SCC File No. 41210

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUEBEC)

B E T W E E N:

ATTORNEY GENERAL OF QUEBEC

Appellant

- and -

BIJOU CIBUABUA KANYINDA and

COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE

Respondents

- and -

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. At the heart of this appeal is the capacity of s. 15 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") to respond to discrimination against noncitizen migrants, including refugee claimants.[1] Discrimination based on citizenship or immigration status is an unfortunate fact in Canadian society.[2] The FCJ Refugee Centre and the Madhu Verma Migrant Justice Centre (together, the "FCJ and Madhu Centres") intervene to support an interpretation of s. 15 that meaningfully protects noncitizen migrants' substantive equality.

2. The decision under appeal concerns, among other things, the constitutionality of s. 3 of Quebec's *Reduced Contribution Regulation* ("*RCR*"), which excludes refugee claimants from subsidized childcare.[3] The Court of Appeal found this denial of childcare subsidies a form of adverse effects discrimination that disproportionately restricts refugee claimant women's access to employment opportunities, contrary to s. 15 of the *Charter*. It declined to rule on whether the impugned provision is discriminatory on the basis of either citizenship or immigration status. The FCJ and Madhu Centres urge this Honourable Court to examine the disadvantaging effects of s. 3 on refugee claimant women by also taking into account the direct distinction that s. 3 draws based on citizenship and immigration status.

3. The Superior Court of Quebec found s. 3 does not differentiate on the ground of citizenship status because it extends childcare subsidies to not only Canadian citizens but also seven categories of noncitizens. It also ruled that insofar as s. 3 treats refugee claimants differently based on their immigration status, such a characteristic is not an analogous ground under s. 15. The narrow reading of what constitutes a citizenship-based distinction, combined with the rejection of immigration status as an analogous ground, significantly limits the capacity of s. 15 to combat laws (or state conducts) which discriminate against a subset of noncitizen migrants.

4. The current appeal presents an opportunity for this Court to affirm noncitizen migrants' equality rights, thereby ensuring substantive equality and Canada's fulfilment of its international

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[1] *Canadian Charter of Rights and Freedoms*, s. 15, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), c 11.
[2] Donald Galloway, "Immigration, Xenophobia and Equality Rights" (2019) 42:1 Dal LJ 17 at 20 [**Galloway**].
[3] *Reduced Contribution Regulation*, CQLR, c. S 4.1.1, r. 1, s. 3.

legal obligations. The FCJ and Madhu Centres submit that when laws target some categories of noncitizen migrants for lesser treatment, they create a distinction based on both citizenship and immigration status, thus meeting the first step of the s. 15(1) analysis. By allowing *Charter* equality claims against such laws to proceed to the second step of the s. 15(1) inquiry, the historical and ongoing disadvantage facing noncitizen migrants can feature more prominently in the examination of the effects of the impugned legal distinction.

PART II – ISSUES AND THE INTERVENER'S POSITION

5. The intervention of the FCJ and Madhu Centres focuses on the compliance of s. 3 of the *RCR* with s. 15 of the *Charter*. Respecting the first step of the s. 15(1) analysis, the FCJ and Madhu Centres submit that excluding refugee claimants from a benefit generally available to others creates a distinction based on citizenship status, as well as immigration status, which constitutes an analogous ground. At the second stage of the s. 15(1) analysis, it is submitted that to fully appreciate the effects of the legal distinction in this case, consideration of noncitizen migrants' pre-existing disadvantage and their integration needs is required.

PART III – ARGUMENT

A. Substantive equality requires s. 15 of the *Charter* to provide adequate safeguard against discrimination based on citizenship or immigration status

6. The historical and ongoing disadvantage facing noncitizen migrants has been recognized by this Court. Cognizant of noncitizens' relative lack of political power, Justice Wilson in *Andrews* found them "vulnerable to having their interests overlooked and their right to equal concern and respect violated."[4] In the same case, Justice La Forest observed the intersectional nature of the disadvantage facing noncitizen migrants, noting that "[d]iscrimination on the basis of nationality has from early times been an inseparable companion of discrimination on the basis of race and national or ethnic origin."[5] Such recognition of noncitizen migrants' disadvantage led this Court to accept citizenship status as an analogous ground under s. 15 of the *Charter*.[6]

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[4] *Andrews v Law Society of British Columbia*, 1989 CanLII 2 (SCC) at 152 [***Andrews***].
[5] *Andrews* at 195.
[6] *Andrews* at 152.

7. However, *Charter* equality jurisprudence following *Andrews* has been criticized by legal scholars for failing to adequately protect noncitizen migrants from discrimination based on one's citizenship or immigration status.[7] One criticism concerns the seeming inability of s. 15 to scrutinize laws that disadvantage some, but not all, noncitizen migrants. As Professor Donald Galloway explains, "[b]y ill-treating non-citizens in such a fragmented and possibly arbitrary way the government may be able to show its disdain for non-citizens as a whole."[8]

8. When faced with laws that target or disproportionately affect a subset of noncitizen migrants, multiple courts have found the legal distinction at issue based not on citizenship but on immigration status, which they in turn (although not always) reject as an analogous ground.[9] The holding of the Superior Court in the present case offers a case in point. As a result, *Charter* equality challenges to laws that differentiate among noncitizen migrants regularly fail at the first step of the s. 15 test, leaving any discriminatory effect of the impugned laws underexamined.

9. This restrictive interpretation of s. 15 undermines substantive equality. It bears repeating that noncitizen migrants have been recognized by this Court as a disadvantaged group. Substantive equality in this context calls for a s. 15 analysis that is attuned to the "persistent systemic disadvantages [that] have operated to limit the opportunities available" to noncitizen migrants, and "seeks to prevent conduct that perpetuates those disadvantages."[10] Dismissing claims of partial discrimination against noncitizen migrants for failing to establish a distinction based on an enumerated or analogous ground turns the first step of the s. 15 inquiry into a technical exercise. It belies the "profound commitment" of the *Charter*'s equality guarantee to "prevent

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[7] See e.g., Catherine Dauvergne, "How the *Charter* Has Failed Non-citizens in Canada: Reviewing Thirty Years of Supreme Court of Canada Jurisprudence" (2013) 58:3 McGill LJ 663 at 682-83, 698-99; Galloway at 23; Y.Y. Brandon Chen, "The Future of Precarious Status Migrants' Right to Health Care in Canada" (2017) 54:3 Alta L Rev 649 at 656-59 [**Chen**].

[8] Galloway at 43.

[9] See e.g. *Brink v Canada*, 2024 FCA 43; *Li v British Columbia*, 2021 BCCA 256 [***Li***]; *Toussaint v Canada (AG)*, 2011 FCA 213, aff'g 2010 FC 810 [***Toussaint FCA***]; *Irshad (Litigation Guardian of) v Ontario (Minister of Health)*, 2001 CanLII 24155 (ON CA); *Clarken v Ontario Health Insurance Plan*, (1998) CarswellOnt 1925 (Book of Authorities of the Apellant, TAB 1). For case law that recognizes immigration status as an analogous ground, see e.g. *Jaballah (Re)*, 2006 FC 115; *R v Church of Scientology of Toronto*, 1997 CanLII 16226 (ON CA).

[10] *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at para 17.

discrimination against disadvantaged groups."[11]

10. Substantive equality, reinforced by the remedial purpose of s. 15, demands a robust protection against discrimination based on citizenship or immigration status. This entails a less formalistic interpretation of what constitutes citizenship-based distinction, as well as the recognition of immigration status as an analogous ground.

B. Citizenship-based distinction under s. 15 includes differentiation between Canadian citizens and a subset of noncitizens, as well as differentiation among noncitizens

11. Section 3 of the *RCR* excludes refugee claimants from childcare subsidies that are available to other Quebec residents, including those who are Canadian citizens, permanent residents, and holders of certain temporary resident statuses. From refugee claimants' perspective, they have been treated differently from Canadian citizens, as well as from other noncitizens. Both forms of differential treatment constitute a distinction based on citizenship status.

12. This Court has repeatedly held that "differential treatment can occur on the basis of an enumerated ground despite the fact that not all persons belonging to the relevant group are equally mistreated."[12] The lesser treatment of refugee claimants, a subset of noncitizens, relative to Canadian citizens is therefore not negated by other noncitizens' eligibility for the sought-after benefit. The same reasoning underpins the decision in *Haseeb*. When faced with a hiring policy that favoured Canadian citizens over all noncitizens except permanent residents, the Ontario Court of Appeal found it reasonable for a tribunal to rule such policy discriminatory on the basis of citizenship under Ontario's human rights legislation.[13]

13. The conclusion that s. 3 of the *RCR* draws a citizenship-based distinction holds true notwithstanding the appellant's observation that some Canadian citizens, namely those who are not Quebec residents, are also denied childcare subsidies. Residency is a separate eligibility requirement that must be met by everyone applying for subsidized childcare in Quebec, irrespective of their citizenship or immigration status. It is irrelevant to the citizenship-based claim at hand. This principle was implied in *Andrews*. The impugned provision there was found to have

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[11] *Fraser v Canada (AG)*, 2020 SCC 28 at para 27 [***Fraser***].
[12] *Fraser* at para 75.
[13] *Imperial Oil Ltd v Haseeb*, 2023 ONCA 364.

created a citizenship-based distinction even though it also refused some Canadian citizens' admission to the British Columbia bar, such as those deemed not a person of good character.

14. Moreover, comparing the treatment of refugee claimants with that of other noncitizens is sufficient to ground a s. 15 claim based on citizenship status. In *Martin*, this Court held that differentiation among persons living with various types of disabilities amounted to a disability-based distinction under s. 15.[14] In reaching this conclusion, this Court considered differential treatment on the basis of other enumerated grounds and reasoned:

> For instance, there could be no doubt that a legislative distinction favouring persons of Asian origin over those of African origin would be "based on" race, ethnic origin or colour, or that a law imposing a disadvantage on Buddhists relative to Muslim would draw a distinction "based on" religion. It would be no answer for the legislator to say there is no discrimination because both persons born in Asia and persons born in Africa have a non-Canadian national origin, or that Muslims, like Buddhists, belong to a minority religion in Canada.[15]

15. The same reasoning applies here: distinctions among different types of noncitizens are distinctions based on citizenship.

C. Immigration status constitutes an analogous ground under s. 15

16. Differential treatment under s. 3 of the *RCR* between refugee claimants and other groups of noncitizen migrants also creates a distinction based on immigration status. Although no formal definition exists, immigration status generally denotes the various administrative categories used by the government to classify noncitizen migrants based on factors like how they arrived in the country, and the purpose and nature of their migration. Immigration status qualifies as an analogous ground under s. 15 of the *Charter* given the historical and ongoing disadvantage facing noncitizen migrants, its constructive immutability, and its recognition under international law as a prohibited ground of discrimination.

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[14] *Nova Scotia (Workers' Compensation Board) v Martin; Nova Scotia (Workers' Compensation Board) v Laseur,* 2003 SCC 54 [***Martin***].
[15] *Martin* at para 80.

i. Migrants experience historical and continuing disadvantage

17. As this Court observed in *Corbiere*, analogous grounds "often serve as the basis for stereotypical decisions" made without regard to one's merit.[16] Justices Kasirer and Jamal in *Dickson* similarly highlighted the "historical and continuing disadvantage" of individuals delineated by analogous grounds as a reason why these grounds represent "constant markers of suspect decision making or potential discrimination."[17] On these bases, immigration status constitutes an analogous ground.

18. This Court's finding in *Andrews* concerning noncitizens' historical and ongoing disadvantage applies equally to all migrants. They are "relatively powerless politically," and they have long experienced intersectional discrimination.[18]

19. Relative to permanent residents, migrants with various temporary resident statuses or no status at all are further disadvantaged by the conditionality associated with their life in Canada. For example, refugee claimants experience considerable distress relating to "the duration of the asylum process and the uncertainty for the future."[19] Temporary migrant workers, frequently made to rely on "the goodwill of their employers to keep returning to, or residing in, Canada or to successfully transition into permanent residents," face heightened risk of exploitation at work.[20] Migrants without legal status ("undocumented migrants") live with "a constant feeling of fear, and mistrust towards public institutions," and are often relegated to working in difficult, dirty and dangerous environments.[21]

20. The disadvantage of migrants is aggravated by longstanding stereotypes that mark them as undesirable: "stereotypes that have their origins in racism, fear of 'others', fear of economic

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[16] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at para 13 [***Corbiere***].
[17] *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 at para 198.
[18] *Andrews* at 195.
[19] Nicola Dolan & Catherine Sherlock, "Family Support through Childcare Services: Meeting the Needs of Asylum-seeking and Refugee Families" (2010) 16:2 Childcare in Practice 147 at 162 (Dossier de l'appelant, vol. 7, p. 17).
[20] Chen at 654.
[21] Jill Hanley et al, "Pregnant and Undocumented: Taking Work into Account as a Social Determinant of Health" (2020) (submitted draft to International Journal of Migration, Health and Social Care) 1 at 9 [**Hanley et al**] (Dossier de l'appelant, vol. 7, p. 194).

competition, and more recently, fear of criminality and terrorism."[22] With respect to refugee claimants specifically, the Federal Court in *Canadian Doctors* acknowledged that, depending on where they are from, they may be stereotyped as "queue-jumpers, 'bogus' claimants and cheats who are only here to take advantage of Canada's social benefits and its generosity."[23]

21. Such disadvantage, prejudice and stereotype undergird the qualification of immigration status as an analogous ground.

ii. Immigration status is constructively immutable

22. *Corbiere* further described analogous grounds as characteristics that are either actually or constructively immutable.[24] Constructive immutability refers to, among others, characteristics which are changeable in theory, but "there are, in reality, a number of factors that may place the decision [to change] out of [a person's] control."[25] Immigration status is immutable in this sense.

23. It is impossible for migrants to change their immigration status unilaterally. Successful status change always requires the government's approval. At the policy level, the government exercises significant control over the accessibility of the various immigration programs, by setting eligibility requirements and the number of applications it invites. In recent decades, Canada has systematically admitted a larger number of migrants through one of its temporary, rather than permanent, residence programs.[26] Whether or not a temporary residence program affords migrants a pathway to permanent residency is completely determined by the government. Consequently, immigration status is often difficult to change, especially for temporary residents looking to obtain permanent resident status.

24. Some lower courts have rejected immigration status as an analogous ground on the basis that it is not "changeable only at unacceptable cost to personal identity."[27] In cases involving undocumented migrants, courts have reached the same conclusion by also finding immigration status a characteristic that the government has "legitimate interest in expecting [the person] to

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[22] *Canadian Doctors for Refugee Care v Canada (AG)*, 2014 FC 651 at para 838 [***Canadian Doctors***].
[23] *Canadian Doctors* at para 837.
[24] *Corbiere* at para 13.
[25] *Quebec (AG) v A*, 2013 SCC 5 at para 316 [***Quebec v A***].
[26] Chen at 652-55.
[27] See e.g. *Li* at para 152.

change."[28] We respectfully disagree with these decisions on both factual and doctrinal grounds.

25. Factually, we submit that certain immigration statuses indeed cannot be changed without unacceptable cost to personal identity. The process of regularizing undocumented migrants' status is illustrative. Undocumented migrants, including unsuccessful refugee claimants, often make considerable effort to integrate into Canadian society despite the challenges they face. They take on jobs that are essential but undesirable to many Canadians, including housekeeping, nannying, and caregiving for older adults or persons with disabilities.[29] They also form social connections and build families in Canada.[30] Such employment and social ties are critical to a person's identity.[31] However, these aspects of undocumented migrants' identity may be jeopardized when they try to regularize their immigration status. By coming forward to immigration authorities, they are exposed to risks of removal from Canada, which threaten to tear them away from the relationships and responsibilities that have come to define who they are.

26. Doctrinally, limiting constructive immutability to characteristics that are changeable only at unacceptable cost to one's identity, or that the government lacks legitimate interest in expecting individuals to change, is at odds with substantive equality. In both cases, the analysis centres on the perceived significance of a characteristic, to either the equality claimants or the government, rather than how disadvantage is structurally created and perpetuated based on the characteristic.[32]

27. Immigration status, as a system of classification created for administrative purposes, may implicate some migrants' identity as demonstrated above, but it may not for others. In the latter scenario, dismissing immigration status as an analogous ground for misalignment with migrants' personal identity obscures the very essence of these migrants' equality claim: they are treated less favourably based on a status that is unrelated to their identity, rather than on their "actual needs,

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[28] See e.g. *Toussaint FCA* at para 99.
[29] Hanley et al at 2, 5 (Dossier de l'appelant, vol 7, pp. 188, 191).
[30] Hanley et al at 8-9 (Dossier de l'appelant, vol 7, pp. 194-95).
[31] See e.g. *Lavoie v Canada*, 2002 SCC 23 ("employment is a fundamental aspect of an individual's life and an essential component of identity, personal dignity, self-worth and emotional well-being" at para 13); *New Brunswick (Minister of Health and Community Services) v G(J)*, 1999 CanLII 653 (SCC) ("an individual's status as a parent is often fundamental to personal identity" at para 61).
[32] Jessica Eisen, "Grounding Equality in Social Relations: Suspect Classification, Analogous Grounds and Relational Theory" (2017) 42:2 Queen's LJ 41 at 83-84.

capacity, or circumstances."[33] Rejecting immigration status as an analogous ground for being a characteristic that the government has legitimate interest in expecting people to change suffers from a similar defect. It prioritizes the government's expectation over considerations of structural barriers, including those embedded in the immigration system, which constrain migrants' capacity to change their legal status.

iii. Immigration status is a prohibited ground of discrimination under international law

28. The recognition of immigration status as an analogous ground is further supported by Canada's international legal obligations. The *International Convention on the Elimination of All Forms of Racial Discrimination*, to which Canada is a party, has been interpreted as imposing a prohibition against discrimination on the basis of "citizenship or immigration status."[34] The UN Human Rights Committee, in a case concerning Canada's denial of life-saving health care to undocumented migrants, has likewise held that discrimination based on immigration status violates the right to non-discrimination enshrined in the *International Covenant on Civil and Political Rights*.[35] The *Charter* is presumed to provide a level of protection that is as great as afforded by these provisions in international human rights law.[36]

D. Denial of childcare subsidies perpetuates noncitizen migrants' disadvantage

29. Closer scrutiny of legal distinctions involving a subset of noncitizen migrants at the first step of the s. 15(1) analysis, based on citizenship and immigration status, will not require courts to find discrimination in all such cases. It will, however, open the door for the effects of these legal distinctions on noncitizen migrants' pre-existing, and often intersectional, disadvantage to be assessed under the second step of the s. 15(1) inquiry. *Fraser* affirmed that substantive equality demands "attention to the 'full context of the claimant group's situation'."[37]

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[33] *Law v Canada (Minister of Employment and Immigration)*, 1999 CanLII 675 (SCC) at para 70 [***Law***].
[34] UNCERD, *General Recommendation 30: Discrimination against Non-citizens*, 64th session, UN Doc CERD/C/64/Misc.11/rev.3 (2004) at para 4.
[35] UNHRC, *Views adopted by the Committee under article 5(2) of the Optional Protocol, concerning communication No. 2348/2014 (Nell Toussaint v Canada*), UN Doc CCPR/C/123/D/2348/2014 (30 August 2018) at para 11.8.
[36] See e.g. *Quebec (AG) v 9147-0732 Québec inc*, 2020 SCC 32 at para 31.
[37] *Fraser* at para 42.

30. The gendered impact of s. 3 of the *RCR* found by the Court of Appeal must be situated within the historical and ongoing disadvantage facing noncitizen migrants, as well as the broader context of international migration and integration. The Court of Appeal found that s. 3 reinforces and perpetuates the historical disadvantage experienced by women who wish to participate in the labour market. For migrant women, including those who are refugee claimants, government-instituted impediment to accessing the labour market also exacerbates work-related disadvantages long facing noncitizens in Canada. As Justice La Forest observed in *Andrews*, historically, "provincial legislation [that] aimed at reducing the opportunities available to aliens in the workplace" had been a common occurrence.[38] The adverse effect of s. 3 on refugee claimant women's access to work "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it."[39]

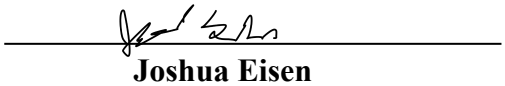
31. For noncitizen migrants, the significance of employment extends beyond financial gains. Work is an important setting for them to hone official language skills, make social connections, and develop a sense of belonging to their new home.[40] In this way, workplace constitutes a "fundamental social institution" for migrants.[41] Such recognition accentuates the severity of the disadvantaging effects of s. 3 of the *RCR* on refugee claimant women, which in turn underscores the critical need for s. 15 of the *Charter* to safeguard noncitizen migrants against these effects.

PARTS IV AND V – SUBMISSIONS ON COSTS AND ORDER SOUGHT

32. The FCJ and Madhu Centres take no position on the outcome of this appeal. The FCJ and Madhu Centres do not seek costs and ask that no cost orders be made against them.

ALL OF WHICH IS RESPECFULLY SUBMITTED this 24th day of April, 2025.

Yin Yuan Chen



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[38] *Andrews* at 195.
[39] *Quebec v A* at para 332.
[40] Jill Hanley, *The Labour Implications of the Exclusion of Refugee Claimants from Quebec's Subsidized Childcare Program*, expert report, paras 50-57 (Dossier de l'appelant, vol. 2, pp. 84-87).
[41] *Law* at para 74.

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