CASE NOTE

STATELESSNESS, GENDER, AND INTERSECTIONALITY IN *BJORQUIST ET AL V ATTORNEY GENERAL OF CANADA*

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I INTRODUCTION

Bjorkquist et al v Attorney General of Canada, decided in the Ontario Superior Court of Justice on 19 December 2023, is a landmark ruling overturning the so-called 'second generation cut off' in Canadian citizenship law that prohibited Canadian citizens born abroad from automatically passing their Canadian citizenship to their children if the latter were also born abroad.[1] The ruling therefore establishes the rights of 'lost Canadians' to Canadian citizenship.

Applicants and the Court made several important contributions not only to the right to a nationality under Canadian law, but also to the global fight against statelessness by lending support to the concept of intersectional discrimination in the context of the right to citizenship. Experts have hailed it as a groundbreaking decision for the principle of intersectionality in discrimination.[2] A further contribution was made concerning the ability of stateless persons to have standing before national courts despite their non-citizen status. Yet, despite the Court acknowledging that the law in question causes the risk of statelessness,[3] the case

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1 *Bjorkquist et al v Attorney General of Canada* (2023) ONSC 7152 ('*Bjorkquist*').

2 Aidan Macnab, 'Lost Canadians Ruling a "Landmark Case on Sex Discrimination" Says Lawyer', *Law Times* (online, 10 January 2024) <https://www.lawtimesnews.com/news/general/lost-canadians-ruling-a-landmark-case-on-sex-discrimination-says-lawyer/382713>, archived at <perma.cc/XJ68-WBKA>.

3 *Bjorkquist* (n 1) [187].

did not directly address Canada's international obligations to prevent and resolve statelessness. Nor did applicants argue, nor the Court independently find, that the creation of statelessness is a *Canadian Charter of Rights and Freedoms* ('*Charter*') violation.[4] Nevertheless, the case will help to close a serious and gendered gap in Canadian law that was producing statelessness.

II FACTS

The facts of the case were not in dispute; the case was brought by 23 applicants from seven families on 9 December 2021. Applicants who were children born abroad to Canadian citizens who were themselves born abroad (referred to as second generation children born abroad) were prevented from acquiring Canadian citizenship at birth due to a change in Canadian citizenship law in 2009, amending the *Canadian Citizenship Act 1947* ('*Citizenship Act*') in s 3(3)(a).[5] The law contributed to at least one applicant in this case being born stateless and it placed several others at risk of statelessness.[6]

III ISSUES

This case raised several substantive issues relating to Canadian citizenship and the *Charter*.

First, the case made an important contribution to the question of standing in cases where Canadian citizenship is an issue before the Canadian courts, including a discussion of standing that is highly relevant to the rights of stateless persons before national courts. The government argued in regard to the claim of a s 6 *Charter* violation[7] by applicants that some of them did not have standing because they lacked a direct and personal interest in the case as they had Canadian citizenship at the time the case was adjudicated.[8] The Court disagreed that these applicants did not have standing. It held that the applicants with Canadian citizenship had standing because they could not freely exercise their rights under s 6 of the *Charter*.[9]

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4 The question of whether statelessness is a violation of the *Canadian Charter of Rights and Freedoms* ('*Charter*') has been raised in *Bakhtiari v British Columbia (Minister of Finance)* (2023) BCSC 1260, [51] where the Court considered whether statelessness could be an analogous ground under the *Charter*. According to the Court, the applicant was not stateless thus the Court did not answer this question. Similarly, the case *Budlakoti v Canada (Minister of Citizenship and Immigration)* (2015) FCA 139, [47]–[48] also did not reach the required threshold for a *Charter* violation because the Court determined the applicant had other avenues to obtain Canadian citizenship.

5 *An Act to Amend the Citizenship Act* (2008) Statutes of Canada, c 14 (Canada). See also House of Commons of Canada, Bill C-37, *An Act to Amend the Citizenship Act and to Make Amendments to Another Act*, 'Strengthening the Value of the Canadian Citizenship Act' (3rd Session, 40th Parliament, 10 June 2010) (Canada).

6 *Bjorkquist* (n 1) [24], [187]–[190].

7 *Canada Act 1982* (United Kingdom) c 11, sch B, pt I, s 6 (Canada) ('*Canadian Charter of Rights and Freedoms*' or 'the *Charter*') states that, '(e)very citizen of Canada has the right to enter, remain in and leave Canada'.

8 *Bjorkquist* (n 1) [166].

9 ibid [167].

The government further argued that other applicants lacked standing under s 7 of the *Charter*[10] because they were non-citizens residing outside of Canada and therefore lacked a nexus to Canada.[11] The Court disagreed, holding that the non-citizen applicants had standing to bring a claim of a s 7 *Charter* violation due to the fact that but for this law, they would have Canadian citizenship, thereby satisfying the nexus requirement and avoiding what would have been a circular argument against standing.[12]

Second, applicants argued several violations of the *Charter*. The applicants made an argument, based on s 15 of the *Charter*,[13] that Canadian citizenship law unlawfully discriminates based on the intersection between gender and national origins.[14] The applicants argued this discrimination was intersectional because it worsened a systemic and long existing disadvantage in Canada's laws that is faced by pregnant women who were born abroad, a form of discrimination dating to at least the 1947 *Citizenship Act*. Applicants noted the racist and sexist history of discrimination that in earlier periods motivated the conferring of second-class citizenship on Canadians born abroad which continues to influence current law.

Applicants further argued that the law violated s 6 of the *Charter* because it restricted affected persons' right to enter, remain in and leave Canada by attaching a penalty to their decisions to work and study abroad.[15] Applicants also argued that the law violated s 7 of the *Charter* because it deprived affected Canadian parents of their right to raise their dependent children in Canada, which interfered with their rights as parents as part of their liberty interest, and that this deprivation was disproportionate, arbitrary and/or overbroad.[16] Applicants also argued that the law deprived affected children of their right to be raised by their parents in Canada under s 7, depriving their interests in their own security of person.[17] Applicants further argued as part of their s 7 argument that the law violated s 28 of the *Charter*[18] because it infringed on the principle that men and women be treated equally with respect to ss 6 and 7 of the *Charter*, arguing that the law disproportionately affected mothers.

Furthermore, applicants argued that the law was not justified by the government's interest in restricting access to Canadian citizenship and, alternatively, that even if justified, the law was not rationally connected to this goal. This is because siblings in the same family were treated differently based on their place of birth, despite having the same or similar substantial connections to

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10 *Canadian Charter of Rights and Freedoms* (n 7) s 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'.

11 *Bjorkquist* (n 1) [195].

12 ibid [198]–[202].

13 *Canadian Charter of Rights and Freedoms* (n 7) s 15: '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'.

14 *Bjorkquist* (n 1) [91]–[95].

15 ibid [168].

16 ibid [204], [209].

17 ibid [211], [215], [216].

18 Ontario Superior Court of Justice (Notice of Application, CV-21-00673419-0000, 9 December 2021) 20 [tttt] ('Notice of Application'). See also *Canadian Charter of Rights and Freedoms* (n 7) s 28: 'Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons'.

Canada, while naturalised citizens were not subjected to this law.[19] Applicants argued that the law was instead a permanent blanket rule, and many less absolute and more flexible alternatives were possible, including within Canada's *Citizenship Act*, as well as in countries with similar immigration profiles like the United States of America, the United Kingdom and Australia.[20]

The government argued, by contrast, that there was no *Charter* right to Canadian citizenship and applicants can, and have, obtained Canadian citizenship by other means[21] and the law therefore did not place a disproportionate burden on them.

IV HOLDING

The Court found s 3(3)(a) of the *Citizenship Act* violated two sections of the *Charter*: s 6, guaranteeing the right to enter, remain in, and leave Canada, and s 15, guaranteeing equality under the law without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. While the Court agreed with applicants that s 3(3)(a) of the *Act* contravened ss 6 and 15 of the *Charter* and could not be justified by an appeal to s 1 of the *Charter*,[22] the Court further held that s 7 of the *Charter* was not breached. The Court adopted the remedy of invalidating s 3(3)(a) but suspended this remedy for six months to allow the government to adopt alternative legislation to avoid a legislative gap. The Court, however, also granted a constitutional exemption to enable certain applicants to immediately receive Canadian citizenship but awarded no damages.[23]

V ANALYSIS

In finding that the applicants had standing before the Court, the Court made an important, if indirect, contribution to the problem of standing for stateless persons by holding that non-citizen applicants may have standing if, but for the law in question, they would have Canadian citizenship. This argument makes an important contribution to the global fight against statelessness by acknowledging that non-citizens can indeed hold connections to a particular country, thus arguing against the type of circular logic that prevents stateless persons from accessing national courts.

In finding that s 15 of the *Charter* was breached, the Court applied the two-step test applied by previous Canadian Supreme Court cases. Step one requires finding

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19 Notice of Application (n 18) [vvvv]–[wwww].

20 *Bjorkquist* (n 1) [268]–[269]. The Court noted another option, Bill S-245, *An Act to Amend the Citizenship Act*, 'Granting Citizenship to Certain Canadians' (44th Parliament, 1st Session, 22 November 2021) ('Bill S-245') which at the date of writing has not passed. The final reading of the Bill was scheduled for January 2024 but was cancelled and has not been rescheduled. See *Bjorkquist* (n 1) [283].

21 These are the sponsorship regimes under s 13(2) of the *Immigration and Refugee Protection Act* (2001), Statutes of Canada, c 27 (Canada) and s 130(2) of the *Immigration and Refugee Protection Regulations* (2002) SOR 2002-227 (Canada), and a grant of citizenship on grounds of special and unusual hardship under s 5(4) of the *Canadian Citizenship Act 1947*, Revised Statute of Canada, c C-29. See *Bjorkquist* (n 1) [260]–[262].

22 *Canadian Charter of Rights and Freedoms* (n 7) s 1: Section 1 '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' (emphasis added).

23 *Bjorkquist* (n 1) [5]–[7].

that the law creates a distinction between two enumerated classes of persons; in this case, national origins and sex. National origins as a class was established in this case by place of birth. The ruling adopted an intersectional approach to conclude that the discrimination was based on the intersection between national origins and sex.[24]

Step two requires that this distinction creates a disadvantage that perpetuates prejudice and/or stereotyping, and/or imposes a burden or denies a benefit in a manner that exacerbates the enumerated class' disadvantage. The Court held that the law imposed a disproportionate burden on women, particularly pregnant women born abroad,[25] and that this burden perpetuated stereotyping and placed them at a disadvantage.[26] The Court cited expert evidence on the history of the purpose of the law, including its origins in the evacuation of Canadian citizens born abroad during the 2006 Israeli invasion of Lebanon and the pejorative connotations of the term 'Canadians of convenience'. Adopting an intersectional approach, and citing experts on intersectionality, the Court concluded that the law perpetuated patriarchal and racist ideas that have long been present in Canadian citizenship law.[27] Notably, the Court held that the law was inconsistent with the goals of art 11(1) of the *Convention on the Elimination of All Forms of Discrimination Against Women* ('*CEDAW*') ratified by Canada in 1981, which requires State Parties to 'take all appropriate measures to eliminate discrimination in the field of employment in order to ensure, on a basis of equality between men and women, the same rights'.[28]

Ending gender discrimination in nationality law is widely recognised as an important part of the global fight against statelessness,[29] and recognising intersectionality is an important component of that fight.[30] While none of the arguments in this case directly discussed statelessness, they nevertheless make an important contribution to addressing the ways in which gender discrimination may contribute to the denial of Canadian citizenship, and therefore to the risk of statelessness under Canadian law. The Court's recognition of intersectionality with respect to national origins and sex is thus a ground-breaking contribution to claims related to the right to nationality and therefore adds important dicta to the global fight against intersectional discrimination that is at least partly based on gender.

On finding that s 6 of the *Charter* was breached with regard to the applicants' rights to enter, remain in, and leave Canada, the Court observed that citizenship guarantees the right to have rights, including mobility rights that are necessary for

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24 *Bjorkquist* (n 1) [91]–[95], [114].

25 ibid [159]–[161].

26 ibid [158].

27 ibid [155].

28 *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1971, UNTS 1 (entered into force 3 September 1981) 13.

29 See Laura van Waas, Zahra Albarazi and Deirdre Brennan, 'Gender Discrimination in Nationality Laws: Human Rights Pathways to Gender Neutrality' in Niamh Reilly (ed) *International Human Rights of Women* (Springer 2019); See also the *Global Campaign on Equal Nationality Rights* (Web Page, 2024) <https://www.equalnationalityrights.org/>, archived at <perma.cc/9TS3-QJ3R>.

30 See Nannie Sköld, 'Understanding Statelessness and Health through Social Science' in Panee Liamputtong (ed), *Handbook of Social Sciences and Global Public Health* (Springer 2023); Deirdre Brennan, Nina Murray and Allison Petrozziello, 'Asking the "Other Questions": Applying Intersectionality to Understand Statelessness in Europe' in Tendayi Bloom and Lindsey N Kingston (eds), *Statelessness, Governance, and the Problem of Citizenship* (Manchester University Press 2021).

applicants to fulfil their family, professional and leisure needs, which are legitimate interests, and that any restrictions on these rights must therefore be justified in accordance with s 1 of the *Charter* because the burden placed on applicants was unreasonable.[31] Citing previous cases which relied on art 12 of the *International Covenant on Civil and Political Rights* ('*ICCPR*') ratified by Canada in 1976,[32] the Court held that s 1 requires that limits on the rights enumerated under the *Charter* must both pursue an objective that is both pressing and substantial and be rationally connected to this objective. As well, the limits must minimally impair the right in question and not have a disproportionate effect on that right.[33] The Court found that the government did not meet its burden under s 1 because the law was not minimally tailored to meet its objectives, but was instead a blanket ban.[34] The Court further found that alternative formulations of the law do exist but that the government had not employed them,[35] and that alternative pathways to citizenship or residency that were available to the applicants may be unfair and prone to error.[36] While these arguments are not explicitly based on the right to a nationality or the duty of Canada to prevent and resolve statelessness, they are important ancillary rights in the fight to end statelessness. Adhering to international obligations concerning one's mobility rights, this case therefore adds important dicta to the global fight against statelessness in a migratory context, while reaffirming the right to enter, remain in and leave one's own country.

The Court rejected the argument put forward by applicants that the law violated their s 7 rights to their parent-child relationship. The Court found that the applicant's interpretation of security of the person was consistent with Canada's obligations set out in art 7(1) of the *Convention on the Rights of the Child* ('*CRC*') ratified by Canada in 1991, which guarantees a child 'as far as possible, the right to know and be cared for by his parents'.[37] However, the Court found that the law did not result in the separation of the family, nor that it interfered in the ability of parents to raise their children.[38] In so finding, the Court applied the two-step approach adopted by past cases, examining first if the law interfered with an applicant's right to life, liberty or security of the person, and second, if the interference complied with principles of fundamental justice. The Court did not find that the law interfered with the applicants' rights to life, liberty or security of the person, and therefore did not examine the extent to which it complied with principles of fundamental justice.[39] Unfortunately, this dicta by the Court undermines the emerging consensus on the importance of recognising the intersection between the global fight against statelessness and the right of the child.[40]

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31 *Bjorkquist* (n 1) [183].

32 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) 171.

33 *Bjorkquist* (n 1) [240].

34 ibid [278].

35 The Court may here be referring to Bill S-245 (n 20) or to similar laws in other countries.

36 *Canadian Charter of Rights and Freedoms* (n 7) s 1.

37 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) 3.

38 *Bjorkquist* (n 1) [225]–[226].

39 ibid [235]–[237].

40 See Jacqueline Bhabha (ed), *Children Without a State: A Global Human Rights Challenge* (MIT Press 2011).

VI CONCLUSION

This case is ground-breaking in that it accords intersectionality a prominent role in matters concerning nationality in Canada, and it affords non-citizens who reside outside of Canada standing before the Court. These changes stand to shape the way cases of non-nationality in Canada are heard.

Despite these positive developments, the Court missed an opportunity to address statelessness more directly, both in terms of the barriers those at risk of statelessness may face and Canada's international obligations on the matter. This missed opportunity is particularly notable given that the problem of statelessness has been discussed in similar cases before the courts in other common law jurisdictions such as the United States.[41] This reveals a double paradox in this decision whereby first, the Court recognised some forms of intersectional discrimination (national origins and sex) but not others (statelessness and rights of the child), and second, relied on Canada's international obligations in the context of *CEDAW*, *CRC* and *ICCPR* but did not consider its obligations under the 1961 *Convention on the Reduction of Statelessness*[42] which it ratified in 1978. Furthermore, despite recognising that s 3(3)(a) causes the risk of child statelessness,[43] the Court missed the opportunity to acknowledge Canada's absence from domestic and international calls to respond to its own record on statelessness.[44]

The Court gave the Canadian government six months to enact *Charter* compliant legislation. The Canadian government did not appeal the Court's decision and in May 2024 introduced legislation that addresses the concerns raised in this case.[45] While Bill C-71 does not specifically address statelessness, it stands to close, should it pass, an important gap with respect to descendants of Canadians who are at risk of statelessness.

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41 For example, the United States Supreme Court discussed the problem of statelessness extensively in *Sessions v Morales-Santana*, 582 US 47 (2017). See also Heather Alexander (2019) 'The US Supreme Court in Sessions v Morales-Santana', *Statelessness & Citizenship Review* 1(2), 330–335.

42 *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975).

43 *Bjorkquist* (n 1) [187].

44 Canada has received recommendations to improve its action against statelessness at three consecutive Universal Periodic Review ('UPR') appearances in 2013, 2018, and 2023. See United Nations Human Rights Council ('UHRC'), Canada 'Matrix of Recommendations' (Report, Canada UPR Second Cycle, 2013) [128.10] <https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session16/CA/CanadaMatriceRecommendations_E.docx>, archived at <perma.cc/3PPM-6H5Y>; UHRC, Canada, 'Matrix of Recommendations' (Report, UPR Third Cycle, 2018) [142.29], [142.30], [142.275] <https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/Session30/CA/MatriceRecommendationsCanada.docx>, archived at <perma.cc/L867-HJ66>; UHRC, Canada, 'Matrix of Recommendations' (Report, UPR Fourth Cycle, 2023) [37.37], [37.332] <https://www.ohchr.org/sites/default/files/documents/hrbodies/upr/sessions/session44/ca/UPR44_Canada_Thematic_List_of_Recommendations.doc>, archived at <perma.cc/35SZ-GCZU>.

45 At the time of writing, Bill C-71 is at second reading in the House of Commons: see House of Commons of Canada, Bill C-71, *An Act to Amend the Citizenship Act* (44th Parliament, 1st Session, 23 May 2024) <https://www.parl.ca/legisinfo/en/bill/44-1/c-71>, archived at <perma.cc/ZYG5-5UTD>.