 FC 774, at para. 67 (F.C.), affd [2016] F.C.J. No. 481 (F.C.A.).

<sup>97</sup> *Id.*

<sup>98</sup> See *Canada v. Schmidt*, [1987] S.C.J. No. 24, [1987] 1 S.C.R. 500, at para. 42 (S.C.C.), affg [1984] O.J. No. 2647 (Ont. C.A.). Justice Marceau himself wrote the lead opinion for the Federal Court of Appeal panel whose decision was affirmed by the Supreme Court in *Kindler: Kindler v. Canada (Minister of Justice)*, [1988] F.C.J. No. 1153, [1989] 2 F.C. 492 (F.C.A.), affd [1991] S.C.J. No. 63 (S.C.C.). Justice Marceau’s opinion did not deal with s. 7, but the concurring opinion of Pratte J.A. appears to presuppose that s. 7 was engaged in that case.

nonetheless the case that *Kindler* confirmed that in the context of extradition, a surrender decision to potentially face the death penalty engages section 7,<sup>99</sup> while *Chiarelli* declined to decide whether the removal of a long-term permanent resident engages section 7 by itself.<sup>100</sup> In the face of these reasons, it seems harder to maintain a claim that section 7 was entirely contingent on statutory rights. This last finding by Marceau J.A. is also consistent with the later holding in *Suresh*, which was cited by the Chief Justice in *Febles*, as it is with later pronouncements by the Federal Court of Appeal that “a risk assessment and determination conducted in accordance with the principles of fundamental justice is a condition precedent to a valid determination to remove an individual.”<sup>101</sup> Again without wishing to make a strong explanatory claim, I believe the courts were comfortable with making this move because they saw themselves as recognizing only a negative right against removal, while at the same time denying any Charter-protected affirmative right to some sort of permanent status.

*Barrera* introduced the idea of prematurity, but in the context of an analysis under section 12 of the Charter. Justice Marceau’s analysis in *Nguyen* employed the same idea in the context of section 7, but with the important nuance that, although an ineligibility decision would not engage section 7, the overall statutory scheme would.<sup>102</sup> The third and final development in the story is the subsequent reaffirmation that it is premature to raise section 7 prior to a decision pertaining to removal, while denying the need to examine the statutory scheme as a whole as was done in *Nguyen*. This principle is set out in *Jekula*, a 1998 case of the Federal Court-Trial Division.<sup>103</sup> It has since been repeated many times over in cases involving many different kinds of proceedings before the IRB involving refugee protection claimants, including vacation decisions,<sup>104</sup>

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<sup>99</sup> *Kindler*, *supra*, note 83, at para. 171 (*per* McLachlin J.) and para. 127 (*per* La Forest J.) (S.C.C.).

<sup>100</sup> *Chiarelli*, *supra*, note 61, at para. 21.

<sup>101</sup> *Farhadi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 646, 27 N.R. 158, at para. 3 (F.C.A.).

<sup>102</sup> *Supra*, note 96.

<sup>103</sup> *Jekula*, *supra*, note 82, at para. 33, *affd* [2000] F.C.J. No. 1956, 266 N.R. 355 (F.C.A.). As authority for this passage, Evans J. (as he then was) relied on *Kaberuka*, *supra*, note 96. However, *Kaberuka* had found that while ineligibility determinations by themselves did not engage s. 7, the joint operation of the ineligibility determinations in combination with the provision allowing for removal did engage s. 7, a finding Evans J. ignored.

<sup>104</sup> *Coomaraswamy v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 603, 2002 FCA 153, at para. 24 (F.C.A.), *affg* [2001] F.C.J. No. 183 (F.C.T.D.).



cessation decisions,<sup>105</sup> decisions regarding whether to grant refugee protection,<sup>106</sup> decisions (like *Febles*) to exclude persons from refugee protection<sup>107</sup> and inadmissibility decisions (like *BOIO*).<sup>108</sup>

Thus the four possible readings of *Singh* were winnowed down to one — (a2, b1) in Table 1 — by the sub-Supreme Federal Courts. In those courts, *Singh* lost its constitutional vitality long ago, weakened by its own ambiguities and by the renewed avowal of a broad immigration power in *Kindler* and *Chiarelli*. Despite this fact, however, the possibility persisted that in the eyes of the Supreme Court, *Singh* still stood for fundamental justice before the IRB. In *Dehghani*, from 1993, Iacobucci J. wrote for a unanimous Court that in *Singh*, “Wilson J. held that since the refugee claim determination process has the potential to deprive a Convention refugee of security of the person, the determination process must accord with the principles of fundamental justice.”<sup>109</sup> And in its last mention of this feature of Wilson J.’s opinion, in the 2007 *Charkaoui* decision, the Court cited *Singh* for the proposition that section 7 could be engaged by the process for determining the reasonableness of security certificates, which are jointly issued by the Minister of Citizenship and Immigration and the Minister of Public Safety to certify a non-citizen as inadmissible on security or other grounds, because such certificates “may lead to removal from Canada, to a place where his or her life would be threatened”,<sup>110</sup> Indeed, after referring to *Charkaoui*, the Federal Court of Appeal in *Benitez* undertook a section 7 analysis with respect to proceedings before the RPD without raising the issue of engagement.<sup>111</sup>

On the strength of these pronouncements, it was still just possible to hold onto a robust reading of *Singh*. This was possible because of everything the courts below had never fully explained: why section 7

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<sup>105</sup> *Romero v. Canada (Citizenship and Immigration)*, [2014] F.C.J. No. 720, 2014 FC 671, at paras. 120-124 (F.C.).

<sup>106</sup> *Laidlow v. Canada (Citizenship and Immigration)*, [2012] F.C.J. No. 150, 2012 FC 144, at paras. 62-63 (F.C.), affd [2012] F.C.J. No. 1270, 2012 FCA 256, at para. 15 (F.C.A.).

<sup>107</sup> *Shephard v. Canada (Citizenship and Immigration)*, [2008] F.C.J. No. 494, 2008 FC 379, at para. 32 (F.C.).

<sup>108</sup> *Poshteh v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 381, 2005 FCA 85, at para. 63 (F.C.A.), affg [2004] F.C.J. 384 (F.C.).

<sup>109</sup> *Dehghani v. Canada (Minister of Employment and Immigration)*, [1993] S.C.J. No. 38, [1993] 1 S.C.R. 1053, at para. 43 (S.C.C.) (original emphasis), affg [1990] F.C.J. No. 558 (F.C.A.).

<sup>110</sup> *Charkaoui v. Canada (Citizenship and Immigration)*, [2007] S.C.J. No. 9, 2007 SCC 9, at para. 14 (S.C.C.), revg [2004] F.C.J. No. 2060 (F.C.A.) (emphasis added).

<sup>111</sup> *Benitez v. Canada (Citizenship and Immigration)*, [2007] F.C.J. No. 735, 2007 FCA 199 (F.C.A.), leave to appeal refused [2007] S.C.C.A. No. 391 (S.C.C.). Another decision that assumed that s. 7 was engaged at the refugee claim stage is *Cota v. Canada (Citizenship and Immigration)*, [1999] F.C.J. No. 872 (F.C.T.D.).

would not be engaged in refugee claims in a manner analogous to criminal and extradition proceedings; why a doctrine of prematurity that originated under section 12 of the Charter also applies under section 7; why the “fundamental principle of immigration law” enunciated in *Chiarelli* does not give way when refugee status is at stake. In *Febles* and *B010*, the Chief Justice aligned herself with the lower courts without providing answers to any of these questions.

#### V. PORTRAIT OF A WEAK IMMIGRATION CONSTITUTIONALISM

Once again, such an explanatory gap is disappointing from the point of view of the practice of constitutionalism. In this last section, I also want to highlight the ways in which the Chief Justice’s pronouncements allow for the restructuring of our system of refugee protection in a way that minimizes Canada’s justificatory obligations, rendering even more remote the ideal of constitutionalism in immigration governance. Before reviewing these structural implications, it is helpful to recap. In *Febles* and *B010*, the Chief Justice suggested that for refugee claimants, section 7 of the Charter is engaged only prior to removal during a PRRA, and only insofar as the PRRA may lead to a stay of removal; not, that is, insofar as the PRRA may lead to refugee status. For the Chief Justice, it followed that section 7 is not engaged before the IRB, either in refugee protection proceedings or in inadmissibility proceedings that may preclude access to the RPD. *Febles* and *B010* also suggest that fundamental justice at the PRRA stage requires a balancing of the risks that a foreign national or permanent resident would face against the danger the person would pose to the Canadian public.<sup>112</sup> There is no mention in either decision of a requirement for an oral hearing to deal with credibility issues, as *Singh* suggested.<sup>113</sup>

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<sup>112</sup> *Febles*, *supra*, note 9, at para. 67.

<sup>113</sup> *Supra*, note 10. It is notable in this regard that in *Suresh*, cited by the Chief Justice in *Febles*, the Supreme Court found that no oral hearing was required during the process for determining whether or not to issue a danger opinion that would allow for removal of a person to a country where they would be at risk of torture: *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] S.C.J. No. 3, 2002 SCC 1, at para. 121 (S.C.C.), revg [2000] F.C.J. No. 5 (F.C.A.). Gerald Heckman has pointed out to me that Mr. Suresh had had access to an oral hearing (lasting 50 days) in the determination of the reasonableness of the security certificate to which he was subject. Perhaps such an argument could be made, but the issues at stake with respect to the reasonableness of a security certificate and the balancing of risk are in substance different, as well as being presided over in the one case by a judge and in the other by a Minister.

A first anomalous implication of the resulting picture is that it runs up against the widely held view that *Singh* led to the creation of the IRB and what is today the RPD.<sup>114</sup> With its system of mandatory oral hearings at the RPD<sup>115</sup> and appeals (though not in all cases<sup>116</sup>) to the RAD, the IRB is the administrative decision-maker that provides the greatest procedural protections for risk determinations under the IRPA. The RPD and RAD are also the only decision-makers established under the IRPA with section 52 constitutional competence with respect to the legislative provisions bearing on refugee protection.<sup>117</sup> If section 7 is not engaged by refugee protection claims before the IRB, and if it can be satisfied by balancing as part of a largely paper review prior to removal, it is not clear whether the many cumbersome safeguards and rules that now saddle refugee protection determinations at the IRB could not be done away with. Indeed, the RPD and the RAD themselves seem to be constitutionally optional.

A second anomalous implication arises because factual and legal findings made at the IRB by either the RPD or the RAD (in the case of refugee protection claims) or by the Immigration Division or Immigration Appeal Division (in the case of inadmissibility cases) have a significant downstream impact during PRRA applications. That impact is in part because a PRRA, unlike the RAD, is not an appeal. Factual findings made by the IRB's divisions will be taken as a given, unless they can be displaced by admissible evidence of new risk developments.<sup>118</sup> Since many of the factual findings by the RPD and/or RAD will touch on credibility, it is hard to see how one could meaningfully evaluate the conformity of a PRRA decision with fundamental justice without taking into account the justice of upstream IRB determinations. Here it should be recalled that in *Bedford*, the Supreme Court had found that to engage section 7, all that is

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<sup>114</sup> NINETTE KELLEY & MICHAEL TREBILCOCK, *The Making of the Mosaic: The History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998), at 414-15. A series of reports on the refugee status determination system in Canada prior to *Singh* had also been critical of the existing system; all three called for oral hearings for all claims: *id.*, at 413.

<sup>115</sup> Except in cases where a claim is approved and the Minister has not given notice of an intention to intervene: IRPA, s. 170(b) and (f).

<sup>116</sup> IRPA, s. 110(2).

<sup>117</sup> That is, competence to find that legislation is of no force or effect under s. 52(1) of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Members of the RPD and RAD do not, obviously, have the power to strike legislation down.

<sup>118</sup> *Raza v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 1632, 2007 FCA 385, at para. 12 (F.C.A.), affg [2006] F.C.J. No. 1779 (F.C.). This decision pre-dated the coming-into-force of the RAD, so in claiming that the PRRA is not an appeal of a RAD decision, I am extending a principle found in *Raza* with respect to RPD decisions. Evidence during a PRRA is admissible only if it "arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection": IRPA, s. 113(a).

required is “a sufficient causal connection” between the government law or conduct and the infringement of the right to life, liberty, or security of the person.<sup>119</sup> Given the impact of the RPD and RAD decisions on the later PRRA process, it is unclear why those prior decisions would not have a “sufficient causal connection” to the potential rights infringements faced by refugees or refugee protection claimants upon removal to a country where their life, liberty, or security of the person would be at risk.

Moreover, the connection between the IRB and the PRRA is not merely causal. The two decision points are also linked by the fact that they apply the same substantive statutory provisions, sections 96 to 98 of the IRPA, in making protection decisions.<sup>120</sup> Even if section 98 is free from ambiguity, as the Chief Justice held in *Febles*, this is not likely to be true of sections 96 and 97. These provisions set out, respectively, the Convention refugee definition and certain grounds for general human rights protection. The RPD and the RAD are the source of most of the case law regarding these provisions. To find, as the Chief Justice did, that section 7 cannot be invoked in their interpretation before the RPD or the RAD walls off these provisions and this case law from meaningful Charter scrutiny, just as it walls off the most important fact-finding stage in what is really an interconnected decision-making scheme.

The third and final structural implication of *Febles* and *B010* stems from the fact that the PRRA is not actually the last possible decision made prior to removal. Among the former Conservative government’s reforms to the IRPA were provisions establishing that persons rejected by the RPD and/or RAD, or whose claims are withdrawn or abandoned, are not entitled to a PRRA before either 12 months or 36 months have passed (these are commonly referred to as the “PRRA bars”),<sup>121</sup> with the latter being the case for nationals of purportedly safe “designated countries of origin”.<sup>122</sup>

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<sup>119</sup> *Bedford, supra*, note 19, at para. 75.

<sup>120</sup> IRPA, ss. 96-98.

<sup>121</sup> IRPA, s. 112(2)(c).

<sup>122</sup> Designated countries of origin (“DCOs”) are countries designated under s. 109.1 of IRPA. That provision provides for designation, either based on quantitative criteria (which criteria are established according by Ministerial orders that are not legislatively constrained) or qualitative assessments based on whether the country has an independent judiciary, protects “basic democratic rights and freedoms”, and “civil society organizations” exist. A provision (IRPA, s. 110(2)(d.1)) denying nationals of DCOs a right of appeal to the RAD was found unconstitutional by the Federal Court last year: *Y.Z. v. Canada (Minister of Citizenship and Immigration)*, [2015] F.C.J. No. 880, 2015 FC 892 (F.C.). The new Liberal government abandoned an appeal of that decision (see *The Canadian Press*, “Liberals drop legal appeal of unconstitutional Conservative refugee measure” (January 4, 2016), online: <[www.cbc.ca/news/politics/liberals-drop-legal-appeal-of-unconstitutional-conservative-refugee-measure-1.3389336](http://www.cbc.ca/news/politics/liberals-drop-legal-appeal-of-unconstitutional-conservative-refugee-measure-1.3389336)>). They have also pledged to use a committee of human

No PRRA will take place if they are removed within these timelines. If it is the case that section 7 is not engaged before the IRB, then persons removed prior to receiving a PRRA may never get access to a process in which their rights must be determined in accordance with fundamental justice. If the various protections included with refugee protection determination at the RPD or RAD were removed, as in principle they can be, this concern would no longer be purely academic. Two Charter challenges to the PRRA bars have gone to the Federal Court of Appeal.<sup>123</sup> These have failed because persons who do not have access to a PRRA may nonetheless either ask an enforcement officer to defer removal or seek a judicial stay of removal: so just as the Chief Justice turned aside Charter arguments with respect to determinations at the IRB by pointing to the PRRA, the Federal Court of Appeal has now turned aside Charter arguments with respect to the bars on access to a PRRA by pointing to these later decision points. Faced with a request for a deferral, an enforcement officer must consider whether the individual has provided sufficient new evidence (that is, evidence not previously assessed) that they would be exposed to “a risk of death, extreme sanction or inhumane treatment”.<sup>124</sup> If appealed to the Supreme Court and upheld, this line of reasoning suggests even PRRAAs need not be made available for everyone under the Charter.

In sum, after *BOIO* and *Febles*, greater procedural protections, as well as Charter competence, now reside in a Board before which section 7 challenges to immigration proceedings and legislation are premature and which itself may be constitutionally optional. All that may be required by section 7 of the Charter is a system under which a CBSA enforcement officer screens written requests for deferrals of removal for cases where there may be sufficient evidence to establish a risk of death, extreme sanction or inhumane treatment. In those cases, the person may be required to receive a PRRA. The result seems to be a profound mismatch of legislative design and the courts’ Charter jurisprudence.

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rights experts for designation of countries. However, they have not disavowed other aspects of the DCO regime, including the 36-month PRRA bar.

<sup>123</sup> *Savunthararasa v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2016] F.C.J. No. 173, 2016 FCA 51 (F.C.A.), affg [2014] F.C.J. No. 1133 (F.C.) and *Atawnah v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2016] F.C.J. No. 481, 2016 FCA 144 (F.C.A.), affg [2015] F.C.J. No. 782 (F.C.).

<sup>124</sup> *Canada (Minister of Public Safety and Emergency Preparedness) v. Shpati*, [2011] F.C.J. No. 1454, 2011 FCA 286, at paras. 43-44 (F.C.A.), revg [2010] F.C.J. No. 1275 (F.C.); see also *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2009] F.C.J. No. 314, 2009 FCA 81 (F.C.A.), affg [2008] F.C.J. No. 434 (F.C.).

## VI. CONCLUSION

In *Appulonappa* and *B010*, the government sought to defend a broad warrant to prosecute or find inadmissible those who help persons enter Canada contrary to the IRPA, even when the beneficiaries are asylum seekers and the help is provided for humanitarian or other non-pecuniary motives; indeed, even when the targets of enforcement are themselves asylum seekers. The Court declined to give them that warrant. This was obviously a good result for those concerned about migrants' rights, and more specifically with the use of anti-smuggling initiatives to claw back access to refugee protection.

Nonetheless, I have argued that the Chief Justice's two unanimous opinions are disappointing if one favours a robust immigration constitutionalism. First, the Chief Justice's analysis of the section 7 Charter claim in *Appulonappa* rested on a methodology that takes for granted the constitutional soundness of Parliament's policy goals and inquires only into the rationality of the means used to secure those goals. Such an analysis cannot be expected to yield principles of lasting power. The results are always liable to be disrupted by legislative change, such as the amendments to the offence of organizing illegal entry found in section 117 of the IRPA. Second, the Chief Justice in *B010* confirmed an approach to section 7 of the Charter, which had been hinted at the year before in *Febles* and foreshadowed by years of sub-Supreme Federal Court case law, that will make constitutional justification harder to access and the protection of refugees more precarious. Third, the Chief Justice did not acknowledge that this position might depart from that espoused by Wilson J. in *Singh*, nor examine the impact her decision would have on the application of the Charter to refugee determination, nor take up basic questions, such as why section 7 is engaged in the realm of immigration and refugee law in a manner so at odds with criminal and extradition law. The result is an immigration constitutionalism that is inadequately explained and more likely to allow for unjustified decisions.

