

Citizenship, Belonging, and Deportation

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Belonging and citizenship exist in tension when Canada seeks to deport people who are part of the community but not citizens. Building on critical citizenship studies, multi-scalar migration studies, and critical race theory, this paper explores how this tension between belonging and citizenship affects immigration law that governs deportation. Using the case study of a refugee who was apprehended by child protection services, spent more than a decade “in care”, and then faced deportation, the paper shows that deportation is not exclusively governed by the federal government. Actors at sub-national and supra-national scales, often informed by a critical analysis of race, can and do challenge the methodological nationalist assumption that the state is the natural and proper social or political form with which to make decisions about who may remain in Canada. The legal and political dynamics that emerge from this contest help construct immigration law. The resulting construction does not do away with the fundamental principle that non-citizens have only a qualified right to remain in Canada, but it does shape the application of this principle and raise important questions of how a right to remain should be qualified.

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Le sens d'appartenance et la citoyenneté peuvent se trouver en opposition dans les cas où le Canada cherche à expulser des personnes intégrées à leur communauté, mais qui ne sont pas citoyennes canadiennes. S'appuyant sur des études critiques de la citoyenneté, des études multiscalaires de la migration et la théorie critique de la race, cet article explore la manière dont la tension entre l'appartenance et la citoyenneté influe sur le droit de l'immigration qui régit l'expulsion. À partir de l'étude du cas d'un réfugié qui a été appréhendé par les services de protection de l'enfance, qui a passé plus d'une décennie « sous tutelle » et qui a ensuite été expulsé, l'article montre que l'expulsion n'est pas exclusivement régie par le gouvernement fédéral. Se fondant souvent sur une analyse critique de la race, les acteurs à l'échelle infranationale et supranationale peuvent remettre en question l'hypothèse méthodologique nationaliste selon laquelle l'État est la forme sociale ou politique naturelle et appropriée pour prendre des décisions sur les personnes autorisées à rester au pays. Les dynamiques juridiques et politiques qui émergent de ce débat contribuent à construire le droit de l'immigration. Ce qui en émerge ne supprime pas le principe fondamental selon lequel les non-citoyens n'ont qu'un droit limité de rester au Canada, mais elle façonne l'application de ce principe et soulève d'importantes questions quant à la manière de définir les limites de ce droit.

I. Introduction

Citizenship is at the core of state sovereignty and is determined by the citizenship laws of a given state. In Canada, entitlement to citizenship and applications for citizenship are governed by the federal *Citizenship Act*.¹ Belonging, by contrast, is a multi-dimensional concept that engages various analytical levels, such as social location, personal narratives, emotional attachments and ethical or political values.² While belonging may include notions of citizenship, it is determined by embeddedness within a group, community or populous, often at the municipal level. As a result, there is frequently a tension between citizenship and belonging when Canada seeks to deport people who are part of the community but not citizens. This paper engages with three intersecting bodies of scholarship that help explicate this tension: critical citizenship studies, multi-scalar migration governance and critical race theory.

Critical citizenship studies reveal a conceptual distinction between substantive citizenship and formal citizenship that is mediated by belonging and legality.³ Often the line between these two categories of citizenship is blurred.⁴ This further complicates the tension between belonging and citizenship because positivist understanding of legal categories may not accord with social understanding. For example, race, otherness and perceptions of disloyalty have been shown to affect majoritarian understanding of citizenship, notwithstanding legal status.⁵

¹ *Citizenship Act*, RSC 1985, c C-29.

² Nira Yuval-Davis, "Belonging and the Politics of Belonging" (2006) 40:3 *Patterns Prejudice* 197; Nira Yuval-Davis, *The Politics of Belonging: Intersectional Contestations* (London: SAGE Publications Ltd, 2011); Marco Antonsich, "Searching for Belonging - An Analytical Framework" (2010) 4:6 *Geography Compass* 644; Nadia Lovell, ed, *Locality and Belonging* (New York: Routledge, 1998); Glenn P Malone, David R Pillow & Augustine Osman, "The General Belongingness Scale (GBS): Assessing achieved belongingness" (2012) 52:3 *Personality & Individual Differences* 311.

³ See e.g. Lois Harder & Lyubov Zhyznomirska, "Claims of Belonging: Recent Tales of Trouble in Canadian Citizenship" (2012) 12:3 *Ethnicities* 293; Lois Harder, "'In Canada of All Places': National Belonging and the Lost Canadians" (2010) 14:2 *Citizenship Studies* 203; Margot R Challborn & Lois Harder, "Sex and the Genuine Marriage: Consummation and Conjugality in Canadian Citizenship" (2019) 23:5 *Citizenship Studies* 407.

⁴ Audrey Macklin, "Who is the Citizen's Other? Considering the Heft of Citizenship" (2007) 8 *Theor Inq L* 333.

⁵ Rita Dhmoon & Yasmeen Abu-Laban, "Dangerous (Internal) Foreigners and Nation-Building: The Case of Canada" (2009) 30:2 *Intl Political Science Rev* 163; Nisha Nath, "Canadian Multicultural Citizenship and the Crisis Over the Veil: Cultivating Internal Exclusions" in Siavash Saffari et al, eds, *Unsettling Colonial Modernity in Islamicate Contexts* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2017) 259 [Nath, "Canadian Multicultural Citizenship"]; Audrey Macklin, "Citizenship Revocation, the Privilege to Have Rights and the Production of the Alien" (2014) 40:1 *Queen's LJ* 1.

Beyond conceptions of citizenship, the tension between belonging and citizenship also exposes the different scales engaged by deportation. Belonging is determined, at least in part, at the level of community.⁶ Citizenship is determined at the level of the state. Each level asserts a claim to “govern” the person facing deportation: the community as the arbiter of belonging and the state as the arbiter of formal citizenship. Here, I use “govern” in the sense of having authority or influence over the person and subject-matter.

Finally, race and institutionalized racism also affect the tension between belonging and citizenship in the context of migration and deportation. Canada has a long history of xenophobia in its immigration policy.⁷ Recently, Canada has sought to shift or push its border outwards to prevent undesirable migrants, particularly refugees, from reaching Canada.⁸ Harsha Walia characterizes this shifting border as a racial project designed to protect a particular conception of nationalism.⁹ Even when Black and other racialized people are able to migrate to Canada, they are differentially policed and treated as inferior members of the Canadian polity.¹⁰ This exposes them to detention and deportation.¹¹

One common theme across all three of these bodies of scholarship is that belonging and citizenship are implicated by deportation processes. Belonging shapes inclusion and the harm caused by exclusion. Citizenship shapes legal entitlement and vulnerability to deportation. Building on this

⁶ See e.g. Cynthia Levine-Rasky, “‘They didn’t treat me as a Gypsy’: Romani Refugees in Toronto” (2016) 32:3 *Refuge: Can J on Refugees* 54 (describing “belonging” as an “activity” that emerges through engagement between migrants and community at the local level); René D Flores & Ariela Schachter, “Examining Americans’ Stereotypes about Immigrant Illegality” (2019) 18:2 *Contexts* 36 [“Examining Americans’ Stereotypes”] (showing that American stereotypes construct “social legality” that operates independently of formal legality).

⁷ Donald Galloway, “Immigration, Xenophobia and Equality Rights” (2019) 42:1 *Dal LJ* 17.

⁸ Ayelet Shchar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester: Manchester University Press, 2020); Efrat Arbel, “Bordering the Constitution, Constituting the Border” (2016) 53:3 *Osgoode Hall LJ* 824.

⁹ Harsha Walia, *Border and Rule: Global Migration, Capitalism, and the Rise of Racist Nationalism* (Winnipeg: Fernwood Publishing, 2021).

¹⁰ Robyn Maynard, *Policing Black Lives: State Violence in Canada from Slavery to the Present* (Winnipeg: Fernwood Publishing, 2017); Rinaldo Walcott and Idil Abdillahi, *BlackLife: Post-BLM and the Struggle for Freedom* (Winnipeg: ARP Books, 2019); Nisha Nath, “Curated Hostilities and the Story of Abdoul Abdi: Relational Securitization in the Settler Colonial Racial State” (2021) 25:2 *Citizenship Studies* 292; Nath, “Canadian Multicultural Citizenship”, *supra* note 5.

¹¹ Sharry Aiken & Stephanie J Silverman, “Decarceral Futures: Bridging Immigration and Prison Justice towards an Abolitionist Future” 25:2 *Citizenship Studies* 141.

common theme, this paper is animated by the question: how does the tension between belonging and citizenship affect deportation under Canadian immigration law?

Conventionally, it is the federal government that determines when foreign nationals can be deported from Canada. The Supreme Court of Canada has affirmed and reaffirmed that “[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country”¹² This methodological nationalism is at the core of cross-partisan immigration policy and the Federal Court’s deportation jurisprudence. It reproduces the assumption that the state is the natural and proper social or political form with which to make decisions about who may remain in Canada.

By focusing solely or preferentially on the state and its deportation logic, conventional approaches to immigration law ignore social, political and legal claims that may be recognized when a different unit of analysis is considered. Migration scholars criticize methodological nationalism for this under-inclusiveness.¹³ Nonetheless, methodological nationalism persists in immigration law and shapes the approach of courts when applying the fundamental principle that a non-citizen does not have an unqualified right to remain. By normalizing or rationalizing an analysis focused solely on the state, methodological nationalism limits consideration of other interests. It averts the construction and qualification of immigration law based, even in part, on those interests. As a result, it immunizes deportation decisions from constitutional scrutiny on all but the narrowest of grounds.¹⁴

¹² *Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 at para 24, 90 DLR (4th) 289 [Chiarelli]; *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 46 [Medovarski]; Compare *De Canas v Bica*, 424 US 351, 354 (1976) (where the Supreme Court of the United States held that the “[p]ower to regulate immigration is unquestionably exclusively a federal power” at 354).

¹³ Andreas Wimmer & Nina Glick Schiller, “Methodological Nationalism, the Social Sciences, and the Study of Migration: An Essay in Historical Epistemology” (2003) 37:3 *Intl Migration Rev* 576; Nicholas De Genova, “We are of the Connections: Migration, Methodological Nationalism, and ‘Militant Research’” (2013) 16:3 *Postcolonial Studies* 250; Bridget A Hayden, “Only Mexicans There: The Nation as Inequality Regime and Methodological Nationalism in Migration Studies” (2018) 7:1 *Migration Studies* 100.

¹⁴ See e.g. *Revell v Canada (Minister of Citizenship and Immigration)*, 2019 FCA 262 at paras 38, 50 [Revell] (holding that inadmissibility decisions, at the front-end of the deportation process, do not engage a long-term permanent resident’s life, liberty, and security of the person interests protected by section 7 of the *Charter of Rights and Freedoms*, and that only risk-based interests can be considered *after* a permanent resident has been ordered deported and is facing *imminent* removal); see also Catherine

A multi-scalar account, informed by critical citizenship studies and critical race theory, reveals a more complex dynamic. Under this multi-scalar account, the federal government does not have a monopoly on deportation. Instead, at least three sources combine to influence how deportation decisions are made, implemented and reviewed. These sources are: (1) the traditional, sovereign nation-state, most frequently embodied by federal immigration officials; (2) subnational communities, organizations and institutions, both governmental and non-governmental, often at the city level; and (3) international treaty bodies such as the United Nations Human Rights Committee. A complex interplay between these subnational, national and supranational actors – what some have called a “multilayered jurisdictional patchwork” – influences how states engage or interact with migrants.¹⁵

These interactions have significant site-specificity and variance.¹⁶ In other words, local and international actors may not always influence migration governance in the same way in the same country. In some cases, the effects are anti-migrant, with subnational actors contributing to surveillance, policing and enforcement that is targeted at migrants.¹⁷ In other cases, the effects are pro-migrant, with subnational actors creating policies to provide “refuge” or “sanctuary” to migrants without formal legal status.¹⁸ What is remarkable is not the nature or magnitude of such effects, but that these effects do not inure at the level of the state.

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 (arguing that the less exacting constitutional scrutiny of immigration decisions by Canadian courts can be attributed to an impoverished approach to the domestic application of international human rights law that recognizes the rights of non-citizens).

¹⁵ Monica W Varsanyi et al, “A Multilayered Jurisdictional Patchwork: Immigration Federalism in the United States” (2012) 34:2 Law & Pol’y 138.

¹⁶ Mathew Coleman, “The ‘Local’ Migration State: The Site-Specific Devolution of Immigration Enforcement in the U.S. South” (2012) 34:2 Law & Pol’y 159; Jorge M Chavez & Doris Marie Provine, “Race and the Response of State Legislatures to Unauthorized Immigrants” (2009) 62:3:1 Annals American Academy Political & Soc Science 78.

¹⁷ Amada Armenta, “Racializing Crimmigration: Structural Racism, Colorblindness, and the Institutional Production of Immigrant Criminality” (2017) 3:1 Sociology Race & Ethnicity 82; Amada Armenta & Isabela Alvarez, “Policing immigrants or policing immigration? Understanding local law enforcement participation in immigration control” (2017) 11:2 Sociology Compass 12453; Forrest Stuart, Amada Armenta & Melissa Osborne, “Legal Control of Marginal Groups” (2015) 11:1 Annual Rev L & Soc Science 235; Doris Marie Provine & Roxanne Lynn Doty, “The Criminalization of Immigrants as a Racial Project” (2011) 27:3 J Contemporary Crim Justice 261; Chavez & Provine, *supra* note 16.

¹⁸ Monica W Varsanyi, “Interrogating ‘Urban Citizenship’ vis-à-vis Undocumented Migration” (2006) 10:2 Citizenship Studies 229; Harald Bauder & Dayana A Gonzalez, “Municipal responses to ‘illegality’: Urban sanctuary across national contexts” (2018) 6:1 Soc Inclusion 124.

Importantly, the rescaling of migration governance also has implications for citizenship and belonging. For example, where local and state-level governments provide voting rights, protections against deportation, access to identification and accessible education, migrants without formal citizenship may gain “membership via the mere fact of *presence* and *residence* in a city or state, in spite of the powerful boundaries still surrounding formal membership in the nation-state.”¹⁹ This can turn into a form of “social legality” or informal citizenship that operates independently of formal legal status.²⁰ Racialization and institutionalized racism are key factors that shape these processes.

The multi-scalar aspects of this migration governance regime also mean that the related politics of belonging becomes multi-dimensional, with various social axes interfacing with federal immigration laws to both include or exclude certain migrants.²¹ In practice, this can lead to local protest over the morality and human cost of deportation, in specific cases, that can alter how federal immigration officials implement deportation policies.²² Here too, racialization and institutionalized racism are key factors that influence the politics and protest surrounding deportation.

What this paper adds to the critical citizenship studies, multi-scalar migration governance and critical race theory literature is an explanation of how the different scales engaged by deportation challenge the methodological nationalist and legal formalist conceptions of immigration law, notably in a context where the power of federal immigration officials has normally been afforded substantial deference by courts. The paper argues that the multi-scalar nature of deportation practices, informed by critical citizenship studies and critical race theory, necessarily imbues immigration law with a broader set of considerations than what is offered by the methodological nationalist and legal formalist accounts. This leads to important qualification of when non-citizens may be deported and when they may have a right to remain.

Using a detailed case study, this paper shows that multi-scalar governance of deportation practices produces a relational power contest

¹⁹ Varsanyi, *supra* note 18 at 244.

²⁰ Flores & Schachter, *supra* note 6; René D Flores & Ariela Schachter, “Who are the ‘Illegals’? The Social Construction of Illegality in the United States” (2018) 83:5 *American Sociological Rev* 839.

²¹ Antje Ellermann, “Discrimination in migration and citizenship” (2020) 46:12 *J Ethnic & Migration Studies* 2463.

²² Antje Ellermann, “Street-level democracy: How immigration bureaucrats manage public opposition” (2006) 29:2 *West European Politics* 293.

between the federal government, communities and treaty bodies. The contest is relational in two connected respects. First, it involves something more than a doctrinal application of federalism or the rules that govern the domestic application of international law. Second, it is not divorced from the people and institutions who are engaged with each other and is in fact shaped by their dynamics.

The legal and political dimensions resulting from this contest can influence when, or even if, a non-citizen is deported from Canada. They can also force meaningful public policy change at the sub-national and national level. This calls into question the methodological nationalism and legal formalism advanced by some courts and some politicians in the context of deportation from Canada.

Part II of this paper introduces the case study of Mr. Abdoul Abdi, a refugee who grew up in the child welfare system before facing deportation from Canada on account of criminality. After explaining why this case study was selected and discussing the limitations of relying on a single case study, Part II outlines Mr. Abdi's story and shows how its ending is inconsistent with methodological nationalist and legal formalist accounts of immigration law.

Part III of this paper describes the national and supra-national legal regimes that shape immigration law in Canada. At the national level, the inadmissibility regime embedded in the *Immigration and Refugee Protection Act* is designed to deport non-citizens found to have committed criminal offences.²³ At the supra-national level, the international human rights law regime embodied by various treaties is designed to protect against arbitrary interference with fundamental civil rights, including one's right to enter and remain in their own country.²⁴ Mr. Abdi's case is situated within and against both regimes. This part shows that Canadian courts have fastidiously protected the power to deport, but also that there is some discretion available to temper the injustice of this power in complex and compelling

²³ *Immigration and Refugee Protection Act*, SC 2001, c 27, ss 33–61 [IRPA].

²⁴ See Louis Henkin et al., *Human Rights*, 2nd ed (New York: Thomson Reuters, 2009) at 444, 454; James Crawford, *Public International Law*, 8th ed (Oxford: Oxford University Press, 2008) at 638–640; Malcolm Shaw *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 311–37 (discussing generally the implementation of international human rights by treaties and treaty bodies); See also UNHRC, *Jama Warsame v Canada*, Comm No 1959/2010, UN Doc CCPR/C/102/D/1959/2010 July 21, 2011 [*Warsame*] (providing a specific example of implementation in the context of the right to enter or remain in one's own country).

cases. Building from the seminal article of Ryan Liss on the international right to belong,²⁵ this part also discusses how the evolving international legal framework on the right to belong influences and tempers the state power to deport. What emerges, both theoretically and empirically, as observed in the case of Mr. Abdi, is an account of immigration law that is not shaped strictly by methodological nationalism and legal formalism.

Proffering that multi-scalar governance of deportation shapes immigration law says nothing of the mechanism through which these different sources of governance exercise influence nor of the relative power of each source. Part IV of this paper argues that multi-scalar governance of deportation creates a relational power contest between sub-national, national and supra-national actors. The legal and political dynamics resulting from this contest, which are often shaped by race, construct immigration law.

These legal and political dynamics influenced the outcome for Mr. Abdi. Ultimately, he was not deported. Canada's deportation efforts were twice overturned by the Federal Court.²⁶ The Minister of Public Safety and Emergency Preparedness publicly stated that the Government of Canada would not pursue further deportation proceedings.²⁷ This result is at odds with an account of immigration law that is understood exclusively in methodological nationalist and legal formalist terms. Part IV also compares countervailing cases where deportation orders were upheld as well as public policy changes that emerged as a result of these cases. A careful reading of these cases and public policy changes reinforces the main claim of this paper, which is: immigration law that applies to deportation cannot be understood exclusively on methodological nationalist and legal formalist grounds because it is also shaped by the dynamics of multi-scalar governance of deportation. The resulting construction of immigration law does not do away with the fundamental principle that non-citizens do not have an unqualified right to remain in Canada, however, it does shape the

²⁵ Ryan Liss, "A Right to Belong: Legal Protection of Sociological Membership in the Application of Article 12(4) of the ICCPR" (2014) 46:1 NYUJ Intl L & Pol 1097.

²⁶ *Abdi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FC 950 [Abdi I]; *Abdi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 733 [Abdi II].

²⁷ Ralph Goodale, "The Government of Canada respects the decision filed on July 13 by the Federal Court concerning Abdoul Abdi. The Government will not pursue deportation for Mr. Abdi" (17 July 2019, at 20:59), online: *Twitter* <twitter.com/ralphgoodale/status/1019371039128674304> [perma.cc/LFH9-7QMH].

application of this principle and raise important questions of how a right to remain should be qualified.

II. The Case of Abdoul Abdi

Mr. Abdoul Abdi was six years old when he arrived in Canada with his sister and two aunts as refugees.²⁸ Resettled as part of a program that pairs the federal government with community organizations to provide enhanced supports to refugees with special needs, Mr. Abdi was expected to find stability in Canada.²⁹ He did not. As this part describes in some detail, Mr. Abdi faced a challenging childhood and, as a young adult, the prospect of deportation from Canada on account of criminality. Race was a key factor in this story.

Mr. Abdi's case was chosen as a case study for this paper because at first glance, it is emblematic of how methodological nationalism and legal formalism apply to immigration law. Here, a foreign national was issued a deportation order pursuant to the inadmissibility provisions of the *Immigration and Refugee Protection Act* following a criminal conviction. What makes Mr. Abdi's story an interesting case study is that he was ultimately not deported, despite strenuous and repeated efforts on the part of Canadian immigration officials. This is inconsistent with accounts of immigration law that are based strictly on methodological nationalism and legal formalism.

Mr. Abdi's story was also chosen because it provoked substantial public attention and debate on the tension between citizenship and belonging, between the federal power to deport and sub-national claims of membership, and between methodological nationalist and multi-scalar accounts of immigration law. Race, specifically Blackness, was a major component of this public attention and debate – much of which occurred transparently in the public sphere. Mr. Abdi's case was covered by local,

²⁸ *Abdi II*, *supra* note 26 at para 1.

²⁹ Canada resettles refugees under a government-assistance program as well as through private sponsorship. There are five different types of private sponsorship. These private programs allow for community organizations or groups of five individuals to sponsor a refugee and their family for resettlement to Canada. The Joint Assistance Sponsorship program, under which Mr. Abdi was resettled, combines government-assistance with a community organization for refugees who have special needs that require additional supports. This can include trauma from violence or torture, medical disability or other unique needs that go beyond what is normally expected of resettled refugees: Jamie Chai Yun Liew & Donald Galloway, *Immigration Law*, 2nd ed (Toronto: Irwin Law, 2015) at 234–239.

national, and international media. It drew explicit commentary from elected officials, including the Prime Minister, the federal Minister of Immigration, the Premier of Nova Scotia and the provincial Minister responsible for child welfare. It also drew opinion editorials and commentary from academics across various disciplines. Thus, Mr. Abdi's case provides a concrete example of the theoretical topics and complex interrelationships this paper explores.

The use of a single case study, however, as with the case study method more generally, presents certain limitations. Case studies are not immediately generalizable. In this sense, the atypical nature of Mr. Abdi's case is also a limitation; it raises the question of whether his circumstances were so factually unique that his story adds little to the broader conversation about immigration law. There are two responses to this concern. First, as will be seen in Part III of this paper, Mr. Abdi's case led to governmental policy changes at both the federal and provincial levels and to proposed legislative changes to the *Citizenship Act*. If Mr. Abdi's case was a "one off" it would not have required a policy response, including an update to the guidelines used by federal immigration officials and provincial child welfare officials. It would not have required amendments to the *Citizenship Act* to prevent other similarly situated individuals from facing deportation. Second, the concern of generalizability relates primarily to the use of case studies as a social science methodology to explain behaviour and not to its use as a means for explicating the boundaries of law. As a qualitative methodology in some disciplines, generalizability requires demonstration that the case studies chosen are representative of a broader sample. As a method of legal analysis, case studies do not require the same equivalence and do not necessarily have to be representative of a larger sample. To be useful, all a case study must do is yield insightful data on the state of a particular area of law. In fact, explorations of the common law regularly proceed based on evaluating "extreme" cases to understand both the common core principles and outer boundaries of an area of law. In this respect, the case study of Mr. Abdi can still contribute useful data to an exploration of immigration law, even if it may not yield generalizable conclusions from a social science perspective.

Within a year of arriving as a refugee to Canada, Mr. Abdi and his sister were apprehended and removed from their family by a provincial child

welfare agency that is responsible for child protection services. The siblings were institutionalized and then separated.³⁰

Mr. Abdi would go on to spend his entire childhood as a permanent ward of the state. He was never adopted. Instead, he was transferred between thirty-one different “care” placements, most of which were group homes or other institutional facilities.³¹

A growing literature shows significant variation in children’s experiences in the child welfare system as well as in their outcomes as adults. Negative experiences and outcomes are strongly correlated with racialization and prolonged exposure to institutionalized care environments.³² One of those negative outcomes is the disproportionate “cross-over” of youth in care to the criminal justice system.³³ This can have drastic consequences for youth who are non-citizens, as it did for Mr. Abdi.

As a teenager, Mr. Abdi amassed several youth findings of guilt.³⁴ Then, as a young adult, he pleaded guilty to aggravated assault and assaulting a

³⁰ *Abdi II*, *supra* note 26 at para 11.

³¹ *Ibid* at para 12.

³² Nico Trocmé, Della Knoke & Cindy Blackstock, “Pathways to the Overrepresentation of Aboriginal Children in Canada’s Child Welfare System” (2004) 78:4 Soc Service Rev 577; Anne Tweddle, “Youth leaving care: How do they fare?” (2007) 2007:113 New Directions for Youth Development 15; Kevin Gosine & Gordon Pon, “On the Front Lines: The Voices and Experiences of Racialized Child Welfare Workers in Toronto, Canada” (2011) 22:2 J Progressive Human Services 135; Gordon Pon, Kevin Gosine & Doret Phillips, “Immediate Response: Addressing Anti-Native and Anti-Black Racism in Child Welfare” (2011) 2:3/4 Intl J Child Youth & Family Studies 385; Laurence Y Katz et al, “Suicide and suicide attempts in children and adolescents in the child welfare system” (2011) 183:17 CMAJ 1977; *One Vision One Voice: Changing the Ontario Child Welfare System to Better Serve African Canadians*, by Ontario Association of Children’s Aid Societies (Toronto, 2016); *Exploring Youth Outcomes After Aging-Out of Care*, by Jane Kovarikova (Toronto, 2017); Kiaras Gharabaghi, *A Hard Place to Call Home: A Canadian Perspective on Residential Care and Treatment for Children and Youth* (Toronto: Canadian Scholars, 2019).

³³ Nicholas Bala et al, “Child Welfare Adolescents & the Youth Justice System: Failing to Respond Effectively to Crossover Youth” (2015) 19:1 Can Crim L Rev 129; Denise C Herz, Joseph P Ryan & Shay Bilchik, “Challenges Facing Crossover Youth: An Examination of Juvenile-Justice Decision Making and Recidivism” (2010) 48:2 Fam Ct Rev 305; Jane Marie Marshall & Wendy L Haight, “Understanding racial disproportionality affecting African American Youth who cross over from the child welfare to the juvenile justice system: Communication, power, race and social class” (2014) 42:1 Child Youth Services Rev 82; Hui Huang et al, “Crossover youth post arrest: Placement status and recidivism” (2015) 57:1 Child Youth Services Rev 193; Michael T Baglivio et al, “Maltreatment, Child Welfare, and Recidivism in a Sample of Deep-End Crossover Youth” (2016) 45:4 J Youth & Adolescence 625.

³⁴ Under the Canadian *Youth Criminal Justice Act*, SC 2002, c 1 [YCJA], a separate criminal code regime that applies to young offenders, youth are not convicted of crimes, they are subject to youth findings of guilt. Such findings have reduced punishment and produce less permanent records. The distinction between findings of guilt and convictions also emphasizes the importance of rehabilitation and reintegration that underscores the YCJA. Finally, findings of guilt reinforce the principle of diminished moral blameworthiness for young offenders, which the Supreme Court of Canada has recognized as a principle of fundamental justice: *R v DB*, 2008 SCC 25 at paras 57-69.

police officer with a weapon. He received a lengthy custodial sentence.³⁵ If Mr. Abdi had been a Canadian citizen, he would have served his sentence and returned to the community to reintegrate into society. However, he was not a Canadian citizen.

Mr. Abdi was not formally a citizen because of several complicated and interrelated reasons. Until recently, Canada's citizenship laws prohibited unaccompanied minors from applying for citizenship.³⁶ Minors who were adopted had a right to citizenship.³⁷ Minors who were the children of citizens could apply for citizenship via their parents.³⁸ But Mr. Abdi was not adopted, and his legal parent was the state, not a citizen. A residual category existed that allowed for a waiver of the age requirement based on "compassionate grounds".³⁹ The provincial child welfare agency responsible for Mr. Abdi was unsure that it could rely on this waiver. Worse, it had no policies in place for non-citizen children in-care and it did not keep track of the immigration status of their wards. This is not to say that they were unaware of Mr. Abdi's precarious immigration status.

Shortly after Mr. Abdi and his sister became permanent wards of the state, their aunt brought an application to regain custody and raised the issue of the children's non-citizenship. This application was denied, but the child welfare agency at least began making inquiries about how to "regularize" the status of the children. The agency retained external legal counsel because it was unaware of how to proceed. But by the time the agency acted, there were concerns that Mr. Abdi's youth offences prohibited him from applying.⁴⁰ No application for citizenship was ever filed. Mr. Abdi's aunt would go on to become a Canadian citizen, but the siblings who were taken from her care remained non-citizens.⁴¹

As a non-citizen, Mr. Abdi was vulnerable to deportation. Canada, like many states, attaches immigration consequences to non-citizens who are convicted of criminal offences. Canadian immigration legislation has

³⁵ *Abdi II*, *supra* note 26 at para 17.

³⁶ See s 5(1) of the *Citizenship Act*, *supra* note 1, which until 19 June 2017 read: 5(1) The Minister shall grant citizenship to any person who (a) makes application for citizenship; (b) is eighteen years of age or over.

³⁷ *Citizenship Act*, *supra* note 1, s 5.1.

³⁸ *Ibid* at s 5(2).

³⁹ *Ibid* at s 5(3).

⁴⁰ Section 22 of the *Citizenship Act*, *supra* note 1, prohibits anyone who is under a probation order, on parole, or serving a term of imprisonment from becoming a citizen, regardless of whether these conditions relate to a youth finding of guilt or an adult criminal conviction.

⁴¹ *Abdi II*, *supra* note 26 at paras 13-16.

explicit objectives of public safety and security which, according to the Supreme Court of Canada, “indicate an intent to prioritize security.”⁴² This approach of combining security with migration governance is part of a broader global trend toward “crimmigration” that takes on varying degrees of harshness based on the political and often xenophobic forces at play.⁴³

Those forces, over the past ten years, have been decidedly anti-migrant and have included legislative offerings such as the *Balanced Refugee Reform Act*,⁴⁴ the *Protecting Canada’s Immigration System Act*,⁴⁵ and the *Faster Removal of Foreign Criminals Act*.⁴⁶ Aspects of these reforms were positive and provided important procedural protections to refugee claimants, such as the creation of the Refugee Appeal Division. Many of these reforms, however, were designed to make the deportation regime more punitive and to make it easier to deport non-citizens from Canada. They are part of a new

⁴² *IRPA*, *supra* note 23, ss 3(1)(h)-(i); *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 10.

⁴³ César Cuauhtémoc García Hernández, “Creating Crimmigration” (2013) 2013:6 *BYU L Rev* 1457; César Cuauhtémoc García Hernández, “What Is Crimmigration Law?” (2017) 17:3 *online*: <www.antonioacasella.eu/nume/Crimmigration.law_spring17.pdf> [perma.cc/NUJ6-95J3]; Howard Adelman, “Canadian Borders and Immigration Post 9/11” (2002) 36:1 *Intl Migration Rev* 15; Philippe Bourbeau, “Detention and Immigration: Practices, Crimmigration, and Norms” (2018) 7:1 *Migration Studies* 83; Katja Franko Aas & Mary Bosworth, eds, *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013); Mary Bosworth, Alpa Parmar & Yolanda Vazquez, eds, *Race, Criminal Justice, and Migration Control: Enforcing the Boundaries of Belonging* (Oxford: Oxford University Press, 2018); Cecilia Menjivar, Andrea Gómez Cervantes & Daniel Alvord, “The Expansion of ‘Crimmigration,’ Mass Detention, and Deportation” (2018) 12:4 *Sociology Compass* 12573; Karol Gil-Vasquez, “A Regional Great Transformation: US Contractualization of Citizenship and Crimmigration Regime” (2020) 54:3 *J Economic Issues* 569; Neža Kogovšek Šalamon, Barry Frett & Elizabeth Stark Ketchum, “Global Crimmigration Trends” (2020) in Neža Kogovšek Šalamon, ed, *Causes and Consequences of Migrant Criminalization* (Cham, Switzerland: Springer, 2020) 3; Aleksandra Gliszczynska-Grabias & Witold Klaus, “Governmental Xenophobia’ and Crimmigration: European States’ Policy and Practices towards ‘the Other’” (2018) 15:1 *No Foundations: An Interdisciplinary JL & Justice* 46; Witold Klaus, “How Does Crimmigration Unfold in Poland? Between Securitization Introduced to Polish Migration Policy by Its Europeanization and Polish Xenophobia” in Robert Koulish & Maartje van der Woude, eds, *Crimmigrant Nations: Resurgent Nationalism and the Closing of Borders* (New York: Fordham University Press, 2020) 298.

⁴⁴ *Balanced Refugee Reform Act*, SC 2010, c 8 (authorizing the Minister to apply different procedural rules to refugee claimants from countries that are designated as presumptively safe, prohibiting certain classes of persons from applying for refugee status altogether, and limiting the circumstances in which humanitarian and compassionate circumstances must be considered).

⁴⁵ *Protecting Canada’s Immigration System Act*, SC 2012, c 17 (authorizing the Minister to designate certain mass arrivals as irregular arrivals that are subject to lessened procedural protections and easier detention, expanding the scope of the offence of human smuggling, and increasing the use of biometric information).

⁴⁶ *Faster Removal of Foreign Criminals Act*, SC 2013, c 16 (limiting the review mechanisms available for non-citizens found inadmissible on account of serious criminality).

migration paradigm that “saw a gradual recharacterization of immigrants, migrants and refugees as ‘security threats’” in the early twenty-first century.⁴⁷ Both Silverman and Hudson, in separate studies, show that the genesis for the more punitive aspects of these reforms was the arrival, by boat, of irregular, racialized asylum-seekers who Canada considered undesirable.⁴⁸ Xenophobia helps explain this response, but it is not historically unique. In Canada, “[t]hrough the years, nativism, jingoism and xenophobia have emerged and re-emerged in the public sphere leading to harsher immigration laws.”⁴⁹ The immigration reforms made in the period 2010 to 2013 are part of this story.

Under Canadian immigration law, at least on a formalistic account, Mr. Abdi was a “foreign criminal” and his removal was express government policy. Deportation proceedings were instigated, and Mr. Abdi was invited to make submissions explaining why he should not be deported. Since Legal Aid is typically unavailable for these types of submissions, Mr. Abdi was unrepresented and alone. With the assistance of his parole officer, Mr. Abdi provided a two-page submission explaining why he should not be deported. These submissions were rejected. He was referred to the Immigration and Refugee Board where a deportation order would be *pro forma* and there would be no right of appeal because his sentence was not less than six months.

On a methodological nationalist and legal formalist account of immigration law, this state-centric power to deport is entirely in keeping with state sovereignty. There is a simple answer to the question: Who determines when non-citizens can be deported? If Canada’s calculus, as expressed in the *Immigration and Refugee Protection Act*, is (1) non-citizen, plus (2) serious criminality, equals (3) deportation with no right of appeal, it is entirely permissible, at least on a traditional account of immigration law, for the Canadian federal government alone to make the determination of who should be deported. However, despite this unilateral federal deportation power, this is not necessarily what transpires, even in states that

⁴⁷ J Mauricio Gaona, “The Final Refugee Paradigm: A Historical Warning” (2021) 10:1 *Can J Human Rights* 1 at 35.

⁴⁸ Stephanie J Silverman, “In the Wake of Irregular Arrivals: Changes to the Canadian Immigration Detention System” (2014) 30:2 *Refuge: Can J on Refugees* 27; Graham Hudson, “Ordinary Injustices: Persecution, Punishment, and the Criminalization of Asylum in Canada” in David C Brotherton & Philip Kretsedemas, eds, *Immigration Policy in the Age of Punishment: Detention, Deportation, and Border Control* (New York: Columbia University Press, 2018) 75.

⁴⁹ Galloway, *supra* note 7 at 21.

take a hardline on the criminality of non-citizens. It is not what happened in Mr. Abdi's case.

III. State Sovereignty and the Evolving Power to Deport

Before returning to the case study of Mr. Abdi and a discussion of what it reveals about immigration law, it is important to first understand the two legal frameworks that shape the federal authority to deport non-citizens from Canada: 1) the domestic statutory scheme that authorizes Canada to deport non-citizens convicted of criminal offences, and 2) the international treaty scheme that obligates Canada to uphold certain human rights. The domestic scheme is by far the most important. It firmly establishes Canada's power to deport. But it also injects discretion into the decision-making process and requires that the provisions that govern that discretion be construed and applied in a manner that complies with international human rights laws signed by Canada.⁵⁰ This has created some uncertainty and debate about how to apply Canada's deportation power where the person being deported is a long-term resident, particularly one who arrived in Canada at a young age. The international scheme recognizes state sovereignty, but also shows signs of evolution that may constrain that sovereignty now and in the future. It has evolved to acknowledge that long-term residence may require different international human rights law considerations before a state exercises its deportation power.

A. The Canadian Inadmissibility Regime

The Supreme Court of Canada has consistently held, pursuant to the common law, that "[t]he most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country."⁵¹ This common law principle deprives non-citizens of the right to enter or remain in Canada. To hold otherwise, the Court reasoned, would be to risk Canada becoming "a haven for criminals and others whom we legitimately do not wish to have among us."⁵² This principle remains good

⁵⁰ IRPA, *supra* note 23, ss 3(3)(f), 44(1), 44(2), 62(3).

⁵¹ Chiarelli, *supra* note 12 at para 24; Medovarski, *supra* note 12 at para 46.

⁵² Chiarelli, *supra* note 12 at para 25.

law and has withstood recent challenges in circumstances where long-term residents were facing deportation.⁵³

In keeping with the policy of removing certain undesirable individuals from Canada, the *Immigration and Refugee Protection Act* creates an inadmissibility regime where non-citizens can be deemed inadmissible on account of various grounds such as security, human or international rights violations, criminality or serious criminality.⁵⁴ Serious criminality is defined as a conviction for an offence where the maximum sentence is at least ten years (regardless of the actual sentence provided) or a conviction for an offence where the sentence provided was more than six months.⁵⁵ In other words, relatively minor offences are deemed “serious criminality” and lead to inadmissibility. In Mr. Abdi’s case, aggravated assault (not a minor offence) carries a maximum sentence of fourteen years. His custodial sentence was greater than six months, so he was inadmissible under either approach.

Where a non-citizen appears to be inadmissible because of a criminal conviction, enforcement officers with the Canada Border Service Agency prepare an inadmissibility report for the Minister of Public Safety and Emergency Preparedness.⁵⁶ These reports outline the alleged grounds for inadmissibility. The reports are then forwarded to delegates of the Minister who decide whether to refer the report to the Immigration Division, an independent administrative tribunal, for a deportation hearing.⁵⁷ If a report is referred and criminality is proven – usually a *pro forma* process based on court records of conviction – the tribunal must issue a deportation order against the non-citizen.⁵⁸ Deportation orders based on criminality can be appealed, but there is no right of appeal where the inadmissibility is based on serious criminality and the person received a custodial sentence greater than six months.⁵⁹

⁵³ *Revell*, *supra* note 14 at para 54 (leave to appeal to the Supreme Court of Canada denied 2 April 2020); *Moretto v Canada (Minister of Citizenship and Immigration)*, 2019 FCA 261 at para 56 (leave to appeal to the Supreme Court of Canada denied 2 April 2020). Both reaffirming the principle outlined in *Chiarelli*, *supra* note 12 and refusing to find that *stare decisis* permitted a re-evaluation of the principle.

⁵⁴ *IRPA*, *supra* note 23, ss 34-40.

⁵⁵ *Ibid* at s 36.

⁵⁶ *Ibid* at s 44(1).

⁵⁷ *Ibid* at s 44(2).

⁵⁸ *Ibid* at s 45(d).

⁵⁹ *Ibid* at s 64.

On appeals from a deportation order based on criminality, the tribunal has a relatively expansive discretion to consider all the circumstances of a case. Relevant and non-exhaustive factors include seriousness of the offence; rehabilitation prospects; length of time and establishment in Canada; family in Canada; dislocation that would be caused by deportation; and potential hardship in the country of removal.⁶⁰

Where a non-citizen is ordered deported because of serious criminality and has no right of appeal, the only discretion not to deport rests with the Minister on humanitarian and compassionate grounds.⁶¹ This was not the case historically but was part of crimmigration amendments in 2001, which removed decision-making authority from independent and impartial administrative tribunal members and placed it, instead, in the hands of Canada Border Services Agency officers.⁶²

At the time, immigration officials testified before Parliament and sought to dispel the concern that this would result in automatic deportation of long-term residents. The Assistant Deputy Minister explained that a person's circumstances would be fully considered before any enforcement action was taken.⁶³ But such pronouncements are not binding on courts or enforcement officers.⁶⁴ The scope of discretion that a Minister exercises when deciding whether to refer a non-citizen to a deportation hearing remains unsettled.

In *obiter* remarks, the Supreme Court of Canada has stated that even if there is a well-founded report establishing serious criminal inadmissibility, "the Minister retains *some discretion* not to refer it to the Immigration Division [emphasis added]."⁶⁵ The Federal Court of Appeal, by contrast, has

⁶⁰ *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 at para 40.

⁶¹ *IRPA*, *supra* note 23, s 25(1).

⁶² These amendments initially curtailed appeals for non-citizens who were sentenced to a term of imprisonment of at least two years, but in 2013 the *Faster Removal of Foreign Criminals Act*, *supra* note 46, reduced this threshold to a six months term of imprisonment.

⁶³ House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 37-1, No 49 (26 April 2001) at 09:25 (Ms Joan Atkinson, Assistant Deputy Minister): "I think we need to clarify, first of all, the claim that some are making that the elimination of appeal rights for permanent residents who are convicted of a serious offence in Canada, for which a term of imprisonment of at least two years has been imposed, will result in the automatic removal of long-term permanent residents without any evaluation of the circumstances of their case. That is simply not true. A decision to remove a long-term permanent resident, as we talked about, is not one that we take lightly. It is a very serious decision to make. We have built and will continue to build safeguards into the system at the front end of the process to ensure that the circumstances of a person's situation are fully considered before any decision is taken to take any enforcement action against that individual."

⁶⁴ *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 429 at para 34.

⁶⁵ *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50 at para 6 [Tran].

held that immigration legislation does not allow the Minister “any room to manoeuvre” where a non-citizen lacks permanent resident status.⁶⁶ For non-citizens who have permanent resident status, the Court of Appeal has signalled that the issue remains unresolved.⁶⁷ In subsequent jurisprudence, the Court of Appeal provided in *obiter* that “[i]t is possible ... that the scope of discretion will be *somewhat broader* for permanent residents than for foreign nationals because of their closer ties to Canada.”⁶⁸ But the Court did not resolve this issue, despite recognizing that the issue has divided the Federal Court.⁶⁹

Unrepresented and alone, Mr. Abdi was left to face this unsettled jurisprudential landscape. In his brief submissions, he attempted to explain why he should not be deported to Somalia. These submissions focused on country conditions in Somalia, his young age upon arrival in Canada, his experience as a Black person in the child welfare system and his mistaken belief that he was a Canadian citizen.

At the time, it was not clear how these factors should be analyzed in conjunction with the resolute adherence by Canadian courts to the principle that non-citizens do not have an unqualified right to remain in Canada. Nor was it clear whether the methodological nationalism and legal formalism that underscores this principle required any reassessment or qualification.

B. International Human Rights Law as Constraint on Sovereignty

While Canadian courts have stridently protected the power to deport, the same cannot be said for international law. When we look to international human rights law, according to Ryan Liss, there is an evolving approach to nationality that has created a right to belong.⁷⁰ This evolution turns on the ambiguity of nationality at international law.

Nationality is one of the cornerstones of international law since it determines the benefits and obligations between persons and states. The

⁶⁶ *Cha v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 at paras 35-38.

⁶⁷ *Canada (Public Safety and Emergency Preparedness) v Tran*, 2015 FCA 237 at para 12 (reversed on other grounds); *Tran*, *supra* note 65.

⁶⁸ *Sharma v Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FCA 319 at para 23 (emphasis added).

⁶⁹ *Ibid* at paras 44-46.

⁷⁰ Ryan Liss, “A Right to Belong: Legal Protection of Sociological Membership in the Application of Article 12(4) of the ICCPR” (2014) 46:1 NYUJ Intl L & Pol 1097.

issue arises in that “there is no coherent, accepted definition of nationality in international law and only conflicting descriptions under the different municipal laws of states.”⁷¹

What is clear is that nationality is relational. Conferral of nationality comes with rights and obligations. Individuals owe allegiance to their state and may be able to demand protection in return.⁷² In the *Nottebohm* case, the International Court of Justice recognized this relational character of nationality as “a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties.”⁷³ Beyond suggesting that this social fact must be assessed in relative terms vis-à-vis another state, the Court did not explain how such legal bonds should be assessed.⁷⁴ This is significant because the right to enter or remain in a state turns on a person being a national of that state.

Determining who and when a person is a national is generally left to the domestic laws of states.⁷⁵ These regimes vary substantially. Nationality may be conferred by *jus soli* (place of birth), *jus sanguinis* (parental citizenship) or a naturalization application process that in turn can be direct, derivative, because of adoption, or based on membership in a group.⁷⁶ The Canadian citizenship regime includes a mixture of birthplace, parental citizenship, and naturalization (that can be direct, based on adoption, or to alleviate statelessness).⁷⁷

In Mr. Abdi’s case, none of these avenues were available to him. He could not apply directly as a minor. He was not adopted. His legal parent, the provincial child welfare agency, could have applied on his behalf but it did not. As a result, Mr. Abdi was a non-citizen even though he arrived at a young age and had spent the vast majority of his life in Canada. He was not a national of Canada, at least from the perspective of domestic law.

Mr. Abdi was, however, a long-term resident of Canada and considered himself to be Canadian. Article 12(4) of the *International Covenant on Civil and*

⁷¹ Malcolm N Shaw, *International Law*, 6th ed (Cambridge: Cambridge University Press, 2008) at 660.

⁷² Hugh M Kindred et al, *International Law: Chiefly as Interpreted and Applied in Canada*, 8th ed (Toronto: Emond Montgomery Publishing, 2014) at 493.

⁷³ *Nottebohm Case (second phase)*, Judgment of April 6th 1955: ICJ Reports 1955, at 4, 23.

⁷⁴ *Ibid.*

⁷⁵ Shaw, *supra* note 71 at 600.

⁷⁶ Kindred et al, *supra* note 72 at 494.

⁷⁷ *Citizenship Act*, *supra* note 1 at ss 3(1), 5(1), 5(5), 5.1.

Political Rights, to which Canada is a party, provides that “[n]o one shall be arbitrarily deprived of the right to enter his own country.”⁷⁸ In its general comment on freedom of movement, the United Nations Human Rights Committee concluded that this paragraph necessarily confers a right to remain and a prohibition of enforced expulsion.⁷⁹

The Committee also noted that there is no distinction between citizens and non-citizens or between nationals and aliens. Accordingly, the scope of “his own country” must be broader than nationality:

[I]t embraces, at the very least, an individual who, because of his or her special ties to or claims in relation to a given country, cannot be considered to be a mere alien The language . . . moreover, permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence.⁸⁰

This produces an obligation to consider whether removal of a person is arbitrary under the *ICCPR* notwithstanding the fact that a person is a non-citizen and their removal is authorized by domestic law.⁸¹

Following this general comment, the Committee’s jurisprudence began to evolve. Liss argues that the Committee shifted from a restrictive interpretation of Article 12(4) that required some type of *mala fides* on the part of the state to a broader interpretation that is based on the relative strength of a person’s sociological connection to a state.⁸² This is evident from two cases — *Warsame v Canada* and *Nystrom v Australia*.⁸³

In *Warsame*, the author (applicant) was born in Saudi Arabia but was of Somali descent. He arrived in Canada at the age of four. In his early twenties, he was convicted of robbery as well as possession for the purposes of trafficking. This resulted in a finding of serious criminal inadmissibility and a deportation order. The author’s attempts to seek recourse from the courts were unsuccessful in large part because he was unrepresented and failed to

⁷⁸ “International Covenant on Civil and Political Rights”, December 19, 1966, [1976] Can TS No 47, Articles 12(4).

⁷⁹ UNHRC, “CCPR General Comment No 27: Article 12 (Freedom of Movement)” (1999) 67th Sess UN Doc CCPR/C/21Rev.1/Add.9 at para 19.

⁸⁰ *Ibid* at para 20.

⁸¹ *Ibid* at para 21.

⁸² Liss, *supra* note 70 at 1137–55.

⁸³ *Warsame*, *supra* note 24; UNHRC, *Nystrom & Turner v. Australia*, Comm No 1557/2007, UN Doc CCPR/C/102/D/1557 /2007 July 18, 2011) [*Nystrom*].

file the necessary documents.⁸⁴ Before the Committee, the author argued that he faced risk in Somalia, had no connection to that country, did not speak the language, and had no support structure.⁸⁵

In finding that Canada was the author's "own country" under Article 12(4), the Committee noted the author's young age when he came to Canada, that he had "lived almost all his conscious life in Canada," that he was educated in Canada, that his linguistic ties were to Canada, and that he had no experience or support structure in Somalia.⁸⁶ In other words, the author's sociological connection was to Canada not Somalia. The Committee held "that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable" and concluded that deportation in the author's circumstances would be arbitrary and a violation of the ICCPR.⁸⁷ Canada ignored this non-binding decision and deported the author anyway.⁸⁸

In *Nystrom*, a non-citizen was again facing deportation, this time from Australia, on account of serious criminality. The author arrived in Australia at age one-month. At age thirteen he was apprehended by child welfare services and became a ward of the state. As a teenager and later an adult, the author amassed a significant and serious criminal record that included sexual assault of a minor. He was successfully deported to Sweden before bringing his complaint to the Committee.⁸⁹

In determining that Australia was the author's own country, the Committee remarked that it was focused on "close and enduring connections between the person and a country, connections which may be stronger than those of nationality."⁹⁰ The Committee then noted the many connections the author had with Australia, in particular, his involvement with that country's child welfare system:

⁸⁴ Warsame, *supra* note 24 at paras 2.1-2.7.

⁸⁵ *Ibid* at paras 3.1-3.5.

⁸⁶ *Ibid* at para 8.5.

⁸⁷ *Ibid* at para 8.6.

⁸⁸ Andrew Stobo Sniderman, "Jama Warsame is a citizen of nowhere" *Maclean's* (10 December 2013), online: <www.macleans.ca/news/canada/jame-warsame-is-a-citizen-of-nowhere/> [perma.cc/YJL3-FUMG] (detailing how during a stopover in the Netherlands Mr. Warsame attempted to claim refugee status in that country but was considered to be insufficiently Somali by Dutch authorities in order to establish the claim).

⁸⁹ *Nystrom*, *supra* note 83 at paras 2.1-2.8.

⁹⁰ *Ibid* at para 7.4.

[T]he author alleges that he never acquired the Australian nationality because he thought he was an Australian citizen. The author argues that he was placed under the guardianship of the State since he was 13 years old and that the State party never initiated any citizenship process for all the period it acted on the author's behalf. The Committee observes that the State party has not refuted the latter argument.⁹¹

Given these circumstances, the Committee concluded that the deportation was arbitrary and that the author should not have been deported.⁹² However, like Canada, Australia refused to recognize the Committee's decision.⁹³

While *Warsame* and *Nystrom* are surely examples of state non-compliance with international law, what matters more is the Committee's recognition of a broad, sociological test for determining whether a country is a person's "own country" for the purposes of Article 12(4). This, Liss argues, is consistent not just with the *travaux préparatoires* of the ICCPR, but also with recognition of sociological belonging in other areas of international human rights law as well as an emerging rights regime that more readily restricts unilateral state authority over migration governance.⁹⁴

Such limitations, however, are not without implication. Liss identifies three main implications: the promotion of two-tier nationality, the uncertainty of how to apply sociological belonging to undocumented migrants, and the possibility of excessive vagueness in the test for Article 12(4).⁹⁵ An answer to some of these concerns, according to Liss, is to limit claims under Article 12(4) "to individuals who arrived in the country of residence at a young age."⁹⁶

The problem with this answer is that it does not fully explain why age is the only factor relevant to determining sociological connection or why it should be the differentiating factor. Age may be a major factor in the analysis, especially when combined with relative length of habitation in a country of residence versus a country of citizenship. However, it is not the only relevant factor. Significant establishment and sociological attachment may also develop from familial, social, educational, employment, linguistic,

⁹¹ *Ibid* at para 7.5.

⁹² *Ibid* at para 7.6.

⁹³ Jeff Waters, "Australia defies UN on deportation case", *ABC News* (25 April 2012), online: <www.abc.net.au/news/2012-04-25/australia-defies-united-nations-on-stephan-nystrom-case/3972180> [perma.cc/6Z74-N6N3].

⁹⁴ Liss, *supra* note 70 at 1157–58.

⁹⁵ *Ibid* at 1165–1173, 1179–1184.

⁹⁶ *Ibid* at 1189.

or religious connections to a jurisdiction. Some of these factors are already recognized in the Canadian jurisprudence (discussed above) and are reasonable considerations for determining sociological belonging. The question to ask is how best to assess sociological connection to place *not* which factors are worthier of recognition. With that said, these questions are questions of implementation and do not take away from the core of Liss's argument.

At the core of recognizing protections for sociological membership is the acknowledgement that such protections "constrain the scope of sovereign discretion to determine who can enter and who belongs."⁹⁷ This does not do away with states. Quite the opposite. States retain the focal position through which belonging takes meaningful shape, at least in terms of legality. While sovereignty is challenged, the emergence of a modified approach to Article 12(4) maintains "the relevance of the state".⁹⁸ In this respect, "a cosmopolitan 'right to belong' ... is, interestingly, far from post-national."⁹⁹

In addition to being cosmopolitan, a "right to belong" is further evidence of a multi-scalar governance approach to deportation practices. The limiting of state sovereignty does not do away with the state, but it does constrain the unilateral role of the state – it challenges methodological nationalism. In its place is a mixture of additional actors, at different scales, who influence how conceptions of citizenship and belonging are interpreted and applied deportation cases.

IV. Contesting Deportation of Long-Term Residents

Contested notions of citizenship and belonging take shape in concrete cases and broader public policy discussions. This part demonstrates how multi-scalar deportation practices, and the relational power contest through which these practices function, affect both individual cases and public policy reforms. Race can be central to these dynamics. A close evaluation of the litigation, advocacy, and outcome for Mr. Abdi provides an important case study with which to evaluate the force of multi-scalar migration governance on the state's traditional power to deport, and to understand the role of race in these processes. At the same time, countervailing cases, with different

⁹⁷ *Ibid* at 1191.

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

outcomes, provide a frame of reference with which to evaluate the true force of the different sources multi-scalar migration governance. This part demonstrates that multi-scalar migration governance plays a role in contesting deportation of long-term residents even it is not always determinative of individual case outcomes. It also shows that race complicates the analysis, creating both vulnerabilities to and protections from deportation. Beyond individual cases, this part also shows that multi-scalar migration governance influences broader public policy reforms applicable to non-citizens.

A. Abdoul Abdi and the Force of Multi-scalar Migration Governance

In Mr. Abdi's case, multi-scalar migration governance exposed two competing circumstances. On the one hand, a long-term resident who was inadmissible to Canada on account of serious criminality. On the other hand, a long-term resident who also had significant sociological connections to Canada and whose upbringing was shaped by racial disadvantage in state care.

A traditional, state-centric approach to sovereignty and citizenship would resolve this competition by affirming the state's unilateral power to deport. Mr. Abdi was not a Canadian citizen, and he was inadmissible on account of serious criminality. With passing reference to his experience as a child in the care of the state, a Minister's delegate decided to refer Mr. Abdi to the Immigration Division. It was at this point that Mr. Abdi retained counsel and sought judicial review. The referral decision was overturned on a technicality and sent back to a different Minister's delegate.¹⁰⁰

Rather than issue Mr. Abdi a warning letter that would give him a second chance, the Minister sought deportation again. This time Mr. Abdi was represented by counsel at the referral stage. The Minister's delegate was provided with an extensive record showing Mr. Abdi's deplorable care in the hands of the state. This included denying him the right to have rights by failing to apply for citizenship on his behalf in a timely manner. The record demonstrated that Mr. Abdi would have become a citizen but for the state's apprehension of him as a child. He also made extensive legal submissions that were based, in part, on the international right to belong and the

¹⁰⁰ *Abdi I*, *supra* note 26 at paras 38-44 (finding that the Minister's delegate erred in relying on criminal charges that did not result in convictions as well as protected youth records).

constitutional rights to equality and to freedom from cruel and unusual treatment. Without any reference to these submissions or to the state's role in depriving Mr. Abdi of citizenship, the Minister's delegate again decided to refer Mr. Abdi to the Immigration Division. He again sought judicial review.

What changed on this second round of litigation was the extent to which ordinary Canadians began discussing and debating the issues that were raised by this case. This then led to discussion and debate in mass media and opinion editorials. While these conversations did not use the term multi-scalar migration governance, a close reading suggests that this concept was at the center of the debate.

Opinion writers asked who should shoulder the blame when the state fails to take care of a child in its care.¹⁰¹ Others noted that there were multiple "local and federal government failures," that is, the failures were multi-scalar.¹⁰² In this sense, Mr. Abdi's apprehension and placement in the care of the state was directly linked to the person he became. This reframed or at least complicated the issue of belonging and identity. As two human rights advocates argued: "The issue is not whether Mr. Abdi is a model member of the Canadian community and so 'deserves' to stay. What matters is that he is already a product and member of this society."¹⁰³ Many of these opinion writers observed that race, specifically Blackness, was linked to overrepresentation and poor outcomes in state care.¹⁰⁴

Beyond opinion writers, an ad hoc coalition of scholars, activists, and organizers in cities across Canada — led most prominently by Dr. El Jones, Dr. Idil Abdillahi, and Mr. Desmond Cole, amongst others — formed to support the case and to raise awareness of the underlying issues. In addition

¹⁰¹ Andray Domise, "Who is to blame when Canada's social services upend families?", *Maclean's* (30 January 2018), online: <www.macleans.ca/opinion/who-is-to-blame-when-canadas-social-services-upend-families/> [perma.cc/LBM3-NPNS]; Denise Balkissoon, "As Abdoul Abdi's parent, Canada is guilty of child neglect", *The Globe & Mail* (15 February 2018), online: <www.theglobeandmail.com/opinion/as-abdoul-abdis-parent-canada-is-guilty-of-child-neglect/article38000645/> [perma.cc/XF6P-7DT8].

¹⁰² Stephanie J Silverman & Amy Nethery, "The shameful attempt to deport a man who's been in Canada since childhood", *The Conversation* (13 March 2018), online: <theconversation.com/the-shameful-attempt-to-deport-a-man-whos-been-in-canada-since-childhood-93262> [perma.cc/7JQZ-7E8G].

¹⁰³ Samer Muscati & Audrey Macklin, "Abdoul Abdi case: A test of Canada's commitment to rules and compassion", *The Globe & Mail* (16 January 2018), online: <www.theglobeandmail.com/opinion/abdoul-abdi-case-a-test-of-canadas-commitment-to-rules-and-compassion/article37616825/> [perma.cc/VH3P-LD87].

¹⁰⁴ See e.g. Domise, *supra* note 101.

to advocacy and organization skills, these people also brought expertise on the role of race in Canadian public policy and related struggles for justice.¹⁰⁵

The coalition arranged for Mr. Abdi's older sister, Ms. Fatuma Alyaan, to attend a town hall hosted by the prime minister. During the question period, Ms. Alyaan was able to directly ask the prime minister why he was deporting her brother and pointedly: "If it was your son would you do anything to stop this?"¹⁰⁶ The prime minister responded: "I know I speak for most of us in this room and indeed across the country when we saw how the care system failed your brother ... We saw how the challenges he's facing have impacted upon him."¹⁰⁷

Implicit in the prime minister's response are two loci of concern. First, there is a reference to the people "in this room," members of the local community who came to participate in a town hall. Second, there is a reference to those "across the country" who collectively comprise the nation-state. In this respect, the prime minister acknowledged, consciously or unconsciously, that both loci or scales are relevant for understanding and evaluating the prospect of a non-citizen being deported from Canada.

Explicit in the prime minister's response is an admission that governmental care systems failed Mr. Abdi and that the looming threat of deportation was attributable, at least in part, to this failure. This was not merely a situation of a non-citizen's own making; it was also a situation which the state helped create. As Dr. Nisha Nath notes, "there is a deep complexity to Abdoul's story, where intersecting and functionally interacting institutions (child welfare, policing, and immigration) and structures of power (anti-Blackness, border imperialism, and settler colonialism) work together to curate the hostilities marking his publicly documented life."¹⁰⁸ As a result, there was no credible claim that the only relevant unit of analysis was the federal government's *Immigration and Refugee Protection Act* and its provisions on inadmissibility for serious

¹⁰⁵ Idil Abdillahi, *Black Women Under State: Surveillance, Poverty, & the Violence of Social Assistance*, (Winnipeg: ARP Books, 2022); Rinaldo Walcott and Idil Abdillahi, *BlackLife: Post-BLM and the Struggle for Freedom*, (Winnipeg: ARP Books, 2019); El Jones, *Live from the Afrikan Resistance!*, (Winnipeg: Roseway, 2014); Desmond Cole, *The Skin We're In: A Year of Black Resistance and Power*, (Toronto: Doubleday, 2020).

¹⁰⁶ Brett Bundale, "System failed former foster child facing deportation: Trudeau", *CityNews* (10 January 2018), online: <<https://toronto.citynews.ca/2018/01/10/nova-scotia-refugee-deportation/>> [perma.cc/3W42-FQM6].

¹⁰⁷ *Ibid.*

¹⁰⁸ Nisha Nath, "Curated Hostilities and the Story of Abdoul Abdi: Relational Securitization in the Settler Colonial Racial State" (2021) 25:2 *Citizenship Studies* 292, 293.

criminality. The prime minister acknowledged this multi-scalar reality. Unsurprisingly, the story blew up nationally and provincially.

The premier of the province responsible for Mr. Abdi's apprehension and care stated that there would be a full review of the child welfare agency's policies.¹⁰⁹ Social workers started having conversations about the failures of the care system – especially for Black and Indigenous children – and the need to develop better interventions for non-citizen children.¹¹⁰ An opposition member of the provincial legislature proposed a private member's bill that would force the relevant department to apply for citizenship on behalf of children in its care.¹¹¹

When the federal minister of immigration visited Halifax to attend a public community meeting, the coalition insured that Mr. Abdi's case was on the agenda. In unison, a group of young people rose and silently turned their backs to the Minister to reveal the words "Free Abdoul". The Minister responded by saying this: "It is unacceptable to see children in care who are let down by the system. Children who had the right to access citizenship and who missed that right, not because of the fault of their own but because of the system."¹¹²

What is implicit in this statement is that "the system" in which non-citizen children are placed includes both state actors (national, provincial and municipal) and non-state actors (e.g., foster families and migrant settlement organizations) who collectively create opportunities and barriers for children. In Mr. Abdi's case, the relevant failures or barriers were not strictly federal or provincial or municipal, they were racial and multi-scalar in nature. Most importantly, according to the Minister of Immigration, these failures were "unacceptable".¹¹³

¹⁰⁹ Bundale, *supra* note 106.

¹¹⁰ Kate Matheson & Alec Stratford, "Our children deserve better: Reflections on how the system failed Abdoul Abdi", Nova Scotia College of Social Workers (2018), online: <nscsw.org/our-children-deserve-better-reflections-on-how-the-system-failed-abdoul-abdi/> [perma.cc/4QER-U82E]; Melanie Doucet & Harrison (Harri Sun) Pratt, "Breaking the cycle for 'crossover youth'", Policy Options (18 April 2018), online: <policyoptions.irpp.org/magazines/april-2018/breaking-cycle-crossover-youth/> [perma.cc/N38K-CKEA].

¹¹¹ Nova Scotia, Bill No 81: An Act to Amend the Children and Family Services Act, 63rd General Assembly, 1st Session (7 March 2018).

¹¹² Alexa MacLean, "Halifax human rights advocates send message of support for Abdoul Abdi", *Global News* (21 February 2018), online: <globalnews.ca/news/4039952/halifax-human-rights-advocates-send-message-of-support-for-abdoul-abdi/> [perma.cc/5NR6-G45R].

¹¹³ *Ibid.*

Despite these public pronouncements by the Prime Minister and the Minister of Immigration, the deportation proceedings against Mr. Abdi continued, unhalted by the pending judicial review application. Protests followed in cities across the country.¹¹⁴ Spurred by the growing public profile of Mr. Abdi's case, a child rights organization and a civil liberties organization both successfully sought leave to intervene in the judicial review application.

The point of this case vignette is to show how the apprehension of Mr. Abdi by the child welfare system provided both short-term protection and long-term harm. Recognition of this harm, the different levels of government responsible for this harm and the role of race in this harm, shaped subsequent debates about citizenship and belonging. It also demonstrates the multi-scalar nature of deportation practices insofar as the systems that impacted Mr. Abdi were at the municipal, provincial and federal levels of government. Finally, the debates around the case show the relational nature of the contest between the state's power to deport and a community's assertion that a person is a member of the community. Canada's assertion of methodological nationalism and the unilateral authority to deport were contested at the municipal, provincial, and national levels. Public discourse rejected the traditional account provided by methodological nationalism as simplistic and blind to the role racialization played throughout Mr. Abdi's childhood in Canada. Debates in the political arena, however, do not necessarily transfer with success to the courts. In Mr. Abdi's case, political debates do appear to have at least informed the Court's decision.

In allowing Mr. Abdi's application for judicial review, the Court noted that the Minister's delegate had blatantly disregarded his constitutional submissions.¹¹⁵ The Court expressed the view that these submissions could have been relevant for establishing a claim of discrimination:

Here, Mr. Abdi provided detailed submissions on his particular and unique facts, including the fact that he was a long-term ward of the state. With respect to his lack of Canadian citizenship, he highlighted the fact that the [child welfare agency] intervened to remove his name from his aunt's citizenship application. These factors may be relevant considerations with respect to a s.15 *Charter* value of non-

¹¹⁴ Robert Devet, "Halifax press conference pressures Province, Feds to allow Abdoul Abdi to stay in Canada", *The Nova Scotia Advocate* (6 March 2018), online: <nsadvocate.org/2018/03/06/halifax-press-conference-pressures-province-feds-to-allow-adoul-abdi-to-stay-in-canada/> [perma.cc/J9CQ-NJ6X].

¹¹⁵ *Abdi II*, *supra* note 26 at paras 82-83.

discrimination in the MD's referral decision. But they were not considered. There is no indication in the record or in the MD's decision that she turned her mind to any of these considerations.¹¹⁶

The Court also found that the Minister's delegate had improperly ignored Mr. Abdi's international law arguments.¹¹⁷ As a result, the Court found the decision unreasonable and sent it back for redetermination by a different Minister's delegate. Redetermination did not occur because the Minister of Public Safety and Emergency Preparedness decided to finally halt further deportation proceedings.¹¹⁸

B. Countervailing Cases and Public Policy Changes

The outcome in Mr. Abdi's case sits in stark contrast to four other recent cases where long-term residents faced deportation from Canada on account of criminal inadmissibility. In each case, the long-term resident was ordered deported, and the deportation order was upheld by the Federal Court on judicial review. Accordingly, these cases provide a helpful juxtaposition with which to evaluate the claims made in the preceding parts in conjunction with Mr. Abdi's case. Mr. Abdi's case also precipitated provincial public policy changes for non-citizen children in care and an update to the federal policy on deporting long-term residents as well as proposed legislative amendments to the *Citizenship Act*. These public policy changes and proposed legislative changes also provide a reference with which to evaluate the strength and limits of multi-scalar migration governance.

In *Revell v. Canada (Citizenship and Immigration)*, the applicant, David Revell, immigrated to Canada from England at the age of ten. He then lived in Canada for 42 years before running afoul of the law. Mr. Revell was convicted of drug trafficking as part of an investigation into organized crime and sentenced to five years in prison. Unbeknownst to him, he was given a warning letter. Years later, he was convicted of assault with a weapon and

¹¹⁶ *Ibid* at para 87.

¹¹⁷ *Ibid* at para 96.

¹¹⁸ Ralph Goodale, "The Government of Canada respects the decision filed on July 13 by the Federal Court concerning Abdoul Abdi. The Government will not pursue deportation for Mr. Abdi." (17 July 2019 20:59), online: [Twitter <twitter.com/RalphGoodale/status/1019371039128674304?ref_src=twsrc%5Etfw%7Ctwcamp%5Etwetembed%7Ctwterm%5E1019371039128674304%7Ctwgr%5Ee3416e0fd95f0e989aaf72cc2034989e0253c8%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fatlantic.ctvnews.ca%2Fcanadian-government-won-t-pursue-deportation-of-abdoul-abdi-minister-says-1.4017542> \[perma.cc/GYS4-ACMC\]](https://twitter.com/RalphGoodale/status/1019371039128674304?ref_src=twsrc%5Etfw%7Ctwcamp%5Etwetembed%7Ctwterm%5E1019371039128674304%7Ctwgr%5Ee3416e0fd95f0e989aaf72cc2034989e0253c8%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fatlantic.ctvnews.ca%2Fcanadian-government-won-t-pursue-deportation-of-abdoul-abdi-minister-says-1.4017542).

assault causing bodily harm against his domestic partner. This only resulted in a suspended sentence and probation, but it restarted deportation proceedings. Mr. Revell was found inadmissible to Canada on account of organized criminality and serious criminality. The Federal Court upheld a deportation order against him after finding that Mr. Revell's lengthy residence and family connections in Canada were adequately considered by the Minister's delegate and did not raise any constitutional concerns.¹¹⁹

In *Moretto v. Canada (Citizenship and Immigration)*, Massimo Moretto immigrated to Canada at 9-months of age. He then lived in Canada for forty years, but his life was marred by addiction and mental health problems. These disabilities contributed to numerous run-ins with the legal system that resulted in a deportation order. Initially, Mr. Moretto was given a reprieve from deportation if he abided by certain conditions, but he ultimately re-offended and the deportation order was reinstated. The Federal Court also upheld this decision after finding that Mr. Moretto's lengthy residence and family connections in Canada did not engage any constitutional or international human rights.¹²⁰

What is remarkable about these two decisions is that despite some close parallels to Mr. Abdi's case – childhood arrival, lengthy residence, and family connections – the outcomes were substantially different. The outcome in *Moretto* is especially noteworthy given the role Mr. Moretto's disability played in his criminality. Both cases, which were affirmed on appeal, serve to reinforce methodological nationalism and the absolute nature of the state's power to deport. At first glance, this casts doubt on the multi-scalar account of migration governance, but as I develop further below, a closer examination of these cases, coupled with more recent case law, reinforces the main claim of the paper.

Of particular significance are the cases of Mr. Abdilahi Elmi and Mr. Deepan Budlakoti. Mr. Elmi came to Canada as a child refugee. Like Mr. Abdi, he was apprehended by child protection services and became a ward of the state. "By age 16, he was living on the streets, where he began

¹¹⁹ *Revell v Canada (Citizenship and Immigration)*, 2017 FC 905 aff'd *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262, leave to appeal to the Supreme Court of Canada denied, *Revell v Canada (Minister of Citizenship and Immigration)*, [2019] SCCA No 478.

¹²⁰ *Moretto v Canada (Citizenship and Immigration)*, 2018 FC 71 aff'd *Moretto v Canada (Citizenship and Immigration)*, 2019 FCA 261 leave to appeal to the Supreme Court of Canada denied, *Moretto v Canada (Minister of Citizenship and Immigration)*, [2019] SCCA No 482.

committing crimes.”¹²¹ This led to further criminality as an adult, inadmissibility proceedings, a deportation order, and a subsequent danger opinion finding that he could be *refouled* to Somalia despite his refugee status. None of these decisions were judicially reviewed.

Facing imminent removal from Canada, several scholars, organizers, and activists took up his case. Mr. Elmi was able to retain a lawyer who sought a judicial stay of removal as well as leave to commence a late application for judicial review of the danger opinion finding. The stay request was rejected.¹²² The leave request was also dismissed.¹²³ This left Mr. Elmi without domestic legal impediments to deportation. However, with the help of an international human rights legal clinic – the same organization that assisted in the case of Mr. Warsame (discussed above) – Mr. Elmi made a request to the UN Human Rights Committee, under the optional protocol to the *ICCPR*, for an emergency interim measures request to halt his removal. The Committee granted this request and asked Canada to temporarily halt the removal pending full adjudication of the case by the Committee.¹²⁴ Canada accepted this request, consistent with its customary practice of adhering to interim measures requests from the Committee. As a result, Mr. Elmi’s deportation is temporarily on hold.

What is remarkable about this case is that despite even closer parallels with Mr. Abdi’s case, Canada’s deportation regime proceeded unimpeded right up to the eve of deportation. Like in *Revell* and *Moretto*, requests for intervention by domestic courts were unsuccessful. Despite the state’s omnipotent power to deport, the competing sources of migration governance identified in this paper were engaged: both local organizations and an international treaty body. This engagement changed the course of Mr. Elmi’s case and led to a temporary halt of his deportation despite domestic courts fully confirming the legality of deportation. While Mr. Elmi’s case is still pending, the temporary halt to deportation casts some

¹²¹ “Former refugee Abdilahi Elmi won't be deported to Somalia Monday as scheduled”, *CBC News* (23 August 2019), online: <www.cbc.ca/news/canada/edmonton/abdilahi-elmi-deportation-somalia-edmonton-1.5258193> [perma.cc/22XQ-MG75].

¹²² *Elmi v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1095 [Elmi].

¹²³ *Ibid* unreported (12 Nov 2019) File No IMM-5076-19.

¹²⁴ University of Toronto International Human Rights Program, “Media Release: UN Calls on Canada to Halt Abdilahi Elmi’s Deportation” (23 August 2019), online: <ihrp.law.utoronto.ca/news/media-release-un-calls-canada-halt-abdilahi-elmi-s-deportation> [perma.cc/W98D-XMZH].

doubt on the unilateral nature of the state's power to deport and reinforces the claim that migration governance is multi-scalar.

Mr. Budlakoti was born in Canada to parents of Indian nationality. This would normally confer citizenship. However, Mr. Budlakoti's parents were employed at the Indian High Commission, which is a barrier to citizenship by birth in Canada. When Mr. Budlakoti was three, his parents applied for permanent residence and included him as a dependent. All family members became permanent residents.¹²⁵ Three years later, his parents applied for Canadian citizenship. Mr. Budlakoti was not included on his parent's application because the family was under the false impression that his birth in Canada conferred citizenship. Reinforcing this false impression was the fact that as a child, Mr. Budlakoti was issued a Canadian passport, along with his parents, despite having never applied for citizenship.¹²⁶ Mr. Budlakoti would spend his entire childhood in Canada under the mistaken belief that he was Canadian.¹²⁷

Then, in his early twenties, Mr. Budlakoti was convicted of breaking and entering, various weapons offences, and narcotics trafficking. He was sentenced to three years in prison.¹²⁸ He quickly learned that he was not a Canadian citizen when federal immigration officials started inadmissibility proceedings against him.¹²⁹ Mr. Budlakoti's efforts to oppose deportation were unsuccessful. However, he was not removed because he did not possess Indian citizenship which effectively rendered him stateless.¹³⁰ Amnesty International took up his case, calling on Canada to restore Mr. Budlakoti's nationality.¹³¹

Mr. Budlakoti filed an application in Federal Court for a declaration that he was a Canadian citizen. This was rejected on the grounds that he was estopped from re-arguing the issue of his parents' employment.¹³² The

¹²⁵ *Budlakoti v Canada (Citizenship and Immigration)*, 2015 FCA 139 at para 4 [*Budlakoti*].

¹²⁶ Daiva Stasiulis, "Deprivation, The Extraordinary Statelessness of Deepan Budlakoti: The Erosion of Canadian Citizenship Through Citizenship" (2017) 11:1 *Stud Soc Justice* 1-26 at 11-12.

¹²⁷ Stacy Douglas, "Canada must give Deepan Budlakoti back his citizenship", *Ottawa Citizen* (28 October 2019), online: <ottawacitizen.com/opinion/douglas-canada-must-give-deepan-budlakoti-back-his-citizenship> [perma.cc/3CBL-FYSH] [*Douglas*].

¹²⁸ *Budlakoti*, *supra* note 125 at para 6.

¹²⁹ *Ibid* at para 7.

¹³⁰ *Ibid* at paras 7-14.

¹³¹ Alex Neve, "Nationality, Statelessness and the Case of Deepan Budlakoti", *Amnesty International* (9 March 2015), online: <www.amnesty.ca/news/uncategorized/nationality-statelessness-and-the-case-of-deepan-budlakoti/> [perma.cc/CH8J-RJT8].

¹³² *Budlakoti*, *supra* note 125 at para 41.

Federal Court of Appeal dismissed Mr. Budlakoti's appeal, holding that he had other avenues to pursue a discretionary grant of citizenship in Canada and that it was premature to classify him as a stateless person.¹³³

During this process, Mr. Budlakoti also filed a complaint with the United Nations Human Rights Committee, alleging that deportation would violate, amongst other provisions, Articles 12(4), 17, and 23(1) of the *ICCPR*. A majority of the Committee found the complaint admissible and determined that deportation would constitute arbitrary interference with the family.¹³⁴ The Committee was unanimous in also finding that deportation would violate Mr. Budlakoti's right to remain in his own country. The majority noted that Mr. Budlakoti was born in Canada, had spent his entire life in Canada, and had his entire family in Canada. The majority further noted that Mr. Budlakoti had been mistakenly issued a Canadian passport and that had he not been issued this passport "he would have become aware much earlier that he was not considered to be a Canadian citizen, at which point he could have applied for citizenship."¹³⁵ Based on Mr. Budlakoti's strong ties to Canada, his lack of ties to India, and the confusion around his nationality during his childhood, the majority held that he had "established that Canada is his own country within the meaning of article 12(4) of the Covenant."¹³⁶ Mr. Budlakoti's case remains outstanding, complicated by the fact that he was recently charged with additional weapons trafficking offences in 2017 and appears to be awaiting trial.¹³⁷

What distinguishes Mr. Abdi's, Mr. Elmi's, and Mr. Budlakoti's cases from those of Mr. Revell and Mr. Moretto is the impact of multi-scalar governance and the role of race. In the former cases, where the applicants were all racialized, local organizations raised public protest regarding the potential removal of individuals who, these organizations argued, were members of the local and Canadian polities. Such protests did not emerge in the cases of Mr. Revell and Mr. Moretto who are both white.

¹³³ *Ibid* at para 69.

¹³⁴ UNHRC, *Deepan Budlakoti v Canada*, Comm No 2264/2013, UN Doc CCPR/C/122/D/2264/2013 April 6, 2018), paras 8.6, 9.5-9.7 [*Budlakoti (HRC)*].

¹³⁵ *Ibid* at para 9.3.

¹³⁶ *Ibid*.

¹³⁷ Joe Lofaro, "Stateless Ottawa man facing 83 charges after OPP raid", *CBC News* (7 November 2017), online: <www.cbc.ca/news/canada/ottawa/deepan-budlakoti-gun-charges-opp-1.4391263> [perma.cc/DS89-P7MQ]; Stacy Douglas, "Canada must give Deepan Budlakoti back his citizenship", *Ottawa Citizen* <ottawacitizen.com/opinion/douglas-canada-must-give-deepan-budlakoti-back-his-citizenship> [perma.cc/HYL4-QZMR]; *Budlakoti et al v R*, 2020 CanLII 73972 (ONSC).

Another distinguishing feature is that an international treaty body regime was engaged, explicitly in Mr. Elmi's and Mr. Budlakoti's cases and implicitly in Mr. Abdi's legal argument and public advocacy. While Mr. Moretto did raise international law arguments before the Federal Court, these arguments were proffered as interpretative aids for domestic and individualized constitutional rights.

Perhaps the most important distinguishing feature between these cases is Mr. Abdi's and Mr. Elmi's experiences in the child protection system, and Mr. Budlakoti's mistaken belief (reinforced by immigration officials) that he was Canadian. Mr. Abdi and Mr. Elmi were apprehended from their families and both became wards of the state. Both were placed in the "care" of the state and suffered from the well-documented shortcomings of these systems. Both were presented with barriers to education, to well-being, to belonging and to acquisition of the right to have rights in Canada. At the same time, this wardship cemented their relational existence and belonging within Canada.

Mr. Budlakoti, for his part, was improperly issued a Canadian passport. He was accepted as Canadian by immigration authorities and proceeded to live his life as a Canadian. As a direct result of Canada's mistaken acceptance of Mr. Budlakoti as Canadian, his family did not include him on their citizenship application. While Mr. Budlakoti did not grow up in the care of the state, Canada played a causal role in him not applying for citizenship as a child.

With the aid of multi-scalar migration governance actors and institutions, these relational linkages (wardship and erroneous recognition of citizenship) created opportunities for legal and political advocacy that were absent in Mr. Revell's and Mr. Moretto's cases. Characterizing this simply as opportunities for advocacy, however, misses the role that race plays in the nature of the mobilization. Where advocates already possess an understanding of multi-scalar governance and the role of race in Canadian public policy, they are more likely to see and respond to the injustices caused by racial disadvantage, whether in the context of deportation or elsewhere. They are also more likely to possess advocacy skills — borne out of an ongoing struggle for racial justice in Canada — that increase their efficacy. In this sense, *Revell* and *Moretto* do not dispel the multi-scalar account of migration governance, they reinforce that the multi-scalar account may have more salience, theoretically and practically, when certain factors are present,

particularly relational linkages within state institutions where there is an intersection with race.

These different case outcomes create somewhat of a mixed jurisprudential landscape. The decision in *Abdi II* stands for the proposition that a Minister's delegate cannot simply ignore constitutional and international law arguments. In the future, more responsive reasons will be expected. In contrast, *Revell* and *Moretto* stand for the proposition that certain substantive constitutional rights – the right to non-deprivation of life, liberty, and security of the person *and* the right to be free from cruel and unusual treatment – are not engaged at the inadmissibility determination stage of the deportation process. Both decisions leave intact the principle that non-citizens do not have an unqualified right to enter or remain in Canada. Of course, as this paper demonstrates, domestic legal arguments are not the only factor that influences case outcomes. Put another way, in a multi-scalar account of migration governance, domestic courts are not the only locus for advocacy and change.

Indeed, after Mr. Abdi's case was closed, the province where he was "in care" announced that it had "developed a new policy to guide child welfare social workers in their practice with children and families who are dealing with immigration and citizenship matters."¹³⁸ The brand-new policy requires social workers to identify the immigration status of children who become part of their caseload. While it does not mandate that a citizenship application be made on behalf of the child, it does require the worker to develop a plan with respect to immigration status and justify the suitability of that plan. This should significantly diminish the chance of another non-citizen child falling through the cracks and facing the prospect of deportation by the state who was responsible for their care. It also acknowledges, albeit implicitly, that migrant children have a right to belong and that the state may have an obligation to fulfill that right in circumstances where children are taken into state care. These provincial policy changes further support the claim that notions of citizenship and belonging do not strictly belong to federal authorities, even if the federal government has exclusive jurisdiction over formal citizenship.

¹³⁸ Nova Scotia, Department of Community Services, *Memorandum re Child Welfare Manual-Revisions and Additions* (30 April 2018).

More recently, the federal government made changes to its policy guidelines on referring inadmissibility reports to a deportation hearing (the “Inadmissibility Guidelines”).¹³⁹ This was the first update to the Inadmissibility Guidelines since 2007 and appears directly linked to the case law discussed in this paper.

The inadmissibility guidelines do not have the force of law. Some may suggest, on this basis, that Mr. Abdi’s case did not lead to any concrete change to immigration law and that it merely recognized a pre-existing administrative law right to have one’s arguments meaningfully considered. This stance ignores the importance of guidelines both legally and practically. Legally, guidelines are relevant to reasonableness review because they “informed the decision maker’s work.”¹⁴⁰ For example, guidelines may provide crucial interpretative assistance in understanding how administrative decision makers define certain terms.¹⁴¹ Practically, guidelines provide immediate instruction to frontline decision makers who often have no legal training. They may be the only articulation of the law that is considered by immigration officers and delegates of the Minister who operate in high-paced decision-making environments. They are regularly referred to by decision makers, counsel, and the courts. As such, the development of guidelines plays a role in the construction of immigration law.

After noting that the *Revell* and *Moretto* decisions suggest that the state of the law is in flux, the Inadmissibility Guidelines state:

Where a person specifically alleges that a provision of IRPA [*Immigration Refugee Protection Act*] or its application (i.e., decision of the MD [Minister’s delegate] to issue a removal order or refer the report to the Immigration Division ID for an admissibility hearing) breaches one or more enumerated Charter right, the MD must address these Charter concerns in their written decision. This was affirmed by the Federal Court in its decision in [*Abdi II*]. In other words, the MD cannot ignore Charter arguments. This does not mean, however, that MDs are expected to engage in a complex Charter analysis within the context of A44(2) decisions.¹⁴²

What is noteworthy about the Inadmissibility Guideline’s treatment of these cases is that the appellate decisions in *Revell* and *Moretto* – which in

¹³⁹ Canada Border Services Agency, “ENF 6 Review of reports under subsection A44(2)”, online: CBSA <www.canada.ca/content/dam/ircc/migration/ircc/english/resources/manuals/enf/enf06-eng.pdf> [perma.cc/39UV-2FM4] [CBSA].

¹⁴⁰ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 94.

¹⁴¹ *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 60.

¹⁴² CBSA, *supra* note 139 at 23.

Canada's system of precedent are to be given increased weight – are considered only in passing, whereas the lower court decision in *Abdi II* is treated as determinative, at least in the obligation to be responsive to submissions. While the underlying reasons for these guideline changes are not publicly available, the primacy placed on the trial-level decision in *Abdi II* appears to be a tacit acknowledgement that the state's power to deport may not be the only relevant consideration when a Minister's delegate exercises their discretion. The unspoken concern of the Inadmissibility Guidelines appears to be a fear that local organizations and international treaty bodies may well be able to challenge a decision, focused entirely on a traditional account of the state's power to deport, as either politically unpalatable or deficient at international law.

Even more recently, a public bill was introduced in the Senate to confer citizenship, as of right, to former children in care and to prevent them from being deported.¹⁴³ A speech from the bill's sponsor at second reading made clear that one of the cases that animated this legislation was the experience of Mr. Abdi.¹⁴⁴ Another Senator, speaking in support of the bill, noted the multi-scalar dimension of these types of cases and the intersecting role of race in creating disadvantage:

Abdoul was criminalized as part of a pattern of marginalizing neglect and harm that the Ontario Human Rights Commission has coined the "child-welfare-to-prison pipeline." At age 24, due to his record, he was threatened with deportation to a country that was embroiled in conflict and with which he had no connections. Why? Because his parent, his legal guardian – the government – failed to ensure he had citizenship ... In 2018, Fatouma Abdi asked Prime Minister Trudeau the question that we might all consider as we debate this bill, " . . . if it was your son, would you do anything to stop this?" ... Bill S-235 aims to prevent the travesty of Canada failing the children in care and then – instead of taking responsibility for the role that Canada has played in their marginalization, victimization, criminalization and/or institutionalization – not only telling them that they do not belong in this country but kicking them out of their home.¹⁴⁵

Whether this bill will become law remains to be seen and its status as a public Senate Bill makes this outcome less likely. Nonetheless, the tabling of

¹⁴³ Bill S-235, An Act to amend the Citizenship Act and the Immigration and Refugee Protection Act, 1st Sess, 44th Parl, 2022, (first reading 9 June 2022).

¹⁴⁴ "Bill S-235, An Act to amend the Citizenship Act and the Immigration and Refugee Protection Act", 2nd reading, Debates of the Senate, 42-1, No 49 (2 June 2022) at 1534 (Hon Mobina S B Jaffer).

¹⁴⁵ "Bill S-235, An Act to amend the Citizenship Act and the Immigration and Refugee Protection Act", 2nd reading, Debates of the Senate, 42-1, No 52 (9 June 2022) at 1599-1600 (Hon Kim Pate).

this bill and the related debates in the Senate recognize that multi-scalar governance shapes deportation and that racialization is a factor in these processes.

V. Conclusion

Migration governance is no longer solely within the purview of the nation-state, even when it comes to deporting non-citizens. Methodological nationalism and the state's assertion of unilateral control over migration has been challenged by a multi-scalar governance model that incorporates local communities, nation-states, and international treaty bodies.

Within this model, states retain significant legal authority to deport non-citizens. Canada's inadmissibility and deportation regime is an example of this type of legal authority, which domestic courts have fastidiously protected. However, competing legal regimes are emerging, most notably an evolving international human right to belong protected by the *ICCPR*. Supervised by an international treaty body, this international human right, depends theoretically on a conception of nationality that is linked to sociological connection to place rather than to formal citizenship, and depends practically on a state's willingness to comply with international law. This shift toward a rights analysis that incorporates sociological connection is entirely consistent with the reality that migrants, forced or otherwise, exist within and relate to geographic and political spaces, as well as to formal legal citizenship regimes.

It is these relational linkages to geography and polities, at both national and sub-national levels, that instantiate informal citizenship and belonging. While these relationships do not confer formal citizenship, they enable legal and political challenges to methodological nationalism when a person who belongs faces the prospect of deportation from their community.

Communities can advocate on behalf of migrants. Communities can have political salience, access to legal resources and supportive networks (local, national, and trans-national). Communities do not necessarily accept that the formality of citizenship governs what it means to belong or what considerations ought to be examined before a community member is deported. Communities may also understand how institutional racism at various scales makes migrants vulnerable to deportation and may have experience confronting this racism.

As a result, communities may challenge methodological nationalist and legal formalist accounts of immigration law that vest sole decision-making

authority over deportation in the hands of the federal government. And in raising such challenges, communities may rely on legal and political arguments that are based on sub-national, national, and international considerations informed by a critical understanding of race. In this sense, challenges to methodological nationalism are multi-scalar both in the actors involved and in the types of arguments raised.

The cases reviewed in this paper show that the legal and political dynamics resulting from these types of multi-scalar challenges can shape individual case outcomes and public policy changes. These dynamics are not always determinative. In some instances, multi-scalar migration governance does not halt deportation and methodological nationalism prevails. In other cases, the legal and political dynamics fostered by multi-scalar migration governance create a powerful force for successfully contesting deportation and effecting public policy change.

A careful reading of recent Federal Court jurisprudence reinforces the relevance of the multi-scalar account, explaining why some cases result in deportation while others result in the permanent or temporary stoppage of deportation. This reveals that immigration law is imbued with a broader set of considerations than what is offered by the methodological nationalist and legal formalist accounts of immigration law, particularly when long-term residents are facing deportation from Canada. While the fundamental principle that non-citizens do not have an unqualified right remain in Canada remains intact, multi-scalar governance of deportation has shaped the application of this principle and raised important qualifications for its application where a non-citizen has a strong claim of belonging in Canada.