



SUPREME COURT OF CANADA

CITATION: Canadian Council for Refugees v. Canada (Citizenship and Immigration), 2023 SCC 17

APPEAL HEARD: October 6, 2022

JUDGMENT RENDERED: June 16, 2023

DOCKET: 39749

BETWEEN:

Canadian Council for Refugees, Amnesty International, Canadian Council of Churches, ABC, DE by her litigation guardian ABC, FG by her litigation guardian ABC, Mohammad Majd Maher Homs, Hala Maher Homs, Karam Maher Homs, Reda Yassin Al Nahass and Nedira Jemal Mustefa
Appellants

and

Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness
Respondents

- and -

Association québécoise des avocats et avocates en droit de l'immigration, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, National Council of Canadian Muslims, Canadian Muslim Lawyers Association, Canadian Lawyers for International Human Rights, Canadian Centre for Victims of Torture, Queen's Prison Law Clinic, Rainbow Refugee Society, British Columbia Civil Liberties Association, Advocates for the Rule of Law, David Asper Centre for Constitutional Rights, West Coast Legal Education and Action Fund Association, Women's Legal Education and Action Fund Inc., HIV & AIDS Legal Clinic Ontario and Rainbow Railroad
Interveners

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

REASONS FOR Kasirer J. (Wagner C.J. and Karakatsanis, Côté, Rowe,
JUDGMENT: Martin, Jamal and O'Bonsawin JJ. concurring)
(paras. 1 to 184)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

* Brown J. did not participate in the final disposition of the judgment.

**Canadian Council for Refugees,
Amnesty International,
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Present: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O’Bonsawin JJ.

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Constitutional law — Charter of Rights — Right to life, liberty and security of person — Fundamental justice — Refugee status claims of foreign nationals arriving at Canadian land ports of entry from United States ineligible to be considered in Canada pursuant to Safe Third Country Agreement — Whether provision in federal immigration and refugee protection regulations designating United States as safe third country infringes refugee claimants’ right to liberty and security of person — Canadian Charter of Rights and Freedoms, s. 7 — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 101(1)(e) — Immigration and Refugee Protection Regulations, SOR/2002-227, s. 159.3 — 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, Can. T.S. 2004 No. 2.

* Brown J. did not participate in the final disposition of the judgment.

Immigration — Refugee protection — Ineligibility — Refugee status claims of foreign nationals arriving at Canadian land ports of entry from United States ineligible to be considered in Canada pursuant to Safe Third Country Agreement — Whether provision in federal immigration and refugee protection regulations designating United States as safe third country is ultra vires enabling statute — Immigration and Refugee Protection Act, S.C. 2001 c. 27, s. 101(1)(e) — Immigration and Refugee Protection Regulations, SOR/2002-227, s. 159.3.

Canada and the United States are parties to a bilateral treaty commonly known as the “*Safe Third Country Agreement*” designed to enhance their sharing of responsibility for considering refugee status claims. In essence, the treaty provides that refugee claimants must, as a general rule, seek protection in whichever of the two countries they first enter after leaving their country of origin. The *Safe Third Country Agreement* is given effect in Canadian domestic law through the *Immigration and Refugee Protection Act* (“*IRPA*”) and its regulations (“*IRPR*”). Under s. 101(1)(e) of the *IRPA*, refugee status claims are ineligible to be considered in Canada if the claimant came from a country designated by the *IRPR*. Section 102(1)(a) of the *IRPA* provides that countries may only be so designated if they are viewed as complying with their *non-refoulement* obligations under international law, which prohibit directly or indirectly returning a person to a place where they would face certain kinds of irreparable harm, including threats to their life or freedom, torture and cruel or degrading treatment. Section 102(2) lists factors for the Governor in Council to consider in designating a country, and s. 102(3) creates an obligation for the Governor

in Council to ensure the continuing review of those factors with respect to each designated country. The United States is designated under s. 159.3 of the *IRPR*.

Several individuals arrived from the United States to claim refugee protection in Canada. Their claims were ineligible to be referred to the Refugee Protection Division, pursuant to s. 101(1)(e) of the *IRPA* and s. 159.3 of the *IRPR*. However, most of the individuals were not returned to the United States, as they had obtained a stay of removal or temporary resident permit. One individual was returned to the United States. That individual says American officials detained her in solitary confinement for a week pending the results of a tuberculosis test and then detained her for another three weeks in an abnormally cold facility, where individuals convicted of criminal offences were present and where her religious dietary restrictions were not respected.

The individuals whose claims were ineligible to be referred to the Refugee Protection Division, along with public interest litigants (collectively, the “applicants”), challenged the validity of s. 159.3 of the *IRPR* on the basis that the designation of the United States was outside the authority granted by the *IRPA* because of post-promulgation constraints on the Governor in Council’s statutory authority to maintain a designation. They also argued that s. 159.3 of the *IRPR* and s. 101(1)(e) of the *IRPA* violated the rights guaranteed by ss. 7 and 15 of the *Charter*, asserting that the legislative scheme results in Canadian immigration officers summarily returning claimants to the United States without considering whether that country will respect

their rights under international law, including those related to detention and *non-refoulement*.

The Federal Court judge rejected the *ultra vires* argument because whether a regulation is within the authority delegated by a statute is assessed based on facts at the time of promulgation. With respect to s. 7 of the *Charter*, she found the alleged violations were largely substantiated and most grave, and that deprivations of liberty and security of the person for refugee claimants arose because those returned to the United States faced risks of *refoulement* as well as other harm relating to immigration detention. She concluded that s. 7 was violated and that this breach was not justified under s. 1, and she therefore declined to rule on the s. 15 claim. She declared s. 101(1)(e) of the *IRPA* and s. 159.3 of the *IRPR* of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. The Court of Appeal allowed the appeal brought by the ministers, dismissed the cross-appeal of the s. 15 claim and the *ultra vires* argument, and set aside the judgment of the Federal Court. The basis for these conclusions was that the causation requirements for a *Charter* claim were not met because the applicants improperly targeted the legislation rather than administrative conduct.

Held: The appeal should be allowed in part.

Section 159.3 of the *IRPR* is not *ultra vires*, nor does it breach s. 7 of the *Charter*. However, the challenge based on s. 15 of the *Charter*, which was not decided by either court below, should be remitted to the Federal Court.

The applicants' submission that s. 159.3 of the *IRPR* is *ultra vires* the *IRPA* should be rejected. Regulations derive their validity from the statute that creates the power to promulgate a regulation, and not from the executive body by which they are made. The limits imposed by the enabling statute are therefore fundamental to determining whether a regulation is *intra vires* that statute. In the instant case, s. 102(1)(a) and (2) of the *IRPA* establishes conditions precedent to designation for the purposes of s. 101(1)(e); these conditions must be met before, not after, a country is designated. While s. 102(3) creates an obligation for the Governor in Council to ensure the continuing review of the s. 102(2) factors, these reviews are not directed at whether the regulation exceeds the limits imposed by the statute. The s. 102(3) reviews are thus outside the scope of a challenge alleging that s. 159.3 of the *IRPR* is *ultra vires* the *IRPA*, although they may well be subject to other forms of challenge based on administrative law principles. Whether or not the impugned regulation is *intra vires* its enabling statute must be examined at the time of promulgation. Regulations benefit from a presumption of validity. The applicants have not shown that on the date of promulgation, the designation of the United States was not authorized by s. 102(1)(a) or (2) of the *IRPA*.

The applicants' s. 7 *Charter* challenge was properly constituted. The s. 159.3 designation is the legislative basis for the relevant ineligibility determinations and is thus properly subject to constitutional scrutiny. To succeed, a *Charter* claim must show a causal link between state action and the violation of the relevant right or freedom; a sufficient causal connection must be established, which does not require

that the impugned state action be the only or the dominant cause of the prejudice suffered by the claimant. As a result, the mere fact that other forms of state action may also have a causal connection to the harms alleged does not mean that a challenge to legislation is improperly constituted. Furthermore, *Charter* challenges need not target provisions that might have served to prevent or cure the harms alleged when the provision of general application to which those other provisions relate is a cause of the mischief. But when a *Charter* challenge targets a provision in an interrelated legislative scheme, the potential impact of related provisions, including preventative or curative measures, must be reviewed. Courts must consider legislative provisions in their entire statutory context, irrespective of how the parties frame their challenge of a legislative scheme. In the instant case, preventative and curative provisions are both relevant in different ways to the applicants' *Charter* claim; however, they did not need to target these provisions in addition to s. 159.3 of the *IRPR* to constitute their challenge.

It was also open to the applicants to challenge s. 159.3 of the *IRPR* rather than administrative conduct, such as s. 102(3) reviews, and seek a declaration that the provision is of no force or effect because it is inconsistent with the *Charter*. The s. 102(3) reviews do not play a curative role, as they do not make after-the-fact relief available on an individual basis. They are also distinct from targeted preventative measures, which preclude the application of a general rule, often through legislative exceptions. While the administrative conduct that led to the designation being maintained may also be susceptible to constitutional challenge in its own right, the existence of this alternative does not insulate s. 159.3 of the *IRPR* from *Charter*

scrutiny. Similarly, while the applicants might have challenged administrative decisions pertaining to the applicability of exceptions or the availability of exemptions, this does not preclude challenges to s. 159.3.

The first stage of the s. 7 analysis makes clear that s. 159.3 engages liberty and security of the person. Assessing the constitutional implications of effects that materialize in other countries does not amount to applying the *Charter* to foreign governments. The challenge in the instant case is directed at the legislative scheme, which is undoubtedly state action that attracts *Charter* scrutiny. Whether an alleged effect of the scheme exists is a question of fact, for which the standard of review is palpable and overriding error, while the scope of a s. 7 interest is a question of law, for which the standard of review is correctness. Although the evidence does not support the Federal Court judge's finding that returnees face automatic detention in the United States, the risks of detention upon return to the United States, as well as three aspects of detention conditions as found by the Federal Court judge — the use of medical isolation, abnormally cold conditions and deficiencies in medical care — fall within the scope of liberty and security of the person. In addition, taking the applicants' position on s. 7 engagement at its highest, it can be assumed that the following effects occur and are within the scope of the s. 7 interests: the non-accommodation of religious dietary needs, detention in a facility housing criminally convicted individuals and risks of *refoulement* flowing from the one-year bar policy and the United States' approach to gender-based claims.

To establish s. 7 engagement, challengers must not only demonstrate effects falling within the scope of the s. 7 interests, but also that these effects are caused by Canadian state action. As Canada has no jurisdiction to dictate the actions of foreign authorities, drawing a causal connection to Canadian state action requires showing that Canadian authorities were implicated in how the harms arose. Accordingly, challengers will succeed in drawing a causal connection to Canadian state action at least where Canada's participation is a necessary precondition for the deprivation. Further, as Canada cannot foresee all the actions that foreign authorities will take, it must be shown that Canadian authorities knew, or ought to have known, that the harms could arise as a result of Canada's actions. This foreseeability threshold can be established by a reasonable inference, drawn on a balance of probabilities. What is required is a sufficient connection, having regard to the context of the case. Here, it is clear that the relevant Canadian state action — s. 159.3 of the *IRPR* along with the broader legislative scheme — is a necessary precondition to each of the proven or presumed effects related to detention and *refoulement*. Without the *Safe Third Country Agreement* regime, individuals could advance their refugee protection claims in Canada; instead, they are sent back to the United States by Canadian officials acting under legislative authority, where they face (or are presumed to face) these effects. However, the Federal Court judge erred in her application of the foreseeability standard established by the Court in *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, and explained in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101. With respect to the cold temperatures in detention facilities, deficiencies in medical care, detention alongside criminally convicted individuals and the violation

of religious dietary restrictions, the record does not support a finding that these effects were a foreseeable consequence of Canada's actions. By contrast, the record substantiates that the other negative effects were entirely foreseeable, such as the risk of detention, the "one-year bar", the treatment of gender-based claim and the widespread practice of medical isolation. These infringements of liberty and security of the person are causally connected to Canadian state action and must be assessed in relation to the principles of fundamental justice.

The applicable principles of fundamental justice in the instant case are overbreadth and gross disproportionality as described by the Court in *Bedford*. The "shocks the conscience" standard may well be relevant to the review of individualized decisions, but it is not relevant to *Charter* challenges to legislation; it is therefore not the appropriate measure here. When assessing whether legislation violates the *Bedford* principles of fundamental justice, courts must identify the legislative purpose and then assess if, in light of that purpose, the legislation breached any of the relevant principles. When a legislative objective is at issue as part of the s. 7 analysis, the focus is the purpose of the impugned provisions, although the broader legislative scheme may provide clues as to the narrower provisions' purpose. Here, taken together, the statement of objectives of the *IRPA*, the text, context, and scheme of the legislation, and the extrinsic evidence suggest that the purpose of s. 159.3 of the *IRPR* is to share responsibility for fairly considering refugee claims with the United States, in accordance with the principle of *non-refoulement*. It is in light of this purpose that the relevant s. 7 deprivations — the risk of discretionary detention and medical isolation,

along with the presumed risks of *refoulement* — must be assessed for overbreadth and gross disproportionality.

The impugned legislative scheme in the instant case is not overbroad or grossly disproportionate. With respect to overbreadth, the question is whether the scheme is so broad in scope that it includes some conduct that bears no relation to its purpose. The analysis is focused not on whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature. The risk of detention in the United States, with opportunities for release and review, is related to the legislative objective. Sharing responsibility for refugee claims with another state will necessarily expose returnees to the foreign legal regime that governs refugee claimants' presence in that country. A degree of difference as between the legal schemes applicable in the two countries can be tolerated, so long as the American system is not fundamentally unfair. While the record shows that returnees face a risk of detention in the United States, it also discloses mechanisms that create opportunities for release and provide for review by administrative decision makers and courts. There is no basis to infer that these arrangements are fundamentally unfair, and thus the risk of detention that returnees face is not overbroad. Similarly, the use of medical isolation to control public health risks is not fundamentally unfair. The applicants do not point to evidence that would sustain an inference that medical isolation is being used improperly in the American immigration detention system. With respect to gross disproportionality, the question is whether the impugned legislation's

effects on the s. 7 interests are so grossly disproportionate to its purposes that they cannot rationally be supported. Neither a risk of detention with opportunities for release and review nor a risk of medical isolation meets this high threshold. In Canada, as in the United States, these risks are within the mutually held norms accepted by our free and democratic societies.

A provision mandating return to a real and not speculative risk of *refoulement*, however, would be overbroad as it would bear no relation to the purpose of the impugned legislation, which has respect for the *non-refoulement* principle at its core. Such a provision would similarly be grossly disproportionate because it would, by definition, expose individuals to risks to their life or freedom, torture or other fundamental human rights violations. However, the impugned legislation in the instant case does not simply mandate return: there are also related curative provisions that must be factored into the analysis, including administrative deferrals of removal (*IRPA*, s. 48(2)), temporary resident permits (s. 24), humanitarian and compassionate exemptions (s. 25.1(1)) and public policy exemptions (s. 25.2(1)). When the impugned legislative scheme contains safety valves, the question is whether these mechanisms — properly interpreted and applied — are sufficient to ensure that no deprivations contrary to the principles of fundamental justice occur. When the *IRPA*'s safety valves are activated, claimants can be exempted from return. If they are not returned to the United States, they do not face any risk of *refoulement* from the United States. The safety valves can therefore intervene to cure what might otherwise be unconstitutional effects. Moreover, these mechanisms are properly considered within the principles of

fundamental justice stage of s. 7 because they can be exercised in order to address the specific deprivation at issue, in this case the risk of *refoulement*. Properly interpreted, these mechanisms in the broader statutory scheme are sufficient to ensure that individuals are not subjected to real and not speculative risks of *refoulement*, if such risks do exist. These mechanisms must be understood in light of the discretion that Article 6 of the *Safe Third Country Agreement* preserves for Canada to consider claims when it is in its public interest to do so. The mere fact that the mechanisms predate the treaty does not make them irrelevant; when the agreement was signed, Canadian domestic law already included provisions that could facilitate individualized consideration of claimants' circumstances. Thus, even assuming that claimants face real and not speculative risks of *refoulement* from the United States, the Canadian legislative scheme provides safety valves that guard against such risks. For that reason, the legislative scheme implementing the *Safe Third Country Agreement* is not overbroad or grossly disproportionate and therefore accords with the principles of fundamental justice. Consequently, no breach of s. 7 of the *Charter* has been established, and it is not necessary to undertake a s. 1 analysis.

The challenge based on s. 15 of the *Charter* should be sent back to the Federal Court for determination. The basis of this claim is that women fearing gender-based persecution are adversely affected by the legislative scheme. Given the profound seriousness of the matter, the size and complexity of the record and the conflicting affidavit evidence, it would be imprudent for the Court to dispose of the equality rights claim as would a court of first instance and thus leave the losing party

with no avenue of appeal. While the Federal Court judge should not be faulted for exercising judicial restraint and not deciding the s. 15 claim, a false economy has arisen due to the need to remit these issues. The principle of judicial policy underlying restraint in constitutional cases is sound, but it must be weighed against other factors, such as the possibility of an appeal and fairness to the parties. Claims based on s. 15 are not secondary issues only to be reached after all other issues are considered. The *Charter* should not be treated as if it establishes a hierarchy of rights in which s. 15 occupies a lower tier.

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Applied: *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; **considered:** *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431; *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136; *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704; **referred to:** *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2020] 1 F.C.R. 700; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R.

176; *Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144, [2017] 1 F.C.R. 153; *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262, [2020] 2 F.C.R. 355; *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909; *Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1; *The Zamora*, [1916] 2 A.C. 77; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441; *R. v. Parker* (2000), 49 O.R. (3d) 481; *United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130; *Canada v. Schmidt*, [1987] 1 S.C.R. 500; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *R. v. Vaillancourt*, [1987] 2 S.C.R. 636; *R. v. Swain*, [1991] 1 S.C.R. 933; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689; *Minister of Employment and Immigration v. Saticum* (1989), 99 N.R. 171; *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014; *Canadian Council for Refugees v. Canada*, 2007 FC 1262, [2008] 3 F.C.R. 606; *R. v.*

Find, 2001 SCC 32, [2001] 1 S.C.R. 863; *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Attorney General) v. Barnaby*, 2015 SCC 31, [2015] 2 S.C.R. 563; *R. v. Hills*, 2023 SCC 2; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Ndhlovu*, 2022 SCC 38; *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *R. v. Morgentaler*, [1988] 1 S.C.R. 30; *R. (Yogathas) v. Secretary of State for the Home Department*, [2002] UKHL 36, [2003] 1 A.C. 920; *R. v. Secretary of State for the Home Department, Ex p. Bugdaycay*, [1987] A.C. 514; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018); *Wells v. Newfoundland*, [1999] 3 S.C.R. 199; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543; *R. v. Esseghaier*, 2021 SCC 9; *Meyer v. General Exchange Insurance Corp.*, [1962] S.C.R. 193; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Anderson v. Bessemer City*, 470 U.S. 564 (1985).

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APPEAL from a judgment of the Federal Court of Appeal (Noël C.J. and Stratas and Laskin JJ.A.), 2021 FCA 72, [2021] 3 F.C.R. 294, 458 D.L.R. (4th) 125, 489 C.R.R. (2d) 276, 79 Imm. L.R. (4th) 1, [2021] F.C.J. No. 322 (QL), 2021 CarswellNat 1003 (WL), setting aside a decision of McDonald J., 2020 FC 770, [2021]

1 F.C.R. 209, 448 D.L.R. (4th) 132, 75 Imm. L.R. (4th) 246, [2020] F.C.J. No. 795 (QL), 2020 CarswellNat 2684 (WL). Appeal allowed in part.

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The judgment of the Court was delivered by
KASIRER J. —

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I.	<u>Overview</u>	

[1] Canada and the United States are parties to a bilateral treaty designed to enhance their sharing of responsibility for considering refugee status claims. In essence, the treaty provides that refugee claimants must, as a general rule, seek protection in whichever of the two countries they first enter after leaving their country of origin. The *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*, Can. T.S. 2004 No. 2, is known as the “*Safe Third Country Agreement*”. The treaty’s preamble speaks to the parties’ mutual recognition that both countries offer generous systems of refugee protection, such that claimants can find effective protection in either country. Sharing responsibility is thus understood as justified, even though the laws of each country differ.

[2] The *Safe Third Country Agreement* is given effect in Canadian domestic law through the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“*IRPA*”), and its regulations. Under s. 101(1)(e) of the *IRPA*, refugee status claims are ineligible to be considered in Canada if the claimant came from a country designated by the regulations. Countries may only be so designated if they are viewed as complying with their “*non-refoulement*” obligations under international law. These obligations — which prohibit directly or indirectly returning a person to a place where they would face certain kinds of irreparable harm, including threats to their life or freedom, torture and cruel or degrading treatment — are the cornerstone of the international refugee protection regime (see, for a plain language summary, United Nations, Office of the High Commissioner for Human Rights, *The principle of non-refoulement under*

international human rights law, July 5, 2018 (online)). A designated country is thus seen as a safe third country in that it is viewed as an appropriate partner with which Canada can share responsibility for considering refugee claims. The United States is designated under s. 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (“*IRPR*”). It is the sole designated country in Canadian law.

[3] The appellants challenge this scheme principally on the basis that it violates the rights guaranteed by ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms*. They claim that the legislation results in Canadian immigration officers summarily returning claimants to the United States without considering whether the United States will respect their rights under international law, including those relating to *non-refoulement* and detention.

[4] Certain questions are not in issue in this appeal. First, there is no debate that safe third country agreements, as a general matter, may be compatible with international law (see, e.g., I. Atak and F. Crépeau, “Asylum in the twenty-first century: Trends and challenges”, in A. Triandafyllidou, ed., *Routledge Handbook of Immigration and Refugee Studies* (2nd ed. 2023), 358, at p. 363). Second, the appellants do not attack the validity of the *Safe Third Country Agreement* itself. Third, this Court is not tasked with assessing the wisdom of Canadian immigration policy, a matter that courts are not institutionally designed to evaluate, much less reform. Fourth, this Court is not asked to resolve the thorny issue of irregular entry into Canada at border crossings other than official land ports of entry (see, e.g., A. Macklin,

“Citizenship, Non-Citizenship and The Rule of Law” (2018), 69 *U.N.B.L.J.* 19, at pp. 35-37). Instead, the appeal focuses on whether the Canadian legislative regime implementing the *Safe Third Country Agreement* — that is, the relevant provisions of the *IRPA* and *IRPR* — complies with constitutional and administrative law requirements.

[5] The complexion of the judgments below on the *Charter* questions could not be more different. The Federal Court judge, who reviewed the evidence first-hand, found that the alleged s. 7 violations were largely substantiated and most grave. Deprivations of liberty and security of the person for refugee claimants arose because those returned to the United States faced risks of *refoulement* as well as other harm relating to immigration detention. In the result, she was persuaded that s. 7 was violated and that this breach was not justified under s. 1. She declared s. 101(1)(e) of the *IRPA* and s. 159.3 of the *IRPR* of no force or effect under s. 52 of the *Constitution Act, 1982*.

[6] By contrast, the Federal Court of Appeal held that the *Charter* challenge was not properly constituted and thus allowed the appeal brought by the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness. Despite the appellants’ evidence and the findings of the Federal Court judge, the Court of Appeal found that the causation requirements for a *Charter* claim were not met because the appellants improperly targeted the legislation rather than administrative conduct. Respectfully, I disagree with the Court of Appeal and prefer the view — shared by both parties on appeal to this Court — that the regulation

designating the United States was an appropriate focus of the *Charter* challenge. In particular, since the s. 159.3 designation is the legislative basis for the relevant ineligibility determinations, it is properly subject to constitutional scrutiny.

[7] Further, I agree with the Federal Court judge's findings that the liberty and security of the person interests of refugee claimants are engaged by the Canadian legislation that renders their claims ineligible. Specifically, I reject the notion that the claimants' s. 7 interests are not engaged simply because the legislation contains measures that could ultimately have offered protection. This, I think, rests on a misunderstanding of *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, and is inconsistent with this Court's approach to s. 7 set out in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

[8] The findings of fact relating to the treatment of refugee claimants made by the Federal Court judge are troubling. Apart from her determinations that detention in the United States is "automatic" and that detention conditions cause a risk of *refoulement*, the respondents have failed to show that those conclusions are tainted by reviewable errors. While she made no finding that American asylum policies give rise to a risk of *refoulement*, I am nevertheless persuaded that the record substantiated her view that the designation of the United States engages the liberty and security of the person interests spoken to in s. 7 of the *Charter*.

[9] After engagement of these constitutionally protected interests is established, however, the s. 7 analysis turns to what scholar Gerald Heckman, writing

prior to his appointment to the bench, describes as the “key question” in refugee protection decision making: whether the deprivation of the liberty or security of the person interests is in accordance with the principles of fundamental justice (“Revisiting the Application of Section 7 of the *Charter* in Immigration and Refugee Protection” (2017), 68 *U.N.B.L.J.* 312, at p. 356). This requires an examination of whether Canadian state action “has interfered with those fundamental interests pursuant to a fair process and in a manner rationally connected and proportionate to the objectives of Canada’s immigration laws” (*ibid.*). The focus of this examination is not on whether asylum law in the United States mirrors the law in Canada. Instead, the focus is on the purpose and effects of the Canadian legislative scheme. Of particular significance here is whether the ineligibility rule in the legislation is tempered by related provisions that provide relief from potential s. 7 violations. As this Court held in *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, speaking specifically to what are usefully described as curative exemptions, legislative “safety valve[s]” can ensure that deprivations of the s. 7 interests are not arbitrary, overbroad or grossly disproportionate (para. 113).

[10] From this perspective, and notwithstanding the findings of the Federal Court judge that the s. 7 interests are engaged, the challenge to s. 159.3 of the *IRPR* ultimately fails. The *IRPA* and the *IRPR* contain exceptions, exemptions and review obligations that address the problems associated with ineligibility and removal from Canada. These provisions give voice in Canadian law to the idea, expressed in Article 6 of the treaty, that each government should be free to examine any refugee status claim

when it determines that doing so is in its public interest. In particular, even where ineligibility under the scheme would lead to deprivations of liberty or security of the person — as the Federal Court judge found — the legislative scheme’s discretionary exemptions ensure compliance with the principles of fundamental justice. In sum, the legislation is tailored to prevent certain infringements of s. 7 interests and, importantly for present purposes, survives constitutional scrutiny here because legislative safety valves provide curative relief.

[11] While the Federal Court judge stated that safeguards in the scheme were “illusory”, her assessment did not consider all the relevant safety valves. This omission was an error of law that led her to improperly discount how the legislative scheme allows Canada to consider refugee status claims when the principles of fundamental justice so require, notwithstanding their presumptive ineligibility. As a result, I am respectfully of the view that the Federal Court’s conclusion that the designation of the United States for the purposes of the *Safe Third Country Agreement* breached s. 7 cannot stand.

[12] It may well be that, in practice, administrative decision makers do not always construe or deploy the legislative safety valves appropriately. In such cases, the legislation itself remains valid, but administrative and *Charter* relief remains available on an individual basis. For instance, the *Charter* can prohibit administrative actors from returning refugee claimants to places where they would face circumstances that would shock the conscience of Canadians. Yet, while some of the appellants have detailed the

difficulties they faced in seeking refugee protection at Canadian land ports of entry, they have not asked this Court to provide them with individualized relief. Instead, they focus their constitutional challenge solely on alleged defects in the legislative scheme itself in order to have s. 159.3 of the *IRPR* declared of no force or effect under the *Constitution Act, 1982*.

[13] While I reject the appellants' s. 7 challenge to the legislative scheme and their other arguments, I would nevertheless allow the appeal in part. I would remit the appellants' claim that the legislation violates *Charter*-guaranteed equality rights, which was not decided by either court below. The appellants' s. 15 claim rests on grave allegations that women facing gender-based persecution and sexual violence are often denied refugee status in the United States contrary to Article 33 of the *Convention Relating to the Status of Refugees*, Can. T.S. 1969 No. 6 ("*Refugee Convention*"). The evidentiary basis for the appellants' s. 15 claim remains disputed and no factual findings were made in the Federal Court on which we can rely on appeal. It would be imprudent for this Court to dispose of the equality rights claim as would a court of first instance and thus leave the losing party with no avenue of appeal.

II. The Parties

[14] The appellants are individual refugee claimants and public interest litigants. The respondents are the Minister of Citizenship and Immigration and the Minister of Public Safety and Emergency Preparedness.

[15] Each individual appellant arrived from the United States to claim refugee protection in Canada. Because they arrived at land ports of entry, their claims were ineligible to be referred to the Refugee Protection Division, pursuant to s. 101(1)(e) of the *IRPA* and s. 159.3 of the *IRPR*.

[16] ABC and her daughters are citizens of El Salvador, where they say they were subject to gender-based persecution and sexual violence committed by gangs. They fled to the United States in 2016, where they were initially detained. American officials advised them they were subject to removal proceedings. ABC and her daughters were released for the duration of those proceedings. In 2017, ABC and her daughters arrived at the land port of entry at Fort Erie, Ontario to claim refugee protection in Canada. They say that a Canadian Border Services Agency (“CBSA”) officer advised them that they should withdraw their claim, as they would be found ineligible in keeping with the *Safe Third Country Agreement*. They decided to return to the United States. About six months later, ABC and her daughters again attempted to make a claim for refugee protection. ABC’s husband, whose own refugee claim in Canada was pending, retained legal counsel in anticipation that the CBSA would determine that ABC’s and her daughters’ claims were ineligible. When the CBSA made that determination, it agreed to defer removal briefly. Counsel applied for judicial review and also obtained a stay of removal, which remains in effect while this appeal is pending.

[17] Ms. Mustefa is an Ethiopian citizen and member of the Oromo ethnic group. When she was 11, she travelled alone to the United States on a visitor's visa for medical treatment. She stayed there through the end of high school. Ms. Mustefa says that oppression of the Oromo in Ethiopia escalated around this time. She decided not to return to Ethiopia but believed a policy known as the "one-year bar" made her ineligible to claim asylum in the United States. In 2017, Ms. Mustefa travelled to the land port of entry in Saint-Bernard-de-Lacolle, Quebec to make a claim for refugee protection in Canada. The CBSA determined her claim was ineligible. She was returned to the United States, where she says that American officials detained her in solitary confinement for a week pending the results of a tuberculosis test and then detained her for another three weeks in an abnormally cold facility, where individuals convicted of criminal offences were present and where her religious dietary restrictions were not respected. While detained, Ms. Mustefa was able to communicate with her family and with legal counsel, and she was later released on a bond. Ms. Mustefa applied for permanent residence in the United States, which was granted in 2021.

[18] Ms. Al Nahass and her three children are citizens of Syria. She and her family lived in Saudi Arabia, where her husband worked. In 2015, Ms. Al Nahass travelled to Syria for medical treatment. She says that during that trip, she was kidnapped, attacked and threatened with sexual violence. The family subsequently travelled to the United States. While there, she says that her husband lost his job, jeopardizing the family's residency in Saudi Arabia. Ms. Al Nahass feared returning to Syria and began the asylum process in the United States. During this process,

Ms. Al Nahass says that she grew concerned with what she perceived as public hatred expressed towards Muslim and Arab people and with actions taken by the United States executive. She and her family decided to seek refugee protection in Canada. When they did so at the land port of entry in Saint-Bernard-de-Lacolle, the CBSA determined their claims were ineligible. Ms. Al Nahass contacted legal counsel, who filed a motion for an emergency stay of removal at the Federal Court. An interim stay was granted. Before the full stay motion could be heard, the Minister granted the family temporary resident permits. They have now been granted permanent residence based on humanitarian and compassionate grounds.

[19] The appellants introduced into evidence affidavits from ten anonymized, non-party affiants. Each affiant says that they were returned to the United States after their claims were found ineligible pursuant to the *Safe Third Country Agreement*. The nine affiants who answered written cross-examinations stated that, after their return, they were detained by American authorities. With one exception, they were released from detention pursuant to an administrative decision or bond hearing. Likewise, they made asylum claims in the United States with the assistance of counsel. One affiant could not meet the bond set for their release. That individual was removed from the United States after unsuccessfully appealing the immigration judge's unfavourable decision to the American Board of Immigration Appeals and, subsequently, to the Court of Appeals for the Second Circuit.

III. Proceedings Below

A. *Federal Court, 2020 FC 770, [2021] 1 F.C.R. 209 (McDonald J.)*

[20] The appellants challenged the validity of s. 159.3 of the *IRPR* on the basis that the designation of the United States was outside the authority granted by the *IRPA*. They also said that s. 159.3 of the *IRPR* and s. 101(1)(e) of the *IRPA* unjustifiably violated ss. 7 and 15 of the *Charter*. The Federal Court judge rejected the argument that the regulation was *ultra vires* but found an unjustified s. 7 breach. Because of her conclusion on s. 7, she declined to rule on the s. 15 claim.

[21] The *vires* argument was rejected because *Canadian Council for Refugees v. Canada*, 2008 FCA 229, [2009] 3 F.C.R. 136 (“*CCR (2008)*”), at para. 57, held that whether a regulation is within the authority delegated by a statute is assessed based on facts at the time of promulgation.

[22] The Federal Court judge found that the *Charter* applied. Deprivations effected by foreign actors remain “subject to the guarantee of fundamental justice, as long as there is a sufficient causal connection between our government’s participation and the deprivation” (para. 100, citing *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; see also Federal Court reasons, at para. 93, citing *Bedford*, at paras. 58 and 75-76).

[23] In the Federal Court judge’s view, the impugned scheme engages “liberty” because “ineligible [*Safe Third Country Agreement*] claimants are . . . immediately and automatically imprisoned by U.S. authorities” (para. 103). It infringes security of the

person given the risk of *refoulement* and the conditions of detention in the United States. She found there was a “real and not speculative” risk that ABC would have been *refouled* from the United States based on “the challenges in advancing an asylum claim] for those detained”, such as barriers to accessing legal advice (para. 106). In addition, she concluded that some detention conditions in the United States engage security of the person since being subjected to these conditions flows directly from Canadian officials’ conduct in returning claimants there.

[24] The Federal Court judge held that these deprivations do not comport with the principles of fundamental justice. She concluded that, despite the suggestion that there are certain “safeguards” available to protect against overbreadth and gross disproportionality, these remedies “are largely out of reach and are therefore ‘illusory’” (paras. 129-30, distinguishing *Tapambwa v. Canada (Citizenship and Immigration)*, 2019 FCA 34, [2020] 1 F.C.R. 700).

[25] The Federal Court judge held that the s. 7 violations were not justified under s. 1 of the *Charter* and “decline[d]” to address the s. 15 arguments (see para. 154, citing *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 93). She declared s. 101(1)(e) of the *IRPA* and s. 159.3 of the *IRPR* of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*, and suspended the declaration for six months.

B. *Federal Court of Appeal, 2021 FCA 72, [2021] 3 F.C.R. 294 (Noël C.J. and Stratas and Laskin J.J.A.)*

[26] Stratas J.A., writing for a unanimous Court of Appeal, allowed the ministers' appeal, dismissed the cross-appeal of the s. 15 claim and the *ultra vires* argument, set aside the judgment of the Federal Court, and dismissed the applications for judicial review.

[27] The court found that the *Charter* claim was not properly constituted because it failed to account for two practical rules flowing from the requirement that impugned state action must be the cause of a *Charter* infringement (para. 57). The first rule is that "provisions in an interrelated legislative scheme cannot be taken in isolation and selectively challenged" because "[o]ther related provisions may be responsible [for the alleged *Charter* violation] or may prevent or cure any possible defects" (para. 58(a), citing *PHS*). The second rule is that when administrative action or inaction is the source of a rights infringement, that is what must be challenged rather than the legislation (para. 58(b), citing *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120). The court concluded that if anything were to blame for the alleged violations, it would be the Government of Canada's reviews of the United States' designation, which are required under s. 102(3) of the *IRPA*, and related administrative conduct. Thus, by targeting s. 101(1)(e) of the *IRPA* and s. 159.3 of the *IRPR*, the challenge was improperly constituted.

[28] Despite allowing the appeal on this basis, the Court of Appeal addressed certain substantive s. 7 issues. First, it noted that the Federal Court judge erred in finding that returnees are "automatically detained" (para. 138, see also paras. 139-40).

Second, the court rejected the finding that the scheme’s safety valves were “illusory” (para. 144). Third, the court found error with the Federal Court judge’s analysis of American detention conditions (para. 146). Fourth, it also perceived errors in her analysis of the principles of fundamental justice. For the Court of Appeal, 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’” (para. 161). In any event, the court considered the scheme to be neither overbroad nor grossly disproportionate.

[29] The Court of Appeal found it unnecessary to address the substance of the s. 15 claim. Had it been necessary, the court wrote that “[w]here, 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” (para. 173).

IV. Issues

[30] The appellants raise three issues: Is s. 159.3 of the *IRPR ultra vires*? Does s. 159.3 unjustifiably breach s. 7 of the *Charter*? Should the s. 15 *Charter* claim be remitted to the Federal Court or decided based on the record on appeal?

V. Statutory and Regulatory Scheme and Context

[31] The impugned regulation is part of the legislative scheme that implements a bilateral treaty between Canada and the United States, that is, the *Safe Third Country*

Agreement. While not itself challenged, this treaty shapes the interpretation of its implementing scheme (see *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1371). It is useful to examine the treaty and the legislation in turn, as they remain substantively distinct under Canada’s “dualist system” for the application of international legal instruments (*Kazemi Estate v. Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 S.C.R. 176, at para. 150; see G. van Ert, *Using International Law in Canadian Courts* (2nd ed. 2008), ch. 7). An additional protocol to the treaty has been signed and the implementing legislation has been amended since the hearing (*Regulations Amending the Immigration and Refugee Protection Regulations (Examination of Eligibility to Refer Claim)*, SOR/2023-58; *Additional Protocol to the 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*, March 24, 2023 (online)). I refrain from commenting on these instruments as they do not directly affect the substance of the issues on appeal before the Court.

A. *Safe Third Country Agreement*

[32] About 30 years ago, Canada and the United States undertook the negotiation of an agreement to share responsibility for refugee status claims. The Canadian Council for Refugees, Amnesty International and the United Nations High Commissioner for Refugees (“UNHCR”) were among the organizations whose

comments resulted in substantive amendments to a draft of the *Safe Third Country Agreement*. The two states signed the agreement in 2002.

[33] The preamble to the agreement expressly acknowledges the governments' international obligations to refugees (paras. 1, 2 and 8). It also addresses the parties' shared determination to safeguard for each eligible claimant "access to a full and fair refugee status determination procedure" (para. 8) and emphasizes that both countries offer generous refugee protection systems (para. 4). Accompanying the treaty is a *Statement of Principles* associated with its implementation, which states that the parties intend to abide by principles that include safeguards for claimants, such as the opportunity for claimants to have a third party present during proceedings (*Procedural issues associated with implementing the Agreement for cooperation in the examination of refugee status claims from nationals of third countries: Statement of Principles*, August 30, 2002 (online)).

[34] The principle animating the *Safe Third Country Agreement* is that "the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry" (Article 4(1)). This is the "crux" of the treaty (A. Macklin, "Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement" (2005), 36 *Colum. Hum. Rts. L. Rev.* 365, at p. 371) or its "general principle" (S. Baglay and M. Jones, *Refugee Law* (2nd ed. 2017), at p. 279). The country of last presence is "that country, being either Canada or the United States, in

which the refugee claimant was physically present immediately prior to making a refugee status claim at a land border port of entry” (Article 1(1)(a)). The parties committed to reviewing the agreement and to inviting the UNHCR to participate in the first review (Article 8(3)).

[35] While Article 4(1) sets out a broad principle, the treaty is limited in its application. To begin, the governments sought to ensure that “indirect” or “chain” *refoulement* would not occur. They agreed that individuals returned to Canada or the United States would not be removed therefrom until that country had adjudicated the individual’s refugee status claim (Article 3). They also did not seek to apply the agreement to citizens or habitual residents of either country (Article 2) and provided for exceptions for unaccompanied minors and family reunification (Article 4(2)).

[36] Even when the principle articulated in Article 4(1) would apply, the parties agreed that there should be an authority to exempt claimants. Article 6 provides that “either Party may at its own discretion examine any refugee status claim made to that Party where it determines that it is in its public interest to do so”.

B. *Domestic Implementation of the Safe Third Country Agreement*

[37] Section 101(1)(e) of the *IRPA* implements the core principle of the *Safe Third Country Agreement* by providing that the claims of individuals who “came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence” are “ineligible” to be

referred to the Refugee Protection Division. This gives domestic effect to the principle set out in Article 4(1) that an individual's country of last presence will examine their refugee status claim. Various other rules in the *IRPA* and its regulations affect the application of this "general rule", including (1) designation and review mechanisms; (2) limits to the scope of the general rule; and (3) exemptions.

(1) Designation and Review Mechanisms

[38] The *IRPA* sets forth the relevant criteria for when a country may be designated by the Governor in Council under s. 101(1)(e). Only countries that comply with the *non-refoulement* obligations under the relevant international conventions are eligible:

102 (1) The regulations may govern matters relating to the application of sections 100 and 101 . . . and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

(a) designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture;

[39] Section 102(2) lists factors to be considered when ascertaining whether a country complies with refugee protection standards mandated by the Conventions:

(2) The following factors are to be considered in designating a country under paragraph (1)(a):

(a) whether the country is a party to the Refugee Convention and to the Convention Against Torture;

(b) its policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture;

(c) its human rights record; and

(d) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection.

[40] The Governor in Council “must ensure the continuing review” of the s. 102(2) factors with respect to each designated country (s. 102(3)). The United States is the only country that has been designated (*Regulations Amending the Immigration and Refugee Protection Regulations*, SOR/2004-217). Section 159.3 of the *IRPR*, which the appellants challenge, provides:

159.3 The United States is designated under paragraph 102(1)(a) of the Act as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture, and is a designated country for the purpose of the application of paragraph 101(1)(e) of the Act.

(2) Limits to the General Ineligibility Rule

[41] Various provisions in the *IRPR* narrow the application of the ineligibility rule by ensuring that not all refugee claimants arriving from the United States are returned there. The regulations do this in two ways. First, the regulations contain limitations that closely track the contours of Articles 2, 3 and 4 of the *Safe Third Country Agreement*. For instance, under the regime considered in this appeal, s. 101(1)(e) ineligibility applies only to the claims of individuals who arrive at land

ports of entry — not elsewhere along the land border, by ship or by air (*IRPR*, s. 159.4). There are specific exceptions for individuals with family in Canada, to facilitate family reunification (s. 159.5(a) to (d)). As the treaty contemplates, these exceptions are applied according to Canada's domestic understanding of the family (Article 1(2); *IRPR*, s. 159.1). There are also exceptions for unaccompanied minors (s. 159.5(e)) and for individuals who have certain Canadian immigration statuses (s. 159.5(f) and (g)). Finally, the regulations ensure that certain individuals whose claims will not be adjudicated in the United States can access the Canadian system (s. 159.5(h)).

[42] Second, the regulations include an exception reflecting Canada's discretion, preserved under Article 6 of the treaty, to consider claims when doing so is in its public interest (Baglay and Jones, at p. 279). Section 159.6 of the *IRPR* ensures that claimants who establish that they have been charged with, or convicted of, an offence punishable by the death penalty in the United States or another country are not returned.

(3) Exemptions From the Application of the General Ineligibility Rule

[43] Individuals subject to the provisions implementing the *Safe Third Country Agreement* cannot access some of the statutory mechanisms available to claimants in different circumstances. For instance, returnees are not eligible for a pre-removal risk assessment before they are removed (*IRPA*, s. 112(2)(b)). Further, there is no administrative appeal body set out in the *IRPA* for them. Judicial review at the Federal Court, however, remains available (s. 72). Judges may grant stays of removal while

such proceedings are ongoing (*Federal Courts Rules*, SOR/98-106, r. 373; see also Baglay and Jones, at pp. 354-57).

[44] The *IRPA* does, however, contain mechanisms for temporary or permanent exemptions from return to the United States (see, e.g., H. Mayrand and A. Smith-Grégoire, “À la croisée du chemin Roxham et de la rhétorique politique: démystifier l’Entente sur les tiers pays sûrs” (2018), 48 *R.D.U.S.* 321, at p. 342). First, officers may grant an administrative deferral from the enforcement of a removal order. This authority flows from s. 48(2) of the *IRPA*, which requires that removal orders be enforced “as soon as possible”. Courts have held that this provision leaves officers with discretion to delay the enforcement of a removal order (see, e.g., *Atawnah v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144, [2017] 1 F.C.R. 153, at paras. 13-18; *Revell v. Canada (Citizenship and Immigration)*, 2019 FCA 262, [2020] 2 F.C.R. 355, at para. 50; *Tapambwa*, at para. 87). In this case, ABC and her daughters benefitted from an administrative deferral of removal, during which their counsel applied for a stay of removal.

[45] Second, officers may grant a temporary resident permit. This authority flows from s. 24 of the *IRPA*, which allows an officer to issue a permit if they are “of the opinion that it is justified in the circumstances”. The Minister or their delegate may also make instructions to guide officers in determining when to issue such permits (s. 24(3)). Here, Ms. Al Nahass’s family received temporary resident permits while the Minister considered whether to grant permanent exemptions.

[46] Third, the Minister may grant an exemption based on humanitarian and compassionate grounds, as occurred for Ms. Al Nahass's family. The Minister may exempt certain foreign nationals who are inadmissible from any of the requirements of the *IRPA*. They may grant exemptions where they view doing so as "justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected" (s. 25.1(1)). This assessment must "consider and give weight to *all* relevant humanitarian and compassionate considerations in a particular case" (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at para. 33 (emphasis in original)).

[47] Fourth, the Minister has a further discretion to exempt foreign nationals who are inadmissible from any of the requirements of the *IRPA*. The Minister may do so when they are "of the opinion that it is justified by public policy considerations" (s. 25.2(1)). The respondents observe that this provision permits the Minister to establish a temporary public policy exempting individuals who are part of a specified group from the ineligibility provision.

[48] Any removal order against a foreign national can be stayed while the Minister makes their decision in relation to s. 25.1(1) or 25.2(1) (*IRPR*, s. 233).

VI. Administrative Law Issues

[49] I turn now to the appellants' argument that s. 159.3 of the *IRPR* is *ultra vires* because of post-promulgation constraints on the Governor in Council's statutory

authority to maintain a designation. First, the appellants submit that it was unreasonable, given the factors in s. 102 of the *IRPA*, to maintain the United States' designation when there is evidence that many refugees cannot access effective protection there. Second, they say that the Governor in Council breached its s. 102(3) obligation to ensure continuing review of the United States' compliance.

[50] I would not give effect to these arguments. I agree with the respondents that the *vires* of s. 159.3 of the *IRPR* must be examined at the time of promulgation.

[51] Regulations “derive their validity from the statute which creates the power, and not from the executive body by which they are made” (*Reference as to the Validity of the Regulations in relation to Chemicals*, [1943] S.C.R. 1, at p. 13, per Duff C.J., quoting *The Zamora*, [1916] 2 A.C. 77 (P.C.), at p. 90). The limits imposed by the enabling statute are therefore fundamental to determining whether a regulation is *intra vires* (see J. M. Keyes, *Executive Legislation* (3rd ed. 2021), at p. 165).

[52] Here, the appellants misconstrue the limitations imposed by s. 102 of the *IRPA*. The Governor in Council may promulgate regulations “designating countries that comply with Article 33 of the Refugee Convention and Article 3 of the Convention Against Torture” (s. 102(1)(a)). The statute also prescribes factors for the Governor in Council to consider “in designating a country” (s. 102(2)). These factors concern when countries may be designated. Thus, s. 102(1)(a) and (2) establishes conditions precedent to designation for the purposes of s. 101(1)(e), as the Federal Court of Appeal held in *CCR (2008)* (para. 75). The statute requires that these conditions be met before,

not after, a country is designated (see E. A. Driedger, “Subordinate Legislation” (1960), 38 *Can. Bar Rev.* 1, at p. 8).

[53] The Governor in Council does, however, have statutory obligations in the period after a country is designated pursuant to s. 102(1)(a). Section 102(3) creates an obligation to “ensure the continuing review” of the s. 102(2) factors. These reviews are not directed at whether the regulation exceeds the limits imposed by the statute, which is the proper focus of a *vires* challenge. In this sense, the s. 102(3) reviews are outside the scope of a challenge alleging that s. 159.3 of the *IRPR* is *ultra vires* the *IRPA*. Instead, the continuing reviews are a distinct statutory obligation of the Governor in Council. As a result, s. 102(3) reviews may be challenged based on administrative law principles (see C.A. reasons, at para. 96). However, the appellants did not seek judicial review of particular s. 102(3) reviews conducted after the promulgation of s. 159.3.

[54] Focusing on the appropriate date and recognizing that the s. 102(3) reviews are outside the scope of a *vires* argument, I am persuaded that the appellants fail on this point. As this Court has held, “[r]egulations benefit from a presumption of validity” (*Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810, at para. 25; see also P.-A. Côté and M. Devinat, *Interprétation des lois* (5th ed. 2021), at para. 1314). Thus, to succeed in their argument based on s. 159.3’s inconsistency with the provisions they rely on, the appellants must show that on the date of promulgation, the designation of the United States was not authorized by s. 102(1)(a) or (2) of the *IRPA*. Because they have directed their argument at

post-promulgation developments, the appellants have not done so. Accordingly, the appellants' submission that s. 159.3 of the *IRPR* is *ultra vires* should be rejected.

[55] As a result, addressing other aspects of the appellants' administrative law claims is unnecessary, including the appropriate standard of review and how that standard would be applied in the circumstances of this case.

VII. The Section 7 Claim

[56] To establish a violation of s. 7 of the *Charter*, challengers must first show that the impugned legislation deprives them of life, liberty or security of the person. This analysis asks whether the legislation "engage[s]" those interests, in the sense that it causes a limitation or negative impact on, an infringement of, or an interference with them (*Carter*, at para. 55; see also *Bedford*, at paras. 57-58, 90 and 111). A risk of such a deprivation suffices (see, e.g., *Carter*, at para. 62; *R. v. Malmö-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 89; *Suresh*, at para. 27). Second, challengers must show that the deprivation is not in accordance with the principles of fundamental justice.

[57] The appellants say that the Federal Court judge's findings were grounded in the evidence, which demonstrates that s. 159.3 of the *IRPR* causes deprivations of liberty and security of the person. They say these deprivations are not consistent with the applicable principles of fundamental justice: overbreadth and gross disproportionality. The appellants argue discretionary remedies cannot ensure that

deprivations accord with the principles of fundamental justice and, in any event, the Federal Court judge found that these safeguards are illusory.

[58] In my respectful view, the Federal Court judge made errors at both stages of her s. 7 analysis. The legislative scheme engages s. 7 in some, but not all, of the respects she identified. Moreover, it does accord with the principles of fundamental justice.

A. *Properly Constituting a Section 7 Challenge*

[59] The parties agree that s. 159.3 of the *IRPR* was an appropriate target for a *Charter* challenge. The Federal Court of Appeal had disagreed, holding that the claim was not properly constituted because it should have been directed at other forms of state action that are the “real cause” of any possible infringements. In particular, the court concluded that the appellants should have targeted the administrative reviews, required by s. 102(3) of the *IRPA*, of the United States’ designation and related administrative conduct. In my respectful view, the Court of Appeal erred by misapplying the relevant *Charter* causation jurisprudence.

[60] This Court has long recognized that, to succeed, a *Charter* claim must show a causal link between state action and the violation of the relevant right or freedom (see, e.g., *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 447, per Dickson J., as he then was). In *Bedford*, this Court held that a “sufficient causal connection” must be established, which does not require that the impugned state action

“be the only or the dominant cause of the prejudice suffered by the claimant” (para. 76). As a result, the mere fact that other forms of state action may also have a causal connection to the harms alleged does not mean that a challenge to legislation — such as s. 159.3 of the *IRPR* — is improperly constituted.

[61] The Court of Appeal dismissed the *Charter* challenges for failing to adhere to two propositions it drew from this Court’s causation jurisprudence. First, challengers should not attack provisions in artificial isolation. Second, when administrative conduct under legislation is responsible for unconstitutional effects, that action or inaction must be challenged, not the legislation. While these two propositions do speak to important considerations, in my respectful view they do not justify the conclusion that the appellants’ challenge is improperly constituted.

(1) The Relevance of Preventative and Curative Measures to the Section 7 Challenge

[62] Provisions in a complex, interrelated legislative scheme should not be viewed in isolation. Generally, the constitutionality of these provisions can only be evaluated by considering the entire scheme. However, this did not preclude the appellants from targeting s. 159.3 of the *IRPR*.

[63] When a *Charter* challenge targets a provision in an interrelated legislative scheme, the potential impact of related provisions, including those that may serve to “prevent or cure any possible defects”, must be reviewed (C.A. reasons, at para. 58(a))

(emphasis added)). The success or failure of a *Charter* claim may turn on arguments or evidence related to preventative or curative provisions. But this should rarely preclude consideration of whether life, liberty or security of the person under s. 7 are “engaged”.

[64] Legislation often implicates interests that s. 7 protects. At times, this will result from broad provisions that would — taken on their own — have constitutionally relevant effects on life, liberty or security of the person. However, legislatures can include related provisions within a scheme that temper those effects. When these measures are part of an integrated legislative whole, they must be accounted for when assessing the constitutionality of rules of general application.

[65] In *PHS*, for example, this Court considered the linkages between a general rule and provisions related to it. At issue was, among other things, a general statutory prohibition on possession of controlled substances except as authorized under the regulations. The statute gave the Minister the power “to issue exemptions for medical or scientific reasons, or for any purpose the Minister deems to be in the public interest” from the application of any provision of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“*CDSA*”) (*PHS*, at para. 39).

[66] The Court found that exemptions acted “as a safety valve that prevents the [statute] from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects” (*PHS*, at para. 113). In other words, when the Minister’s discretion was exercised, these provisions cured the constitutional defects that would have arisen had the general prohibition been left to apply to those who ought not to

have been caught by it: the staff and clients of a safe injection facility (paras. 94 and 114).

[67] Here, the Federal Court of Appeal rightly drew on *PHS* in stating that related provisions in a legislative scheme may “prevent” or “cure” constitutional defects (C.A. reasons, at para. 58(a)). The exemptions discussed in *PHS* were “curative” in that they made discretionary relief available to those who would otherwise be inappropriately subject to the general prohibition. In other words, the exemption remedied the specific harm that would have flowed from the application of the general rule.

[68] Curative measures are thus remedial: they repair a breach that would be caused by a general rule by providing a targeted exemption after the fact (see *PHS*, at para. 41). These measures often work together with preventative measures to limit the scope of a provision of general application. Preventative measures narrow a general rule by precluding its application in anticipation of a breach, often through legislative exceptions. These categories are not watertight compartments, nor are they exhaustive. Moreover, if a class of individuals habitually receive individualized exemptions after the fact, a legislature could enact a class-wide exception that applies in advance.

[69] *Charter* challenges need not target preventative and curative provisions when the provision of general application to which they relate is a cause of the alleged mischief. Following *PHS*, courts must consider legislative provisions in their entire statutory context, irrespective of how the parties frame their challenge of a legislative

scheme. Indeed, a failure to consider a relevant related provision can “undermine the legitimacy” of constitutional analysis (*R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.), at para. 171, per Rosenberg J.A.).

[70] In the legislative scheme at issue in this case, examples of preventative measures include the death penalty exception in s. 159.6 of the *IRPR* and the various family reunification exceptions in s. 159.5(a) to (d). Curative measures include the availability of temporary resident permits under s. 24, humanitarian and compassionate exemptions under s. 25.1(1), and public policy exceptions under s. 25.2(1).

[71] At the engagement stage, preventative provisions can tailor a provision of general application so carefully that it never threatens s. 7 interests. For instance, s. 159.6 of the *IRPR* prevents the threat to life that might emerge from returning individuals subject to the death penalty. In so doing, preventative provisions like s. 159.6 rule out certain s. 7 engagements. By contrast, curative provisions will rarely, if ever, preclude the engagement of s. 7. *PHS* provides direct support for this proposition, as this Court held that the general prohibition on possession engaged s. 7 despite the availability of safety valves. Curative provisions create exceptional departures from a general rule; they are typically available only after a determination that the general rule applies. The possibility of obtaining an exemption is therefore a path through which the risks the general rule poses to life, liberty or security of the person can sometimes be avoided. In such cases, the threat to the s. 7 interests persists, but it does not always materialize.

[72] Some have suggested that because curative mechanisms are available, refugee claimants' s. 7 interests are not engaged at the exclusion or inadmissibility determination stage. This assertion rests on a statement in *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 S.C.R. 704, that it is at the "subsequent pre-removal risk assessment stage of the *IRPA*'s refugee protection process that s. 7 is typically engaged" rather than earlier stages (para. 75). This comment in *B010* relied on a passage from *Febles*, which spoke to the *Charter*-compliance of an exclusion provision in the *IRPA*. Some scholars have criticized this view of curative mechanisms' role in engagement, saying that *dicta* from these cases should not deflect analysis from this Court's approach to s. 7 engagement established in other contexts (see Heckman, at p. 313; C. Grey, "Thinkable: The Charter and Refugee Law after *Appulonappa* and *B010*" (2016), 76 *S.C.L.R.* (2d) 111, at pp. 131-35 and 139; see also H. Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (2nd ed. 2019), at pp. 77-81 and 342).

[73] *Febles* stated that an exclusion provision was "consistent" with s. 7 of the *Charter* (para. 67). In line with *Bedford* and *PHS*, *Febles* should not be read as conflating the engagement and the principles of fundamental justice stages of the s. 7 analysis. As for *B010*, I observe that this Court ordered a new hearing in that appeal as a matter of statutory interpretation and found it unnecessary to consider the appellants' s. 7 challenge (para. 74). The brief comment that it is only at the pre-removal stage that "s. 7 is typically engaged" was neither a formal statement of the law nor necessary to decide the case (para. 75). It should not be taken to have changed the established law

on s. 7 engagement. It is helpful to recall that in other contexts, such as extradition, s. 7 “permeates” the entire process and is “engaged, although for different purposes” at each stage of the proceedings (*United States of America v. Cobb*, 2001 SCC 19, [2001] 1 S.C.R. 587, at para. 34, per Arbour J.). In the context of ineligibility under s. 101(1)(e) of the *IRPA*, where curative measures are key to the s. 7 analysis, such measures are thus best understood as relevant to the principles of fundamental justice rather than to the threshold question of engagement, in keeping with this Court’s methodology in *Bedford* (see, e.g., Heckman, at pp. 347-56).

[74] Turning to the principles of fundamental justice analysis, the role of preventative provisions will vary depending on which principles are at issue. For example, legislative tailoring determines how broadly the general regime will be applied and thus undoubtedly factors into whether a scheme is overbroad.

[75] The parties disagree as to how curative measures bear on this case. In line with this Court’s reasoning in *PHS*, the respondents appear to see curative measures — like humanitarian and compassionate exemptions — as relevant to determining whether the principles of fundamental justice are respected. Conversely, the appellants claim that *Bedford*’s highly individualistic focus on “whether *anyone*’s life, liberty or security of the person has been denied” has overtaken *PHS* on this point (para. 123 (emphasis in original)). They say that discretionary exemptions now only factor into the s. 1 analysis.

[76] I disagree with the appellants. Curative mechanisms are properly considered when assessing whether a deprivation comports with the principles of fundamental justice. *Bedford* did not hold otherwise. Indeed, curative mechanisms were not at issue in *Bedford*, so it was unnecessary for this Court to comment on how its approach interacted with its reasoning in *PHS*. In my view, *Bedford* and *PHS* are compatible. Curative provisions have taken on increased significance in the wake of *Bedford*'s recognition that a regime that is rational and non-arbitrary in almost all circumstances can nonetheless violate s. 7 if it is arbitrary, overbroad or grossly disproportionate for one individual (para. 123). If the legislature has crafted a scheme that cures potential breaches by providing exemptions that can target the specific deprivations, this can render the legislative scheme *Charter*-compliant (see D. Moore, "Engagement with Human Rights by Administrative Decision-Makers: A Transformative Opportunity to Build a More Grassroots Human Rights Culture" (2017), 49 *Ottawa L. Rev.* 131, at pp. 150-51; see also *PHS*, at para. 114). In this sense, the focus of the s. 7 analysis is, at most, only "highly individualistic" when the legislature has not provided mechanisms that individualize the law's effects (Stewart (2019), at p. 150; see also C. Fehr, "Rethinking the Instrumental Rationality Principles of Fundamental Justice" (2020), 58 *Alta. L. Rev.* 133). However, as in *PHS*, the exemption mechanism must be responsive to the specific deprivation that is the subject of the *Charter* challenge.

[77] I note that the Court of Appeal viewed the availability of judicial review in the federal courts as a relevant safety valve. It is true that within the framework

established by *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, and this Court’s broader administrative law jurisprudence, judicial review helps ensure that public authorities respect “legal limits, derived from the enabling statute itself, the common or civil law or the Constitution” (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 28). However, judicial review offers different relief than a statutory mechanism that prevents or cures defects that would arise from the isolated operation of a general rule. This is because legislatures can never entirely “shield administrative decision making from curial scrutiny” (*Vavilov*, at para. 24). The general availability of judicial review therefore cannot save otherwise unconstitutional legislation. For this reason, I consider it unhelpful to view judicial review as a form of “safety valve” or statutory safeguard.

[78] In sum, preventative and curative provisions are both relevant in different ways to the appellants’ *Charter* claim. To assess a s. 7 breach, the presence of such mechanisms must be considered. However, the appellants did not need to target these provisions to constitute their challenge.

(2) The Relevance of Associated Administrative Conduct to the Section 7 Challenge

[79] I now turn to the question of whether the appellants were obliged to target administrative conduct rather than the legislation. The Court of Appeal said that “subsection 102(3) reviews and related administrative conduct”, which could have led to the revocation of the United States’ designation under the *IRPR*, was the proper focus

of the challenge (para. 61). The appellants dispute this conclusion, submitting that whatever the result of the s. 102(3) reviews should have been, “the fact remains that the law on the books (s. 159.3 *IRPR*) is the cause of the *Charter* breaches in issue and is therefore the proper object of *Charter* scrutiny and s. 52 [of the *Constitution Act, 1982*] relief” (A.F., at para. 34).

[80] I agree with the appellants that it was open to them to challenge s. 159.3 of the *IRPR*, rather than administrative conduct, and seek a declaration that the provision is of no force or effect because it is inconsistent with the *Charter*. While other avenues may have been available — such as challenging the conduct of the s. 102(3) reviews or seeking individual relief from adverse administrative decisions related to the s. 24, 25.1(1), 25.2(1) or 48(2) curative mechanisms — the appellants did not have to pursue these alternatives to properly constitute their *Charter* claim.

[81] To understand why the appellants were not obliged to target the s. 102(3) reviews, it is necessary to examine their role within the overall legislative scheme. The s. 102(3) reviews are not safety valves. Safety valves, as referred to in the ss. 7 and 12 *Charter* jurisprudence, typically mean discretionary exemptions or other curative mechanisms, rather than preventative provisions (e.g., *PHS*, at para. 113; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 224, per Binnie and LeBel JJ., dissenting; *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 36, per McLachlin C.J.). The reviews do not play a curative role, as they do not make after-the-fact relief available on an individual basis. They are also distinct from targeted

preventative measures, which preclude the application of a general rule, often through legislative exceptions.

[82] Section 102(3) of the *IRPA* requires the Governor in Council to ensure the continuing review of the s. 102(2) factors, such as the designated country's human rights record. The reviews conducted to date have left the designation in place, which remains the legislative basis for the ineligibility of claims advanced by the individual appellants. While the administrative conduct that led to the designation being maintained may also be susceptible to constitutional challenge in its own right, the existence of this alternative does not insulate s. 159.3 of the *IRPR* from *Charter* scrutiny. Similarly, while the appellants might also have challenged administrative decisions pertaining to the applicability of exceptions or the availability of exemptions, this does not preclude challenges to s. 159.3.

B. *Engagement of Section 7 Interests*

[83] In light of the foregoing, the appellants' challenge was properly constituted. I now turn to the substantive s. 7 *Charter* analysis. While the parties agree that s. 159.3 of the *IRPR* engages s. 7, they disagree on the particulars of each alleged deprivation and their causal connections to Canadian state action. The first stage of the s. 7 analysis makes clear that the Federal Court judge was right that s. 159.3 engages liberty and security of the person. But in my respectful view, she erred in her assessment of certain particulars.

[84] The respondents rightly acknowledge that assessing the constitutional implications of effects that materialize in other countries does not amount to applying the *Charter* to foreign governments. Here, the challenge is directed at the legislative scheme, which is undoubtedly state action that attracts *Charter* scrutiny. There is no place in this analysis for assessing whether American laws, policies or actions themselves comply with the *Charter*. Canadian courts only consider deprivations “effected by actors other than our government, if there is a sufficient causal connection between our government’s participation and the deprivation ultimately effected” (*Suresh*, at para. 54). Canada cannot “avoid the guarantee of fundamental justice merely because the deprivation in question would be effected by someone else’s hand” (*ibid.*; see also *Canada v. Schmidt*, [1987] 1 S.C.R. 500, at p. 522; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283, at paras. 59-60; *India v. Badesha*, 2017 SCC 44, [2017] 2 S.C.R. 127, at para. 38). But the focus remains fixed on the Canadian legislative scheme and its effects.

(1) Effects Implicating Section 7 Interests

[85] The appellants’ liberty and security of the person submissions focus on detention in the United States and the risks that claimants may be *refouled* to their countries of origin following their return to the United States. These arguments have both factual and legal aspects. Whether an alleged effect exists is a question of fact, while the scope of a s. 7 interest is a question of law. The standard of review for the factual questions on appeal is “palpable and overriding error” (*Housen v. Nikolaisen*,

2002 SCC 33, [2002] 2 S.C.R. 235, at para. 10; *Bedford*, at para. 56; *Carter*, at para. 109). The standard of review for the legal questions is correctness (*Housen*, at para. 8).

(a) *Detention in the United States*

[86] The appellants argue that all returnees face a risk of detention in the United States. They allege that this risk is especially pressing for individuals without status there and that those under a removal order are certain to be detained. Further, they claim that the Federal Court judge's findings did not turn on her references to "automatic" detention. In any event, "automatic" refers to detention that is imposed without consideration, as a mechanistic or reflexive result and, as such, is not an error.

[87] With respect, the Federal Court judge's references to "automatic" detention were erroneous. The evidence shows that detention is not automatic and returnees' risks of detention vary on a case-by-case basis. In my view, this palpable error overwhelmed the Federal Court judge's conclusions on detention. I agree with the respondents and the Court of Appeal that detention is not automatic, in the sense that it is not universally applied: for the broad class comprising all returnees, the "highest possible finding on this record is that returnees to the United States are exposed to a risk of discretionary detention . . . [as] returnees who are detained in the United States can seek release and release is often granted, either on bond or without" (C.A. reasons, at paras. 140-41).

[88] It is true that the respondents' expert acknowledged that there are certain categories of individuals for whom detention is automatic or mandatory: those whom American law defines as arriving or criminal aliens; individuals subject to a final removal order; and suspected terrorists (Affidavit of Stephen Yale-Loehr, at paras. 135-41, reproduced in A.R., vol. XLVII, at pp. 20144-45). But the record does not demonstrate that these categories apply to those returned pursuant to the *Safe Third Country Agreement*. For other categories of non-citizens, the appellants did not seriously dispute that detention is discretionary and subject to the possibility of release (*ibid.*, at paras. 131-34; Cross-examination of Anwen Hughes, questions 143-49, reproduced in A.R., vol. XXVII, at pp. 11291-92). Indeed, Ms. Mustefa and all of the anonymized affiants who answered written cross-examinations were offered release on bond, and all but one were released. The record also suggests that other alternatives to detention are available (Affidavit of Yale-Loehr, at paras. 159-62). Thus, the evidence does not support the Federal Court judge's finding that detention is "automatic", in the ordinary sense of the word.

[89] While returnees do not face automatic detention in the United States, the risk of detention remains an effect that engages liberty. This Court has repeatedly held that "liberty" encompasses freedom from detention, imprisonment and the threat thereof (*R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 652; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 969; *Winko v. British Columbia (Forensic Psychiatric Institute)*, [1999] 2 S.C.R. 625, at para. 64; *R. v. Demers*, 2004 SCC 46, [2004] 2 S.C.R. 489, at para. 30).

Thus, because the question at the engagement stage is simply whether the appellants have demonstrated an effect within the scope of s. 7, a risk of detention suffices.

(b) *Conditions While Detained in the United States*

[90] The appellants also argue that conditions of detention in the United States implicate the security of the person interest, as the Federal Court judge held. To be sure, security of the person protects against physical punishment or suffering and the threat thereof (*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, at p. 207; *Suresh*, at paras. 53-55). It also protects against serious and profound state-imposed psychological stress (*New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 60). The respondents have failed to show reversible errors in the Federal Court judge’s determination that the conditions of detention fall, in certain respects, within the scope of the security of the person interest.

[91] First, the Federal Court judge found that the “use of solitary confinement” raised the security of the person interest (para. 110). Ms. Mustafa and one of the anonymized affiants stated that they were isolated pending the results of tuberculosis tests. The Federal Court judge’s heavy reliance on this evidence suggests that she reached her conclusion on solitary confinement with respect to its uses for this public health purpose. Thus, as I understand her finding, she concluded that isolation is used while some returnees are awaiting tuberculosis testing. This finding discloses no reviewable error. I have no hesitation in concluding that the use of medical isolation presents a risk of serious physical and psychological suffering, as do other forms of

“solitary confinement”. Whether these risks accord with the principles of fundamental justice, or are otherwise justified, is not the question at this stage.

[92] Second, the Federal Court judge also accepted evidence that certain detention centres were “abnormally cold” (para. 111). She relied, in support of this conclusion, on four affiants who had themselves experienced cold conditions in detention. Ms. Mustefa says that her detention facility was “freezing cold” and that, during the day, she had to put socks over her hands and arms to stay warm, while curled up under a towel. I see no reversible error in the conclusion that this level of cold could cause physical suffering, which engages security of the person.

[93] Third, the Federal Court judge concluded that the medical care provided in the detention facilities was inadequate in certain respects (para. 112). For instance, she noted evidence that medical staff would ignore Black detainees while addressing White detainees’ medical issues (*ibid.*). No reversible error has been shown in her factual findings on inadequacies in medical care, nor in her conclusion that these effects fall within the scope of the security of the person interest (para. 114).

[94] Fourth, the Federal Court judge noted two other portions of Ms. Mustefa’s affidavit. In particular, Ms. Mustefa said that while detained in the United States, her religious dietary restrictions were not respected and she was held alongside individuals who had been criminally convicted (para. 96). The appellants reference these forms of treatment, even though the Federal Court judge did not rely on them in her analysis of whether security of the person was engaged. I would hesitate to conclude, absent clear

findings below, that this treatment falls within the scope of security of the person. However, as will become plain, even taking the appellants' case on this point at its highest, I would find no breach of s. 7 on this basis.

(c) *Risks of Refoulement From the United States*

[95] The appellants also argue that returnees are at a real and not speculative risk of being *refouled* from the United States to their countries of origin, as the Federal Court judge held. Returning individuals to the United States does not itself constitute *refoulement*, nor does the United States returning individuals to their countries of origin if the relevant international obligations are respected. Rather, the concern is that the United States may be returning individuals contrary to those obligations, thereby making Canada a participant in indirect *refoulement* when it returns refugee claimants to the United States. The appellants claim that this risk implicates security of the person. There is no question that a risk of *refoulement* — whether directly from Canada or indirectly after return to a third country — falls within the scope of the security of the person interest. This Court has noted that the *non-refoulement* principle is “the cornerstone of the international refugee protection regime” (*Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 18). By definition, *refoulement* exposes individuals to threats to their life or freedom (*Refugee Convention*, Article 33), torture (*Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Can. T.S. 1987 No. 36, Article 3) or other serious human rights violations. It is because these potential consequences are so grave that this Court

in *Singh* considered it “unthinkable” that *refoulement* would fall outside the scope of s. 7’s protections (p. 210).

[96] In this case, the more difficult question at the s. 7 engagement stage is the factual one: whether the Federal Court judge erred in concluding that a real and not speculative risk of *refoulement* from the United States exists. As I will explain, so said most respectfully, the Federal Court judge made reviewable errors on this point.

(i) *Refoulement Because of Barriers Caused by Detention Conditions*

[97] The appellants argue that the Federal Court judge was right to find that a risk of *refoulement* flows from the barriers to making an asylum claim while detained (Federal Court reasons, at para. 106). The respondents submit that the record cannot support this conclusion and that Canadian courts should presume that foreign processes for determining asylum claims are fair. The respondents also invoke a presumption of compliance with international obligations and say that the standard for displacing this presumption with respect to the United States is that “the evidence must demonstrate extraordinary circumstances and impeach the totality of the system, even casting doubt on the independence of the judiciary” (R.F., at para. 89; see also transcript, at pp. 89 and 92).

[98] The respondents’ arguments are overstated. It is true that there is a presumption that foreign states have fair and independent judicial processes (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at p. 725, quoting *Minister of*

Employment and Immigration v. Satiacum (1989), 99 N.R. 171 (F.C.A.), at para. 19).

But I am not satisfied that courts should rely on a presumption that foreign states comply, in every respect, with international law. Instead, the ordinary principles for *Charter* claims should be followed: the challengers must prove the facts substantiating the alleged rights violations connected to state action ascribed to Canada. When those factual findings are challenged, the ordinary appellate standard of “palpable and overriding error” applies.

[99] Applying the proper standard, I am satisfied that the respondents have shown a reviewable error. The record cannot support the Federal Court judge’s finding that barriers to advancing an asylum claim while detained give rise to a “real and not speculative” risk of *refoulement* from the United States.

[100] To begin, as the Court of Appeal noted, the Federal Court judge’s reasons did not squarely engage with significant evidence related to how asylum claims are advanced while individuals are detained (para. 142). For instance, Ms. Mustefa and nearly all of the anonymized affiants had access to counsel to assist with their claims while detained in the United States. Further, several of the expert affiants acknowledged widespread programs designed to provide free legal representation to individuals in immigration detention. Indeed, the record indicates that relevant American legislation offers guarantees of a right to counsel in asylum proceedings and requires claimants be given a list of pro bono counsel (see Affidavit of Yale-Loehr, at paras. 21-24 and 68-74, discussing, *inter alia*, *Immigration and Nationality Act*, 8

U.S.C. § 1158(d)(4)(B) (2018); see also Cross-examination of Hughes, questions 298-310). The Federal Court judge did not explicitly engage with this important evidence in making her finding. In my respectful view, this omission “gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected [her] conclusion” (*Housen*, at para. 39, quoting *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15).

[101] Further, the record does not support the Federal Court judge’s finding that *refoulement* flows from alleged barriers to advancing a claim while detained. In this respect, two crucial matters went largely unaddressed. First, the record discloses review and appeal mechanisms internal to the American asylum system (Affidavit of Yale-Loehr, at paras. 67-74). The appellants point to no evidence establishing that these mechanisms are ineffective. Second, the record reveals that certain claimants whose asylum applications fail have avenues for remaining in the United States. Among these is temporary protected status, which permits individuals from designated countries to remain (see, e.g., Cross-examination of Abed Ayoub, questions 236-60, reproduced in A.R., vol. XXXI, at pp. 13012-17). Another avenue is “withholding of removal”, which allows individuals to remain if they are more likely than not to be persecuted based on one of the grounds recognized in the *Refugee Convention* (see, e.g., Affidavit of Deborah Anker, at paras. 65-67, reproduced in A.R., vol. XVII, at pp. 7340-41). Yet another path is protection based on the *Convention Against Torture* (see, e.g., *ibid.*). There are also many targeted visa programs for individuals in certain classes, like

victims of crime or trafficking (see, e.g., Cross-examination of Lenni B. Benson, questions 278-82, 344-47, 350-55 and 513-21, reproduced in A.R., vol. XXVIII, at pp. 11604-5, 11621, 11623 and 11659-61). These mechanisms are relevant to whether individuals whose detention may create barriers to advancing their asylum claims are, in the end, *refouled*. But the Federal Court judge did not assess these mechanisms.

[102] Respectfully said, the Federal Court judge erred by not explicitly considering these aspects of the record that undermine her finding. The record does not support her conclusion that American detention conditions pose barriers to the advancement of asylum claims that raise a real and not speculative risk of *refoulement*. While it is possible that barriers to advancing a claim in a third country could be so high as to create such a risk, the appellants have not demonstrated that here.

(ii) *Refoulement Due to American Asylum Policies*

[103] Before the Federal Court, the appellants also argued that the imposition of a “one-year bar” (i.e., a rule under which asylum claims must be advanced within a year of a claimant’s arrival) and the restrictive interpretation of gender-based persecution as a basis for asylum each result in a risk of *refoulement* from the United States. They argued that the Canadian legislation facilitating the return of claimants to the United States, where those risks may materialize, implicates the security of the person interest. The Federal Court judge did not make any findings in connection with these arguments, resting her conclusion about the risk of *refoulement* solely on barriers

to advancing an asylum claim from detention (paras. 106 and 113). Indeed, she did not comment on the nature or scope of the relevant American policies.

[104] On appeal to this Court, the appellants invoke the purported risks of *refoulement* flowing from these aspects of American asylum law. However, they do not address how these policies operate and should be understood. Instead, they cite the findings of the Federal Court in *Canadian Council for Refugees v. Canada*, 2007 FC 1262, [2008] 3 F.C.R. 606, along with certain aspects of the evidence that was before the Federal Court judge in the present case. The respondents, by contrast, argue that the relevant American policies respect the *non-refoulement* principle, relying on other parts of the evidentiary record.

[105] In *CCR (2008)*, the Federal Court of Appeal set aside the judgment of the Federal Court, in part because the hypothetical nature of the challenge provided “no factual basis upon which to assess the alleged Charter breaches” (para. 103). More importantly, however, findings made in those proceedings are not properly before this Court here. The Federal Court’s 2007 findings are thus of no assistance here.

[106] Further, the evidence on the applicable American policies is of limited assistance absent relevant factual findings. The record on this issue is mixed. For instance, the respondents’ expert appeared to acknowledge that the one-year bar leads to some individuals being denied asylum even if their underlying claims are meritorious (Cross-examination of Stephen Yale-Loehr, question 664, reproduced in A.R., vol. XLVIII, at p. 20508). If this is true, risks of *refoulement* would be pressing. But

the one-year bar has exceptions for changed or extraordinary circumstances (see, e.g., *ibid.*, questions 655 and 660-64; Affidavit of Anker, at para. 60; Affidavit of Jaya Ramji-Nogales, at para. 9, reproduced in A.R., vol. XXX, at pp. 12752-53). Without findings of fact on how these exceptions function, this Court is not positioned to assess whether the one-year bar actually leads to *refoulement*. Further, the various alternative avenues for remaining in the United States, as described above, may be relevant. These exceptions and alternative avenues may be the manner in which the United States implements its *non-refoulement* obligations in light of its one-year bar policy.

[107] The Federal Court judge's lack of findings in relation to American policies on gender-based persecution also makes it imprudent for this Court to determine whether there is a real and not speculative risk of *refoulement* for claimants fleeing such persecution. In the circumstances, it would not be appropriate for this Court to attempt to make its own factual findings. In any event, as will become clear, even assuming that these policies do present a real and not speculative risk of *refoulement* for returnees, I would not ultimately find a s. 7 breach on this basis.

(d) *Conclusion as to the Effects Implicating Section 7 Interests*

[108] The risks of detention upon return to the United States, as well as three aspects of detention conditions as found by the Federal Court judge — the use of medical isolation, abnormally cold conditions and deficiencies in medical care — fall within the scope of liberty and security of the person. Beyond that, to take the

appellants' position on s. 7 engagement at its highest, I am prepared to proceed on the assumption that the following effects occur and are within the scope of the s. 7 interests: the non-accommodation of religious dietary needs, detention in a facility housing criminally convicted individuals and the risks of *refoulement* flowing from the one-year bar policy and the United States' approach to gender-based claims. With these effects in mind, I turn to the causation analysis.

(2) Causal Link to Canadian State Action

[109] As noted above, to establish s. 7 engagement, challengers must not only demonstrate effects falling within the scope of the s. 7 interests, but also that these effects are caused by Canadian state action. In domestic matters, the requisite causal link will often be obvious. This is rarely so for cases where the deprivation in question is effected by foreign actors. When connecting harms to Canadian state action, courts must be “sensitive to the context of the particular case” (*Bedford*, at para. 76). When a challenger seeks to draw a causal connection between Canadian state action and a harm brought about by a foreign actor, the context is meaningfully different from cases in which harms arise through purely domestic processes.

[110] Canada has no jurisdiction to dictate the actions of foreign authorities. Thus, to draw a causal connection to Canadian state action, Canadian authorities must have been implicated in how the harms arose. Accordingly, challengers will succeed in drawing a causal connection to Canadian state action “[a]t least where Canada’s participation is a necessary precondition for the deprivation” (*Suresh*, at para. 54).

[111] Further, Canada cannot foresee all the actions that foreign authorities will take. Where there is no basis for Canada to have known that a harm would arise, it would be improper to view those harms as causally connected to Canadian state action. Thus, to draw a causal connection to Canadian state action, it must be shown that Canadian authorities knew, or ought to have known, that the harms could arise as a result of Canada's actions. This has been expressed through the recognition that challengers will be able to show a causal connection to Canadian state action “[a]t least where . . . the deprivation is an entirely foreseeable consequence of Canada's participation” (*Suresh*, at para. 54 (emphasis added)).

(a) *Necessary Precondition*

[112] In this case, it is clear that Canada's participation is a necessary precondition to each of the effects related to detention and *refoulement*. Without the legislative implementation of the *Safe Third Country Agreement* regime, individuals could advance their refugee protection claims in Canada. Instead, they are sent back to the United States by Canadian officials acting under legislative authority, where they face (or are presumed to face) these effects. Thus, I have no hesitation in concluding that the relevant Canadian state action — here, s. 159.3 of the *IRPR* along with the broader legislative scheme — is a necessary precondition.

(b) *Foreseeable Consequence*

[113] In *Bedford*, this Court discussed the foreseeability threshold from *Suresh* and further explained its role (para. 77). Foreseeability, as described in *Suresh*, can be established “by a reasonable inference, drawn on a balance of probabilities” (*Bedford*, at para. 76). As is generally true, what is required is “a sufficient connection, having regard to the context of the case” (para. 78). Nevertheless, foreseeability remains useful in an international context where Canada does not necessarily have full knowledge of how foreign authorities will act (see, e.g., J. C. Hathaway, *The Rights of Refugees Under International Law* (2nd ed. 2021), at pp. 367-68). To be plain, the foreseeability standard described in *Suresh* and interpreted in *Bedford* is binding on this Court.

[114] An effect can be shown to be foreseeable in at least two ways (see, e.g., Hathaway, at p. 373). First, challengers can show that Canada had actual knowledge of the risk that the effects would emerge. For example, Parliamentary debates discussing the risks may establish this knowledge. Second, challengers can also show that Canada ought to have known about the risks, such that knowledge can be imputed. Public reporting, academic analysis, and other sources originating outside government may help establish constructive knowledge. While speculation will not suffice, the threshold for constructive knowledge should remain attainable since foreseeability is a “port of entry for s. 7 claims” (*Bedford*, at para. 78). For example, the threshold should remain well below the strict approach taken to judicial notice (see *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 48).

[115] In this case, the Federal Court judge noted the *Suresh* causation framework but did not explicitly consider whether each of the relevant effects was foreseeable (para. 100). She did not state what evidence could have allowed her to conclude that Canada knew, or ought to have known, that these effects would occur. In my respectful view, this approach led the Federal Court judge into reversible error in her application of the foreseeability standard this Court established in *Suresh* and *Bedford*.

[116] With respect to the cold temperatures in detention facilities, deficiencies in medical care, detention alongside criminally convicted individuals and the violation of religious dietary restrictions, the record does not support a finding that these effects were a foreseeable consequence of Canada's actions on the *Suresh* and *Bedford* standard. While these effects are concerning, the question at this stage is whether Canada knew or ought to have known they could occur. The appellants have not pointed to evidence that would enable this Court to answer this question in the affirmative in light of the absence of findings below. They have not established that Canada either knew or ought to have known of this kind of harm arising in American detention facilities. Thus, in my respectful view, there was no basis for concluding that these effects were a foreseeable consequence.

[117] By contrast, the record substantiates that the other negative effects were entirely foreseeable. With respect to the risk of detention, it is plain that Canada knew returnees would be exposed to such a risk. From the earliest consultations on the scope of a possible safe third country agreement, the use of detention in the United States was

the subject of debate and study (see, e.g., UNHCR, *UNHCR Comments on the Draft Agreement between Canada and the United States of America for “Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries”*, July 26, 2002 (online), at p. 3). Similarly, the “one-year bar” and the treatment of gender-based claims were each focal points during the adoption of the agreement (see, e.g., p. 2; Regulatory Impact Analysis Statement, SOR/2004-217, *Canada Gazette*, Part II, vol. 138, No. 22, November 3, 2004, at p. 1627). Further, Canada ought to have known that returnees were at risk of being subjected to the widespread practice of medical isolation. These infringements of liberty and security of the person are causally connected to Canadian state action and must be assessed in relation to the principles of fundamental justice.

C. *Principles of Fundamental Justice Analysis*

(1) The Applicable Principles

[118] Here, the applicable principles of fundamental justice are overbreadth and gross disproportionality. These principles were applied at first instance and are invoked by the appellants before this Court. By contrast, the respondents argue that the “shocks the conscience” standard applies to “the constitutional review of the effects of removal to foreign legal systems and administrations” (R.F., at para. 64). They submit that this high threshold is only met in exceptional circumstances, as is proper given the importance of international comity and respect for the sovereignty of foreign states. In my view, the respondents’ arguments are misplaced. The “shocks the conscience”

standard may well be relevant to the review of individualized decisions, but it is not relevant to *Charter* challenges to legislation.

[119] It is true, as the respondents noted in oral argument, that “shocks the conscience” was treated as applicable to legislative challenges by some members of this Court in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, at pp. 849-50. But *Kindler* must be read in light of this Court’s later, more complete, consideration of “shocks the conscience” in *Burns*. It must also be read in the context of this Court’s broader assessment of the principles of fundamental justice in *Malmo-Levine*.

[120] In *Burns*, this Court made plain that the “shocks the conscience” standard applies to reviewing individual decisions by the Minister and “should not be allowed to obscure the ultimate assessment that is required”, which is whether those decisions are “in accordance with the principles of fundamental justice” (para. 68). Following *Burns*, this Court has used “shocks the conscience” when assessing requests for individualized *Charter* relief from the Minister’s decisions on extradition or deportation rather than, as here, to evaluate the constitutionality of a legislative regime (see, e.g., *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paras. 38-39; *Canada (Attorney General) v. Barnaby*, 2015 SCC 31, [2015] 2 S.C.R. 563, at para. 11). Academic commentators have also concluded that the “shocks the conscience” standard speaks to how “a discretionary decision by a state official can be challenged under the *Charter* even though the statute under which the decision was

made is not itself challenged” (see, e.g., Stewart (2019), at pp. 130-31). Indeed, in *Malmo-Levine*, this Court explicitly concluded that a broad balancing exercise — of the kind that “shocks the conscience” describes — is not an applicable principle of fundamental justice for challenges to legislation (paras. 94-99). It is true that in some contexts, the language of “shocks the conscience” has been used to inform the gross disproportionality standard (see, e.g., in relation to s. 12, *R. v. Hills*, 2023 SCC 2, at paras. 109-10, 145 and 163, per Martin J., and at paras. 182-83, per Côté J., dissenting, but not on this point). As a practical matter, a provision held to be grossly disproportionate to its purpose might well shock the conscience if it were pressed into service. But this convergence does not displace the principles of fundamental justice that apply in challenges to legislation.

[121] Because the appellants target legislative provisions, the “shocks the conscience” standard is not the appropriate measure in this case. This is not to say, however, that whether governmental conduct shocks the conscience is not relevant to challenging the implementation of the *Safe Third Country Agreement*. Administrative decisions made under legislative schemes must, like the schemes themselves, respect the guarantees in the *Charter*. It therefore remains open to refugee claimants arriving from the United States to advance constitutional challenges against determinations that their claims are ineligible to be referred to the Refugee Protection Division or against decisions that exceptional relief is unavailable. As this Court has recognized, it is possible to consider challenges to both legislation and administrative conduct within

the same proceeding (see, e.g., *PHS*, at paras. 74-77; *Kindler*, at p. 840, per McLachlin J.).

[122] If claimants in future cases challenge administrative conduct, courts may conclude that returning them would shock the conscience of Canadians (see *Burns*, at para. 69). In this way, vulnerable claimants whom Canada improperly seeks to return can be protected. However, at oral argument, the appellants expressly disclaimed any intention to challenge the constitutionality of administrative decisions to deny them exemptions.

[123] None of the foregoing implies that the respondents' concern for international comity and foreign states' sovereignty is unwarranted. In my view, however, these concerns can be accommodated under the principles of overbreadth and gross disproportionality. To begin with, the *Suresh* and *Bedford* causation analysis ensures that Canadian courts only assess effects brought about by foreign actors if those effects are causally connected to Canadian state action.

[124] Further, the *Bedford* principles of fundamental justice provide space to consider comity and foreign sovereignty. This is because arbitrariness, overbreadth and gross disproportionality are principles of "instrumental rationality" or of means-ends assessment, which can only be examined in light of the impugned law's purpose (paras. 107-9; Stewart (2019), at pp. 150-51; P. W. Hogg, "The Brilliant Career of Section 7 of the Charter" (2012), 58 *S.C.L.R.* (2d) 195, at p. 209). The proper articulation of the purpose of a scheme with foreign elements must be sensitive to the

international context, in which there will rarely, if ever, be exact correspondence between foreign and Canadian regimes. Courts should thus hesitate to conclude that such legislation is predicated on the laws of the foreign state precisely mirroring those of Canada. In these circumstances, I emphasize that courts must take due care in defining the purpose of Canadian legislation.

[125] Finally, this Court has left open the possibility that a s. 7 breach might be justified under s. 1 in appropriate circumstances (*Malmo-Levine*, at paras. 96-98; *Bedford*, at para. 129). This Court has also emphasized that the s. 1 analysis must be approached with sensitivity to the factual and social context of each case (see, e.g., *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 63, per La Forest J., dissenting, but not on this point, and at paras. 132-34, per McLachlin J.). At the s. 1 stage, a contextual approach would likely consider international comity and the sovereignty of foreign states.

(2) The Scheme Is Not Overbroad or Grossly Disproportionate

[126] The respondents do not mention *Bedford* in their factum. Although their position is that the *Bedford* principles of fundamental justice do not apply to this appeal, their failure to address *Bedford* was unhelpful. The appellants' case focused on overbreadth and gross disproportionality at each stage of the proceedings. The Federal Court applied these principles and the Court of Appeal commented on them. It would therefore have been useful to this Court for the respondents to provide explanations, or alternative arguments, about these principles.

[127] Here, the *Bedford* principles apply. When assessing whether legislation violates these principles, courts consider “whether the law’s purpose, taken at face value, is connected to its effects and whether the negative effect is grossly disproportionate to the law’s purpose” (para. 125). This requires courts to identify the legislative purpose and then to assess if, in light of that purpose, the legislation breached any applicable principle of fundamental justice.

(a) *Legislative Purpose*

[128] The courts below relied on the purpose of the legislative scheme articulated in *CCR (2008)*, at para. 75: “. . . the sharing of responsibility for the consideration of refugee claims with countries that are signatory to and comply with the relevant articles of [the *Refugee Convention* and the *Convention Against Torture*] and have an acceptable human rights record” (Federal Court reasons, at paras. 119-22; C.A. reasons, at para. 164). The appellants advance a broader view of the place of international law in the scheme’s purpose, saying that it is designed “to share responsibility for the protection of refugees in accordance with Canada’s international obligations” (A.F., at para. 56 (emphasis deleted)). Conversely, the respondents would have this Court adopt a purpose that does not make international obligations explicit: “. . . to share responsibility for providing protection to those in need and to improve the efficiency of the refugee determination system” (R.F., at para. 26). I would not adopt any of these statements. In my view, the purpose of s. 159.3 of the *IRPR* is to share

responsibility for fairly considering refugee claims with the United States, in accordance with the principle of *non-refoulement*.

[129] In *R. v. Ndhlovu*, 2022 SCC 38, this Court reiterated several principles guiding the characterization of legislative purpose within a s. 7 analysis. It noted, for instance, that the focus is the purpose of the impugned provisions, although the broader legislative scheme may provide clues as to the narrower provisions' purpose (para. 61, per Karakatsanis and Martin JJ., and para. 153, per Brown J., dissenting in part, but not on this point). Courts may consider “statements of purpose in the legislation, if any; the text, context, and scheme of the legislation; and extrinsic evidence” (para. 64; see also *R. v. Appulonappa*, 2015 SCC 59, [2015] 3 S.C.R. 754, at para. 33).

[130] Purpose statements are “[t]he first, ‘most direct and authoritative evidence’ of the legislative purpose” (*Appulonappa*, at para. 49, citing R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 274-76). Here, while the specific sections containing the impugned provisions do not provide formal purpose statements, s. 3(2) of the *IRPA* articulates the Act’s overall objectives with respect to refugees:

(2) The objectives of this Act with respect to refugees are

(a) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(b) to fulfil Canada’s international legal obligations with respect to refugees and affirm Canada’s commitment to international efforts to provide assistance to those in need of resettlement;

(c) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(d) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(e) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

[131] These objectives supply three key considerations relevant to assessing the purpose of the provisions at issue here: respecting Canada's international obligations (s. 3(2)(b) and (d)), ensuring fair process and consideration for claimants (s. 3(2)(b), (c) and (e)), and upholding the efficiency and sustainability of the Canadian refugee protection system (s. 3(2)(e)). Further, s. 102(1) of the *IRPA* also speaks to legislative objective in this instance insofar as it permits the designation of countries "for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims".

[132] With respect to the text and context of the legislative scheme, the provision directly challenged is s. 159.3 of the *IRPR*. This provision designates the United States pursuant to s. 102(1)(a) of the *IRPA*. In my view, the purpose of a provision designating a specific country can only be understood in light of s. 102(2), as the Federal Court of Appeal recognized in *CCR (2008)*. Considering the factors set out in s. 102(2) is a condition precedent to designating a country. These factors, identified by Parliament, necessarily partake of the purpose for which a designation is made. They include the

country's "policies and practices with respect to claims under the Refugee Convention and with respect to obligations under the Convention Against Torture" (s. 102(2)(b)). The "human rights record" of a country is another (s. 102(2)(c)).

[133] The authority to designate a country flows from s. 102(1)(a), which focuses on whether the designated country complies with the *non-refoulement* principle, as embodied in Article 33 of the *Refugee Convention* and Article 3 of the *Convention Against Torture*. The *non-refoulement* principle, which scholars have also described as the [TRANSLATION] "cornerstone of refugee law" (see, e.g., F. Crépeau, *Droit d'asile: De l'hospitalité aux contrôles migratoires* (1995), at p. 166), is thus of central importance to the scheme's purpose. Indeed, even scholars who are critical of the agreement have recognized that it "evinces a joint commitment to ensuring access to a refugee protection procedure in either Canada or the United States" in order to respect the *non-refoulement* principle (Macklin (2005), at p. 381; Mayrand and Smith-Grégoire, at p. 337).

[134] The various factors in s. 102(2) of the *IRPA* clearly relate to the *non-refoulement* principle. But they also go beyond it. By referencing policies and practices related to the *Refugee Convention* and the *Convention Against Torture* as a whole (s. 102(2)(b)), the legislation directs the Governor in Council to consider a broad range of guarantees designed to ensure that refugee claimants receive fair treatment in host countries. The requirement in s. 102(2)(c) to consider a country's "human rights record" is to similar effect, as it helps assess whether refugees will receive fair

treatment beyond the floor established by the *non-refoulement* principle. These requirements do not suggest that designated countries must have identical policies or human rights records to Canada, so long as the designated countries respect certain minimum requirements. In that sense, the s. 102(2) factors leave space for permissible differences in countries' domestic regimes, which reflects Parliament's respect for international comity, within the bounds of the Constitution.

[135] The broader statutory scheme that structures the legal effects flowing from designating a country is also illuminating, in that it shows that sharing responsibility with a designated country is a core objective. In particular, s. 101(1)(e) of the *IRPA* renders individuals arriving from designated countries ineligible to be referred to the Refugee Protection Division. Access to other procedures in Canada is also restricted (see, e.g., *IRPA*, s. 112(2)(b)). The message is clear: designation ensures that claims will be considered in the designated country, rather than in Canada.

[136] Finally, three sources of extrinsic evidence assist in ascertaining the purpose of s. 159.3 of the *IRPR*. First, the preamble to the *Safe Third Country Agreement* provides useful indicators of Parliament's and the Governor in Council's objectives in enacting the legislation that gives domestic effect to the treaty. As discussed, the preamble acknowledges the *non-refoulement* obligations that bind both countries (para. 2). It states that the governments were aware of the necessity to avoid "indirect breaches of the fundamental principle of non-refoulement . . . [through] access to a full and fair refugee status determination procedure" (para. 8). Thus, the

preamble to the *Safe Third Country Agreement* confirms that the *non-refoulement* principle is at the core of the scheme, along with a broader emphasis on the fair adjudication of refugee claims. It was in light of these mutually held commitments that the sharing of responsibility was proposed.

[137] Second, the accompanying *Statement of Principles* agreed to by Canada and the United States reflects a shared commitment to ensuring that refugee claimants subject to the scheme are treated fairly. For instance, it affords claimants an opportunity for a chosen person to be present during proceedings.

[138] Third, the Regulatory Impact Analysis Statement for s. 159.3 of the *IRPR* stated that the “purpose of the provisions is to render paragraph 101(1)(e) of the [IRPA] effective” by designating the United States in order to proceed with “sharing responsibility [for] refugee protection” while also respecting “Canada’s commitment to its international obligations toward refugees”, which “reflects our humanitarian tradition and core values of compassion and fairness” (pp. 1622-23).

[139] Taken together, the statement of objectives of the *IRPA*, the text, context, and scheme of the legislation, and the extrinsic evidence suggest that the purpose of the legislation has three essential elements: (1) to share responsibility for considering refugee claims; (2) to respect the *non-refoulement* principle; and (3) to return refugee claimants only to countries that will fairly consider their claims. Given these elements, the legislative purpose of s. 159.3 of the *IRPR* is to share responsibility for fairly considering refugee claims with the United States, in accordance with the principle of

non-refoulement. This purpose reflects a primary goal (sharing responsibility), which is subject to two limits (the *non-refoulement* principle and the requirement for fair consideration). Notably, these two limits do not disclose an expectation that the American asylum claim system mirror the Canadian system in every respect. It is in light of this purpose that the relevant s. 7 deprivations — the risk of discretionary detention and medical isolation, along with the presumed risks of *refoulement* — must be assessed for overbreadth and gross disproportionality.

(b) *Risks of Detention and Medical Isolation*

[140] The appellants argue that the risks of detention and medical isolation are both overbroad and grossly disproportionate. I am not persuaded that either principle of fundamental justice is breached in the circumstances of this case.

[141] With respect to overbreadth, the question is whether the impugned legislation “is so broad in scope that it includes some conduct that bears no relation to its purpose” (*Bedford*, at para. 112 (emphasis deleted)). As this Court has affirmed, a law is overbroad if it overreaches in a single case (paras. 113 and 123; *Ndhlovu*, at para. 78). This analysis is focused not on “whether Parliament has chosen the least restrictive means, but whether the chosen means infringe life, liberty or security of the person in a way that has no connection with the mischief contemplated by the legislature” (*Carter*, at para. 85).

[142] In my view, the risk of detention in the United States, with opportunities for release and review, is related to the legislative objective. Sharing responsibility for refugee claims with another state will necessarily expose returnees to the foreign legal regime that governs refugee claimants' presence in that country. Exposure to foreign legal systems — including their detention practices — necessarily results from achieving the scheme's purpose. Of course, the legislation's responsibility-sharing objective is qualified by the requirement that refugee claimants are to be given fair consideration in the designated country. But whether this requirement is respected does not turn on the extent to which the American asylum system mirrors Canada's system. A degree of difference as between the legal schemes applicable in the two countries can be tolerated, so long as the American system is not fundamentally unfair. Thus, for the appellants to show that the scheme overreaches this limit — such that there is “no connection” at all between the effects of the scheme and the legislative objective, which includes the aim of only returning refugee claimants to countries that will fairly consider their claims (see *Carter*, at para. 85) — the question is whether the American system is fundamentally unfair. In my view, the record does not support the conclusion that the American detention regime is fundamentally unfair.

[143] International legal instruments provide indicia of what it means to treat refugee claimants fairly. For instance, the UNHCR's *Detention Guidelines* recognize that detention of refugee claimants “is neither prohibited under international law *per se*, nor is the right to liberty of person absolute” (*Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to*

Detention (2012), Guideline 4, at para. 18). The *Detention Guidelines* require safeguards in relation to the use of detention. The particular form of these safeguards is a matter of state practice. Here, the appellants did not discharge their burden to show that safeguards are absent in the American asylum system. While the record shows that returnees face a risk of detention in the United States, it also discloses mechanisms that create opportunities for release and provide for review by administrative decision makers and courts. There is no basis to infer that these arrangements are fundamentally unfair. Thus, the risk of detention that returnees face is not overbroad.

[144] Similarly, the use of medical isolation is not fundamentally unfair. Nothing in the record suggests that isolating those awaiting tuberculosis test results is unnecessary to control public health risks in detention facilities. Indeed, the *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, U.N. Doc. A/RES/70/175, December 17, 2015, require that where individuals in detention facilities are suspected of having contagious diseases, measures are taken “providing for the clinical isolation and adequate treatment of those prisoners during the infectious period” (Rule 30(d)). Of course, the *Mandela Rules* also restrict the use of isolation or segregation (see, e.g., Rules 37(d), 43(1), 44 and 45). But the appellants do not point to evidence that would sustain an inference that medical isolation is being used improperly in the American immigration detention system.

[145] It is true that the record includes the affidavits of two lawyers from American advocacy organizations outlining their belief that isolation may be used more

broadly. For instance, the lawyers suggested solitary confinement may be used to deal with claimants facing mental health challenges (Affidavit of Ruby Robinson, at para. 18, reproduced in A.R., vol. XXXIII, at pp. 13884-85) or as a punitive mechanism (Affidavit of Timothy Warden-Hertz at para. 8, reproduced in A.R., vol. XXXIII, at pp. 13807-8). However, there are no findings below on these specific matters. The Federal Court judge did not find that the American immigration detention system imposes isolation on individuals with mental health challenges or that isolation is used punitively.

[146] This Court is appropriately reluctant to assume the mantle of a finder of fact (*Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33, per La Forest J., and at para. 89, per Sopinka J., dissenting, but not on this point). Here, given the limitations of the evidentiary record, it would be imprudent for this Court to make factual determinations about how the United States uses solitary confinement in immigration detention. There is therefore no basis to conclude that American practices are fundamentally unfair. As a result, I am not satisfied that the risk of medical isolation for individuals returned to the United States is an overbroad effect of the Canadian legislation.

[147] With respect to gross disproportionality, the question is whether the impugned legislation's effects on the s. 7 interests are "so grossly disproportionate to its purposes that they cannot rationally be supported" (*Bedford*, at para. 120). This threshold is only met "in extreme cases where the seriousness of the deprivation is

totally out of sync with the objective” and is “entirely outside the norms accepted in our free and democratic society” (*ibid.*). Neither a risk of detention with opportunities for release and review nor a risk of medical isolation meets this high threshold. In Canada, as in the United States, these risks are within the mutually held norms accepted by our free and democratic societies. The appellants have not shown otherwise.

(c) *Risks of Refoulement Due to American Asylum Policies*

[148] Subjecting returnees to real and not speculative risks of *refoulement* would bear no relation to the purpose of the impugned legislation, which has respect for the *non-refoulement* principle at its core. A provision mandating return to a risk of *refoulement* would therefore be overbroad. Similarly, a provision mandating return to a risk of *refoulement* would be grossly disproportionate because doing so would, by definition, expose individuals to risks to their life or freedom (*Refugee Convention*, Article 33), torture (*Convention Against Torture*, Article 3) or other fundamental human rights violations. Scholars have criticized these sorts of mandatory regimes, which require countries to assume “the partner state’s ability and willingness to protect refugees” (see, e.g., Hathaway, at p. 330). However, the impugned legislation in this case does not simply mandate return: there are also related curative provisions that must be factored into the analysis. These provisions include administrative deferrals of removal (*IRPA*, s. 48(2)), temporary resident permits (s. 24), humanitarian and compassionate exemptions (s. 25.1(1)) and public policy exemptions (s. 25.2(1)). I note that while the Federal Court judge did not consider the full range of relevant curative

measures, she properly recognized — in her s. 7 analysis under the headings of “Overbroad” and “Grossly Disproportionate” in her reasons — that safety valves are germane to the assessment of the *Bedford* principles of fundamental justice.

[149] As this Court held in *PHS*, when the impugned legislative scheme contains safety valves, the question is whether these mechanisms — properly interpreted and applied — are sufficient to ensure that no deprivations contrary to the principles of fundamental justice occur (para. 113; see also Moore, at pp. 150-51). Plainly, if no such deprivations materialize, then there is no breach of s. 7. This observation is what, in my view, explains McLachlin C.J.’s statement in *PHS* that “if one were to set out to draft a law that combats drug abuse while respecting *Charter* rights, one might well adopt . . . a prohibition combined with the power to grant exemptions” (para. 114).

[150] The *IRPA*’s curative provisions are, in many key respects, analogous to the safety valve in the *CDSA* upon which the Court relied in *PHS*. For example, s. 25.1 of the *IRPA* is structurally similar to what was then s. 56 of the *CDSA*. Both mechanisms contemplate the exercise of ministerial discretion to grant relief from rules that would otherwise apply. Moreover, they both grant a broad discretionary authority, as they permit exemptions from any of the Act’s provisions (in the case of the *CDSA*) or any of the Act’s applicable criteria or obligations (in the case of the *IRPA*). Exemptions on public policy grounds (*IRPA*, s. 25.2) play a comparable role. Further, administrative deferrals of removal (s. 48(2)) and temporary resident permits (s. 24) also create avenues for discretionary relief, by front-line decision makers rather than the Minister.

[151] When the *IRPA*'s safety valves are activated, claimants can be exempted from return. If they are not returned to the United States, they do not face any risk of *refoulement* from the United States. The safety valves can therefore intervene to cure what might otherwise be unconstitutional effects, as was the case in *PHS*. Moreover, as in *PHS*, they are properly considered as part of the principles of fundamental justice stage of s. 7 because the mechanisms can be exercised in order to address the specific deprivation at issue, in this case the risk of *refoulement*.

[152] The appellants argue that “overbroad and grossly disproportionate effects cannot be cured” by these mechanisms in the *IRPA* (A.F., at para. 67). They say the safety valves are irrelevant because they are “not among the legislative and regulatory provisions implementing the [*Safe Third Country Agreement*] ineligibility” (para. 69). I disagree. This is not a case where the scheme's safety valves are so disconnected from the deprivation that they are irrelevant for determining whether the challenged provision violates s. 7 of the *Charter*. Properly interpreted, the curative mechanisms in the broader statutory scheme are sufficient to ensure that individuals are not subjected to real and not speculative risks of *refoulement*, if such risks do exist. These mechanisms must be understood in light of the discretion that Article 6 of the *Safe Third Country Agreement* preserves for Canada to consider claims when it is in its public interest to do so.

[153] In Article 6, the parties agreed that each of them could examine “any refugee status claim” when it was in their public interest to do so. The United States

has implemented this provision in a manner that leaves room for discretion and consideration of various humanitarian factors (see, e.g., UNHCR, *Monitoring Report: Canada-United States “Safe Third Country” Agreement* (2006), at pp. 63-65). Nothing in the agreement prevented Canada from leaving in place mechanisms that permit a similar approach.

[154] The mere fact that these mechanisms predate the treaty does not make them irrelevant. Indeed, scholars have observed that “[t]he great majority of treaties concluded by Canada are in the nature of state-to-state agreements that do not require amendment of the internal laws of either party” (van Ert, at p. 233). When the agreement was signed, Canadian domestic law already included provisions that could facilitate individualized consideration of claimants’ circumstances when it is in Canada’s public interest to do so. New legislation implementing additional mechanisms was not necessary. Likewise, it is of no consequence that these provisions are found in other, generally applicable parts of the *IRPA*. As I have said, *Charter* analyses must consider all relevant provisions in an interrelated legislative scheme.

[155] The related provisions in the *IRPA* and *IRPR* provide various avenues for refugee claimants to be exempted from return on a temporary or permanent basis. For instance, an officer who is persuaded during an initial interview that a real and not speculative risk of *refoulement* exists could refer the case to Immigration, Refugees and Citizenship Canada for further consideration. That department could then determine whether to recommend that the Minister grant a humanitarian and

compassionate exemption under s. 25.1 of the *IRPA*, including waiving the s. 101(1)(e) ineligibility. Alternatively, the Minister might decide that grounds for granting a temporary resident permit exist, thus providing time for determining whether permanent resident status should be granted on humanitarian and compassionate grounds. These avenues are, of course, not exhaustive. But they suggest that the statutory scheme can limit the risk of harm that the general rule might otherwise occasion.

[156] It is true that Canada has only ever expressly relied on Article 6 to create categorical exceptions (Canada, *A Partnership for Protection: Year One Review* (2006), at p. 37). Nevertheless, Canada has long been aware that Article 6 may permit it to consider the claims of “individuals who would not normally be eligible under an exception but who nevertheless warrant special consideration because of their vulnerability” (UNHCR, *Monitoring Report*, at p. 36; see also *A Partnership for Protection*, at pp. 35-37). I share this reading of Article 6, which must inform the interpretation of the existing exemption mechanisms.

[157] The appellants argue in their factum that the Federal Court judge found these mechanisms to be “illusory” and “largely out of reach” (A.F., at para. 68). The respondents, by contrast, say these mechanisms “exist in law” and the Court of Appeal found that they were available in practice, as the record reflects (R.F., at para. 91). In my view, neither position can be accepted outright.

[158] It is clear that an exemption would be merely “illusory” — and thus incapable of curing constitutional defects — if there were no possibility of accessing it in law. For example, if there is no legal pathway to obtain a statutory exemption, then it is illusory (see *Parker*, at para. 174). It is also insufficient for curative mechanisms to be available in law but unavailable in practice. Empty promises do not safeguard against breaches of constitutionally protected rights. For instance, this Court has recognized that a statute permitting exemptions may nonetheless create barriers to accessing them (see, e.g., *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 60-62, per Dickson C.J., and at pp. 91-100, per Beetz J.). It is open to challengers to argue that legislation unjustifiably breaches s. 7 because the exemption mechanism itself produces difficulties for individuals seeking access to it (*Morgentaler*, at pp. 73-76, per Dickson C.J., and at pp. 122-28, per Beetz J.). This Court has, however, emphasized that the legislation must be the cause of the alleged difficulties in order for *Charter* scrutiny to attach to it (see *Little Sisters*, at para. 128).

[159] It may not always be obvious whether the source of an alleged breach is the legislation or the administrative conduct implementing it (see, e.g., A. M. Latimer and B. L. Berger, “A Plumber with Words: Seeking Constitutional Responsibility and an End to the *Little Sisters* Problem” (2022), 104 *S.C.L.R.* (2d) 143, at pp. 145-46). In applying *Morgentaler* and *Little Sisters*, it is appropriate to look to the broader jurisprudence on the assessment of causation in s. 7 challenges. As is true at every stage of proving a s. 7 violation, challengers bear the evidentiary burden to establish that the legislation causes difficulties for individuals seeking access to curative mechanisms

(*Bedford*, at para. 78). They must therefore show that the legislation causes the exemption to be illusory in their individual circumstances. Challengers need not show that the legislation causes exemptions to be illusory in general, as the s. 7 analysis is not focused on “the percentage of the population that is negatively impacted” (para. 123). When courts conclude that the legislation causes the alleged difficulties, they should explain how this burden is met for each of the relevant curative mechanisms.

[160] It is true that the Federal Court judge wrote that “safeguards . . . are largely out of reach and are therefore ‘illusory’” (para. 130). Nevertheless, as the appellants themselves acknowledged in oral argument before this Court, when that statement is read in context, the Federal Court judge’s immediate focus was on the practical availability of judicial review proceedings. As discussed above, the availability of judicial review is distinct from whether there are statutory safeguards that may function as curative mechanisms or “safety valves”. The Federal Court judge’s reasons in this case do not point to a considered finding that all the relevant curative mechanisms are illusory for any individual. Indeed, she did not assess the relevant curative mechanisms in any substantive way. In my respectful view, this was an error of law reflecting a failure to consider how the relevant legislative provisions might apply to the question at hand — although the Federal Court judge can hardly be blamed for it, as the parties’ arguments before her do not appear to have squarely addressed how these mechanisms might, properly interpreted, be relevant.

[161] Had the full range of relevant curative measures been considered, the Federal Court judge would have recognized that there is insufficient evidence in the record regarding their practical operation. For example, the appellants have identified no evidence that could support a finding that an individual returnee would not have access to these mechanisms. Instead, the record shows that administrative deferrals of removal, temporary resident permits, and humanitarian and compassionate consideration are available. I note, in particular, the circumstances of Ms. Al Nahass's family, who did receive temporary resident permits and permanent residence on humanitarian and compassionate grounds. Thus, the record in this case cannot sustain the conclusion that the applicable curative mechanisms are "illusory". In any event, the Federal Court judge's error of law means that her comment does not bind this Court.

[162] The public interest authority preserved in Article 6 may be exercised on an individualized basis through the *IRPA*'s curative mechanisms. Absent a finding that these mechanisms are illusory or otherwise inadequate to respond to the potential harms, realizing the Article 6 discretion in this manner poses no constitutional defect. It is, of course, also open to the Governor in Council to make regulations respecting the criteria for the application of s. 101(1)(e) ineligibility in order to clarify when the general principle of return should not apply (*IRPA*, s. 102(1)(c)). The Governor in Council has done so in s. 159.6 of the *IRPR*, which exempts individuals subject to the death penalty from return. This exception responds to a marked difference between American and Canadian law. It is thus one example of how sharing responsibility need not require that the two countries agree in every respect. Indeed, Article 6 reflects an

acceptance that each party to the treaty will abide by its own distinctive view of when considering a refugee claim is in its public interest. Further, regulations under s. 102(1)(c) are not the only avenue for specifying circumstances that warrant an Article 6 exception. The Minister may also set out classes for whom public policy dictates that an exception should be established (*IRPA*, s. 25.2). Using the authority under s. 102(1)(c) or 25.2 to clarify the relevant exceptional circumstances may make the process more efficient and predictable.

[163] In sum, even assuming that claimants face real and not speculative risks of *refoulement* from the United States, the Canadian legislative scheme provides safety valves that guard against such risks. For that reason, the legislative scheme implementing the *Safe Third Country Agreement* is not overbroad or grossly disproportionate and therefore accords with the principles of fundamental justice. In light of this conclusion, as well as my conclusions on deprivations related to detention, no breach of s. 7 of the *Charter* has been established.

[164] I recall that the challenge here was advanced against legislation, not administrative conduct. It may be that administrative actors, such as CBSA officers, acted unreasonably or unconstitutionally in their treatment of some returnees or in their interpretation of the legislative scheme, including its safety valves. As noted above, when administrative action or inaction is the cause of the alleged harms, then that conduct is properly the subject of *Charter* scrutiny, not the legislation itself. But these are not issues before this Court on appeal. If administrative malfeasance results in

returning individuals to circumstances that would shock the conscience of Canadians, such as returning individuals to face a real and not speculative risk of *refoulement*, constitutional and administrative remedies remain available. Without saying more, I observe that administrative decisions in this area call for “the most anxious scrutiny” (*R. (Yogathas) v. Secretary of State for the Home Department*, [2002] UKHL 36, [2003] 1 A.C. 920, at paras. 9, 58 and 74, quoting *R. v. Secretary of State for the Home Department, Ex p. Bugdaycay*, [1987] A.C. 514 (H.L.), at p. 531).

D. *Section 1*

[165] Given that the legislative scheme does not violate s. 7, it is not necessary to undertake a s. 1 analysis. However, for the sake of completeness, I provide some brief comments on s. 1 justification for circumstances in which it would be required. In doing so, I highlight the distinct relevance of safety valves in a s. 1 analysis where the burden of justification is on the state.

[166] The appellants argue that while legislative safety valves did not ensure that the legislation accords with the principles of fundamental justice under s. 7, such avenues for discretionary relief may remain relevant in addressing s. 1. However, they submit that the respondents did not file any evidence in support of a s. 1 justification, and they rely on the Federal Court judge’s statement that safeguards are “illusory”.

[167] The respondents argue that had a s. 7 breach been made out, it would be justified under s. 1, in part because of related provisions in the legislative scheme. They

say that the whole of the law serves to advance the pressing and substantial objective of sharing responsibility for refugee status determinations with the United States. Further, they submit that the scheme is minimally impairing of claimants' s. 7 rights and point to the continuous monitoring of the regime under s. 102(3) of the *IRPA* and to the *IRPA*'s safety valves.

[168] Both parties rightly acknowledge that safety valves are relevant at the s. 1 stage, as this Court accepted in *Carter* (paras. 114-21). However, the role these mechanisms play at the s. 1 stage differs from their role at the s. 7 stage as does, of course, the burden that the state bears. This is because s. 7 and s. 1 “ask different questions” insofar as “justification on the basis of an overarching public goal is at the heart of s. 1, but it plays no part in the s. 7 analysis, which is concerned with the narrower question of whether the impugned law infringes individual rights” (*Bedford*, at para. 125). Given this distinction, “a different set of considerations comes into play under section 1: not just the effect of the law on (at least) one person’s section 7 interests, but the effect of the section 7 violation in achieving the law’s policy objectives” (H. Stewart, “*Bedford* and the Structure of Section 7” (2015), 60 *McGill L.J.* 575, at p. 589). When safety valves are at issue, the considerations in play under s. 7 and s. 1 remain distinct.

[169] While discretionary exemption mechanisms are relevant to determining whether impugned legislation breaches individual rights protected by s. 7, they may not be adequate to ensure that no deprivations contrary to the principles of fundamental

justice occur. In other words, they may not succeed in curing all deprivations of individuals' s. 7 interests. For instance, the scope of a safety valve may simply not be wide enough to exempt all individuals inappropriately caught by the general rule.

[170] As is the case throughout the s. 7 analysis, claimants bear the burden to show that legislative safety valves do not remedy individual deprivations. To do so, they may, for example, advance arguments and lead evidence demonstrating that a legislative regime itself causes a statute's curative mechanisms to be practically unavailable. However, at the s. 1 stage, the government bears the burden to show that the safety valves — as a whole — are sufficient to justify any established s. 7 breaches under the test from *R. v. Oakes*, [1986] 1 S.C.R. 103. This Court has left open the “possibility that the government could establish that a s. 7 violation is justified” (*Bedford*, at para. 129).

[171] At the s. 1 stage, the government may argue — as Canada did here — that a scheme's safety valves, if they proved to be imperfect under s. 7, nonetheless render the legislation minimally impairing. Further, the government might seek to rely on safety valves in the final balancing stage of *Oakes*. Nonetheless, given that a s. 7 violation was not established in this case, it is unnecessary to comment on what the outcome of any part of the s. 1 analysis might have been here.

VIII. The Section 15 Claim

A. *The Parties' Positions on the Section 15 Challenge*

[172] In their factum, the appellants asked this Court to remit the matter to the Federal Court. They acknowledge that, in declining to decide their claim under s. 15 of the *Charter*, the Federal Court judge made no findings of fact on which a gender-based discrimination argument might rest. In oral argument, counsel for the appellants advanced the alternative argument that it is open to this Court to make the necessary factual findings to decide the s. 15 issue and noted that the matter was pleaded before the courts below.

[173] The basis of the appellants' s. 15 claim in the Federal Court was that women fearing gender-based persecution are adversely affected by s. 159.3 of the *IRPR*. The appellants submitted, for instance, that the American interpretation of "particular social group" — one of the classes of individuals protected from *refoulement* under Article 33(1) of the *Refugee Convention* — is overly restrictive with respect to women.

[174] The respondents argue that there is no need to remit the matter because the appellants' gender-based concerns are properly addressed within the s. 7 analysis. In the respondents' submission, what primarily drove the s. 15 claim was the decision in *Matter of A-B-*, 27 I. & N. Dec. 316 (A.G. 2018), which was vacated in 2021. They submit that the American system recognizes gender-related harms as a basis for asylum claims and that, on a fair reading of the record, there is no evidence of a s. 15 breach.

B. *The Section 15 Challenge Should Be Remitted to the Federal Court*

[175] The *Supreme Court Act*, R.S.C. 1985, c. S-26, empowers this Court to remand any appeal or part thereof to the court appealed from or the court of original jurisdiction (s. 46.1). This discretion is to be exercised “in the interests of justice” (*Wells v. Newfoundland*, [1999] 3 S.C.R. 199, at para. 68; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543, at para. 45; *R. v. Esseghaier*, 2021 SCC 9, at para. 63). Here, remitting the s. 15 challenge is just in the circumstances.

[176] A court of first instance would have, as a part of its fact-finding mandate, an institutional advantage in making the determinations necessary to a fair treatment of the s. 15 claim. The evidentiary record is voluminous, and while this Court is entitled to make factual findings based upon it, much of the expert affidavit evidence regarding the s. 15 allegations conflicts. For example, the Court would have to evaluate competing expert opinions on a line of cases dealing with the American approach to defining a “particular social group” (see, e.g., Affidavit of Yale-Loehr, at paras. 118-30; Affidavit of Karen Musalo, at paras. 10 et seq., reproduced in A.R., vol. XXI, at pp. 8965 et seq.). To decide the gender-based claim on the merits, this Court would have to assume the mantle of trier of fact and consider potentially conflicting trends in American jurisprudence as an appellate court of final resort.

[177] Appellate courts may — and occasionally are required to — assume the role of finder of fact where doing so is “in the interests of justice and feasible on a practical level” (*Hollis*, at para. 33, per La Forest J.). However, they are “generally, and justifiably, wary” of doing so (*ibid.*), given the many advantages first instance courts

have in drawing factual inferences. These include their “relative expertise with respect to the weighing and assessing of evidence” and their “inimitable familiarity with the often vast quantities of evidence” (*Housen*, at para. 25). Appellate courts should be especially cautious, for example, when a first instance judge has failed to make essential factual findings and where evidence conflicts or is in dispute (*Hollis*, at paras. 89 and 93, per Sopinka J., dissenting, but not on this point).

[178] In my view, this Court is not well placed to make the factual findings necessary to assess the merits of the s. 15 claim. Given the profound seriousness of the matter, the size and complexity of the record and the conflicting affidavit evidence, it would be neither “in the interests of justice” nor “feasible on a practical level” for this Court to take up the task of finder of fact (*Hollis*, at para. 33). Notably, there would be no possibility of appeal with respect to any factual determinations this Court might make on the disputed, conflicting evidence.

[179] Further, it would not be in the interests of justice to dismiss the s. 15 claim for lack of argument. It is true that the appellants did not argue the substance of their s. 15 claim before this Court beyond a brief mention in their factum and a reference in oral argument to their pleadings before the courts below. This Court has sometimes held that the aspects of a claim not argued by an appellant can be considered abandoned and can thus be dismissed (see, e.g., *Meyer v. General Exchange Insurance Corp.*, [1962] S.C.R. 193, at p. 201, per Locke J.). These decisions rightly recognize that appellants are generally expected to provide full arguments for the claims they maintain

before this Court. Yet, I sense it would be inappropriate to interpret the appellants' lack of argument as an abandonment of serious submissions that the courts below commented on so briefly and did not decide. In the specific circumstances of this appeal, it was not unreasonable for the appellants to limit their pleadings to a request for this Court to remit the s. 15 matter. The alternate argument that the matter be decided here was not a considered position. It would have been unrealistic for the appellants to attempt to fill the factual void left by the courts below while simultaneously advancing novel legal arguments, such as those relating to causation and equality rights in the international context.

[180] Finally, I note that certain interveners are troubled by what they see as a judicial "pattern of neglect with respect to section 15" in challenges based on multiple *Charter* rights (I.F., David Asper Centre for Constitutional Rights, West Coast Legal Education and Action Fund Association and Women's Legal Education and Action Fund Inc., at para. 13). One can well understand the concern: claims based on s. 15 are not secondary issues only to be reached after all other issues are considered. The *Charter* should not be treated as if it establishes a hierarchy of rights in which s. 15 occupies a lower tier.

[181] I would not fault the Federal Court judge here for exercising judicial restraint and not deciding the s. 15 claim. I recognize that the principle of judicial policy underlying such restraint is sound, as "[i]t is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which

have not been foreseen” (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97, at para. 9, per Sopinka J.). Even so, these judicial policy considerations are not always determinative. They must be weighed against other factors, such as the possibility of an appeal and fairness to the parties. While the proceeding at first instance remains the “main event” (*Housen*, at para. 13, quoting *Anderson v. Bessemer City*, 470 U.S. 564 (1985), at pp. 574-75), the possibility that further proceedings might require addressing alternative constitutional grounds should be considered. As in this case, when first instance judges decline to consider further constitutional issues, a false economy may arise if appellate courts have to remit claims.

[182] In sum, it is in the interests of justice to send the matter back to the Federal Court for determination, as the Federal Court of Appeal rightly recognized (para. 173). Nothing in these reasons should be taken to decide the factual or legal questions that will be relevant to the s. 15 challenge.

IX. Conclusion

[183] I would answer the questions posed on appeal as follows. First, s. 159.3 of the *IRPR* is not *ultra vires*. Second, s. 159.3 does not breach s. 7 of the *Charter*. Third, the challenge based on s. 15 of the *Charter* should be remitted to the Federal Court.

[184] Because the Federal Court of Appeal allowed the appeal and dismissed the applications for judicial review in their entirety, certain aspects of its judgment should

be set aside. In particular, the Court of Appeal erred in deciding that the challenge to s. 159.3 of the *IRPR* based on s. 15 of the *Charter* should be dismissed rather than remitted to the Federal Court. Accordingly, I would allow the appeal in part. Neither party sought costs. Like the courts below, I would make no order as to costs on the appeal or the application for leave to appeal.

Appeal allowed in part.

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Solicitor for the appellants ABC, DE by her litigation guardian ABC, FG by her litigation guardian ABC, and Nedira Jemal Mustefa: Downtown Legal Services, Toronto.

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Solicitors for the respondents: Department of Justice — Ontario Regional Office, Toronto; Department of Justice — Quebec Regional Office, Montréal.

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Solicitors for the intervener the Canadian Civil Liberties Association: Landings, Toronto; Legal Aid Ontario — Refugee Law Office, Toronto; University of British Columbia Allard School of Law, Vancouver.

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Solicitors for the interveners the National Council of Canadian Muslims and the Canadian Muslim Lawyers Association: Mithoowani Waldman Immigration Law, Toronto; National Council of Canadian Muslims, Ottawa.

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