Federal Court  Cour fédérale

**Date: 20180222**

**Docket: IMM-1872-17**

**Citation: 2018 FC 197**

**Ottawa, Ontario, February 22nd, 2018**

**PRESENT: THE CHIEF JUSTICE**

**BETWEEN:**

**KARAMDEEP SINGH BAGRI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# JUDGMENT AND REASONS

## I. Introduction

[1] Mr. Bagri was declared inadmissible to Canada on grounds of organized criminality after he was found to have engaged in people smuggling, in the context of transnational crime.

[2] He submits that the inadmissibility decision was unreasonable for two principal reasons. First, he asserts that there was insufficient evidence to support the finding that he was involved

in a “criminal organization” whose purpose was to engage in transnational human smuggling. Second, he maintains that errors were made in the assessment of his understanding and motivation with respect to the events in question.

[3] For the reasons that follow, I disagree.

## II. **Background**

[4] Mr. Bagri is a citizen of India who became a permanent resident of Canada in 2008.

[5] On January 12, 2015, he was arrested in Washington State by the U.S. Department of Homeland Security for having picked up five Indian nationals who had just crossed illegally into the U.S. from Canada.

[6] According to a report prepared by the U.S. Department of Homeland Security at the time of his arrest, Mr. Bagri admitted to having entered the U.S. to pick up two of those individuals. He also stated that he expected to be paid $1,000 for his services, and that he had made several previous attempts to transport undocumented immigrants, but had been unsuccessful.

[7] After being returned to Canada, he was interviewed on three separate occasions by representatives of the Canada Border Services Agency [**CBSA**].

[8] Based on statements he made during those interviews, particularly the first one, he was found inadmissible to Canada pursuant to paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [**IRPA**] at two separate admissibility hearings.

[9] After the first of those hearings, Member McPhalen of the Immigration Division [**the ID**] of the Immigration and Refugee Board rejected testimony provided by Mr. Bagri which contradicted certain statements that he had made in his prior interviews with the CBSA. In particular, Member McPhalen rejected Mr. Bagri's testimony that he did not know that the people he had picked up lacked the documentation required to enter the U.S., and that they had entered the U.S. illegally. Relying on a statement that Mr. Bagri made during his first interview with the CBSA, Member McPhalen concluded that it was obvious that Mr. Bagri knew that he was "involved in something illegal." In this regard, Member McPhalen found that Mr. Bagri had aided and abetted the illegal entry of the five individuals in question into the U.S., because his "part of the scheme was to pick them up on the U.S. side of the border."

[10] In the course of his decision, Member McPhalen only made reference to one other person who was involved in that scheme, namely, someone Mr. Bagri had identified as "Babba."

[11] That initial decision was set aside by Justice Gagné of this Court. At the outset of her decision, Justice Gagné identified the main issue in dispute as being whether a person could be found to be inadmissible to Canada pursuant to paragraph 37(1)(b) of the IRPA, based on involvement in a scheme to which only one or two persons participated (*Bagri v Canada (Citizenship and Immigration)*, 2016 FC 1034, at para 3 [***Bagri***]). After noting that Member

McPhalen had not addressed that particular question of statutory interpretation, Justice Gagné expressed a preference for returning the matter to the ID, to make a determination on this issue, rather than conducting her own analysis in the absence of the ID's assessment. In the course of making that determination, Justice Gagné also observed that "there is little evidence of the involvement of other individuals in Babba's organization." After noting that she did not have sufficient factual information to fully assess the case, she expressed a preference for obtaining the ID's views on this factual issue as well, rather than providing her own assessment based on the "partial evidence" that was before her.

[12] Notwithstanding the foregoing, Justice Gagné found that it was reasonable for the ID to have concluded that Mr. Bagri was not credible when he resiled from statements he had made to the CBSA regarding the involvement of two other particular individuals in the smuggling scheme.

## III. **Relevant Legislation**

[13] The legislation that is relevant to my disposition of this Application is set forth in ss. 33 and 37 of the IRPA, as well in as subs. 467.1(1) of the *Criminal Code*, RSC, 1985, c C-46 [**the *Criminal Code***]. Those provisions provide as follows:

| ***Immigration and Refugee Protection Act*, SC 2001, c 27** | ***Loi sur l'immigration et la protection des réfugiés*, LC 2001, ch. 27** |
|---|---|
| **33** The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to | **33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent |

believe that they have occurred, are occurring or may occur.

survenir.

*Organized criminality*

**37 (1)** A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

**(a)** being a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment, or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence, or engaging in activity that is part of such a pattern; or

**(b)** engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime.

*Activités de criminalité organisée*

**37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants :

**a)** être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

**b)** se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

***Criminal Code*, RSC, 1985, c C 46**

***Code criminel*, LRC (1985), ch C-46)**

**467.1 (1)** The following definitions apply in this Act.

**467.1 (1)** Les définitions qui suivent s'appliquent à la présente loi.

***criminal organization*** means a group, however organized, that

***organisation criminelle*** Groupe, quel qu'en soit le mode d'organisation :

**(a)** is composed of three or more persons in or outside Canada; and

**a)** composé d'au moins trois personnes se trouvant au Canada

| | |
|---|---|
| | ou à l'étranger; |
| **(b)** has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group. | **b)** dont un des objets principaux ou une des activités principales est de commettre ou de faciliter une ou plusieurs infractions graves qui, si elles étaient commises, pourraient lui procurer — ou procurer à une personne qui en fait partie — , directement ou indirectement, un avantage matériel, notamment financier. |
| It does not include a group of persons that forms randomly for the immediate commission of a single offence. | La présente définition ne vise pas le groupe d'individus formé au hasard pour la perpétration immédiate d'une seule infraction. |

## IV. **The decision under review [the Decision]**

[14] On redetermination, Member Tessler relied on this Court's decision in *Saif v Canada (Citizenship and Immigration)*, 2016 FC 437 [***Saif***], in finding that the criminal organization contemplated by paragraph 37(1)(b) must include at least three persons.

[15] *Saif*, above, concerned an application for judicial review of an inadmissibility decision made by the ID pursuant to paragraph 36(1)(a) of the IRPA. In the course of his decision, Justice Barnes found that the Supreme Court's decision in *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58 [***B010***] had the effect of incorporating the full definition of "criminal organization" set forth in subs. 467.1(1) of the *Criminal Code*, into paragraphs 37(1)(a) and 37(1)(b) of the IRPA. This includes the provision in paragraph 467.1(1)(a), which requires that the organization, however organized, be comprised of three or more persons in or outside Canada (*Saif*, above, at para 15).

[16] Relying on *B010*, Member Tessler also found that the words "organized criminality" in s. 37 of the IRPA and "criminal organization" in subs. 467.1(1) of the *Criminal Code* should be given a consistent interpretation (*B010*, above, at para 42). Accordingly, he determined that the activity contemplated by paragraph 37(1)(b) of the IRPA must be engaged in for a financial benefit (see *B010*, above, at paras 5, 63, and 72). He also stated that the words "however organized" in subs. 467.1(1) of the *Criminal Code* should be read into paragraph 37(1)(b) of the IRPA. Relying on *R v Venneri*, 2012 SCC 33, at para 31, he found that those words are meant to capture differently structured criminal organizations, and simply require that there be at least some degree of organization.

[17] Applying the foregoing interpretation to the facts, Member Tessler found that the evidence was sufficient to provide reasonable grounds to believe that there were three or more persons involved in the transnational people smuggling scheme in which Mr. Bagri had participated. Those persons were the individuals Mr. Bagri had identified in his first interview with the CBSA, namely, Babba, a friend named Tari and someone named Balkar, who Mr. Bagri stated he had met on one occasion. In addition, Mr. Bagri had stated that Babba had arranged for "someone else" to pick up people in the U.S. on two occasions when he had gone across the border for that purpose. Based on the foregoing, Member Tessler was satisfied that the number of persons required to satisfy the "criminal organization" element that he found to be implicitly contemplated by paragraph 37(1)(b), had been established.

[18] Member Tessler also found that the activity for which Mr. Bagri was apprehended by U.S. authorities was "part of a pattern of criminal activity and not a single random event." In

addition, he found that there was evidence of "some form of hierarchy" in the organization, since Mr. Bagri had stated in his initial interview that Babba worked for Balkar, while he (Mr. Bagri) and Tari worked for Babba. In this regard, he relied on principles set forth in *Thanaratnam v Canada (Citizenship and Immigration)*, 2004 FC 349, at para 30 [***Thanaratnam***], and *Sittampalam v Canada (Citizenship and Immigration)*, 2006 FCA 326, at paras 36-39 [***Sittampalam***].

[19] Finally, Member Tessler found that the evidence Mr. Bagri adduced of mental impairment attributable to drugs and alcohol was not strong enough to permit him to conclude that Mr. Bagri "was unable to have the mental element to involve himself in the people smuggling scheme."

## V. **Issue**

[20] The issues raised by Mr. Bagri on this application can conveniently be restated as being as follows:

> Was the Decision unreasonable, having regard to the findings made by Member Tessler with respect to (i) Mr. Bagri's participation in a "criminal organization" whose purpose was to engage in transnational human smuggling, and (ii) his intention and mental capacity to participate in the transnational human smuggling scheme?

[21] The Respondent characterizes the issue differently. In its view, the "pivotal issue" on this application is whether *B010*, above, requires a minimum of three participants for the purposes of an inadmissibility finding under paragraph 37(1)(b). In its view, a minimum of two persons will suffice for that purpose. However, given the conclusion that I have reached regarding the

reasonableness of the Decision, it is not necessary for me to address whether an "organization" comprised of two persons would suffice for the purposes of paragraph 37(1)(b). I will therefore leave that issue to be determined on another occasion.

## VI. **Standard of Review**

[22] The issue as I have framed it has two principal components. The first is a question of statutory interpretation, namely, Member Tessler's interpretation of the words "organized criminality," as contemplated by paragraph 37(1)(b). That question is subject to review on a standard of reasonableness (*B010*, above, at para 25; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, at para 34).

[23] The second component concerns Member Tessler's findings in relation to whether there were reasonable grounds to believe that Mr. Bagri (i) had participated in a "criminal organization" whose purpose was to engage in transnational human smuggling, and (ii) had the requisite intention and the mental capacity to understand that he was participating in such a scheme. Those are issues of mixed fact and law that are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 53).

## VII. **Analysis**

### A. *The ID's interpretation of "organized criminality"*

[24] Mr. Bagri does not dispute that he engaged in "people smuggling" when he picked up five Indian nationals near the Canada-U.S. border. He also does not dispute the "transnational nature of that activity."

[25] However, he disputes that he was a member of a criminal organization whose purpose was to commit offences such as people smuggling. In this regard, he states that he knew very little about the broader smuggling scheme. In addition, he maintains that there was no evidence that he intended to strengthen a criminal organization or to advance its objectives, including by committing further crimes.

[26] This "membership" issue that Mr. Bagri has raised can be easily addressed. In brief, there are two types of "organized criminality" described in subs. 37(1), namely, that which is described in paragraph 37(1)(a) and that which is articulated in paragraph 37(1)(b). Whereas the term "being a member" is an element of the first type, it is not an element of the second type. Instead of "membership," paragraph 37(1)(b) contemplates "engaging … in activities such as people smuggling …" (emphasis added, see also *B010*, above, at para 37).

[27] It can be inferred from Parliament's use of the words "being a member" in paragraph 37(1)(a), and the complete absence of the word "member" from paragraph 37(1)(b), that membership in a criminal organization is not an element of the ground of inadmissibility contemplated by the latter provision (*R v Summers*, 2014 SCC 26, at paras 36-39; *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, at para 43). To hold otherwise would narrow the scope of paragraph 37(1)(b) in a way that Parliament can be inferred to have not intended. It

would also be contrary to s. 12 of the *Interpretation Act*, RSC, 1985, c I-2, which states: "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

[28] Accordingly, no error was made by Member Tessler in respect of Mr. Bagri's "membership" in the criminal organization contemplated by paragraph 37(1)(b). That was not an element that Member Tessler was required to address. This explains why there is no mention of it in the Decision.

[29] I will simply note in passing that Member Tessler implicitly found that Mr. Bagri had indeed advanced the objectives of the "criminal organization" that he assisted. This is readily apparent from Member Tessler's observation that Mr. Bagri "had a limited but essential role of picking up persons who had illegally entered the U.S. from Canada."

B. *The ID's factual findings regarding Mr. Bagri's participation in a "criminal organization" whose purpose was to engage in transnational human smuggling*

[30] Mr. Bagri's submissions regarding the factual findings made by Member Tessler are rooted in the fact that Justice Gagné remitted Member Phelan's initial inadmissibility decision back to the ID, after she characterized the evidence as having been "partial" in nature. Given that characterization of the evidence by Justice Gagné, he maintains that "something more" was required before Member Tessler could reasonably conclude that he had participated in a criminal organization whose purpose was to engage in transnational human smuggling.

[31] I disagree.

[32] In *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48, at para 19 [***Yansané***], it was held that "only instructions explicitly stated in [a judgment of this Court remitting a matter back for redetermination] bind the subsequent decision-maker." Absent such instructions or directions in the formal Judgment of this Court (as distinct from the Court's Reasons for Judgment), "[t]he officer in charge of reviewing such an application [on redetermination] is the one responsible for determining the admissibility and weight of the evidence" (*Yansané*, above, at para 22). However, where this Court makes a finding on a particular issue, it must be taken into account and followed, "unless new facts call for a different analysis" (*Yansané*, above at 25).

[33] In this case, Justice Gagné stated that she did not have "sufficient factual information to fully assess this case" (*Bagri*, above, at para 38 (emphasis added)). In those circumstances, she observed: "I prefer to refer that matter back to the ID rather than substituting my own assessment of the partial evidence that was before the ID or considering arguments that were not put to the ID" (*Bagri*, above (emphasis added)).

[34] Justice Gagné then made the following observation:

> [39] Considering the state of the jurisprudence at the time [Member McPhalen's] decision was rendered, the ID did not require and fully assess the evidence. It is true that there is little evidence of the involvement of other individuals in Babba's organization but neither party focused on that aspect of the evidence at the hearing before the ID, as the number of participants was not an issue at that time.
>
> …

> [41] I am of the view that the parties' arguments should be put to the ID, who would benefit from a complete evidentiary file. It is for the ID, as a specialized Tribunal, to answer those questions at first instance.
>
> [Bagri, above]

[35] It is readily apparent from the foregoing that Justice Gagné did not make a determination with respect to the issue of whether Mr. Bagri had participated in a "criminal organization" whose purpose was to engage in transnational human smuggling. Rather, she simply observed that she did not have sufficient factual information to fully assess the case. Under those circumstances, she preferred to refer the matter back to the ID, rather than to make her own assessment of the limited evidence that was then on the record. After recognizing that neither party had focused on the question of the number of participants in the scheme, she remitted the matter back to the ID to provide its view on that issue, and on another related issue that has not been raised in the present Application.

[36] This is precisely what Member Tessler did. After determining what constitutes a "criminal organization," as discussed at paragraphs 14-18 above, he assessed the evidence that was on the record through the lens of that test, as instructed by Justice Gagné.

[37] Given that the Minister did not lead additional evidence with respect to the issue, Member Tessler dealt with the evidence that was available. In so doing, he noted that "[t]he evidence of a criminal organization is not the strongest part of the Minister's case," and that Mr. Bagri "credibly knew very little about the broader smuggling scheme." Nevertheless, based

on the limited evidence available, he proceeded to make the determination that Justice Gagné stated should be made.

[38] In this regard, Member Tessler made the following findings:

i. "Mr. Bagri was to receive financial compensation for his role" in the scheme.

ii. "[T]here were three or more persons involved: Mr. Bagri, Babba, Balkar and Tari."

iii. "There is no evidence of the nature of Balkar [sic] and Tari's involvement in the smuggling scheme, other than that Babba worked for Balkar and Tari worked for Babba."

iv. "Mr. Bagri's descriptions of [several smuggling events], mostly consistent, confirm that Babba's organization was recurrently engaged in people smuggling. The day Mr. Bagri was arrested, that event was therefore part of a pattern of criminal activity and not a single or random event. There was therefore continuity to the criminal activity, as required by the Supreme Court of Canada in *Venneri*, above."

v. "There is evidence from Mr. Bagri of some form of hierarchy; Babba worked for Balkar and Tari worked for Babba. Mr. Bagri worked for Babba who was his sole source of instruction for his role in the operation."

vi. "Mr. Bagri noted that Babba arranged for someone else to pick up people on two occasions when Mr. Bagri had gone to Washington State for that purpose. This is evidence of other persons working for the organization."

[39] Based on the foregoing factual determinations, Member Tessler concluded that there were reasonable grounds to believe that the people smuggling activity was organized by three or more persons, and that Mr. Bagri had engaged in the activity for a financial benefit.

[40] That conclusion was reached after Member Tessler had reasonably summarized the tests for what constitutes (i) a "criminal organization," as set forth in the jurisprudence discussed at paragraphs 16-18 of these reasons above, and (ii) "reasonable grounds to believe." In this latter regard, member Tessler noted the following:

> The "reasonable grounds to believe" standard has been confirmed by the Supreme Court of Canada as requiring more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information. This standard applies to questions of fact [citing *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, at para 114].

[41] The key factual determinations made by Member Tessler, and summarized at paragraph 38 above, were drawn from the notes and transcripts of three interviews that Mr. Bagri had with representatives of the CBSA.

[42] During the first of those interviews, Mr. Bagri stated that both he and his friend Tari worked for Babba, and that there were "other people, but [he] didn't really know them."

However, he stated that "BABBA worked for BALKAR," who lives in Toronto, and that he had met Balkar on one occasion. He added that, on the occasion when he was apprehended by U.S. immigration authorities, he was supposed to be paid $1,000 for picking up two people, but ultimately he picked up five individuals. In addition, he stated that he was aware that he was doing something illegal when he went to pick up the individuals, as instructed by Babba.

[43] In his second interview, Mr. Bagri stated that Babba had instructed him "to go to the US approximately two to three times between October and November for the purpose of familiarizing himself with the area." He added that, on one of those occasions, Babba told him that he (Babba) would call him once he had crossed into the US with the foreign nationals that Bagri was supposed to pick up. However, Babba later called to tell him that someone else would pick up the individuals in question. Mr. Bagri also confirmed that Babba and undertaken to pay him to assist two people to cross the border.

[44] In his third interview, Mr. Bagri was not asked whether there were other people who worked with Babba. Instead, he was asked if Babba was ever with anyone else when Mr. Bagri met him. He simply replied that he knew one person who Babba addressed as "Tari," and that there was another individual present who was called "Jesse." He added that, on two or three occasions, Babba told him "that he would like me to do this job and then he would call me and say somebody else has taken them and he would not call me." Mr. Bagri explained that, when he complained to Babba about having wasted his time and money going to the U.S. on those occasions, Babba "said don't worry some other person has taken those people. I will pay you for the expenses." During that same interview, Mr. Bagri confirmed that he had gone to the U.S. on

two or three other occasions "to check or search the area," and that this included checking to see how many police were there. He added that Babba told him that he would pay him $500 per person. When asked twice whether he was aware that what he was doing with Babba was illegal, he replied "yes" on both occasions.

[45] Notwithstanding all of the foregoing, in testimony before Member Tessler, Mr. Bagri denied knowing someone named Tari, having a friend who worked for Babba or ever having met Balkar. However, in questioning by counsel to the Minister, he stated that "there was a number of" persons who worked with Babba.

[46] When asked why he had stated in his first interview with the CBSA that he had met Balkar, if in fact he had not met him, Mr. Bagri replied: "At that point of time, I was very nervous. Very scared. At the spur of the moment, I thought if I just keep replying the way I replied, I will get away from all this. I will get out of this situation."

[47] On direct examination by his own counsel, he added that he never met or was introduced to other individuals who may have been involved in "giving direction on smuggling." He stated that any information regarding the involvement of other persons always came from Babba.

[48] In the Decision, Member Tessler stated that he found Mr. Bagri's denial of ever having met anyone named Balkar or knowing Tari to lack credibility. In this regard, he observed that the statements made by Mr. Bagri in his earlier interviews with the CBA, which were closer to the time that he was apprehended by U.S. authorities, "ring truer than his attempts to later distance

himself from those statements when facing the consequences of the admissibility hearing." In my view, this was not an unreasonable finding. As Justice Gagné observed: "[a] person's first story is usually the most genuine and, therefore, the one to be most believed" (*Bagri*, above, at para 44, quoting *Ishaku v Canada (Citizenship and Immigration)*, 2011 FC 44, at para 53).

[49] Mr. Bagri attempted to distance himself from the comments made during his first two interviews with the CBSA, based on the fact that the interviews were conducted in English and without the benefit of an interpreter. Member Tessler found that there was nothing in the content of the responses he gave during his three interviews with the CBSA, and in the interview that he gave to U.S. authorities at the time he was apprehended, to suggest that he did not substantially comprehend the questions he was asked.

[50] In my view, that finding was not unreasonable. Indeed, I note that Justice Gagné reached a similar conclusion in respect of what appears to have been essentially the same argument (*Bagri*, above, at para 44).

[51] In brief, it does not appear from the record that Mr. Bagri requested an interpreter at any time. Indeed, the record of Mr. Bagri's second and third interview with the CBSA indicates that he speaks English "fluently" and "very well," respectively. The record of the third interview further indicates that Mr. Bagri offered to speak in English and to use the interpreter only if he got "stuck somewhere." Moreover, having reviewed the notes of the various interviews given by Mr. Bagri, I agree with Member Tessler's observation that Mr. Bagri's description of the various smuggling events in which he had been involved was "fairly consistent" across the various

interviews that he gave. Considering the foregoing, it was reasonably open to Member Tessler to find that Mr. Bagri substantially comprehended the questions he was asked during his interviews with the CBSA.

[52] In summary, the factual findings made by Member Tessler, particularly those set forth at paragraph 38 above, were amply supported by the notes of the interviews that Mr. Bagri had with representatives of the CBSA. Given those factual findings, Member Tessler's determination that three or more people had been involved in a "criminal organization" that had been recurrently engaged in transnational people smuggling was not unreasonable.

[53] In addition to reasonably finding that three or more persons were involved in that organization, Member Tessler reasonably found that the organization was engaged in a pattern of criminal activity that extended over multiple smuggling events, and that there was some form of hierarchy to that organization. Mr. Bagri did not dispute that he had engaged in people smuggling, that there was a transnational dimension to that activity, nor that he expected to receive a financial benefit for his role in the activity. Member Tessler also reasonably found that Mr. Bagri was well aware of the illegal nature of that activity. Mr. Bagri himself said so on at least two occasions.

[54] The foregoing facts, all provided by Mr. Bagri himself, provided both "the reasonable grounds to believe" required by s. 33 of the IRPA, and a rational foundation for Member Tessler's decision (*Halifax (Regional Municipality) v Nova Scotia Human Rights Commission*, 2012 SCC 10, at para 47 [***Halifax***]). In light of that evidence, it cannot be said that there was "no

rational basis in law or on the evidence to support" Member Tessler's decision (*Halifax*, above, at para 46, quoting Justice Evans (as he then was) in *Zündel v Canada (Attorney General)*, [1999] 4 FC 289, at para 49, aff'd [2000] FCJ No 2057, at para 5)). Stated differently, given the rational basis that Member Tessler provided to support his conclusion, and the compelling nature of the evidence, that conclusion was not unreasonable.

C. *Mr Bagri's intentions and mental capacity to participate in the scheme*

[55] Mr. Bagri submits that the ID's analysis of his intentions and his mental capacity to participate in the scheme was unreasonable. I disagree.

[56] With respect to his intentions, he notes that Member Tessler stated in the Decision that "[t]here was no evidence that this movement of people across the border had an altruistic or humanitarian purpose." However, in his third interview with the CBSA, he provided the following explanation for why he participated in the scheme:

> I want to tell the reason why I did that. When I told Babba everything about me he started telling me these people are desperate. They've got family problems and they need help. When he told me that they had to be helped I did it. I didn't do it for the money. Money was ok but the main reason was I thought they need help so I would help them. Money was part of it as well.

[57] It is readily apparent from the above-quoted passage that Member Tessler erred in stating that there was no evidence of an altruistic or humanitarian purpose in relation to the human smuggling scheme in which Mr. Bagri participated.

[58] Nevertheless, this error was not material, given Mr. Bagri's testimony that he was also motivated to obtain a financial benefit from his participation in the scheme. In view of that fact, he came within the purview of paragraph 37(1)(b), which "targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational crime" (*B010*, above, at para 72). He would only have been able to escape inadmissibility under paragraph 37(1)(b) if he had been "solely" or "merely" motivated by his altruistic and humanitarian motives (*B010*, above, at paras 69 and 72).

[59] Turning to his mental capacity, Mr. Bagri submits that Member Tessler's assessment of his drug addiction should have been "given weight in considering whether he possibly understood that his role in the people smuggling scheme was part of a larger scheme of organized transnational criminality."

[60] The focus of this Court's review of Member Tessler's assessment is upon whether it was unreasonable. It my view, it was not unreasonable, given the determinations that were made with respect to Mr. Bagri's own recollection of events and the other evidence on the record.

[61] In brief, Member Tessler noted that the answers provided by Mr. Bagri during the three interviews he gave to representatives of the CBSA, as well as when he was apprehended by U.S. immigration authorities, were all "fairly consistent" and did not suggest that he had not substantially comprehended the questions asked. In addition, he observed that Mr. Bagri's actions in relation to the smuggling scheme did not suggest that he "was so utterly befuddled by drugs and alcohol that he was unable to have the mental element to involve himself in" that

scheme. In this regard, Member Tessler noted that Mr. Bagri's judgment did not appear to be impaired when he took instructions from Babba, rented a car, drove to the U.S. two days before the scheduled pick up, passed through U.S. border scrutiny, checked into motel, followed instructions from Babba and then maintained constant phone contact with Babba. Member Tessler also took into account that none of the four people who interviewed Mr. Bagri noted that he was "displaying the attributes of a person who was addled by drugs or alcohol." That said, he observed that the CBSA officer who conducted the first interview wrote at the end of her notes that Mr. Bagri is a diabetic and a methadone user who "had to be provided EMS assistance for a wellness check after the interview process was complete." Unfortunately for Mr. Bagri, no evidence was provided with respect to the outcome of that wellness check.

[62] The foregoing determinations were all based upon, and corroborated by, the contents of the reports that were made of the interviews that Mr. Bagri had with the CBSA and U.S. immigration authorities. Given those determinations, it was reasonably open to Member Tessler to find that the evidence of Mr. Bagri's impairment was "not strong enough to [warrant a conclusion] that it had any effect on his participation in people smuggling." In my view, that conclusion was well "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above, at para 47). It was also appropriately justified, transparent and intelligible.

[63] In support of his position that Member Tessler's treatment of the evidence regarding his drug impairment was unreasonable, Mr. Bagri noted that two witnesses who spoke on his behalf testified that he had a substance abuse problem at the time of the events in question. However,

neither of those witnesses saw him on the day that he was apprehended after picking up five illegal immigrants into the U.S. Indeed, one of them (an employee at a drug treatment centre) did not meet him for the first time until approximately 16 months later, while his sister had not seen him for approximately one month prior to that event.

[64] Considering all of the foregoing, I am satisfied that Member Tessler's treatment of Mr. Bagri's drug and alcohol use was not unreasonable. The burden on this issue was Mr. Bagri's to meet. Given the evidence that was before Member Tessler, it was reasonably open to him to find that Mr. Bagri had failed to meet that burden.

## VIII. **Conclusion**

[65] For the reasons set forth above, this application is dismissed.

[66] The Respondent proposed the following two questions at the end of the hearing of this application:

i. Does s. 37(1)(b) of the IRPA require a minimum number of participants? If so, what is that minimum number?

ii. To what extent must the activity in s. 37(1)(b) of the IRPA be "organized?"

[67] However, these questions cannot be certified, as they are not questions that I needed to decide in ruling upon this Application (*Lai v Canada (Public Safety and Emergency*

*Preparedness)*, 2015 FCA 21, at para 10; *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, at para 46).

[68] It was common ground between the parties that paragraph 37(1)(b) would apply to Mr. Bagri if the "criminal organization" in which he is alleged to have participated had three or more members. The only dispute between the parties was whether that provision also would also apply if that organization had only two members. Given my conclusion that it was not unreasonable for Member Tessler to find that the organization had at least three members (namely, Mr. Bagri, Babba, Balkar and Tari), it was not necessary for me to consider whether paragraph 37(1)(b) also applies to criminal "organizations" that have only two members. I will simply add in passing that Member Tessler reached a similar finding, and therefore cannot be faulted for having refrained from further addressing this question.

[69] Turning to the second question proposed by the Respondent, once again, there was no dispute between the parties regarding the extent to which the "criminal organization" in which Mr. Bagri was alleged to have participated was organized. In particular, neither party took issue with the words "however organized" in subs. 467.1(1) of the *Criminal Code* being read into paragraph 37(1)(b), and interpreted in the manner set forth in *Venneri, Thanaratnam and Sittampalam*, as discussed at paragraphs 16-18 of these reasons above.

[70] No other serious question of general importance was identified by the parties, and I am satisfied that no such question arises from the issues at play in this case.

**JUDGMENT IN IMM-1872-17**

**THIS COURT'S JUDGMENT** is that:

1. This Application is dismissed.

2. There is no question for certification.

"Paul S. Crampton"
Chief Justice

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1872-17 |
| **STYLE OF CAUSE:** | KARAMDEEP SINGH BAGRI V THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | VANCOUVER |
| **DATE OF HEARING:** | OCTOBER 4, 2017 |
| **JUDGMENT AND REASONS:** | CRAMPTON C. J. |
| **DATED:** | FEBRUARY 22, 2018 |

**APPEARANCES:**

| | |
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| Marjan Double | FOR THE RESPONDENT |

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