



THE CHARTER CHALLENGE

Ontario Justice Education Network

CASE SCENARIO Spring 2012

BENITA SUAREZ

v.

CANADA
(CITIZENSHIP AND IMMIGRATION)

This OJEN Charter Challenge Case Scenario has been adapted from the Official Problem used at the 2012 Wilson Moot. The Wilson Moot was conceived to honour the outstanding contribution to Canadian law made by the late Honourable Bertha Wilson and, in the spirit of this contribution, to promote justice for those disempowered within the legal system. The goal of The Wilson Moot is to explore legal issues concerning women and minorities, and thereby promote the education of students and the legal profession in these areas of pressing concern. OJEN would like to thank the organizers of the Wilson Moot for letting it adapt this law school resource for a high school audience.

Federal Court

Date: 20141015
Docket: IMM-4520-13
Citation: 2014 FC 119

BETWEEN:

BENITA SUAREZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER

ANDERS J.

Introduction

1. On August 5, 2012, the Applicant, sixteen-year-old Benita Suarez fled her home country of Espadrole. Believing her entire immediate family to be dead and fearing for her own life, she travelled by land and by water eventually arriving in Vancouver, British Columbia, on a fishing boat with thirty-six other people hoping to make refugee claims for protection.

2. The Minister designated the group's arrival as "irregular" under s. 20.1(1) of the *Immigration and Refugee Protection Act* ("IRPA"). The Minister of Citizenship and Immigration (the "Minister") concluded that there were reasonable grounds to suspect that there had been a contravention of s. 117(1) of IRPA, in that the boat trip taken by Benita to Canada was organized by human smugglers.

3. Given the Minister's designation, and her lack of identification, Benita became a "designated foreign national" and was held in detention. During her detention, Benita learned

that her mother, whom she assumed dead, was actually alive. Badly hurt by the attack which had taken the lives of all of her other family members, Benita's mother lay in a coma in a hospital in the United States and doctors feared that she did not have long to live.

4. With the assistance of a pro bono lawyer, Benita sought an order from the Minister releasing her so that she could visit her mother before her death. Her request was denied on the basis that she was a designated foreign national and the Minister was concerned that she had not provided valid identification and was at risk of not returning to custody if her refugee claim was denied.

5. Benita was eventually released 18 months later and was granted refugee status. Unfortunately, by this time, her mother had already passed away.

6. Benita brings this application for judicial review of the Minister's decision and seeking an order declaring that the new mandatory detention scheme for designated foreign nationals in *IRPA* violates sections 7, 9, and 15 of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). For the reasons that follow, I do not find that the legislative scheme violates either section 7 or section 15 of the *Charter*; however I do find that the scheme is in violation of section 9 of the *Charter*, and is not a justifiable limit under section 1.

The Facts

7. Espadrole is a totalitarian military state with a very poor human rights record. The citizens of the country are not permitted to travel outside its borders, and the government does not issue identification or travel documents to its citizens.

8. Benita's father was a prominent journalist in Espadrole and her mother was a community activist. In July of 2012, Benita's father published an article condemning the military leader of Espadrole for various human rights abuses, and calling for free and fair elections by 2013.

9. On August 5, 2012, soldiers arrived at Benita's home in the capital city of Espadrole, where they murdered her father and two younger brothers. Benita discovered their bodies when she returned home later that night. The family home had been ransacked, and her mother was missing. Neighbours recounted to Benita what had happened, indicating that the soldiers had declared before leaving the house that they were going to make "an example" of Benita's family, to warn others against speaking out against the government. Her neighbours did not know what had happened to her mother, but someone resembling her mother, was taken from the house in what appeared to be a dead or unconscious state. Fearing for her life, Benita fled the capital city with some money that her family kept hidden in the house.

10. Benita made her way, on foot, to a small coastal town in Espadrole, where she made contact with a man who planned to take a boat to Canada. The man agreed to take the money which Benita had salvaged from her house in exchange for passage on his vessel. Two days later, Benita boarded a fishing vessel with 38 others, all of whom were Espadrolean nationals. Two of the passengers died en route. The boat landed in Vancouver, British Columbia, on September 16, 2012, and all passengers were detained by the port authority and interviewed by immigration officials.

11. Benita told the immigration officials that she could not return to Espadrole because she feared for her life. As her country issued neither identification nor travel documents, Benita had no way of proving to immigration officials her identity or nationality. She, along with all other passengers on the fishing boat were determined to be "designated foreign nationals" pursuant to the new *IRPA* amendments. Benita made a refugee claim on September 17, 2012, but was detained in custody, pursuant to the aforementioned *IRPA* amendments.

12. Not knowing what happened to her mother caused Benita particular strife. The pro bono lawyer who assisted her with her refugee claim offered to search online for any news about the current situation in Espadrole and reports about her family's death. On January 17, 2013, Benita's lawyer discovered a news story, published in the United States, about a middle-aged woman, believed to be a citizen of Espadrole, who fled the country after escaping captivity by the military government. The article went on to describe that she was a community activist and

wife of a prominent journalist who was murdered for speaking out against the government.

While held in captivity, the woman was tortured, but managed to escape; with the assistance of family friends, she fled to the United States hoping to claim refugee status. The article stated that not long after she arrived in the United States and before her refugee claim could be processed, the woman fell into a coma, which doctors believed stemmed from injuries sustained prior to her US arrival.

13. With the help of her lawyer, and the small but active Espadolean community in Canada, Benita raised enough money to allow her to travel to the United States, provided that she could be released from detention and granted travel documents. Her lawyer sought an order from the Minister releasing her so that she could visit her mother before her death. Her request was denied on the basis that she was a designated foreign national and the Minister was concerned that she had not provided valid identification and was at risk of not returning to custody if her refugee claim was denied.

14. Benita remained in custody for 18 months. Unfortunately, her mother passed away in the hospital on December 31, 2013. Benita was released on March 21, 2014, after her refugee claim was granted. Benita moved to Toronto, Ontario, where an Espadolean family took her in and supported her so that she could return to high school and continue her education.

15. At trial, evidence was adduced that there is a significant backlog of refugee claims in Canada. Between 2008 and 2010, there was a 60% increase in refugee claims in Canada, and there has been an increase in the number of mass arrivals by boat. On average, it takes 5 years to remove a failed refugee claimant from Canada. In some cases it can take up to 10 years.

16. Expert evidence indicated that conditions aboard illegal migrant ships are often deplorable. The ships are usually severely overcrowded. People aboard are generally exposed to unsanitary conditions and not provided with sufficient nutrition. Illnesses, and even death, are common aboard such ships. Persons who survive these journeys are usually malnourished and sometimes suffering from communicable illnesses or diseases upon arrival. Violence, at the

hands of the smugglers or other passengers, is common aboard migrant ships. Sexual assaults generally occur at an increased frequency on the ships as compared to the frequency of such assaults in the state of origin. Finally, smugglers often demand exorbitant fees to carry migrants.

17. In addition to the two passengers who died en route, 32 of the passengers on Benita's boat were dehydrated and malnourished, and 21 were diagnosed with Hepatitis A.

Relevant Legislation

18. On February 16, 2012, the federal government tabled Bill C-31, *Protecting Canada's Immigration System Act*, in the House of Commons. The legislation included most of the provisions from a previously un-passed bill (C-4: *Preventing Human Smugglers from Abusing Canada's Immigration System Act*), which made changes to the *Immigration and Refugee Protection Act (IRPA)* and created a new mandatory detention scheme for refugees who are categorized as "designated foreign nationals". Bill C-31 was enacted in June of 2012. To my knowledge, this application represents the first time a court has been asked to consider the constitutionality of the new mandatory detention scheme in *IRPA*.

19. Subsection 20.1(1) of *IRPA* provides the Minister with the authority to designate certain individuals who arrive in Canada as "designated foreign nationals". The designation depends on the manner of the groups arrival, and whether the individual can provide proper travel documents:

20.1(1) The Minister may, by order, having regard to the public interest, designate as an irregular arrival, the arrival in Canada of a particular group of persons if he or she

...

(b) has reasonable grounds to suspect that, in relation to the arrival in Canada of the group, there has been...a contravention of subsection 117(1) for profit...

20. Subsection 117(1) of *IRPA* is aimed at prohibiting the practice of human smuggling:

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

21. Subsection 55(3.1) of *IRPA* requires officers to detain designated foreign nationals, either as they enter Canada, or once they are designated:

(3.1) If a designation is made under subsection 20.1(1) an officer must

(a) detain, on their entry into Canada, a foreign national, who, as a result of the designation, is a designated foreign national and who is 16 years of age or older on the day of arrival that is the subject of the designation; or

(b) arrest and detain without a warrant – or issue a warrant for the arrest and detention of – a foreign national who, after their entry into Canada, becomes a designated foreign national as a result of the designation and who was 16 years of age or older on the day of the arrival that is the subject of the designation.

22. Subsection 56(2) of *IRPA* governs the conditions under which a detained designated foreign national may be released:

56(2) ...a designated foreign national who is detained under this Division and who was 16 years of age or older on the day of the arrival that is the subject of the designation in question must be detained until

(a) a final determination is made to allow their claim for refugee protection or application for protection;

(b) they are released as a result of the Immigration Division ordering their release under section 58; or

(c) they are released as a result of the Minister ordering their release under section 58.1.

23. Subsection 58(1) of *IRPA* provides for an order of release from the Immigration Division if certain criteria are not met:

58(1) The Immigration Division shall order the release of a permanent resident or a foreign national unless it is satisfied...that

...

(b) they are unlikely to appear for examination, an admissibility hearing or removal from Canada;

... [or] ...

(d) the Minister is of the opinion that the identity of the foreign national has not been, but may be, established and they have not reasonably cooperated with the Minister by providing relevant information for the purpose of establishing their identity or the Minister is making reasonable efforts to establish their identity.

24. Section 58.1 of *IRPA* reads provides that the Minister may order the release of a designated foreign national in “exceptional circumstances”:

58.1 The Minister may, on request of a designated foreign national who was 16 years of age or older on the day of the arrival that is the subject of the designation in question, order their release from detention if, in the Minister’s opinion, exceptional circumstances exist that warrant the release...

25. I will refer to these provisions collectively as the legislative scheme.

Legal Issues

26. The parties agree that there are four legal issues that I need to decide:

1. Does the legislative scheme violate Benita’s s. 7 *Charter* right to liberty?
2. Does the legislative scheme violate Benita’s s. 9 *Charter* right not to be arbitrarily detained?
3. Does the legislative scheme violate Benita’s s. 15 *Charter* right to equality?
4. If the legislative scheme does violate one or more of Benita’s *Charter* rights, is the infringement justified under s. 1 of the *Charter*?

ISSUE ONE: SECTION 7 – LIFE, LIBERTY, AND SECURITY OF THE PERSON

27. Section 7 of the *Charter* provides:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

28. The s. 7 analysis consists of two stages. The first question is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice and determining whether the deprivation has occurred in accordance with the relevant principle or principles of fundamental justice: see *Blencoe v. B.C. (Human Rights Commission)*, 2000 SCC 44.

29. At the first stage, Benita argues that her detention under the legislative scheme infringed her right to liberty by preventing her from visiting her mother before her death. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, the Supreme Court held that liberty means more than freedom from physical restraint. It includes the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. This is true only to the extent that such matters "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence." Benita argues that the decision to visit a dying family member is a fundamentally personal choice that was for Benita to make independently.

30. The government, on the other hand, argues that while the liberty guarantee in s. 7 of the *Charter* has expanded over time, it remains limited to inherently private choices about one's self, such as one's own medical decisions. It does not guarantee family reunification. In *B. (R.) v. Children's Aid Society*, the Supreme Court rejected the argument that section 7 provides inherent protection for the integrity of the family unit.

31. In my opinion, while any observer would be deeply saddened by Benita's loss, the right to liberty is not so flexible as to include the right to travel internationally to be physically present for the passing of a loved one. Such a decision is not at the core of an individual's dignity and independence. Accordingly, I find no violation of s. 7 of the *Charter*.

32. Were I to find that there had been a deprivation of Benita's liberty in this sense, I would have found that, at the second stage of the s. 7 analysis, the interference would not have been in accordance with the principles of fundamental justice.

33. As Benita has argued that the legislative scheme preventing her from visiting her mother is arbitrary, this court is required to examine the relationship between the operation of the scheme and the objective of the scheme: see *Rodriguez v. B.C. (Attorney General)*, [1993] 3 S.C.R. 519. In my view, for the reasons stated below in my s. 9 analysis, the law is arbitrary.

ISSUE TWO: SECTION 9 – ARBITRARY DETENTION

34. Section 9 of the *Charter* provides:

9. Everyone has the right not to be arbitrarily detained or imprisoned.

35. The first requirement for a successful s. 9 claim – that a detention has occurred – is clearly met. There is no argument that Benita was detained.

36. The real question in this case is whether the detention was arbitrary.

37. It is important for me to highlight that this case is different from the typical case argued under s. 9. Cases argued under s. 9 typically deal with circumstances where a police officer exercises his or her discretion to detain someone. To determine whether the officer's decision to detain the person was arbitrary, the court looks at whether there are express or implied criteria that govern the exercise of the officer's discretion: *R. v. Hufsky*, [1988] 1 S.C.R. 621, at para. 13.

38. The government argues that Benita's detention was not arbitrary because the legislation sets out express criteria that immigration or enforcement officers must use to determine whether they must detain people under the mandatory detention provisions.

39. On the other hand, Benita urges this court to assess whether those criteria themselves are arbitrary, in that they are not connected to the purpose of the mandatory detention regime. I agree with Benita that, as the detention in this case was authorized by statute, I must consider whether the legislative scheme itself is arbitrary, and not the acts of the individual immigration officers who detained the Espadroleans at the port of entry.

40. The government argued that the legislative scheme is necessary to address the growing backlog of refugee claims in Canada, and the difficulty in locating and removing unsuccessful claimants. I do not accept this argument. The decision of Parliament to impose mandatory detention on all persons arriving in Canada without proper identification documents is arbitrary. Whether a refugee claimant arriving in Canada does or does not have proper travel documents has no rational bearing on whether their refugee claim has merit, or on the ease or difficulty of removing the individual from Canada should their claim be unsuccessful. Therefore, I hold that there is a violation of s. 9 of the *Charter*.

ISSUE THREE: SECTION 15 – EQUALITY

41. Section 15 of the *Charter* protects against discrimination:

15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

42. In *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, the Supreme Court described the test to determine whether s. 15 has been violated:

First, we must examine whether the law, program or activity imposes differential treatment between the claimant and others. Secondly, we must establish whether this differential treatment is based on one or more enumerated or analogous grounds. And finally, we must ask whether the impugned law, program or activity has a purpose or effect that is substantively discriminatory.

43. In this case, the parties agree that the legislative scheme imposes differential treatment. The parties disagree as to whether the distinction is based on an enumerated or analogous ground, and whether it amounts to discrimination.

44. Benita argues that she could not have to come to Canada except in the manner she did, as a result of a combination of her national origin and her citizenship. She submits that discrimination may be based on intersecting grounds, and may also be established where a law affects a subset of persons within an enumerated or analogous group – for example, a law that discriminates on the basis of pregnancy would also be discrimination on the basis of sex even though not all women are, or will become, pregnant.

45. The government essentially argues that the legislation only distinguishes between individuals on the basis of their manner of arrival into Canada, and whether or not they have proper travel documentation. The government suggests it was Benita's choice to arrive in Canada in the manner she did and that manner of arrival is not the sort of personal characteristic that should be recognized as a new analogous ground.

46. The enumerated and analogous grounds include characteristics that are both innate and a matter of choice in the strict sense, such as marital status or religion. The *Charter* prohibits discrimination not just on grounds that are immutable, but those which are constructively immutable. Benita never had, and certainly cannot now, obtain any identification documents as a result of the regime in Espadrole. Being undocumented, it is difficult to conceive of how else Benita could have made the trip from Espadrole to Canada, other than in the manner she did. I therefore conclude that the impugned provisions draw a distinction on the intersecting grounds of national origin and/or citizenship. If Benita came from a country in which travel to Canada through regular channels was possible, she could have avoided the burden of this law.

47. However, at the next stage of the section 15 analysis, Benita must show that the differential treatment amounts to discrimination. The Supreme Court of Canada held in *R. v.*

Kapp, 2008 SCC 41, at paras. 17-18, that a law will be discriminatory if it perpetuates disadvantage, prejudice, or stereotyping.

48. Benita argues that she belongs to an already disadvantaged group of refugees who, when they arrive in Canada, are treated as a threat. She says this will perpetuate a stereotype that refugee claimants are burdens on society, or are accomplices in the human smuggling problem.

49. The government argues that the distinction is not discriminatory, and submits that the disadvantage suffered by Benita is the responsibility of the Government of Espadrole.

50. I agree. The *Charter* does not impose on the Government of Canada the duty to compensate for the prejudice individuals suffer outside of its borders. The legislative scheme is an attempt to regulate the growing number of refugees into Canada that has strained the resources of our immigration system. It is neither discriminatory in its purpose nor its effect.

ISSUE FOUR: SECTION 1 - JUSTIFICATION

51. I must now consider whether the infringement of section 9 can be justified under section 1 of the *Charter*. Section 1 provides:

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

52. The mandatory detention regime is undoubtedly “prescribed by law” because it is a duly enacted legislative provision. What I must determine is whether the mandatory detention regime is a reasonable limit on Benita’s section 9 right.

53. The two-stage test for “reasonable limits” was established in *R. v. Oakes*, [1986] 1 S.C.R. 103, at para 69:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom"... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test"... Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

54. At the first stage, I find that the government has demonstrated a pressing and substantial objective, which is the deterrence of human smuggling. Human smuggling is a growing criminal enterprise that threatens the safety and security of people who are smuggled. Human smuggling also threatens the security of Canadians and recent reports indicate that human smugglers are increasingly targeting Canada.

55. However, I am not persuaded that the law is proportional. In my view, the government's argument fails at both the rational connection and minimal impairment stages of the analysis. The mandatory detention regime is not rationally connected to the objective of deterring human smuggling because the regime punishes the people who are subject to the crime, as opposed to the smugglers who are committing the crime. The mandatory detention regime is also not minimally impairing. The law could easily have been crafted to reduce its impact on the people who are smuggled into Canada and so falls outside the range of reasonable alternatives that the government could have used to deter human smuggling.

56. As the government as failed to show that the law is rationally connected to its objective and minimally impairing of Benita's rights, I do not need to consider the final element of the s. 1 analysis: whether the salutary effects of the law outweigh its deleterious effects on the rights guaranteed under the *Charter*.

57. I would add that, had I held that sections 7 and 15 were violated, I would have also held that those infringements were not justified under s. 1 of the *Charter*.

CONCLUSION

58. The legislative scheme does not violate sections 7 or 15 of the *Charter*; however I do find that the scheme is a violation of section 9 of the *Charter* which cannot be justified under section 1 of the *Charter*. The provisions are therefore of no force and effect.

ANDERS, J.