Federal Court of Appeal | Cour d'appel fédérale

Date: 20130322

Dockets: A-195-12
A-194-12

Citation: 2013 FCA 87

CORAM: **EVANS J.A.**
DAWSON J.A.
STRATAS J.A.

Docket: A-195-12

BETWEEN:

B010

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: A-194-12

BETWEEN:

B072

Appellant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Heard at Vancouver, British Columbia, on February 7, 2013.

Judgment delivered at Ottawa, Ontario, on March 22, 2013.

REASONS FOR JUDGMENT BY: DAWSON J.A.

CONCURRED IN BY: EVANS J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] Individuals referred to in the proceedings below as B010 and B072 were each on board the MV *Sun Sea* when it arrived in Canadian waters on August 13, 2010, carrying 492 Sri Lankan migrants. After their arrival in Canada, B010 and B072 were reported to be inadmissible to Canada under paragraph 37(1)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act).

[2] Paragraph 37(1)(*b*) of the Act defines a permanent resident or foreign national to be inadmissible to Canada on grounds of organized criminality for "engaging, in the context of transnational crime, in activities such as people smuggling […]". B010 was reported to be inadmissible on the basis of his alleged role as a crew member of the MV *Sun Sea*. B072 was reported to be inadmissible as a result of his alleged involvement in the organization and preparation of the MV *Sun Sea* operation.

[3] On July 6, 2011, the Immigration Division of the Immigration and Refugee Board of Canada (Board) found B010 to be inadmissible as alleged. A similar finding of inadmissibility was reached by the Board on November 10, 2011, in respect of B072. In both decisions the Board concluded that the phrase "people smuggling", as used in paragraph 37(1)*(b)* of the Act, was defined by subsection 117(1) of the Act. Subsection 117(1) creates an offence: it prohibits a person from knowingly organizing, inducing, aiding or abetting the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by the Act.

[4] Both B010 and B072 sought judicial review in the Federal Court of the Board's decisions. In careful and thoughtful reasons, Justice S. Noël dismissed the application for judicial review brought by B010 (2012 FC 569, [2012] F.C.J. No. 594). Justice Noël stated and certified the following serious question of general importance:

> For the purposes of paragraph 37(1)(*b*) of the *Immigration and Refugee Protection Act*, is it appropriate to define the term "people smuggling" by relying on section 117 of the same statute rather than a definition contained in an international instrument to which Canada is a signatory?

[5] In respect of B072's application for judicial review, Justice Hughes of the Federal Court issued a brief endorsement in which he dismissed the application for the reasons given by Justice Noël in B010's case. Justice Hughes briefly disposed of two additional arguments raised by B072, and certified the same question as that certified by Justice Noël.

[6] B010 and B072 now appeal to this Court. By an order made on consent, their appeals were heard together. A copy of these reasons will be placed on each court file.

[7] The principal issue raised on these appeals is whether the decisions below should be set aside on the ground that the term "people smuggling" in paragraph 37(1)(*b*) requires that an alleged smuggler receive some material benefit as a result of his or her role in the smuggling venture.

[8] For the reasons that follow, I have concluded that people smuggling does not require that a material benefit be conferred upon the alleged smuggler. I would dismiss each appeal and answer the certified question as follows:

> **Question: For the purposes of paragraph 37(1)(*b*) of the *Immigration and Refugee Protection Act*, is it appropriate to define the term "people smuggling" by relying on**

section 117 of the same statute rather than a definition contained in an international instrument to which Canada is a signatory?

Answer: Yes, it is reasonable to define inadmissibility under paragraph 37(1)*(b)* by relying upon subsection 117(1) of the *Immigration and Refugee Protection Act*, which makes it an offence to knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by the Act. To do so is not inconsistent with Canada's international legal obligations.

FACTS

[9] The following brief summary of the facts will situate the circumstances of each appellant.

B010

[10] B010, a Tamil, testified before the Board that he lived in Sri Lanka in territory historically controlled by the Liberation Tigers of Tamil Eelam (LTTE). He worked as a driver, a mechanic and a fisherman. After the Sri Lankan Government gained control of the territory, the Sri Lankan Army, police and paramilitary forces detained B010 on several occasions. He decided to leave Sri Lanka when he was ordered to report to a camp from which, his wife's relatives had told him, detainees did not return. He contacted his sister in Norway for assistance and was smuggled to Thailand.

[11] B010 further testified that he stayed in Thailand for two months. While there, he met a smuggler, Piraba, who arranged for B010 to come to Canada. B010 was among the first to board the MV *Sun Sea*. According to B010, when he boarded the vessel there were several Thai crew members on board. The Thai crew members later left, leaving the ship without a crew. B010 said that he was then asked to serve as a crew member because of his expertise with engines. He agreed and worked for 6 hours a day: serving 3 hours during the day and 3 hours each night. B010 was responsible for checking the engine temperature, water and oil levels. B010 denied that he received

remuneration or better accommodation or food during his voyage in exchange for his work in the engine room. He testified that he secured his accommodation because he boarded first and had his choice of accommodations. In statements to members of the Canada Border Services Agency (CBSA), B010 denied any knowledge that his food rations were superior to those of other passengers.

B072

[12] B072, also a Tamil, did not testify before the Board. His statements about his participation in the operation and his experience in Sri Lanka changed over multiple interviews with representatives of the CBSA. According to B072, he worked as an auto mechanic in Sri Lanka in LTTE-controlled territories. He did not want to join the LTTE, and married in 2008 partly to avoid being drafted into the LTTE. He left LTTE territory two months after his marriage, eventually making his way to Colombo, Sri Lanka and then Bangkok, Thailand. His wife arrived in Bangkok some time later. B072 claimed that he stayed in Bangkok for two years. His departure for Canada was financed by his wife's parents. The smuggler Piraba facilitated his entire journey.

[13] B072 admitted that he proposed the name for the corporation that bought the MV *Sun Sea* and that he signed the incorporating documents for the corporation, because, he said, the smugglers told him to do these things. He also claimed that the smugglers instructed him to sign a cashier's cheque in the approximate amount of $150,000 USD which was immediately cashed. B072 also admitted to assisting the smugglers by loading food and other equipment bound for the MV *Sun Sea*. As they were preparing to load the materials into a van, he and others were caught and arrested by the Thai police. B072 claimed that when he was arrested a member of the smuggling operation

instructed him to tell the police that he bought the goods in the company's name. B072 claimed that he had no active role on board the MV *Sun Sea* during its voyage to Canada.

APPLICABLE LEGISLATION AND INTERNATIONAL INSTRUMENTS

The Immigration and Refugee Protection Act

[14] Subsection 3(1) sets out the objectives of the Act with respect to immigration:

3. (1) The objectives of this Act with respect to immigration are	3. (1) En matière d'immigration, la présente loi a pour objet :
[…]	. . .
(*h*) to protect public health and safety and to maintain the security of Canadian society;	*h*) de protéger la santé et la sécurité publiques et de garantir la sécurité de la société canadienne;
(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks;	*i*) de promouvoir, à l'échelle internationale, la justice et la sécurité par le respect des droits de la personne et l'interdiction de territoire aux personnes qui sont des criminels ou constituent un danger pour la sécurité;

[15] Subsection 3(2) sets out the objectives of the Act in relation to refugees:

3. (2) The objectives of this Act with respect to refugees are	3. (2) S'agissant des réfugiés, la présente loi a pour objet :
(*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;	*a*) de reconnaître que le programme pour les réfugiés vise avant tout à sauver des vies et à protéger les personnes de la persécution;
(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;	*b*) de remplir les obligations en droit international du Canada relatives aux réfugiés et aux personnes déplacées et d'affirmer la volonté du Canada de participer aux efforts de la communauté internationale pour venir en aide aux personnes qui doivent se réinstaller;

[…]	. . .
(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;	*d*) d'offrir l'asile à ceux qui craignent avec raison d'être persécutés du fait de leur race, leur religion, leur nationalité, leurs opinions politiques, leur appartenance à un groupe social en particulier, ainsi qu'à ceux qui risquent la torture ou des traitements ou peines cruels et inusités;
(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;	*e*) de mettre en place une procédure équitable et efficace qui soit respectueuse, d'une part, de l'intégrité du processus canadien d'asile et, d'autre part, des droits et des libertés fondamentales reconnus à tout être humain;
[…]	. . .
(*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and	*g*) de protéger la santé des Canadiens et de garantir leur sécurité;
(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.	*h*) de promouvoir, à l'échelle internationale, la sécurité et la justice par l'interdiction du territoire aux personnes et demandeurs d'asile qui sont de grands criminels ou constituent un danger pour la sécurité.

[16] Subsection 3(3) deals with the proper construction of the Act:

3. (3) This Act is to be construed and applied in a manner that	3. (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet :
(*a*) furthers the domestic and international interests of Canada;	*a*) de promouvoir les intérêts du Canada sur les plans intérieur et international;
[…]	. . .

(*f*) complies with international human rights instruments to which Canada is signatory.	*f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.

[17] Paragraph 37(1)(*b*) deems individuals who engage in people smuggling to be inadmissible:

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.	*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.

[18] Section 33 sets out the "reasonable grounds to believe" as the appropriate standard of proof when considering inadmissibility:

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

[19] An exception from a finding of inadmissibility under subsection 37(1) is contained in paragraph 37(2)(*a*) of the Act, and a saving provision is found in paragraph 37(2)(*b*):

37. (2) The following provisions govern subsection (1):	37. (2) Les dispositions suivantes régissent l'application du paragraphe (1) :
(*a*) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; and	*a*) les faits visés n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national;

(*b*) paragraph (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.	*b*) les faits visés à l'alinéa (1)*a*) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

[20] Under the heading "Human Smuggling and Trafficking", section 117 makes it an offence to engage in human smuggling:

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.	117. (1) Commet une infraction quiconque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.
(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable	(2) L'auteur de l'infraction visant moins de dix personnes est passible, sur déclaration de culpabilité :
(*a*) on conviction on indictment	*a*) par mise en accusation :
(i) for a first offence, to a fine of not more than $500,000 or to a term of imprisonment of not more than 10 years, or to both, or	(i) pour une première infraction, d'une amende maximale de cinq cent mille dollars et d'un emprisonnement maximal de dix ans, ou de l'une de ces peines,
(ii) for a subsequent offence, to a fine of not more than $1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and	(ii) en cas de récidive, d'une amende maximale de un million de dollars et d'un emprisonnement maximal de quatorze ans, ou de l'une de ces peines;
(*b*) on summary conviction, to a fine of not more than $100,000 or to a term of imprisonment of not more than two years, or to both.	*b*) par procédure sommaire, d'une amende maximale de cent mille dollars et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.	(3) L'auteur de l'infraction visant un groupe de dix personnes et plus est passible, sur déclaration de culpabilité par mise en accusation, d'une amende maximale de un million de dollars et de l'emprisonnement à perpétuité, ou de l'une de ces peines.
(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.	(4) Il n'est engagé aucune poursuite pour une infraction prévue au présent article sans le consentement du procureur général du Canada.

[21] Paragraph 121(1)(*c*) of the Act evidences Parliament's intent that profit is not an element of the offence created by section 117 of the Act. Rather, the element of profit is an aggravating factor when determining penalty:

121. (1) The court, in determining the penalty to be imposed under section 120, shall take into account whether	121. (1) Le tribunal tient compte, dans l'infliction de la peine visée à l'article 120, des circonstances suivantes :
[…]	. . .
(c) the commission of the offence was for profit, whether or not any profit was realized; and	c) l'infraction a été commise en vue de tirer un profit, que celui-ci ait été ou non réalisé;

United Nations Convention against Transnational Organized Crime

[22] Article 2 of the United Nations General Assembly resolution 55/25 adopted the United Nations Convention against Transnational Organized Crime (Convention) and also the Protocol against the Smuggling of Migrants by Land, Sea and Air (Protocol).

[23] Section 2 of Article 3 of the Convention provides a definition of a transnational offence:

2. For the purpose of paragraph 1 of this article, an offence is transnational	2. Aux fins du paragraphe 1 du présent article, une infraction est de nature

in nature if:	transnationale si:
(*a*) It is committed in more than one State;	*a*) Elle est commise dans plus d'un État;
(*b*) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;	*b*) Elle est commise dans un État mais qu'une partie substantielle de sa préparation, de sa planification, de sa conduite ou de son contrôle a lieu dans un autre État;
(*c*) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or	*c*) Elle est commise dans un État mais implique un groupe criminel organize qui se livre à des activités criminelles dans plus d'un État; ou
(*d*) It is committed in one State but has substantial effects in another State.	*d*) Elle est commise dans un État mais a des effets substantiels dans un autre État.

Protocol against the Smuggling of Migrants by Land, Sea and Air

[24] The purpose of the Protocol is stated, in Article 2, to include preventing the smuggling of migrants while protecting the rights of smuggled migrants.

[25] Article 3(*a*) of the Protocol defines "smuggling of migrants" as :

For the purposes of this Protocol:	Aux fins du présent Protocole:
(*a*) "Smuggling of migrants" shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;	*a*) L'expression "trafic illicite de migrants" désigne le fait d'assurer, afin d'en tirer, directement ou indirectement, un avantage financier ou un autre avantage matériel, l'entrée illégale dans un État Partie d'une personne qui n'est ni un ressortissant ni un résident permanent de cet État;

[26] Article 6 of the Protocol requires all states to establish criminal offences in circumstances when the smuggling of migrants is committed to obtain, directly or indirectly, a financial or other material benefit:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:	1. Chaque État Partie adopte les mesures législatives et autres nécessaires pour conférer le caractère d'infraction pénale, lorsque les actes ont été commis intentionnellement et pour en tirer, directement ou indirectement, un avantage financier ou autre avantage matériel:
(*a*) The smuggling of migrants;	*a*) Au trafic illicite de migrants;

[27] Section 4 of Article 6 of the Protocol preserves certain rights of signatory states:

4. Nothing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.	4. Aucune disposition du présent Protocole n'empêche un État Partie de prendre des mesures contre une personne dont les actes constituent, dans son droit interne, une infraction.

[28] Article 5 of the Procotol provides that migrants should not be subject to prosecution on the ground that they were smuggled:

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.	Les migrants ne deviennent pas passibles de poursuites pénales en vertu du présent Protocole du fait qu'ils ont été l'objet des actes énoncés à son article 6.

[29] Article 19 of the Protocol preserves certain state obligations under international law: [emphasis added]

1. Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law,	1. Aucune disposition du présent Protocole n'a d'incidences sur les autres droits, obligations et responsabilités des États et des

including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.	particuliers en vertu du droit international, y compris du droit international humanitaire et du droit international relatif aux droits de l'homme et en particulier, lorsqu'ils s'appliquent, de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés ainsi que du principe de non-refoulement qui y est énoncé.

1951 Convention Relating to the Status of Refugees

[30] Article 31 of the *1951 Convention Relating to the Status of Refugees* (Refugee Convention) constrains signatories from imposing penalties on refugees as a result of their illegal entry:

> a. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article I, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> b. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

[31] Article 32 of the Refuge Convention constrains a state's ability to expel refugees:

> a. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.
>
> b. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

> c. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary.

[32] Article 33 of the Refugee Convention sets out the principle of non-refoulement:

> 1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.

THE DECISIONS BELOW

The Decision of the Board in respect of B010

[33] Member McPhalen began his analysis by noting the applicable standard of proof was the "reasonable grounds to believe" standard contained in section 33 of the Act. He then turned to the meaning of "transnational crime", noting the term was not defined in the Act. At the urging of counsel, he adopted the definition contained in the Convention. He concluded that there was a transnational element to the MV *Sun Sea* operation because people were brought from Thailand to Canada. B010 was a foreign national and thus was subject to a determination of inadmissibility.

[34] The Board member then turned to the meaning of "people smuggling" in paragraph 37(1)(*b*). He noted that the Convention and Protocol require signatories to make people smuggling a criminal offence and that Canada has done so in section 117 of the Act. He concluded that because Canada had defined people smuggling in section 117 there was no need to consult the

Convention or Protocol to find the definition of people smuggling. While the definition contained in section 117 was broader than the definition set out in the Protocol (because it does not require the smuggler to act for a financial or other material benefit), the Convention and the Protocol set minimum standards. The fact section 117 caught a broader range of conduct did not make it non-compliant with the Convention or the Protocol.

[35] Thus, the Board member found the elements imported from subsection 117(1) of the Act that were required to prove people smuggling for the purpose of paragraph 37(1)(*b*) of the Act were:

(i) the person being smuggled did not have the required documents to enter Canada;

(ii) the person was coming into Canada;

(iii) the smuggler was organizing, inducing, aiding or abetting the person to enter Canada; and

(iv) the smuggler had knowledge of the lack of required documents.

These requirements were in addition to those that the alleged smuggler be a permanent resident or a foreign national, and that the activity take place in the context of transnational crime.

[36] The member then reviewed B010's evidence. B010 claimed that he did not know when he first boarded the MV *Sun Sea* that he was going to be a member of the crew. The member rejected this claim and was satisfied that there were reasonable grounds to believe B010 boarded the ship knowing that he would be a crew member. In reaching this conclusion, the member considered that B010 had spent time in Thailand with the captain and two other crew members, as evidenced by photographs taken of the men together in Thailand. Further, B010 was one of the first persons to

board the ship, had at least somewhat better accommodation than the majority of passengers and was "deliberately evasive" when asked about the functions performed by certain alleged crew members. In any event, the member reasoned that even if B010 did not know when he boarded the ship that he would be a crew member, he worked two 3 hour shifts a day from shortly after the ship left Thailand until it reached Canada. B010 admitted that as a result of his contribution and the contribution of the other people who worked in the engine room, the MV *Sun Sea* was able to cross the ocean to Canada.

[37] The Board member then noted B010's admissions that he knew the other people on the ship were Tamils, were refugees and that the ship would be taking them to Canada.

[38] With respect to the elements required by subsection 117(1) of the Act, the Board member concluded as follows:

> 42. [B010] is not a Canadian citizen or permanent resident. Therefore he is a foreign national.
>
> 43. The MV *Sun Sea* left Thailand bound for Canada with 492 people on board. The passengers intended to come to Canada to make refugee claims against Sri Lanka. This ship arrived in Canada on August 13, 2010. The Minister has established that the people were coming to Canada as required by (ii) of the section 117 test.
>
> 44. The Minister has established that the majority of the passengers were coming to Canada without passports or visas. Sri Lankan nationals are required to have passports and visas to come to Canada. The Minister has established that the passengers did not have the documents required to enter Canada as required in (i) of the section 117 test.
>
> 45. Whether [B010] boarded the ship intending to be a member of the crew from the outset or became a crew member by happenstance, he made a choice to work a regular shift from soon after the ship left Thailand until it arrived in Canada. He played a minor role as an engine room assistant, but his role was still vital in

> ensuring that the MV *Sun Sea* and its passengers reached Canada. He aided in their coming to Canada. This meets the requirement of (iii) of the section 117 test.
>
> 46. The final element of the section 117 test is whether the alleged smuggler had knowledge that the people being smuggled did not have the required documents. Counsel says that [B010's] credible, uncontested evidence was that he had no knowledge of what documents his fellow travellers possessed until after the vessel arrived in Canada and he was placed in detention.
>
> […]
>
> 49. [B010] is from Sri Lanka, he knew that as a Sri Lankan he needed a visa to enter Canada and he travelled on the MV *Sun Sea* to try to circumvent the visa requirement. He spent more than three months on a ship with hundreds of other people from Sri Lanka. He has testified that he thought that the other people on board who were travelling on the MV *Sun Sea* were in similar circumstances to him. He had ample opportunity to find out if the passengers had to documents required for entry. I am satisfied that if he did not actually know that they did not have the required documents, it was because he deliberately chose not to obtain that knowledge. I am satisfied that at the very least he was wilfully blind as to whether the passengers had the required documents. Since wilful blindness is the equivalent of knowledge, the final element of the definition of people smuggling, that the person concerned knew that the people being smuggled did not have the require documents, is met.

[39] Finally, in the event he had erred in his interpretation of paragraph 37(1)*(b)*, the Board member considered whether B010 received any material benefit. He found B010 did not receive any material benefit because the Minister did not establish that B010 received free passage in exchange for working during the voyage or that he was paid for his work. The member did not consider that the better accommodation B010 received constituted a material benefit.

The Decision of the Board in respect of B072

[40] Member King also found that "people smuggling" in paragraph 37(1)(*b*) of the Act should have the same meaning as the criminal provision for "human smuggling" defined at subsection 117(1) of the Act. In his view, there was no reason why paragraph 37(1)(*b*) should not be

interpreted with reference to a criminal provision in section 117 of the Act since (1) the Protocol required signatory states to criminalize human smuggling and (2) reference is made to the relevant criminal provisions when considering inadmissibility for terrorism and money laundering. Consequently, the member found that the constituent elements of people smuggling within paragraph 37(1)(*b*) were the same as those found by Member McPhalen.

[41] With respect to B072's circumstances, the Board member found that B072 was one of the lead organizers of the MV *Sun Sea* operation in Thailand. He found that B072 "generally lacks credibility" and had been untruthful with CBSA officers since arriving in Canada. The member found that B072 gave the CBSA a false name, misrepresented his arrest in Thailand, and gave an incoherent explanation about his actions in Thailand. Based on B072's inconsistent statements, the member decided that there was no credible evidence that B072 had to pay a smuggler in order to travel on the MV *Sun Sea*. The member further found there are "reasonable grounds to believe that the activities performed by [B072] in Thailand were carried out with his knowledge that he was participating in purchasing the ship and organizing the voyage of the MV *Sun Sea* from Thailand to Canada by obtaining fuel and engine parts for the ship. He thereby knowingly organized and aided the coming into Canada of the passengers of the MV *Sun Sea*."

[42] The member concluded that all four essential elements of people smuggling were made out.

[43] Before turning to consider the two decisions of the Federal Court under appeal, I note that neither B010 nor B072 contested in the Federal Court, or in these appeals, any of the findings of fact made by the Board.

The Decision of Justice S. Noël (B010 Federal Court Decision)

[44] Justice Noël upheld Member McPhalen's decision.

[45] Justice Noël began his analysis by considering the appropriate standard of review to be applied to the Board's interpretation of paragraph 37(1)(*b*) of the Act. In his view, recent decisions of the Supreme Court of Canada, including *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association,* 2011 SCC 61, [2011] 3 S.C.R. 654 (*Alberta Teachers'*), required him to apply the standard of reasonableness.

[46] The Judge then went on to apply a textual, contextual and purposive interpretation of the relevant sections of the Act. The Judge rejected the submission that because paragraph 37(1)(*b*) uses the term "people smuggling" and the heading of section 117 uses the term "human smuggling", Parliament intended the two phrases to have different meanings. The Judge found that Parliament intended both phrases to address the same activity.

[47] After noting that one of the purposes of the Act as it relates to refugees is to comply with international human rights instruments (including the Procotol), the Judge conducted an analysis to determine if section 117's definition should be incorporated into paragraph 37(1)(*b*). The Judge went on to consider the guidance provided by paragraph 3(1)(*i*) of the Act with respect to the objectives of the Act, by paragraph 3(2)(*h*) of the Act with respect to security and criminality risks, and by paragraphs 3(3)(*a*) and (*f*) with respect to the need to further Canada's interests while complying with human rights instruments which Canada has signed. The Judge concluded that the Board had correctly noted that section 117 of the Act is the provision that criminalizes the

smuggling of human beings into Canada. In his view, the Board reasonably concluded that the fact section 117 defined smuggling more broadly than the Protocol's definition did not place Canada in breach of the Protocol or the Convention. The Judge noted this Court's decision in *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] 3 F.C.R. 198 where section 37 was said to require an "unrestricted and broad" interpretation. The ministerial exemption found in paragraph 37(3)(*a*) of the Act justified such a broad interpretation. Justice Noël concluded that, on the basis of the wording of subsection 117(1) of the Act, material gain is not an element of paragraph 37(1)(*b*).

[48] The Judge went on, however, to make an additional finding that, if material gain was an element of paragraph 37(1)(*b*), the Board had made an unreasonable decision in concluding on the evidence before it that B010 did not receive a material gain. In his view, because B010 received better accommodation and food as a result of his participation in the smuggling operation, it was unreasonable for the Board to find B010 did not receive a material benefit.

The Decision of Justice Hughes (B072 Federal Court Decision)

[49] Justice Hughes found that B072's application was indistinguishable from B010's application. He then considered two additional arguments raised by B072. He rejected the submission that B072 and others were "invited" into Canada because they were intercepted by the Canadian Navy on the high seas. In his view, being intercepted is not analogous to being invited. Justice Hughes also rejected the submission that a finding of criminality is required for a finding of inadmissibility. In his view, a plain reading of paragraph 37(1)(*b*) shows that a finding of

criminality is not required before an inadmissibility determination. The first additional argument advanced by B072 before Justice Hughes was not pursued on appeal.

THE ISSUES

[50] In my view, the issues to be determined on these appeals are:

1. Did the Federal Court err by setting aside the Board's finding that B010 did not receive a material benefit because of his work as a crew member?

2. What is the standard of review to be applied to the Board's interpretation of the phrase people smuggling contained in paragraph 37(1)(*b*) of the Act?

3. Depending upon the appropriate standard of review, was the Board's conclusion that paragraph 37(1)(*b*) does not require that a people smuggler receive any material benefit from his or her actions unreasonable or incorrect?

4. Did the Federal Court err by dismissing the applications for judicial review brought by B010 and B072?

CONSIDERATION OF THE ISSUES

1. Did the Federal Court err by setting aside the Board's finding that B010 did not receive any material benefit because of his work as a crew member?

[51] As explained above, the nub of the dispute over the interpretation of paragraph 37(1)(*b*) is whether a person can engage in people smuggling if the person does not receive any material benefit as a result of his or her actions. The effect of the Federal Court's additional finding that B010 did

receive a material benefit is that the certified question is no longer dispositive of the appeal. It is for this reason that the first issue to be decided is whether the Federal Court erred in setting aside the Board's finding that B010 did not receive any material benefit from his work as a crew member.

[52] In the Board's view, the fact that B010 received better accommodation than the regular passengers did not amount to material benefit. This was a finding of mixed fact and law that was entitled to deference and could only be set aside if found to be unreasonable.

[53] On an appeal from a decision of the Federal Court rendered in an application for judicial review, the task of this Court is to determine whether the Federal Court selected the appropriate standard of review and applied it correctly (*Feimi v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 325, [2012] F.C.J. No. 1610, at paragraph 17).

[54] The reasons of the Federal Court for setting aside the Board's conclusion are found at paragraph 64 [emphasis in original]:

> As outlined in paragraphs 7 and 8 of these reasons, the panel had evidence before it that because of his work as a crew member in the engine room, the applicant received better lodging and food as compared to the hundreds of passengers on board (see TR at 192, 196, 221 and 237). I find these tangible benefits did constitute important advantages gained from his work as a crew member and were therefore a material benefit. Should there be any doubt regarding this conclusion, I need only point to the markedly different conditions of the passengers in comparison to the crew, as described in a CBSA Report (TR at 253, Canada, CBSA, *Sun Sea Human Smuggling Operation* (January 27, 2011) at 12):
>
> > Many of the migrants comment on the poor – some use words like 'terrible', 'horrible' – conditions of their accommodations on the *Sun Sea*. Some migrants say the children on board suffered even more than the adults. There is general agreement among the migrants that people were very angry

> about the conditions on board and that the conditions they experienced were much worse than what they were promised by agents […] Complaints about the *Sun Sea* include:
> - food shortages
> - water shortages (being limited to ½ litre per day per person)
> - abuse of power by crew members via food and water (punishing certain people by refusing them food and/or water, allowing some people more water than others, refusing water to people who requested more water because they couldn't pass urine)
> - having to bathe in salt water
> - inadequate toilet facilities
> - cramped space
> - five or more people crowded into a single, small cabin
> - difficulty finding somewhere to sleep comfortably
> - some people having to sleep on the deck
> - some people getting sick
> - the fact there was a fatality during the voyage
> - the fact that several of the people onboard had to be taken to the hospital when the ship arrived in Canada.

[55] B010 testified before the Board that he shared his accommodation with eight other individuals (Transcript, April 15, 2011, Appeal Book volume 3 at page 666, line 29). The Minister adduced no evidence as to the conditions of B010's accommodation, which prompted Member McPhalen to observe during the hearing that "I mean if you had eight people in a room the size of a broom closet, then he didn't derive much of a benefit, if any." (Transcript, April 15, 2011, Appeal Book volume 3 at page 697, line 35).

[56] B010 was not asked any questions before the Board about the food he received, although transcripts of interviews conducted by CBSA officers were in evidence.

[57] In my view, the evidentiary record before the Board was such that it could reasonably conclude that B010 received no material benefit. On the basis of the reasons given by the Board, read with the record, the Board's decision was defensible as falling within the range of permissible outcomes. Respectfully, the Federal Court erred by substituting its assessment of the evidence for that of the Board. I would therefore restore the Board's finding that B010 did not receive any material benefit as a result of his work on the MV *Sun Sea*. It follows that the certified question is dispositive and should be considered. I now turn to the issue of the standard of review to be applied to the Board's interpretation of the Act.

2. What is the standard of review to be applied to the Board's interpretation of the phrase "people smuggling" contained in paragraph 37(1)(*b*) of the Act?

[58] The Federal Court's analysis concerning the appropriate standard of review is found at paragraph 33:

> 33. With regard to the ID's interpretation of the IRPA, the Supreme Court has consistently spoken of the need for deference when a tribunal is interpreting its own statute (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] SCJ 61 [*Alberta Teachers'*]; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at paras 37-39 [*Alliance Pipeline*], [2011] 1 SCR 160; *Khosa*, above, at para 44; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*]). Accordingly, this Court will apply the standard of reasonableness to the ID's interpretation of para 37(1)(*b*) of the IRPA, ensuring that there was justification, transparency, and intelligibility within the decision-making process and that the ID's interpretation fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).

[59] Both the appellants and the respondent minister submit that the Federal Court erred by applying the reasonableness standard of review. They argue that:

i) The prior jurisprudence has established that correctness is the standard of review to be applied to the interpretation of the inadmissibility provisions of the Act. Reliance is placed upon *Sittampalam*, as cited above, at paragraph 15; *Patel v. Canada Minister of Citizenship and Immigration)*, 2011 FCA 187, 419 N.R. 321, at paragraph 27 and, *Canada (Minister of Citizenship and Immigration) v. Dhillon*, 2012 FC 726, [2012] F.C.J. No. 710, at paragraphs 16 to 22.

ii) The interpretation issue required an analysis which was outside of the expertise of the Board because it involved the interpretation of international law as well as Canadian criminal law and procedure.

[60] For the following reasons, I conclude that the Federal Court correctly selected the reasonableness standard of review as the standard to be applied to the Board's interpretation of paragraph 37(1)(*b*) of the Act.

[61] First, I disagree that the jurisprudence relied upon by the parties has determined the applicable standard of review in a satisfactory manner. The decision of this Court in *Sittampalam* predates the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and in *Sittampalam* the Court did not conduct any extensive analysis of the applicable standard of review. *Patel* did not consider the standard of review to be applied to the Board's interpretation of the Act. Rather, it concerned the decision of a visa officer (that is, a ministerial delegate). *Dhillon* is a decision of the Federal Court in which the Federal Court relied, at least in part, on *Sittampalam*.

[62] As the standard of review has not been satisfactorily determined, it is necessary to consider the degree of deference to be afforded to the Board's interpretation of paragraph 37(1)(*b*) of the Act.

[63] At this stage, the primary focus of the analysis is the nature of the issue that was before the decision-maker (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paragraph 4). A reviewing court is to consider: the existence of a privative clause; whether there is a discrete and special administrative regime wherein the decision-maker has special expertise; and the nature of the question of law (*Dunsmuir*, at paragraph 55). At paragraph 55, the majority in *Dunsmuir* explained that:

> […] A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E.*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[64] More recently, in *Alberta Teachers'*, cited above at paragraph 45, the Supreme Court restated the general principle that reasonableness will usually be the applicable standard of review when a tribunal is interpreting its own statute or statutes closely connected to its function. At paragraph 30 of the reasons of the majority, this general principle was said to apply:

> […] unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

[65] The application of these principles to the present case leads to my second reason for concluding that the Federal Court selected the appropriate standard of review.

[66] Members of the Board function in a discrete and special administrative regime. They have expertise with respect to the interpretation and application of the Act. The nature of the question of law is the interpretation of the phrase "people smuggling". This question of statutory interpretation of the Board's home statute raises neither a constitutional question, nor a question of law of general importance to the legal system as a whole. Neither does it involve a question regarding jurisdictional lines between competing specialized tribunals nor a true question of jurisdiction (to the extent such questions continue to exist; see, *Alberta Teachers'* at paragraphs 33 to 43).

[67] In *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, the Supreme Court did apply a pragmatic and functional analysis to conclude that correctness was the proper standard to be applied to the interpretation of section F(c) of article 1 of the Refugee Convention by the Refugee Determination Division of the Immigration and Refugee Board. One reason for this conclusion was that the then *Immigration Act*, R.S.C. 1985, c. I-2, like the Act, gave a statutory right of appeal only when a serious question of general importance was certified. In the view of the majority, this was indicative of Parliament's intent that such questions be reviewed on the standard of correctness (reasons, paragraphs 42 to 44).

[68] However, in light of the view of the majority in *Alberta Teachers'*, I am no longer satisfied that the importance of a question by itself is sufficient to warrant review on the correctness standard.

[69] In *Alberta Teachers'*, at paragraphs 45 and 46, Justice Rothstein wrote for the majority:

> 45. At para. 89, Binnie J. suggests that "[i]f the issue before the reviewing court relates to the interpretation and application of a tribunal's 'home statute' and related statutes that are also within the core function and expertise of the decision maker, and the issue does not raise matters of legal importance beyond

> administrative aspects of the statutory scheme under review, the Court should afford a measure of deference under the standard of reasonableness." With respect, I think Binnie J.'s isolating matters of general legal importance as a stand-alone basis for correctness review is not consistent with what this Court has said in *Dunsmuir*, *Alliance, Canada (Canadian Human Rights Commission)* and *Nor-Man*.
>
> 46. At para. 22 of *Canada (Canadian Human Rights Commission)*, LeBel and Cromwell JJ. state:
>
> > On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. [Emphasis added.]
>
> In other words, since *Dunsmuir*, for the correctness standard to apply, the question has to not only be one of central *importance to the legal system* but also outside the *adjudicator's specialized area* of expertise.

[70] It follows, in my view, that there is no basis in law for ousting the presumption that deference should be afforded to the Board's interpretation of the Act.

[71] In reaching this conclusion, I am mindful that this Court has previously applied the correctness standard of review to the Refugee Protection Division's interpretation of international conventions (see, for example, *Febles v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 324, [2012] F.C.J. No. 1609, at paragraphs 22 to 25). There, the presumption of reasonableness review was rebutted by the majority of the Court in view of the need to interpret international conventions uniformly. In my view, cases such as *Febles* are distinguishable on the basis that here, the Board was interpreting sections 37 and 117 of the Act. Further, unlike the Refugee Convention, the Protocol anticipates individual states will enact different measures to fulfil the Protocol's objectives (see: article 6, section 4). The uniformity concerns in *Febles* do not apply to the Protocol.

[72] I am also mindful of the concern that review of the Board's interpretation of the Act on the reasonableness standard may give rise to conflicting interpretations by the Board. However, I believe this concern is misplaced. While reasonableness is a single standard of review, it is concerned with the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at paragraph 47). As aptly illustrated by the Supreme Court's textual, contextual and purposive analysis in Canada *(Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, even when the question at issue is the interpretation of a tribunal's home statute, the range of possible, acceptable outcomes can be narrow.

3. Was the Board's conclusion that paragraph 37(1)(*b*) does not require that a people smuggler receive any material benefit from his or her actions reasonable?

[73] Justice Noël applied the required textual, contextual and purposive analysis to conclude that the Board's interpretation of paragraph 37(1)(*b*) of the Act was reasonable. I see no error in his application of the standard of review or in his analysis. I reach the same conclusion, substantially for the reasons given by Justice Noël.

[74] On these appeals, the principal arguments advanced by the appellants are that:

i) The Protocol defines the term "smuggling of migrants" in article 3(a). This definition requires the smuggler to procure illegal entry "in order to obtain, directly or indirectly, a financial or other material benefit." This definition must inform the definition of "people smuggling" as used in paragraph 37(1)(*b*) because paragraph 3(3)(*f*) of the Act requires that the Act be construed in a manner that

complies with international human rights instruments to which Canada is a signatory. Article 2 of the Protocol requires signatories to protect the rights of smuggled migrants and article 6 requires signatories to adopt legislation to establish as a criminal offence the smuggling of migrants when committed intentionally "and in order to obtain, directly or indirectly, a financial or other material benefit."

ii) Pursuant to paragraphs 101(1)(*f*) and 112(3)(*a*) of the Act, a finding of inadmissibility under paragraph 37(1)(*b*) curtails access to refugee protection. This curtailment places Canada in breach of its international obligation of non-refoulement.

iii) Eliminating the requirement that a smuggler receive a financial or other material benefit as a result of his or her actions leads to potentially absurd results.

iv) In subsequent cases the Federal Court has interpreted the term people smuggling to include an element of profit: *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1417, [2012] F.C.J. No. 1531; *J.P. v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1466, [2012] F.C.J. No. 1648. The reasoning in these cases is said to be correct.

Each submission will be dealt with in turn.

[75] To turn first to the submissions based upon the Protocol, contrary to the submission of the appellants, Canada has enacted a provision to protect the rights of smuggled migrants as required by the Protocol. Paragraph 37(2)(*b*) embodies this commitment by providing that persons may not be

found to be inadmissible under paragraph 37(1)(*a*) only by reason of the fact that they entered Canada with the assistance of a smuggler.

[76] As to the Convention and the Protocol generally, nothing in either document prohibits a signatory from enacting legislation which makes inadmissible to Canada those who contribute to, but do not profit from, people smuggling.

[77] As to the scope of the offence of human smuggling, again nothing in the Convention or the Protocol requires signatory states to enact legislation which tracks the language of the Protocol. Indeed, the "Legislative Guide for the Implementing of the Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Organized Crime" (Legislative Guide) specifies that the language of the Protocol "was not intended for enactment or adoption verbatim."

[78] Similarly, nothing in the Convention or the Protocol prevents a signatory from enacting legislation that criminalizes a broader range of conduct. Section 4 of Article 6 of the Protocol, set out above at paragraph 27, states that nothing in the Protocol "shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law." As the Legislative Guide notes at paragraph 58: [emphasis added]

> Finally, as noted above, the Protocol sets only a minimum requirement for the range of conduct that must be criminalized and how seriously it should be punished, leaving it open to States parties to go further in both aspects. The adoption of further supplementary offences or offences that are broader in scope than those required may well enhance the effectiveness of prevention, investigation and prosecution in cases of smuggling of migrants or more general matters of organized crime.

[79] A number of nations have enacted legislation that criminalizes a broader range of conduct than contemplated in the Convention and Protocol. See, for example, the legislation of: France, *Code de l'entrée et du séjour des étrangers et du droit d'asile*, Article L622-1; United Kingdom, *Immigration Act* (U.K.), 1971, c. 77, s. 25; and, United States of America, *Federal Immigration and Nationality Act*, 8 U.S.C. § 1324.

[80] In summary, the Convention and the Protocol required Canada, as a signatory, to criminalize the smuggling of migrants. Canada did so in section 117 of the Act. Nothing in the Convention or the Protocol constrained Canada from criminalizing a wider sphere of smuggling activity than the conduct described in the Protocol. When construing the phrase "engaging in the context of transnational crime, in activities such as people smuggling" it is therefore appropriate to define "people smuggling" in terms of the crime created by section 117 of the Act.

[81] To turn now to the submission that this interpretation places Canada in breach of its international obligations of non-refoulement, as noted above, paragraph 3(3)(*f*) of the Act requires that the Act be interpreted in a manner that complies with the international human rights instruments to which Canada is a party.

[82] In view of the stated purpose of the Convention, neither it nor the Protocol can readily be characterized as international human rights instruments. Article 1 of the Convention states that its purpose is "to promote cooperation to prevent and combat transnational organized crime more effectively." The Protocol is a supplement to the Convention, and is to be interpreted together with the Convention (Section 1, Article 1 of the Protocol).

[83] The relevant international human rights instrument is the Refugee Convention. The relevant articles 31, 32 and 33 are set out at paragraphs 30, 31 and 32 above.

[84] Neither article 31 nor article 32 of the Refugee Convention is implicated by the facts of these cases.

[85] Article 31 prohibits penalizing Convention Refugees for entering a signatory state illegally. However, as James C. Hathaway describes in *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at pages 412-413, the drafters of the Refugee Convention were "unambiguous" that Article 31 does not prevent a signatory state from expelling refugees who illegally enter the state's territory.

[86] Moreover, as set out above, paragraph 37(2)(*b*) of the Act excludes a finding of inadmissibility under paragraph 37(1)(*a*) based only on the fact that the individual had been smuggled into Canada. Thus, those who are smuggled into Canada are not penalized as a result of their mode of entry.

[87] Article 32 of the Refugee Convention places limits on the ability of a signatory state to expel a refugee lawfully in its territory. However, as Guy S. Goodwin-Gill and Jane McAdam note in *The Refugee in International Law*, 3d ed. (Oxford: Oxford University Press, 2007), at page 524, the phrase lawful presence "implies admission in accordance with the applicable immigration law, for a temporary purpose, for example, as a student, visitor or recipient of medical attention." Neither B010 nor B072 can be said to be lawfully in Canada so as to attract the protection of Article 32.

[88] Article 33 of the Refugee Convention, which is incorporated in section 115 of the Act, is potentially applicable to B010 and B072. Subject to the terms of section 115, it would generally prohibit Canada from returning either individual to a territory where their life or freedom would be threatened on a Convention ground. However, it is well-settled law that a finding of inadmissibility is not the equivalent of removal or refoulement, and a finding of inadmissibility should not be conflated with subsequent removal or refoulement. See: *Sandhu v. Canada (Minister of Citizenship and Immigration)* (2000), 258 N.R. 100, at paragraph 2 (F.C.A.); *Poshteh v. Canada* (Minister of Citizenship and Immigration), 2005 FCA 85, [2005] 3 F.C.R. 487, at paragraphs 62-63.

[89] The separation of the concepts of inadmissibility and removal reflects the temporal nature of both the need for protection and the risk feared. Justice Cromwell, writing for the Court, explained this in *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at paragraph 50:

> Under the Refugee Convention, refugee status depends on the circumstances at the time the inquiry is made; it is not dependent on formal findings. As one author puts it, "it is one's *de facto* circumstances, not the official validation of those circumstances, that gives rise to Convention refugee status": James C. Hathaway, *The Rights of Refugees Under International Law* (2005), at pp. 158 and 278. It follows that the rights flowing from the individual's situation as a refugee are temporal in the sense that they exist while the risk exists but end when the risk has ended. Thus, like other obligations under the Refugee Convention, the duty of *non-refoulement* is "entirely a function of the existence of a risk of being persecuted [and] it does not compel a state to allow a refugee to remain in its territory if and when that risk has ended": Hathaway, at p. 302; *R. (Yogathas) v. Secretary of State for the Home Department*, [2002] UKHL 36, [2003] 1 A.C. 920, *per* Lord Scott of Foscote, at para. 106. The relevant time for assessment of risk is at the time of proposed removal: Hathaway, at p. 920; Wouters, at p. 99. This temporal understanding of refugee status under the Refugee Convention does not support the "binding effect" approach to earlier formal findings of refugee status.

[90] Moreover, as this Court noted in *Poshteh* at paragraph 63, the separation of the concepts of inadmissibility and removal also reflects the fact that after a finding of inadmissibility is made a

number of proceedings may take place before the individual reaches the stage where removal from Canada may occur. Examples of procedures potentially available to B010 and B072 include an application for ministerial relief pursuant to paragraph 37(2)(*a*) of the Act, an application for ministerial relief on humanitarian and compassionate grounds pursuant to section 25 of the Act, and a pre-removal risk assessment on subsection 97(1) grounds pursuant to section 112 of the Act.

[91] To conclude on this point, defining the term "people smuggling" by reference to section 117 of the Act does not place Canada in breach of the Refugee Convention because a finding of inadmissibility is not the equivalent of removal or refoulement. Significant protections remain available to the person found inadmissible, and the relevant time for assessing any risk to B010 and B072 is at the time of any proposed removal.

[92] To turn to the appellants' contention that the Board's interpretation of paragraph 37(1)(*b*) will lead to absurd results, the appellants argue that eliminating the requirement of a financial or other material benefit opens the door to inadmissibility too widely so that, for example, family members could be rendered inadmissible simply for assisting one another in their flight to Canada. There are, however, three answers to this submission. First, the alleged absurdity of an outcome can not defeat a clear statement of Parliamentary intent. Based upon the textual, contextual and purposive analysis of the Federal Court, the language of paragraph 37(1)(*b*) is sufficiently clear that its meaning should not be determined by reference to any alleged resulting absurdity. Second, as the Minister argues, the appellants' interpretation of the provision would lead to the absurd result that a foreign national convicted of human smuggling in Canada might not be inadmissible under paragraph 37(1)(*b*) as a result of that conviction, although they could well be inadmissible on other

grounds. Finally, inadmissibility proceedings are initiated pursuant to subsections 44(1) and (2) of the Act:

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.	(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

[93] The preparation of a report is permissive, that is, an officer "may" prepare a report. As well, the Minister's delegate "may" refer the report to the Immigration Division. It is to be expected that common sense will prevail in situations such as when family members simply assist other family members in their flight to Canada, or when a person acting for humanitarian purposes advises a refugee claimant to come to Canada without documents.

[94] Finally, the appellants argue that the reasoning of the Federal Court in cases such as *Hernandez* and *J.P.* is to be preferred over that in the present appeals. However, in both of those cases the Federal Court applied the correctness standard of review to the Board's interpretation of the Act. I have concluded that the applicable standard of review is reasonableness. As Justice Noël

explained at paragraph 36 of his reasons, when applying the reasonableness standard of review the Court is not to assess on a free-standing basis the appellants' proposed definition. Rather, the Court is to determine whether the Board's interpretation falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law. Justice Noël found the Board's interpretation to fall within that range, and I agree.

4. Did the Federal Court err by dismissing the applications for judicial review brought by B010 and B072?

B010

[95] B010 argues that both the Board and the Federal Court failed to consider the impact of subsection 117(4) of the Act which prohibits prosecution under section 117 without the consent of the Attorney General of Canada. The existence of this provision is said to demonstrate Parliament's intent that not every fact scenario that falls within subsection 117(1) is deserving of prosecution. No similar protection is said to exist in paragraph 37(1)(*b*). The failure of the Board and the Federal Court to consider this is said to render their decisions unreasonable.

[96] In my view, this submission overlooks the effect of section 44 and paragraphs 37(2)(*a*) and (*b*) of the Act. As discussed above, pursuant to subsection 44(2) the ministerial delegate "may" refer the report to the Immigration Division if of the "opinion that the report is well-founded". Paragraphs 37(2)(*a*) and (*b*) provide mechanisms for relief from a finding of inadmissibility and an exception from a finding of inadmissibility. These provisions provide sufficient flexibility to respond to special cases in a similar manner to the discretion conferred on the Attorney General of Canada under subsection 117(4) of the Act.

B072

[97] B072 argues that Justice Hughes erred in the following two respects:

i) B072 submits that a reading of subsections 15(1), 18(1), 99(1) and 99(3) of the Act establishes that a refugee claimant is not required to possess a visa, passport or other document in order to enter Canada when seeking refugee protection. Thus, he submits the Federal Court erred by finding all of the elements of subsection 117(1) to be met in circumstances where none of the persons said to have been smuggled into Canada were required to have been in possession of any particular document.

ii) B072 also submits that the crucial elements of subsection 37(1) are the terms "organized criminality" and "transnational crime". He further submits that the Federal Court erred in finding him to be inadmissible in circumstances where he had not been charged with, or arrested for, a transnational crime. In oral argument, counsel withdrew his contention that a person could only be found to be inadmissible after conviction under section 117.

[98] It is not clear that the first submission was advanced before the Federal Court. In any event, I disagree that refugee claimants are not required to possess travel documents. Subsection 20(1) requires foreign nationals who seek to enter or remain in Canada to possess a visa or other document. More specifically, subsection 20(1) of the Act provides: [emphasis added]

20. (1) Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,	20. (1) L'étranger non visé à l'article 19 qui cherche à entrer au Canada ou à y séjourner est tenu de prouver :

(*a*) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and	*a*) pour devenir un résident permanent, qu'il détient les visa ou autres documents réglementaires et vient s'y établir en permanence;
(*b*) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.	*b*) pour devenir un résident temporaire, qu'il détient les visa ou autres documents requis par règlement et aura quitté le Canada à la fin de la période de séjour autorisée.

[99] While, pursuant principles of refugee law, refugee claimants may be excused from the consequences of arriving without proper documentation, this does not mean that there is no requirement to possess documentation. If the appellant's submission on this point were accepted, no one could ever be found inadmissible for people smuggling if the persons smuggled into Canada made refugee claims.

[100] Turning to B072's second argument, I agree with Justice Hughes that a plain reading of paragraph 37(1)(*b*) makes it clear that there is no requirement that a person be charged or arrested before a determination of inadmissibility may be made. This interpretation is consistent with the context and purpose of the paragraph.

CONCLUSION

[101] For these reasons, I would dismiss each appeal and answer the certified question as follows:

> **Question: For the purposes of paragraph 37(1)(*b*) of the *Immigration and Refugee Protection Act*, is it appropriate to define the term "people smuggling" by relying on section 117 of the same statute rather than a definition contained in an international instrument to which Canada is a signatory?**

Answer: Yes, it is reasonable to define inadmissibility under paragraph 37(1)*(b)* by relying upon subsection 117(1) of the *Immigration and Refugee Protection Act*, which makes it an offence to knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by the Act. To do so is not inconsistent with Canada's international legal obligations.

"Eleanor R. Dawson"

J.A.

"I agree.
John M. Evans J.A."

"I agree.
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 7, 2013
REASONS FOR JUDGMENT BY:	DAWSON J.A.
CONCURRED IN BY:	EVANS J.A. STRATAS J.A.
DATED:	March 22, 2013

APPEARANCES:

ROD HOLLOWAY SAMUEL LOEB ERICA OLMSTEAD	FOR THE APPELLANT
BANAFSHEH SOKHANSANJ MARY MURRAY VIVIAN BURTON, ARTICLING STUDENT	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BARRISTER & SOLICITOR LEGAL SERVICES SOCIETY VANCOUVER, B.C.	FOR THE APPELLANT
WILLIAM F. PENTNEY DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT

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GURPREET BADH KAMALJIT LEHAL BENJAMIN LAU, ARTICLING STUDENT	FOR THE APPELLANT
BANAFSHEH SOKHANSANJ MARY MURRAY VIVIAN BURTON, ARTICLING STUDENT	FOR THE RESPONDENT

SOLICITORS OF RECORD:

BARRISTER AND SOLICITOR SMEETS LAW CORPORATION VANCOUVER, B.C.	FOR THE APPELLANT
WILLIAM F. PENTNEY DEPUTY ATTORNEY GENERAL OF CANADA	FOR THE RESPONDENT