

IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

BETWEEN:

MANICKAVASAGAM SURESH

Appellant

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE ATTORNEY GENERAL OF CANADA

Respondents

FACTUM OF THE INTERVENER
THE CANADIAN COUNCIL FOR REFUGEES

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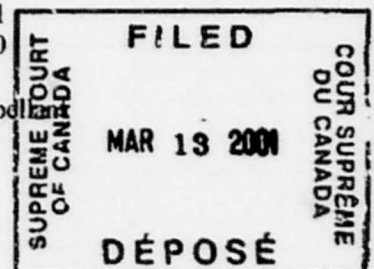
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PART I - STATEMENT OF FACTS

1. The Canadian Council for Refugees is a national, non-profit umbrella organization comprising member agencies working with and on behalf of immigrants and refugees across Canada, whose mission is to ensure that "Refugees, refugee claimants, displaced persons and immigrants have the right to a dignified life and the rights and protections laid out in national and international conventions concerning human rights."
- 10 2. The Intervenor, Canadian Council for Refugees, accepts the facts as set out in the Appellant's Factum.

PART II - POINTS IN ISSUE

3. It is submitted that the term "terrorism" in s.19 of the *Immigration Act* is void for vagueness and violates s.7 of the Canadian Charter of Rights and Freedoms.
4. It is submitted that subsections 19(1)(e)(iv)(C) and S. 19(1)(~~f~~(iii))(B) of the *Immigration Act* are overly broad, and violate the rights of expression and association of non-citizens.

20

PART III - LAW AND ARGUMENT

5. The issues in this appeal will have a significant impact on refugees and non-citizens, including the right of a refugee to access the refugee determination system and of refugees and non-citizens to exercise their rights of freedom of expression and association by taking part in political and humanitarian organizations

A. Section 15 as an Interpretive Lens – Non-Discrimination in Domestic and International Law

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6. Section 3(f) of the *Immigration Act* affirms the government's duty not to subject non-

citizens to standards of admission that discriminate in a manner inconsistent with the *Canadian Charter of Rights and Freedoms*. Apart from sections 3, 6 and 23 of the *Charter*, the rights and freedoms guaranteed in the *Charter* extend equally to citizens and non-citizens alike. This was confirmed in the recent decision of *United States v. Burns and Rafay*. In *Singh*, this Court affirmed that, at a minimum, the *Charter's* protection extended to those who, by virtue of their physical presence in Canada, were subject to Canadian law. While this Court has held that non-citizens do not have an unqualified right to remain in Canada, this does not confer upon the state an unqualified right to remove non-citizens in a manner or for reasons that discriminate against non-citizens contrary to the *Charter*.

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Immigration Act, s. 3(f).

Singh et al. v. Minister of Employment and Immigration, [1985] 1 S.C.R. 177 at 202, Wilson J.

Chiarelli v. Minister of Employment and Immigration, [1992] 1 SCR 711 at 733, Respondent's Authorities, Vol. 3, Tab 34

United States of America. v. Burns and Rafay, 2001 SCC 7 at para. 48.

7. This analysis is consistent with international and regional human rights treaties to which
 20 Canada is a party, which predicate states' human rights obligations toward individuals on universal
 personhood, rather than nationality or legal status; and which enshrine the principles of equality and
 equal protection of the law.

Universal Declaration on Human Rights, [G.A. Res. 217A(III), U.N. GAOR, 3d Sess.,
 Supp. (No. 13), U.N.Doc. A/810 (1948) 71, Preamble and Arts. 2, 7, UNHCR's
 Authorities, Tab 29

Convention Relating to the Status of Refugees, [1969] Can. T.S. No. 6, Respondent's
 Authorities, Vol. I, Tab 2, Art. 3.

30 *International Covenant on Civil and Political Rights*, [1976] Can. T.S. No. 47,
 Respondent's Authorities, Vol. I, Tab 3, Art. 26.

*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or
 Punishment*, [1987] Can. T.S. No. 36, Respondent's Authorities, Vol. I Tab 5, Preamble.

Convention on the Rights of the Child, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp.
 (No. 49), U.N. Doc. A/44/49 (1989) 167, Art. 2.1.

American Declaration of the Rights and Duties of Man Preamble and Art. II. (Adopted by
 the Ninth International Conference of American States, Bogota, Colombia,

1948)OEA/Ser.L.V/II.92 doc.31 rev.3 May 3, 1996 Original:Spanish. Pp. 17-24.

8. The purpose of s.15 of the *Charter* is to ensure equality in the formulation and application of the law, including the *Charter*. This purpose has subsequently been identified as one which underlies all other rights guaranteed by the *Charter* and is, in effect, an interpretive lens through which all *Charter* rights should be viewed.

10 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171 and 185.
New Brunswick (Minister of Health and Community Services) v. G. (J.), [1999] 3 S.C.R. 46 at 99, 101, L'Heureux-Dubé J.

9. The rights guaranteed by subsections 2(b) and (d) and section 7 of the *Charter*, respectively, should be interpreted in a manner which protects and promotes human dignity, an interest which is at the root of section 15. This would be consistent with both a purposive interpretation of the *Charter*, and with the guarantee of equality of section 15.

20 *Hunter et al. v. Southam Inc.*, [1984] 2 S.C.R. 145 at 155-56.
B. (R) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at 367-69.
Law v. Canada (Minister of Human Resources Development), [1999] 1 S.C.R. 497 at 529-531.

B. The Impact of Section 19

10. Section 19(1)(f)(B)(iii) of the *Immigration Act* infringes on the freedoms of expression and association of non-citizens, and creates a situation where refugees are deprived of their right to life,
 30 liberty and security of the person contrary to principles of fundamental justice.

11. Because of section 19, non-citizens can be removed from Canada for participating in the same lawful activities or association in which citizens can participate without repercussions. These activities include those which involve an open exchange of ideas, including political discussions which are seen as being fundamental to a democracy. This constitutes an infringement of their

rights to freedom of speech and expression merely because they are non-citizens.

R. v. Sharpe 2001 SCC 2, at para. 25.

12. Where the non-citizen is a refugee, Section 19 of the *Immigration Act* is the starting point in a chain which leads to a situation where he or she can be *refouled* to a country where he or she fears persecution. This Honourable Court has recognized that *refoulement* of a refugee clearly infringes on the right to life, liberty and security of the person.

Singh v. Minister of Employment and Immigration, supra at 102

10 C. Denial of Access to the Refugee Determination System

13. When Canada became a party to the 1951 *United Nations Convention on the Status of Refugees* (Refugee Convention) in 1969, it relinquished the absolute prerogative to decide whom to admit into the country. Refugees seeking access now had rights that Canada is obligated to take into account.

14. Section 19(1)(f)(iii)(B) makes inadmissible persons who there are reasonable grounds to believe are or were members of an organization which there are reasonable grounds to believe is or was engaged in terrorism, except persons who have satisfied the Minister that their admission
20 would not be detrimental to the national interest. The Act and regulations are silent as to what procedures are to be followed in satisfying the Minister.

Immigration Act, R.S.C. 1986, c.1-2, ss. 19(1)(f)(iii)(B).

15. The Minister then has the discretion to deny access to the refugee determination system to a refugee claimant described in s. 19(1)(f)(iii)(B) if the Minister is of the opinion that it would be against the public interest for the claim to be determined.

Immigration Act, s.46.01(1)(e)(ii).

16. In the case of a claimant who has been able to access the refugee determination system and
30 who has been found to be a Convention refugee, the Minister can exercise her discretion to exempt

the refugee found described in s. 19(1)(f)(iii)(B) from the *non-refoulement* provision by rendering an opinion that person constitutes a danger to the security of Canada.

Immigration Act, s.53(1)(b)

17. With respect to refugee claimants denied access to the refugee determination system because the Minister is of the opinion that a referral would be contrary to the public interest, there is no statutory bar at all to removal to the country where that person has a well-founded fear of persecution. "Public interest" has already been found, in the context of the former criminal bail
10 provisions to be an unconstitutionally vague term. Yet under the *Immigration Act*, a refugee described in s. 19(1)(f)(iii)(B) can be removed from Canada to the country where the refugee fears persecution without ever having a hearing into the merits of his or her case, if the Minister is of the opinion that a referral would be against the public interest.

R. v. Morales, [1992] 3 S.C.R. 711, at 727, 729, 732, Appellant's Authorities, Vol. I, Tab 22

18. For these reasons, s. 19(1)(f)(iii)(B) is a necessary link in a chain which can lead to the *refoulement* of a refugee to a country where he or she has a well-founded fear of persecution, even though it is in s.46.01 and s.53 where the Minister can exercise her discretion to deny a refugee his
20 right against *non-refoulement*. Moreover, it is submitted that because the Minister's discretion in these sections can be used to take away the protection normally provided under the *Immigration Act*, it is a "rights detracting" provision, and administrative decision-makers do not merit deference on determinations infringing *Charter* rights.

United States of America v. Burns, 2001 S.C.C. 7 at para. 54.

Baker v. Canada (MCI), [1999] 2 S.C.R. 817 at 837-40.

s. 19(1)(f)(iii)(b) is unconstitutionally vague

30 19. A law is unconstitutionally vague where it does not provide fair notice to persons of what is

prohibited, making it difficult for them to comply with the law, and does not provide clear standards for those entrusted with enforcement which may lead to arbitrary enforcement. s. 19(1)(f)(iii)(B) is such a law.

Peter Hogg, *Constitutional Law of Canada*, at 44.

20. "Terrorism" is not defined in the *Immigration Act*. There is no universally agreed upon definition of terrorism. The *Convention for the Prevention and Punishment of Terrorism*, proposed by the League of Nations in 1937, defined "terrorism" as "criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or
10 a group of persons or the general public." The more recent recognition of the legitimacy of the right of self-determination has led to debate in the United Nations as to any categorical ban on violence. There has been an increasing recognition of a right of self-defence where a government is oppressive towards a racial, political, ethnic, or religious minority.

S. Aiken, "Manufacturing 'Terrorists': Refugees, National Security and Canadian Law" (2000) 19:3 *Refuge* 54 at 56, 58, 59.

21. Because of this, international conventions have taken a functional approach, prohibiting specific acts. It is therefore important to distinguish between United Nations resolutions which
20 condemn "terrorism" and the actual treaties which may refer to terrorism in their titles, but in their substance are careful not to use an umbrella definition of terrorism, but instead proscribe specific and defined criminal misconduct. Furthermore when specific misconduct is alleged, there is generally a *mens rea* element. Similarly, when acts of "terror" and "violence" are committed in an armed conflict, international humanitarian law furnishes the rules of conduct for both state and non-state actors and distinguishes between permissible and non-permissible use of force. When civilians are targeted, perpetrators are subject to sanctions under humanitarian law, where there also exists a set of well-established defences. In the conventions, the obligations given signatory states are to either prosecute on their territories or to extradite.

30 S. Aiken, "Manufacturing 'Terrorists': Refugees, National Security and Canadian Law" (2000) 19:3 *Refuge* 54 at 56, 58, 59.

Convention on Offences and Certain Other Acts Committed on Board Aircraft, [1987] Can. T.S. No. 36, Respondent's Authorities, Vol. I, Tab 6.

Convention for the Suppression of the Unlawful Seizure of Aircraft, [1972] Can. T.S. No. 23, Respondent's Authorities, Vol. I, Tab 7.

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, [1973] Can. T.S. No. 6. Vol. I, Tab 8.

Convention on the Prevention and Punishment of Crimes against internationally protected persons, including Diplomatic Agents, [1977] Can. T.S. No. 43, Respondent's Authorities, Vol I, Tab 9, Art. 2.

International Convention against the Taking of Hostages, [1986] Can. T.S. No. 45, Respondent's Authorities, Vol. I, Tab 10, Arts. 1, 2.

10 *Convention on the Physical Protection of Nuclear Material*, [1987] Can. T.S. No. 35, Respondent's Authorities, Vol. I, Tab 11, Article 7.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, [1993] Can. T.S. No. 10, Respondent's Authorities, Vol. I, Tab 13, Article 2, 3.

Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, [1993] Can. T.S. No. 9, Respondent's Authorities, Vol. I, Tab 14, Article 3.

20 *Protocol for the Suppression of Unlawful Acts of Violence at Airports serving International Civil Aviation, Supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, done at Montreal on 23 September 1971, [1993] Can. T.S. No. 8, Respondent's Authorities, Vol. I, Tab 15, Article 2.

Convention for the Suppression of Terrorist Bombing, 9 January 1998, GA Res. 52/164, signed by Canada January 12, 1998, Respondent's Authorities, Vol. I, Tab 16, Arts. 2, 5, 15.

Convention for the Suppression of the Financing of Terrorism, 9 December 1999, GA. Res. 54/109, signed by Canada February 10, 2000, Respondent's Authorities, Vol. I, Tab 17, Arts. 2, 5, 6, annex.

22. In the case of extradition, the treaties generally include protective provisions. The
 30 protective provisions provide that persons are not extraditable in circumstances where they were
 alleged to have committed a serious political offence or where extradition would result in prejudice
 to the individual due to his or her race, religion or nationality. Even as the political offence
 exemption has been restricted in the context of extradition, international conventions dealing with
 "terrorist" offences maintain a specific exemption proscribing extradition for persons who would
 face human rights violations due to their civil or political status.

Convention Against the Taking of Hostages, Art. 9(1)(a), Respondent's Authorities, Vol. I, Tab 10.

40 *Convention for the Suppression of Terrorist Bombings*, Art. 12, Respondent's Authorities, Vol I, Tab 16.

Convention for the Suppression of Financing of Terrorism, Art. 12, Respondent's Authorities, Vol. I, Tab 17.

S. Aiken, "Manufacturing "Terrorists": Refugees, National Security and Canadian Law" (2000) 19:3 *Refuge* 54 at 60.

23. It is submitted that the international conventions referred to in the above paragraphs have set out rules about what kind of conduct is not permissible. In the *Immigration Act*, however, there is no definition of "terrorism." The Federal Court has been unwilling to define or limit the term. In 10 *Ahani*, the Federal Court judge, Mr. Justice Denault, said, "In my view, since Parliament has decided not to define these terms, it is not incumbent upon this Court to define it...while...the word is not capable of a legal definition that would be neutral and non-discriminatory in its application, I am still of the opinion that the word must receive an unrestricted interpretation." In *Suresh*, at the trial division, Mr. Justice Teitelbaum took a similar approach: "I am satisfied that there is no need to define the word 'terrorism.' When one sees a 'terrorist act' one is able to define the word." The Federal Court has provided no guidance to Immigration offices to channel their enforcement, nor to Immigration adjudicators who preside over s. 19(1)(f)(iii)(B) inquiries.

Re Suresh, 40 Imm.L.R.(2d) 247 at 260 (F.C.T.D.), Respondent's Authorities, Vol. 3, Tab 21.

20 *Re Ahani*, 42 Imm. L.R.(2d) 219 at 226 (F.C.T.D.).

24. It is submitted that it is a principle of fundamental justice that laws not be too vague. The doctrine of vagueness is founded upon principles of fair notice and of limitation of enforcement discretion. A law which delegates limitless discretion to an official is impermissibly vague. While overbreadth is not a separate doctrine, it is an analytical tool in assessing whether there has been a breach of a Charter right -- that is whether the ambit of the legislation infringes more than necessary on a Charter right, and is especially relevant to considerations under s.1 of the *Charter*.

R. v. Nova Scotia Pharmaceutical [1992] 2 S.C.R. 606, at 626-627, 632-635, 638-640, Appellant's Book of Authorities, Vol. II Tab 24

30 *City of Chicago v. Morales* 110 , S.Ct. 1849 at paras. 32, 33, 47.

25. It is submitted that s. 19(1)(f)(iii)(B) infringes on the freedom of expression and association and does so in a manner which discriminates against non-citizens, including refugees.

26. A non-citizen could be caught by the section in the following ways, which it is submitted, show the overbreadth of the section:

a) A person could be a member of an organization and not be aware that the organization has committed the acts which there have been reasonable grounds to believe are "terrorist."

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b) A person could have been a member of an organization in the past, but left the organization before the acts said to be "terrorist" were committed, or a person could join an organization which has committed an act said to be "terrorist" in the past. Both of these situations are related to the fact that the legislation does not require contemporaneity between the time when the person is or was a member and when the act alleged to be "terrorist" takes place. This becomes even more problematic if "terrorism" is seen as an evolving concept, since it means someone could be found inadmissible if the past acts only later become defined as "terrorist."

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27. In these situations, the non-citizen is liable for removal from Canada although he or she has no *mens rea*. It is submitted that because of the serious repercussions to refugees, in order to comply with the *Canadian Charter of Rights and Freedoms*, a person should never be found described in the s. 19(1)(f)(iii)(B) unless he or she has knowledge of the acts said to be "terrorist."

28. In *Taylor*, this Honourable Court said:

While I would have difficulty defending human rights provisions from a s. 2(b) attack if they exposed a discriminator to imprisonment despite a lack of intent, it must be remembered that Mr. Taylor's jail sentence was the result of a contempt order.

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Canada (H.R.C.) v. Taylor, [1990] S.C.R. 892, at 932, 933

29. The Court went on to indicate that before a contempt order was issued there would be a cease and desist order which would bring home to the person that his or her messages are likely to have a harmful effect. Moreover, the contempt order would only issue after a finding that a person had wilfully violated the cease and desist order. So both knowledge and intent are necessary.

Canada (H.R.C.) v. Taylor, [1990] S.C.R. 892, , at 932, 933

10 .

30. It is submitted that there is no similar safeguard in the Immigration Act to notify a person that they could be in breach, which would prevent a person from being deprived of their life, liberty or security of the person in a situation where they lacked knowledge of the activities said to constitute "terrorism" which makes their membership, past or present, the reason for their removal from Canada. The lack of a similar safeguard unduly chills the freedom of expression and association of non-citizens, including refugees.

31. It is noteworthy that in *Chiarelli v. Canada*, this Honourable Court found there was no
20 breach of fundamental justice in deporting a criminal who was a permanent resident where such a person had *deliberately* violated an essential condition in which they were permitted to stay in Canada. It is submitted that this shows that there needs to be a mental element where a person's life, liberty or security of the person is at risk.

Chiarelli v. Canada [1992] 1 S.C.R. 711 at 734.

32. It is submitted that the degree of connection or involvement a person must have to the organization to be considered a member has not been defined by the Federal Court.

S. Aiken, "Manufacturing "Terrorists": Refugees, National Security and Canadian Law, Part 2" (2001) 19:4 *Refugee* (forthcoming) at 5.

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33. As stated, refugees can be denied access to the refugee determination process itself on the

basis of mere membership. In the refugee determination process, on the contrary, the Federal Court of Appeal, has held that mere membership is not sufficient for exclusion, but that there has to be a personal and knowing involvement in specific human rights abuses. An exception exists in the case of an organization principally directed to a limited brutal purpose, in which case mere membership may necessarily involve personal and knowing participation. The result is that a refugee with a well-founded fear of persecution, who would not be found undeserving of protection under Article 1F of the *Refugee Convention* can be denied access to the very procedure which could protect him or her.

10 *Ramirez v. M.E.I.* [1992] F.C. 306 (C.A); *Moreno v. M.E.I.*, 1 F.C. 298 (C.A), both cited in S. Aiken, "Manufacturing "Terrorists": Refugees, National Security and Canadian Law, Part 2" (2001) 19:4 *Refuge* (forthcoming) at 6.

34. This difference in how membership is treated at the eligibility and refugee determination stages is illustrated in the following two cases: In *Balta*, a refugee exclusion case, Mr. Justice Rothstein found that a soldier in the Serbian Army should not be excluded from the refugee definition on the basis of mere membership. On the other hand in the security case of *Canada v. Iqbal Singh*, Mr. Justice Rothstein held that mere membership was sufficient to bring someone within paragraph 19(1)(f)(iii)(B).

20 *Balta v. M.E.I.* (F.C.T.D.) IMM-2459-94, Jan. 27, 1995
Iqbal Singh v. M.E.I. [1998] 151 F.T.R. 101,

35. In dealing with paragraph 19(1)(f)(iii)(B), the courts have not taken into account that certain organizations may have distinct political wings, which in the reasoning used in the refugee exclusion cases would take them out of the realm of organizations with a limited brutal purpose.

36. It is significant that the UN treaty criminalizing "terrorist" financing prescribes culpability only where there is mental element shown -- people are only culpable when they knew or ought to have known that their activities were supporting the crime. Exclusion in
 30 refugee determination requires a personal and knowing participation. It is submitted that by creating a situation where refugees and non-citizens can be removed from Canada on the basis of

mere membership it violates s.7 of the *Canadian Charter of Rights and Freedoms*.

Convention for the Suppression of the Financing of Terrorism, 9 December 1999, GA. Res. 54/109, Article 2, Respondent's Authorities, Vol. I, Tab 17.

37. It is submitted that s. 19(1)(f)(iii)(B) also infringes on the freedom of expression and association of non-citizens and refugees in that it can lead to their removal in Canada for their advocacy for causes or association with organizations, neither of which is unlawful.

D. Discrimination in Immigration Law, Policy and Practice

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38. The application of subsections 2(b) and (d) and section 7 of the *Charter* to the circumstances of this case must be informed by the pre-existing disadvantage, vulnerability, stereotyping and prejudice experienced by non-citizens and especially refugee claimants, Convention refugees and other persons at risk of human rights violations in their country of origin. Differential treatment that exacerbates an existing prejudicial stereotype is particularly stigmatizing and demeaning of human dignity. In *Andrews*, this Court explicitly affirmed that citizenship is an analogous ground of discrimination under section 15.

Law, supra at 534.

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Andrews, supra at 182-83.

39. Historically, Canada's immigration laws, policies and practices systemically discriminated against would-be immigrants on the basis of race, religion, country of origin, nationality and ethnic background as well as political opinion. During the inter-war period of the 20th century, for example, the federal government used deportation as a means of eliminating political dissent. Anarchists, trade unionists, socialists and Communists were frequent targets. They were accused of provoking social unrest, fomenting international revolution or inciting violence. Throughout the Cold War, the government exercised its coercive capacity to protect citizens from the "threat" of
30 foreigners. National security was an all-purpose justification for the assignment of guilt by association. Racism and moral panic underpinned immigration law, policy and practice and were at

the heart of some of the most shameful episodes in Canadian history.

N. Kelly and M. Trebilcock, *The Making of a Mosaic: The History of Canadian Immigration Policy* (Toronto: University of Toronto Press, 1998) at 107-110, 132-163, 234-247, 260-262 and 274-310.

R. Whitaker, "Refugees: The Security Dimension" (1998) 2:3 *Citizenship Studies*, 413 at 417.

S. Aiken, *supra* at 60-65.

10 40. Although immigration law and policy is no longer characterized by overt racism, systemic racism and discrimination have persisted in Canadian immigration law and policy. Certain groups of non-citizens, particularly racialized persons from poor and conflict ridden societies, continue to be subject to differential security treatment. Those who have been found inadmissible, or have been kept waiting without a decision being made on security-related grounds include significant numbers of Iranians with some association with the Mujahedin-E-Khalq movement, Kurdish people, Sri Lankan Tamils, Sikhs, Algerians and Palestinians. CCR submits that this treatment is a direct result of the extent to which "xenophobic prejudices" and a patchwork of specific biases are brought to bear on security decisions applying the terrorism provisions in the *Immigration Act*.

20 A. Simmons, "Racism and Immigration Policy" in V. Satzewitch ed. *Racism and Social Equality in Canada* (Toronto: Thompson Publishing, 1998) at 91.

Canadian Council for Refugees, *Refugees and Security*, at 1, 10-11 and 12-28.

SIRC Decision Re Suleyman Goven, cited in S.Aiken, *supra* 65, Note 17

SIRC Decision Re Sami Durgun, cited in S.Aiken, *supra* 65, Note 17

R. Whitaker, *supra* at 427.

S. Aiken, *supra* at 55.

E. The Anti-Terrorism Provisions are an Affront to the Dignity of Non-Citizens

30 41. The anti-terrorism provisions are an affront to the dignity of non-citizens, not only because they infringe upon their rights and freedoms guaranteed by subsections 2(b), (d) and section 7 of the *Charter*, but because they do so in a manner that is both differential and discriminatory. The absence of parallel provisions and definitions in the Criminal Code encourage the differential treatment of non-citizens under Canadian law with respect to fundamental rights, rights which must be upheld regardless of an individual's legal status in Canada. Differentiation also exists at the administrative level, in the implementation of the law. To the extent that section 19 of the

Immigration Act permits a finding that one is a terrorist merely because of one's membership in a group, it renders non-citizens impermissibly vulnerable to decision-making based on widespread stereotypes of immigrants as terrorists. In contrast to the circumstances in *Little Sisters*, this risk of arbitrary enforcement is compounded because terrorism is not defined by statute and there are no legally acceptable, objective criteria to guide its application. This risk is further compounded because the decision makers are not independent.

R. v. Parks (1993) 84 C.C.C. (3d) 353 (Ont. C.A.) at 366-72.

R. v. Williams, [1998] 1 S.C.R. 1128 at 1146-1147, 1158-1159.

10 *Little Sisters and Art Emporium v. Canada*, [2000] S.C.J. No.66 at para. 130, 146, 150.
Canadian Council for Refugees, *supra* at 9-10.

42. Further, the overly broad use of the term *membership* has the effect that non-citizens cannot exercise their section 2 freedoms in a meaningful manner. People are caught up in the security net even if their association with the organization did not coincide with the period of violent action of the organization. Refugee claimants and Convention refugees have often sought the protection of Canada because their support, or perceived support for a particular cause or group has put them in danger. In Canada, these same individuals remain in constant fear that their support for such groups and causes may lead to expulsion from the country. Participation in
20 civic life, and opportunities to freely express one's beliefs can be an integral means of facilitating the adaptation and integration of newcomers in Canadian society. The effect of the law is to force non-citizens to choose between exercising their associational and expressive rights in Canada or renouncing them altogether, which is difficult to do when one's family and friends remain at risk under a repressive foreign state. The rights in question are intrinsically related to the identity of the individuals affected.

Canadian Council for Refugees, *supra* at 7 -8, 10.

Corbiere v. Canada (Minister of Indian and Northern Affairs) [1999] 2 S.C.R. 203 at 223-224

30 *Little Sisters*, *supra* at para 144.

F. Terrorism Provisions Exacerbate Existing Disadvantage of Non-Citizens

43. The application of the terrorism provisions to non-citizens exacerbates their already

disadvantaged position in Canadian society. Investigations by CSIS officers have recalled interrogation techniques used against refugees by their persecutors. Further, an investigation can lead to delays in referral to the IRB, in the granting of permanent resident status or resettlement for refugees abroad. Convention refugees in Canada cannot benefit from family reunification, they face discrimination in access to education, employment and financial services and they cannot travel outside the country. Delays in processing for refugees waiting abroad can have very serious consequences in terms of personal safety and security. Of even greater concern is that refugees and other non-citizens may be subject to *refoulement* in circumstances where they are at risk of torture.

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Canadian Council for Refugees, *supra* at 4-8.9

44. Non-citizens who have attracted the scrutiny of CSIS as alleged terrorists or members of terrorist groups experience psychological stress while they wait in a state of limbo, in some cases for more than eight years, with an ever-present fear of being *refouled* to torture and possibly death. CCR submits that these conditions are analogous to the "death row phenomenon" which the Judicial Committee of the Privy Council, the European Court of Human Rights and this Honourable Court have recognized as a factor which weighs in the balance against extradition without assurances. Just as the prospect of subjecting someone under sentence of death to await their fate for many years shocks the conscience, so too should subjecting a non-citizen to a life of deprivation on the margins of society for years while awaiting an equally abhorrent fate. CCR fully appreciates the need for security screening generally but submits that the concepts of *terrorism* and *membership* in the *Immigration Act* have been the basis for discriminatory and inconsistent application of the inadmissibility provisions which have resulted in serious harm to the affected individuals.

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Canadian Council for Refugees, *supra* at 8 and 12-28.

Pratt v. Attorney General for Jamaica, [1993] 4 All E.R. 769 and Eur. Court H.R., *Soering* case, judgment of 7 July 1989, Series A No. 161 as cited in *U.S. v. Burns and Rafay*, *supra* at 94, 118-123.

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45. This differential treatment is discriminatory because it reinforces the stereotypes that

only non-citizens are prone to terrorist activities; and that non-citizens are untrustworthy. The inclusion of terrorism in the *Immigration Act* but not the *Criminal Code* suggests that the participation of citizens in certain groups is benign whereas for non-citizens it is not. CCR submits that the differentiation between non-citizens and citizens in respect of subsections 2(b) and (d) must be predicated on one of two assumptions: either non-citizens are not entitled to the same fundamental freedoms as citizens because of their lack of citizenship status or, alternatively, non-citizens are more likely than citizens to engage in the conduct the government designates as terrorist. CCR submits that the first proposition contradicts the fundamental respect for human dignity that the *Charter* seeks to ensure. The second proposition is not supported by
10 evidence and relies on stereotype and prejudice, which is inimical to section 15 and the *Charter* generally.

G. The Values Underpinning s. 15 Should Form Part of Balancing Under s. 7

46. The values underpinning section 15 should form part of the balancing process engaged under section 7. Although Canadian citizens may be subject to extradition, this Court has recently held that citizens and non-citizens alike should not be extradited in circumstances where the death penalty could be imposed. CCR submits that it is not in accordance with the principles of fundamental justice to proscribe extradition based on the punishment or treatment reasonably
20 anticipated to await a fugitive but to rely on an unrestricted application of counter-terrorism and national security measures to permit the deportation of a non-citizen to a country where he or she is a risk of torture.

United States of America v. Burns and Rafay, supra at paras. 4-48, 57, 82-84, 124.

47. Extradition normally proceeds on the basis of specific treaties between states and in cases where the requesting state may not share our constitutional values, upon reliable assurances with regard to the treatment to be accorded to the fugitive. Unlike the extradition context, deportation is not contingent on the existence of such bilateral treaties. In situations where the person to be
30 deported is a Convention refugee, any "assurances" proffered would be from states which have been determined incapable of protecting individuals and groups from violations to fundamental

human rights. Such "assurances" are unreliable. Furthermore, it is not reasonable to accept an "assurance" from a state which either practices or tolerates torture, since by so doing, it has placed itself beyond the parameters of conduct that is acceptable by the international community. CCR submits that in the specific circumstances of a Convention refugee such as the Appellant, any assurances offered by the government of Sri Lanka should not be relied upon.

U.S. Department of State, *Country Reports on Human Rights Practices - 2000, Sri Lanka* at 7 as cited in S. Aiken, "Manufacturing "Terrorists": Refugees, National Security and Canadian Law - Part 2", forthcoming (2001) 19:4 *Refugee* at 13-14.

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48. It is submitted that s.19 violates subsections 2(b) and (d) and section 7 of the *Charter*, and that in an attempt to address security concerns, it goes beyond minimal impairment of those rights, and exceeds the range of reasonable solutions to the problem, going beyond what could be a reasonable impairment under s.1 of the *Charter*, as re-stated by this Honourable Court in *Sharpe*. By creating a broad class of inadmissibility which sweeps in persons whose "membership" may not even be contemporaneous with the "terrorist" acts alleged, by including those who may not even be aware of the commission of those acts, that those acts might be said to constitute "terrorism" or that they might even be considered to be "members", the legislation
20 infringes on the freedom of association and expression of non-citizens and exposes refugees to a risk of persecution in their home countries in a way lacking any rational connection to the object of the legislation, and unconstitutionally extends the reach of the statute.

R. v. Sharpe, supra at para 98-100.

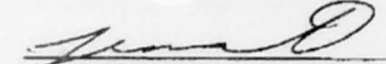
Part IV Nature of the Order Requested

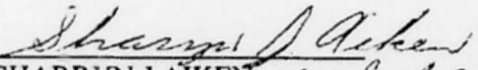
49. The Intervener requests that the appeal be allowed.

50. In the alternative, should the appeal be dismissed, the Intervener asks this Honourable
30 Court to order a stay of deportation pending determination of any petition the appellant might make to the United Nations Committee against Torture established under the *Convention against Torture*.

All of Which is Respectfully Submitted,

Dated at the City of Toronto, in the Province of Ontario, this 12th day of March, 2001.


JACK MARTIN

10 
SHARRYN J. AIKEN *per Jack Martin*

Of Counsel for the Intervener
Canadian Council for Refugees

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