Federal Court of Appeal | Cour d'appel fédérale

Date: 20131112

Dockets: A-29-13
A-498-12
A-563-12

Citation: 2013 FCA 262

CORAM: **SHARLOW J.A.**
MAINVILLE J.A.
NEAR J.A.

Docket: A-29-13

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

J.P. AND G.J.

Respondents

Docket: A-498-12

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

B306

Respondent

Docket: A-563-12

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

JESUS RODRIGUEZ HERNANDEZ

Respondent

Heard at Toronto, Ontario, on October 2, 2013.

Judgment delivered at Ottawa, Ontario, on November 12, 2013.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: SHARLOW J.A.
NEAR J.A.

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REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] These are three appeals by the Minister of Public Safety and Emergency Preparedness which were heard concurrently. These reasons apply to all three appeals, and a copy thereof shall be filed in each appeal docket.

[2] All three appeals raise substantially the same issues relating to findings of inadmissibility pursuant to paragraph 37(1)(*b*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (*IRPA*). Under that paragraph, a foreign national is inadmissible to Canada for "engaging, in the context of transnational crime, in activities such as people smuggling".

[3] The Minister, relying for this purpose on subsection 117(1) of *IRPA*, submits that paragraph 37(1)(*b*) does not require that the foreign national be engaged in people smuggling for a financial or other material benefit in order to be declared inadmissible to Canada.

[4] At the time periods pertinent to all three appeals, subsection 117(1) provided that "[n]o 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." It is useful to note that subsection 117(1) has since been amended and replaced through subsection 41(1) of *Protecting Canada's Immigration System Act*, S.C. 2012 c. 17. It now sets out that "[n]o person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act." These reasons address the subsection as it read prior to that amendment.

[5] The respondents in all three appeals, relying on paragraph 3(1)(*f*) of *IRPA*, on paragraph (*a*) of Article 3 of the *Protocol against the Smuggling of Migrants by Land, Sea and Air* (*Smuggling of Migrants Protocol*), and on Article 31 of the *1951 Convention Relating to the Status of Refugees* (*Refugee Convention*), submit that "people smuggling" requires that the perpetrator carry out the smuggling for a financial or other material benefit in order to be captured by the inadmissibility provision set out in paragraph 37(1)(*b*) of the *IRPA*.

[6] The respondents add that if they are wrong in their interpretation of the scope of "people smuggling" under paragraph 37(1)(*b*), then the effect of that paragraph is to deny a determination of their *Refugee Convention* refugee claims by the Refugee Division of the Immigration and Refugee Board of Canada. The respondents submit that such a denial violates their rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (*Charter*).

[7] The Immigration and Refugee Board of Canada – Immigration Division (Board) has relied on subsection 117(1) of the *IRPA* to interpret paragraph 37(1)(*b*). It has consequently consistently found that a foreign national may be excluded under paragraph 37(1)(*b*) of the *IRPA* even if he or she did not expect or receive a financial or other material benefit when engaging in people smuggling. However, in various judicial review proceedings, the Federal Court has been sharply divided on the issue, with the judges of that Court expressing different and irreconcilable views on a number of related matters, such as the applicable standard of review: see notably *B010 v. Canada (Citizenship and Immigration)*, 2012 FC 569; *B072 v. Canada (Citizenship and Immigration)*, 2012 FC 899; *B306 v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1282; *Hernandez v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1417; *J.P. v. Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1466; *S. C. v. Canada (Public Safety and Emergency Preparedness)*, 2013 FC 491.

[8] A panel of our Court has recently dealt with this controversy in *B010 v. Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87, 359 D.L.R. (4th) 730 (*B010 Appeal Decision*). The panel in the *B010 Appeal Decision* found that it was reasonable for the Board to define people smuggling under paragraph 37(1)(*b*) of the *IRPA* by relying upon subsection 117(1). The Supreme Court of Canada dismissed the leave to appeal in the *B010 Appeal Decision* on October 3, 2013: SCC file 35388.

[9] The *B010 Appeal Decision* did not address the constitutional issues raised by the respondents in all three appeals which are before this Court, including the effect of the recent Supreme Court of British Columbia decision in *R. v. Appulonappa*, 2013 BCSC 31, 358 D.L.R. (4th)

666 (*Appulonappa*), which declared section 117 of the *IRPA* inconsistent with the provisions of the Constitution and therefore of no force or effect. That decision is currently under appeal before the British Columbia Court of Appeal. The declaration of constitutional inapplicability made in *Appulonappa* has been suspended pending the outcome of that appeal: unreported Order of the Supreme Court of British Columbia dated June 10, 2013 in SCBC file 25796.

[10] In two of the appeals before us, the respondents urge this panel not to follow the *B010 Appeal Decision*. The respondents in all appeals add that even if this panel finds that it is bound by that decision, numerous questions nevertheless remain unanswered and should be dealt with in the appeals before us. These questions may be formulated as follows:

> (a) Does the interpretation of paragraph 37(1)(*b*) of the *IRPA* require that the foreign national have the *mens rea* to aid and abet in people smuggling in order to be captured by the inadmissibility provision? And if so, what is that *mens rea* requirement?
>
> (b) If the definition of people smuggling under paragraph 37(1)(*b*) of the *IRPA* is to be determined with reference to subsection 117(1), is that definition constitutionally overbroad?
>
> (c) Does paragraph 37(1)(*b*) of the *IRPA* engage section 7 of the *Charter* by precluding a refugee determination hearing for the foreign national captured by this inadmissibility provision?
>
> (d) In the case of the respondent B306, did the Board err (i) by refusing to consider that his assistance to the people smuggling operation was the result of necessity or duress, or (ii) by failing to consider the findings of another Board member reached with respect to his release from detention?

THE LEGISLATIVE FRAMEWORK

[11] Pertinent provisions of the *IRPA*, of the *United Nations Convention against Transnational Organized Crime* (*Transnational Organized Crime Convention*), of the *Smuggling of Migrants Protocol* and of the *Refugee Convention* are reproduced in a Schedule to these reasons.

[12] The general framework of these instruments, as they pertain to the issues raised in these appeals, may be briefly set out as follows.

[13] The most fundamental principle of immigration law is that foreign nationals have no unqualified right to enter into or to remain in Canada: *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at p. 733; *Medovarski v. Canada (Minister of Citizenship and Immigration); Esteban v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51, [2005] 2 S.C.R. 539 at para. 46.

[14] Parliament may thus regulate and control the entry of foreigners into Canada, and has done so principally through the *IRPA*. A foreign national seeking to enter and remain in Canada is therefore required to apply from abroad to a Canadian officer for a visa or for any other document required by the regulations to ascertain whether he is not inadmissible and meets the requirements of the legislation: *IRPA* ss. 11(1).

[15] Certain individuals are inadmissible to Canada under the terms of the *IRPA*. These include, but are not limited to, those individuals for which there are serious grounds to believe that they:

(i) are a threat to security: *IRPA* s. 34;
(ii) have committed crimes against humanity, war crimes or other international rights violations: *IRPA* s. 35;
(iii) have committed a serious crime in Canada or abroad: *IRPA* s. 36;

(iv) have engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert: *IRPA* para. 37(1)(*a*);
(v) have engaged, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering: *IRPA* para. 37(1)(*b*);
(vi) have a health condition that is likely to be a danger to public health or safety, or which might reasonably be expected to cause excessive demand on health or social services: *IRPA* s. 38;
(vii) are unable or unwilling to support themselves or their dependents and for which no adequate arrangements for care and support have been made: *IRPA* s. 39;
(viii) have misrepresented or withheld material facts or failed to comply with the *IRPA*: *IRPA* s. 40 and s. 41; or
(ix) are accompanying a family member that is inadmissible: *IRPA* s. 42.

[16] Notwithstanding these provisions, the responsible Minister may, in certain circumstances, waive the inadmissibility and grant permanent resident status to a foreign national if he is of the opinion that it is justified by humanitarian and compassionate considerations or by public policy considerations: *IRPA*, ss. 25(1), ss. 25.1(1) and ss. 25.2(1).

[17] Canada is also a signatory to the *Refugee Convention*. That instrument was developed as a response by the international community to the horrors of the Second World War and the atrocities committed during that conflict. Articles 31 and 33 of the *Refugee Convention* are relevant for the purposes of these appeals:

> (a) Article 31 provides that no penalties are to be imposed on refugees who "coming directly from a territory where their life or freedom was threatened in the sense of Article 1, 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) Article 33 sets out the principle of *non-refoulement*. It specifies that a refugee is not to be expelled or returned "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." However, the benefit of *non-refoulement* may not 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."

[18] Parliament has implemented Article 31 through the provisions of the *IRPA*. As a result, a distinction has been made between foreign nationals who seeks to enter and remain in Canada in the normal course of the application of the *IRPA* and those foreign nationals claiming *Refugee Convention* protection in Canada. While a foreign national who wishes to enter and remain in Canada must normally apply from abroad for the appropriate documents, in the case of a foreign national claiming *Refugee Convention* protection, the protection claim may be made in Canada: *IRPA* ss. 99(1). In the event the foreign national entered Canada without proper documents or with forged documents, he may not be charged with related offences while his *Refugee Convention* refugee claim is still pending or if refugee protection is eventually conferred to him: *IRPA* s. 133.

[19] Parliament has also implemented Article 33, and added additional protections for refugees, through subsection 115(1) of the *IRPA*. That subsection provides that a *Refugee Convention* refugee may not be removed from Canada to a country where he or she would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual punishment.

[20] That being said, the *Refugee Convention* provisions of the *IRPA* do not extend to certain categories of foreign nationals who assert a refugee claim in Canada and who are contemplated by certain (but not all) of the inadmissibility provisions described above. Specifically, the determination of a foreign national's refugee claim is suspended where the foreign national is deemed to be inadmissible to Canada on grounds of security, violating human or international rights, serious criminality, or organized criminality (which includes engaging in people smuggling in the context of transnational crime): *IRPA* para. 100(2)(*a*) and para. 103(1)(*a*). If the

inadmissibility of the foreign national is determined by the Immigration Division of the Board on one or another of these grounds, then the foreign national is ineligible to have his *Refugee Convention* refugee claim determined by the Refugee Division of the Board: *IRPA* para. 101(1)(*f*).

[21] Save exception, the inadmissibility determination does not necessarily entail that the concerned foreign national will be removed from Canada to a jurisdiction where he would personally be subject to a danger, believed on substantial grounds to exist, of torture or to a risk to his life or of cruel and unusual treatment or punishment, which I shall refer herein as "deportation to torture". Indeed, in circumstances of a potential deportation to torture, the inadmissible foreign national may still seek the protection of Canada not as a *Convention Refugee*, but rather as a person in need of protection: *IRPA* ss. 97(1), para. 112(3)(*a*) and para. 114(1)(*b*). However, the mechanisms set out under the *IRPA* to extend such protection to inadmissible foreign nationals are somewhat discretionary and vary in accordance with the grounds under which the inadmissibility was determined.

[22] In the case of a foreign national found inadmissible to Canada on grounds of organized criminality which, as already noted, includes engaging in people smuggling in the context of transnational crime, the responsible Minister may waive the inadmissibility if he is satisfied that this would not be contrary to the national interest: *IRPA* s. 42.1 (formerly para. 37(2)(*a*)).

[23] A foreign national found inadmissible on such grounds may also apply for a pre-removal risk assessment: *IRPA* para. 112(1). However, in such circumstances the risk assessment will be restricted to consideration of the risk of deportation to torture, and it shall also include consideration

of whether the application should be refused because of the nature and severity of the acts committed by the foreign national or because of the danger he poses to the security of Canada: *IRPA* subparagraph 113(*d*)(ii). If protection is extended, it does not confer refugee protection, but simply stays the removal order with respect to the country or place in respect of which the concerned foreign national was determined to be in need of protection: *IRPA* paras. 112(3)(a) and 114(1)(*b*). In any event, protection may be denied if, in the opinion of the Minister, the foreign national should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed or of the danger to the security of Canada: *IRPA* para. 115(2)(*b*).

[24] The *Smuggling of Migrants Protocol* supplements the *Transnational Organized Crime Convention* which defines a transnational offence, and it must be interpreted together with that Convention. The purpose of the *Smuggling of Migrants Protocol*, as set out in Article 2, is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States to that end, while protecting the rights of smuggled migrants. It requires under Article 6 that each State Party adopt legislative and other measures to establish as a criminal offence the smuggling of migrants, which is described as an act "committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit". Article 5 however provides an exemption from prosecution for the migrants who have been the object of the smuggling operations.

[25] Section 4 to Article 6 of the *Smuggling of Migrants Protocol* however states that nothing in that Protocol "shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law." Section 3 to Article 34 of the *Transnational Organized Crime Convention* also provides that "[e]ach State Party may adopt more strict or severe

measures than those provided for in this Convention for preventing and combating transnational organized crime."

THE DECISIONS BELOW

The cases of J.P. and G.J.

[26] In a blatant people smuggling operation, the MV *Sun Sea* arrived in Canadian waters after a long and secretive voyage from Thailand, carrying aboard 492 Sri Lankan foreign nationals seeking to enter Canada to make refuge protection claims. Among them were J.P. and G.J.

[27] After interviews and investigation, Canadian Border Services Agency officials concluded that J.P. had acted as one of the crew members of the MV *Sun Sea* and was thus engaging in people smuggling. As noted above, foreign nationals engaging in people smuggling are inadmissible to Canada pursuant to paragraph 37(1)(*b*) of the *IRPA*. Border Services officials also concluded that J.P.'s spouse, G.J., was inadmissible pursuant to section 42 of the *IRPA* as an accompanying family member of an inadmissible person. A report was consequently prepared pursuant to subsection 44(1) of the *IRPA*, thus suspending the determination of the refugee claims made by J.P. and G.J. The Minister was of the opinion that the report was well-founded, and therefore referred the matter to the Board for an admissibility hearing pursuant to subsection 44(2) of the *IRPA*.

[28] After holding a hearing and weighing the evidence, the Board concluded that J.P. had knowingly aided the coming into Canada of persons who were not in possession of a visa, passport or other document required by the *IRPA*, and thus engaged, in the context of a transnational crime, in people smuggling. The Board thus found J.P. inadmissible pursuant to paragraph 37(1)(*b*). It

consequently also found G.J. inadmissible as an accompanying family member of an inadmissible person. The Board issued a deportation order against both of them pursuant to paragraph 45(*d*) of the *IRPA* and paragraph 229(1)(*e*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[29] The Board found as a matter of fact that J.P. and his spouse G.J. first left Sri Lanka for Thailand using their personal passports. They spent some time in Thailand until they received word that they could board the ship which would bring them to Canada. They paid $30,000 each for the voyage to Canada. They did not board the ship at the public docks, but were tendered to somewhere in the ocean where they could not be seen, and they boarded separately one or two days apart.

[30] Some time after they boarded, the MV *Sun Sea*'s Thai crew left the ship. This was when J.P. was recruited to help operate the vessel. He originally declined, but shortly thereafter agreed to help. The Board found that his duties included chart plotting, reading GPS and radar and controlling the ship's wheel. It also found that J.P. was an assistant navigator throughout most of the voyage.

[31] J.P. and G.J. submitted to the Board three grounds under which they should not be found inadmissible to Canada:

> -First, because all the individuals aboard the MV *Sun Sea* had made refugee claims at a port of entry in Canada, there was no connection with people smuggling since no clandestine behaviour was at issue.
>
> -Second, the concept of people smuggling set out in paragraph 37(1)(*b*) of the *IRPA* must be consistent with the international instruments to which Canada is a party, including the *Smuggling of Migrants Protocol* which defines the smuggling of migrants with reference to a "financial or other material benefit".

> -Third, paragraph 37(1)(*b*) is constitutionally overbroad and it violates the principles of fundamental justice and in the process restricts life, liberty or security of the person more than is necessary to accomplish its purpose.

[32] On the first submission, the Board concluded that secret or clandestine behaviour was not necessary to find that someone had engaged in people smuggling. Moreover, the Board did indeed find that even if clandestine activities were required, such activities occurred, in this case, taking into account all of the circumstances, including the stealthy manner in which the MV *Sun Sea* navigated and the secrecy surrounding the voyage. The Board concluded that "although the plan may have been to present themselves to the Canadian authorities, they [the passengers of the MV *Sun Sea*] were circumventing the border requirements and more than likely chose this route because they would not have made it to the Canadian border if they tried to board an airplane where there would be some pre-boarding screening of documents (and in these cases – missing documents)": Board's Decision at paragraph 36.

[33] With respect to the second submission, the Board found as a matter of law that people smuggling pursuant to paragraph 37(1)(*b*) of the *IRPA* does not require the element of "financial or other material benefit" referred to in the *Smuggling of Migrants Protocol*. The Board rather based its finding with respect to the scope of people smuggling under paragraph 37(1)(*b*) with reference to subsection 117(1) of the *IRPA* as it then read, which defined the offence of human smuggling more broadly than the *Smuggling of Migrants Protocol* and without any reference to a financial or material benefit. The Board consequently adopted the elements identified by the Ontario Court of Justice in *R. v. Alzehrani*, 237 C.C.C. (3d) 471, 75 Imm. L.R. (3d) 304 (*Alzehrani*) with respect to human smuggling under subsection 117(1), as it then read, to identify people smuggling under paragraph 37(1)(*b*).

[34] The Board refused to consider the third submission raising constitutional arguments on the ground that the formalities of section 47 of the *Immigration Division Rules*, SOR/2002-229 with respect to a notice of constitutional question had not been properly followed.

[35] J.P. and G.J. were granted leave to submit an application for judicial review of the Board's decision, and in a judgment dated December 12, 2012 cited as 2012 FC 1466, Mosley J. allowed their application.

[36] Two issues were raised in the judicial review: (1) Did the Board err in law by declining to consider the third submission on the ground that proper notice had not been given? And (2) did it err in law by failing to interpret "people smuggling" in a manner consistent with the *Smuggling of Migrants Protocol*?

[37] Mosley J. applied a standard of reasonableness to the first issue. He found that in their submissions before the Board, J.P. and G.J. were not seeking to strike down paragraph 37(1)(*b*) of the IRPA on constitutional grounds, but rather seeking that this provision be interpreted in a manner consistent with the Constitution and international instruments. He thus concluded that the Board misinterpreted the thrust of the submissions and erred in declining to consider the *Charter* arguments notwithstanding the lack of notice. He found that this was an unreasonable decision in the sense that it was not justified and was outside the range of appropriate outcomes.

[38] With respect to the second issue, Mosley J. recognized that a controversy existed within the Federal Court as to the applicable standard to review the Board's interpretation of paragraph 37(1)(*b*) of the IRPA, and that a question had been previously certified on this issue by another judge of the Federal Court. He nevertheless weighed into the controversy by opining (at para. 13 of his reasons) that the interpretation of paragraph 37(1)(*b*) was "a question of law which is beyond the adjudicator's expertise and a matter of central importance to the legal system requiring the correctness standard."

[39] He then reviewed the party's submissions and the contradictory Federal Court decisions respecting the interpretation of paragraph 37(1)(*b*). He concluded (at para. 42 of his reasons) that Canada's international commitments to both penalize smugglers and to protect those who are being smuggled "may be blurred by an overly expansive interpretation of 37(1)(*b*) which encompasses those who did not plan or agree to carry out the scheme and have no prospect of a reward other than a modest improvement in their living conditions enroute." He added that it was consequently improper for the Board to interpret paragraph 37(1)(*b*) by strict reliance on the factual elements of the offence set out in subsection 117(1) as it then read.

[40] He then certified the following two questions pursuant to paragraph 74(*d*) of the *IRPA*:

> (1) For the purposes of paragraph 37(1)(*b*) of the *IRPA* 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?
>
> (2) Is the interpretation of paragraph 37(1)(*b*) of the *IRPA*, and in particular of the phrase "people smuggling" therein, reviewable on the standard of correctness or reasonableness?

The case of B306

[41] B306 was also aboard the MV *Sun Sea* and he also submitted a refugee claim when that ship arrived in Canada. A report pursuant to subsection 44(1) of the *IRPA* was also prepared in his case, thus suspending the determination of his refugee claim. The Minister was of the opinion that the report was well-founded, and referred the matter to the Board for an admissibility hearing pursuant to subsection 44(2) of the *IRPA*.

[42] The Board found that B306 had acted as a cook for the crew of the MV *Sun Sea* and also as a lookout to avoid the ship being detected. It notably found that B306's watch-keeping duties helped to prevent the potential interception of the ship as it proceeded to Canada, and that his work aboard the ship meaningfully supported the people smuggling operation.

[43] As was done in the case of J.P., the Board defined the scope of "people smuggling" under paragraph 37(1)(*b*) of the *IRPA* with reference to paragraph 117(1) as it then read. As a result, the Board found that B306 had aided and abetted the coming into Canada of the foreign nationals aboard the MV *Sun Sea*.

[44] The Board also rejected B306's submissions raising necessity and duress on its findings that he did not face any sort of impending peril nor was he subject to coercion.

[45] B306 had also served a notice of constitutional question on the Board alleging that it was contrary to section 7 of the *Charter* for a refugee claimant to be barred from having a refugee protection hearing based on an inadmissibility finding under paragraph 37(1)(*b*) of the *IRPA*. The Board rejected that submission on the ground that although B306 will likely be found ineligible to

make a refugee claim, this did not mean that he would be returned to Sri Lanka since (a) he "has a statutory right to apply for the Pre-Removal Risk Assessment and he cannot be removed from Canada until that process is completed" and (b) he "may also make an application to the Minister under 37(2)(*a*) [now s. 42.1] of the Act so that an inadmissibility finding under 37(1)(*b*) would not apply to him": Board's decision at para. 41.

[46] The Board consequently found B306 inadmissible pursuant to paragraph 37(1)(*b*) of the *IRPA* and issued a deportation order against him.

[47] B306 was also granted leave to submit an application for judicial review of the Board's decision, and in a judgment dated November 9, 2012 cited as 2012 FC 1282, Gagné J. allowed his application.

[48] With respect to the applicable standard of review, Gagné J. found that she was bound by the prior decision of Noël J. in *B010 v. Canada (Citizenship and Immigration)*, 2012 FC 569 who had applied a reasonableness standard in reviewing the Board's interpretation of paragraph 37(1)(*b*). Applying that standard to the case of B306, she found that the Board had reached an unreasonable conclusion.

[49] Gagné J. criticized the Board's findings of fact as "not informed by the context of complete dependency, vulnerability and power imbalance in which the applicant found himself during the three-month journey to Canada": Reasons at para. 34. She then substituted her own assessment of

the evidence to that of the Board. This allowed her to conclude as follows, at para. 37 of her Reasons:

> However, in order to establish *mens rea* the [Board] had to turn its mind to the reasons for which the applicant sought to help the smugglers and it erred in law by failing to do so. In other words, the applicant aided the smugglers in exchange for food; he did not aid 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.' Nor did he induce or abet such actions. A distinction should be made between the offence of people smuggling contemplated in section 117 of the *IRPA* and the offence of conspiring with, being accomplice to, or being an accessory after the fact of the smugglers as contemplated in section 131 of the *IRPA* (reference is made to its French version). [Paragraph] 37(1)(*b*) refers to people smuggling, it does not refer to complicity or conspiracy.

[50] She then proceeded to certify the following two questions:

> (1) For the purposes of paragraph 37(1)(*b*) of the *IRPA*, is it appropriate to define the term "people smuggling" by relying on section 117 of the same statute rather than on a definition contained in an international instrument to which Canada is a signatory?
>
> (2) For the application of paragraph 37(1)(*b*) and section 117 of the *IRPA*, is there a distinction to be made between aiding and 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 *IRPA*, as opposed to aiding and abetting the smugglers while within a vessel and in the course of being smuggled? In other words, in what circumstances would the definition of people smuggling in paragraph 37(1)(*b*) of the *IRPA* extend to the offences referred to in section 131 of the *IRPA*?

The case of Mr. Hernandez

[51] Mr. Hernandez is a Cuban national who had left Cuba for the United States of America (U.S.). While in the U.S., he and two other individuals purchased a 34 foot boat and left Florida for Cuba purportedly to pick up family members. When they arrived in Cuba, the family members of his two friends were present, as well as some of his cousins; however, none of his close family members were there.

[52] In all, 48 Cuban nationals boarded the small vessel and made their way to the U.S. They were apprehended by the U.S. Coast Guard approximately 80 to 100 km from the U.S. coast. Though Mr. Hernandez was a principal organizer of the smuggling operation, he did not participate in it for financial gain.

[53] As a result of these smuggling activities, Mr. Hernandez was convicted in the U.S. of alien smuggling pursuant to Title 8 USC s. 1324(a)(2)(A). Because of this conviction, he was subject to deportation from the U.S. He came to Canada, where he made a refugee claim.

[54] Two reports were prepared under subsection 44(1) of the *IRPA*. In the first report, Mr. Hernandez was said to be inadmissible to Canada on grounds of serious criminality under paragraph 36(1)(*b*) of the *IRPA* for having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years. The officer who prepared the report equated Mr. Hernandez's alien smuggling conviction in the United States to the offence of human smuggling under section 117 of the *IRPA* as it then read.

[55] The second report under subsection 44(1) concluded that Mr. Hernandez was inadmissible pursuant to paragraph 37(1)(*b*) of the *IRPA* for engaging in people smuggling given the facts for which he had been convicted in the United States for alien smuggling.

[56] Both reports were referred by the Minister to the Board.

[57] With respect to the inadmissibility under paragraph 36(1)(*b*), the Board found, based on the evidence before it, "that the offence of alien smuggling pursuant to Title 8 of the United States Code section 1324(a)(2)(A) is equal in its elements to the Canadian offence of organizing entry into Canada pursuant to subsection 117(1) of *IRPA* and would constitute an indictable offence punishable under paragraph 117(2)(*a*)(i) of *IRPA* to a maximum term of not more than 10 years which is inclusive of the 10 years that are required for a finding under paragraph 36(1)(*b*)": Board's decision at para. 25.

[58] The Board accordingly found that there were reasonable grounds to believe that Mr. Hernandez was subject to paragraph 36(1)(*b*) of the *IRPA* and consequently inadmissible on grounds of serious criminality. It therefore made a deportation order against him on those grounds.

[59] With respect to inadmissibility under paragraph 37(1)(*b*), the Board followed its unvarying jurisprudence to the effect that section 117 of *IRPA*, as it then read, provided an appropriate interpretative guide for defining people smuggling and therefore "does not require the element of 'financial or other material benefit' which is found in the Protocol's definition of smuggling of migrants": Board's decision at para. 39.

[60] It also found, based on the definition provided in subsection 117(1), as it then read, that "people smuggling" for the purposes of paragraph 37(1)(*b*) includes the elements of knowingly organizing, inducing, aiding or abetting the coming into a country of one or more persons who are not in possession of a visa, passport or other document required by that country. It finally noted that the elements which must be proved to sustain a claim of "people smuggling" are the same as those

set out in *Alzehrani* for the offence of "human smuggling" under subsection 117(1) as it then read, albeit on a different standard of proof: Board's decision at paras. 40 to 42.

[61] Reviewing the facts in light of these findings of law, the Board concluded that there were reasonable grounds to believe Mr. Hernandez was inadmissible under paragraph 37(1)(*b*) even though there was no evidence that he had engaged in people smuggling for financial gain or material benefit. Consequently, it also made a deportation order against him on that second ground.

[62] Mr. Hernandez was granted leave to submit an application for judicial review of the Board's decision, and in a judgment dated December 12, 2012 cited as 2012 FC 1417, Zinn J. allowed his application.

[63] Mr. Hernandez did not challenge the Board's inadmissibility finding under paragraph 36(1)(*b*) of the *IRPA* in judicial review. His application therefore only concerned the Board's finding of inadmissibility under paragraph 37(1)(*b*) relating to people smuggling.

[64] Zinn J. recognized that there were conflicting findings within the Federal Court with respect to the applicable standard of review of a Board's decision dealing with paragraph 37(1)(*b*) of the *IRPA*. He decided to carry out a full standard of review analysis. That analysis led him to conclude that the correctness standard applied since, in his view, the interpretation of paragraph 37(1)(*b*) involved matters of criminal law and of international law: Reasons at para. 28. He also opined that the question of who is or is not admissible to Canada was a question of central importance to the legal system: Reasons at para. 31.

[65] Zinn J. recognized that the crime of human smuggling set out in subsection 117(1) of the *IRPA* did not require a profit motive. However, applying a correctness standard of review to the interpretation of paragraph 37(1)(*b*), he found that the paragraph should not be interpreted in light of subsection 117(1), as it then read. In his view, "Canada's international commitments to criminalize the smuggling of migrants […] has no bearing on when it must permit persons to seek *Refugee Convention* protection or when exceptions to the principle of *non-refoulement* will be met": Reasons at para. 49.

[66] He found that, properly construed, the notion of "people smuggling" under paragraph 37(1)(*b*) includes a profit element. He reached that conclusion on three grounds: (1) "Parliament used different terms in paragraph 37(1)(*b*) and section 117 – people smuggling versus human smuggling": Reasons at para. 59; (2) under the associated words rule of statutory interpretation (*noscitur a sociis*) people smuggling in paragraph 37(1)(*a*) should be interpreted with the terms "trafficking in persons" and "money laundering" set out in that paragraph, both of which include a profit motive: Reasons at paras. 70-71; and (3) the reference to "in the context of transnational crime" in paragraph 37(1)(*b*) should be understood as a reference to international instruments: Reasons at para. 72.

[67] Zinn J. then certified the following two questions:

> (1) Is the interpretation of paragraph 37(1)(*b*) of the *IRPA*, and in particular the phrase "people smuggling" therein, by the Immigration and Refugee Protection Board, Immigration Division, reviewable on the standard of correctness or reasonableness?
>
> (2) Does the phrase "people smuggling" in paragraph 37(1)(*b*) of the *IRPA* require that it be done by the smuggler in order to obtain, "directly or indirectly, a financial or other material benefit" as is required in the *Smuggling of Migrants Protocol*?

ANALYSIS

The *B010 Appeal Decision*

[68] The *B010 Appeal Decision*, released on March 22, 2013, dealt with many of the issues raised by these appeals.

[69] B010 and B072 were also aboard the MV *Sun Sea*, and both submitted refugee claims upon their arrival in Canada. After the Thai crew of the MV *Sun Sea* left, B010 became a crew member responsible for checking engine temperature, water and oil levels. B072 signed the incorporating documents for the corporation that bought the MV *Sun Sea*, cashed checks for the smuggling operation, and assisted in loading food and equipment on the ship. The Board found both B010 and B072 inadmissible to Canada pursuant to paragraph 37(1)(*b*) of the *IRPA*. In the respective judicial review proceedings challenging these findings, Noël J. and Hughes J. of the Federal Court both refused to set aside these decisions of the Board. Both certified the following question:

> For the purposes of paragraph 37(1)(*b*) of the *IRPA*, 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?

[70] In thoughtful and well articulated reasons, Dawson J.A. dismissed both appeals concerning B010 and B072 respectively. She applied a standard of reasonableness to the Board's interpretation of paragraph 37(1)(*b*) of the *IRPA*. She also answered the certified question as follows:

> Answer: Yes, it is reasonable to define inadmissibility under paragraph 37(1)(*b*) by relying upon subsection 117(1) of the *IRPA*, 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.

It should be noted that the reference to subsection 117(1) in that answer is to the text of the provision as it read prior to the replacement of that subsection brought about by subsection 41(1) of *Protecting Canada's Immigration System Act*.

[71] The respondents in this case submit that the *B010 Appeal Decision* rests essentially on the standard used to review the Board's interpretation of paragraph 37(1)(*b*). The respondents consequently ask that this Court not follow the *B010 Appeal Decision* with respect to the standard of review on the ground that the use of the reasonableness standard is manifestly wrong. They add that by applying a correctness standard of review to the Board's interpretation of paragraph 37(1)(*b*) of the *IRPA*, we would be bound to conclude that the notion of "people smuggling" set out therein must conform to the *Smuggling of Migrants Protocol* rather than subsection 117(1). As a result, we would also be bound to conclude that a financial or other material benefit is required in order to be found inadmissible to Canada on the ground of people smuggling.

[72] This Court is normally bound by its own previous decisions: *Miller v. Canada (Attorney General)*, 2002 CAF 370, 220 D.L.R. (4th) 149 at paras. 8 to 10; *Canada (Minister of Employment & Immigration) v. Widmont*, [1984] 2 F.C. 274 at pp. 278 to 282 (C.A.).This principle does not however entail that this Court may never overrule its own decisions; the principle only stands for the proposition that this Court must rarely do so and only for important and valid reasons. This Court may overturn a prior decision in the following circumstances:

> (a) when the prior decision is found to be manifestly wrong because it failed to consider a relevant provision of a statute or regulation or it failed to follow a binding precedent from the Supreme Court of Canada: *Jansen Pharmaceutica Inc. v. Apotex Inc.* (1997), 208 N.R. 395 at para. 2;

> (b) when the prior decision has been overtaken by legislative changes or by subsequent decisions of the Supreme Court of Canada such as to justify not following it; or
>
> (c) when there are other serious and compelling reasons to overturn the prior decision, but in this latter case the Court must then engage in a balancing exercise between the two important values of correctness and certainty and ask itself whether it is preferable to adhere to an incorrect precedent to maintain certainty, or to correct the error: *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489 at paras. 25 to 27.

[73] In this case, I find no compelling reason not to follow the *B010 Appeal Decision* on any of the fundamental issues resolved by that decision.

[74] I recognize that the standard of review of decisions of the Board interpreting subsection 37(1) of the *IRPA* has been found in past jurisprudence of this Court to be that of correctness: *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, [2007] 3 F.C.R. 198 at para. 15. However, as aptly noted in the *B010 Appeal Decision* at paras. 61 to 70, the position of the Supreme Court of Canada with respect to the standard of review applicable to decisions of administrative tribunals interpreting their own statutes or statutes closely related to their functions has considerably evolved since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. Deference is now the rule rather than the exception where administrative tribunals are concerned.

[75] I subscribe to the comments of Dawson J.A. at paragraph 72 of the *B010 Appeal Decision* where she notes that as "aptly illustrated by the Supreme Court's textual, contextual and purposive analysis in *Canada (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." In many circumstances, there is

not much of a practical distinction between applying a standard of review based on reasonableness or on correctness.

[76] I am comforted in this approach by the fact that even if I were to apply a standard of correctness to the Board's interpretation of paragraph 37(1)(*b*) of the *IRPA*, I would reach the same conclusion on the meaning of that provision.

[77] Indeed, I subscribe to this Court's reasoning in the *B010 Appeal Decision* at paragraphs 76 to 80 that nothing in the *Transnational Organized Crime Convention* or in the *Smuggling of Migrants Protocol* prohibits signatories from enacting legislation which makes inadmissible to Canada those who contribute to, but do not profit from, people smuggling. Moreover, I also subscribe to the reasoning set out at paragraphs 81 to 91 of that decision that although the *Refugee Convention* places limits on the ability of a signatory State to expel a refugee lawfully in its territory, a finding of inadmissibility under the *IRPA* is not the equivalent of a removal under the *IRPA* or *refoulement* under the *Refugee Convention*.

[78] I also note that to attach a financial component to the concept of people smuggling would lead to unacceptable results. Individuals could engage in people smuggling of dangerous persons such as potential terrorists, but would not as a result be subject to an inadmissibility finding under the *IRPA* on the ground that they carried out the smuggling activities for ideological reasons rather than for a financial gain. This, in my view, would be clearly contrary to Parliament's intent in adopting paragraph 37(1)(*b*).

[79] The Board's decision to interpret paragraph 37(1)(*b*) of the *IRPA* with reference to subsection 117(1) thereof, as it then read, is not only reasonable, but in my view also the correct interpretation of that provision.

[80] First, that interpretation is entirely consistent with the modern rule of statutory interpretation requiring that a statutory provision be read as a whole with the act of which it is part of, which in this case includes the closely related subsection 117(1), as it then read: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27.

[81] Second, the *Smuggling of Migrants Protocol* does not restrict Canada's ability to take measures against persons whose conduct constitutes an offence under its own laws. As a result, the reference to "a financial or other material benefit" in that Protocol does not restrict Canada's ability to adopt a wider definition of people smuggling which does not refer to a financial or material benefit.

[82] As a final argument, the respondents also allege that Dawson J.A. did not discuss in the *B010 Appeal Decision* a paper dealing with the scope and interpretation of Article 31 of the *Refugee Convention*, and had she considered that paper, she would have reached a different conclusion. There is no merit to this submission. First, there is no evidence that Dawson J.A. did not consider the material placed before her, and I must assume that she did. Second, I have carefully considered the paper in question, by Guy Goodwin-Gill, "Article 31 of the Convention Relating to the Status of Refugees: non-penalization, detention and protection", in Erika Feller, Volker Turk and Frances

Nicholson, *Refugee Protection in International Law* (Toronto: Cambridge University Press, 2003); that article does not address in any depth the issue of migrant smuggling, and I have found it to be of marginal pertinence to the issues which were before the Court in the *B010 Appeal Decision*.

[83] In any event, Dawson J.A. properly relied (at para. 85 of the *B010 Appeal Decision*) on the work of James C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge: Cambridge University Press, 2005) at 412-413, to conclude that Article 31 of the *Refugee Convention* does not prevent Canada from expelling refugees who illegally enter its territory.

[84] I therefore conclude that this Court is bound by the *B010 Appeal Decision* with respect to the following issues:

> (a) That the standard of review of decisions of the Board with respect to the interpretation of paragraph 37(1)(*b*) of the *IRPA* is that of reasonableness;
>
> (b) That the Board acted reasonably by referring to subsection 117(1) of the *IRPA*, as it then read, to define the concept of "people smuggling" in paragraph 37(1)(*b*) without the requirement of a financial or material gain or advantage; and
>
> (c) That the Board's interpretation of paragraph 37(1)(*b*) is not inconsistent with Canada's international obligations under the *Refugee Convention*, the *Transnational Organized Crime Convention* or the *Smuggling of Migrants Protocol*.

The mens rea requirement

[85] The Board found that the essential elements required to conclude that a foreign national is inadmissible on the ground of having been involved in people smuggling are those set out in *Alzehrani* at para. 10. This, again, is a reasonable finding. Indeed, it is the only possible finding once the Board had concluded that paragraph 37(1)(*b*) must be interpreted with regard to subsection 117(1), as it then read.

[86] As a result, relying on subsection 117(1) as it then read, in order to make an inadmissibility determination with respect to a foreign national pursuant to paragraph 37(1)(*b*) of the *IRPA*, the Board had to find that "there are reasonable grounds to believe" (*IRPA* s. 33) that (i) the smuggled person did not have the required documents to enter Canada or another concerned foreign jurisdiction; (ii) the smuggled person was coming to Canada or to the concerned foreign jurisdiction; (iii) the foreign national was organizing, inducing, aiding or abetting the smuggled person to enter Canada or the concerned foreign jurisdiction; and (iv) the foreign national had knowledge of the lack of required documents.

[87] In this context, evidence of the proper *mens rea* must be established. The Board must have reasonable grounds to believe that the foreign national knew that the smuggled person was entering Canada or a concerned foreign jurisdiction without the required documents, but nevertheless organized, induced, aided or abetted the entry of the person into Canada or the foreign jurisdiction. Thus, the *mens rea* attached to paragraph 37(1)(*b*) includes both the specific knowledge of the lack of required documents and the more general *mens rea* that the foreign national intended to organize, induce, aid or abet the entry of the smuggled person.

[88] As noted above, in the case of B306, Gagné J. reasoned that the required *mens rea* had not been established since B306's participation in the operation was motivated by a desire to secure food, not to assist in people smuggling. J.P. and G.J. rely on this reasoning to argue that J.P.'s involvement in assisting in the operation of the ship was motivated by a modest improvement in his living conditions aboard the MV *Sun Sea*, and that consequently he did not have the required *mens*

rea of assisting in the people smuggling operation. With respect, this line of reasoning confuses the notion of intent with that of motive. It is plainly unsustainable.

[89] In determining liability, subsection 21(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 specifically provides that everyone is a party to an offence who (a) actually commits it; (b) does or omits to do anything for the purpose of aiding any person to commit it: or (c) abets any person in committing it.

[90] The *actus reus* of "aiding" is doing (or in certain circumstances omitting to do) something that assists or encourages a perpetrator to commit an offence. However, the *actus reus* is not sufficient alone; the individual must have rendered assistance for "the purpose of aiding any person to commit" a crime (*Criminal Code* para. 21(1)(*b*)). That *mens rea* requirement in the word "purpose" has two components: intent and knowledge: *R v. Briscoe*, 2010 SCC 13; [2010] 1 S.C.R. 411 at para. 16.

[91] Unless Parliament has specifically included motive as part of the elements of an offence, the required *mens rea* of aiding any person to commit an offense concerns the intent to assist in the commission of the offence, and that intent has very little or nothing to do with the motive for providing the assistance: see the discussion in *R. v. Hibbert*, [1995] 2 S.C.R. 973 at paras. 23 to 39. The perverse consequences of confusing motive with intent are well illustrated by the following hypothetical situation described by A.W. Mewett and M. Manning, *Criminal Law* (2nd ed. 1985), at p. 112 and referred to by the Supreme Court of Canada in both *R. v. Hibbert*, above at para. 35 and in *R v. Briscoe*, above at para. 16:

> If a man is approached by a friend who tells him that he is going to rob a bank and would like to use his car as the getaway vehicle for which he will pay him $100, when that person is …charged under s. 21 for doing something for the purpose of aiding his friend to commit the offence, can he say "My purpose was not to aid the robbery but to make $100?" His argument would be that while he knew that he was helping the robbery, his desire was to obtain $100 and he did not care one way or the other whether the robbery was successful or not.

[92] For the purposes of paragraph 37(1)(*b*) of the *IRPA*, the required *mens rea* was established in these cases when the Board had reasonable grounds to believe that the respondents in each of these appeals knew that the smuggled persons did not have the required documents but nevertheless agreed to organize, induce, aid or abet those persons entry into Canada or into a concerned foreign jurisdiction. The motive for doing so, whether ideological, financial, or material, has no bearing in this analysis.

[93] In the case of B306, the Board found, as a matter of fact, that "[h]e chose to help the people smugglers, who he knew were illegally transporting people to Canada": Board's reasons at para. 26. In the case of J.P., the Board found that he knowingly aided the coming into Canada of persons who were not in possession of a visa, passport or other documents required by *IRPA*. In the case of Mr. Hernandez, it is not disputed that he knew that the persons he was aiding to enter the U.S. did not have proper documents. These findings were sufficient in each of these cases to establish the *mens rea* requirement of paragraph 37(1)(*b*) irrespective of the motive for which each respondent acted.

The Minister's objection to the constitutional issues being dealt with by this Court

[94] In the *B010 Appeal Decision*, Dawson J.A. did not consider the issue of whether the interpretation of paragraph 37(1)(*b*) of the *IRPA* retained by the Board and based on paragraph 117(1), as it then read, was consistent with section 7 of the *Charter*. Nor did she consider the impact of the *Appulonappa* decision which declared section 117 of *IRPA*, as it then read, constitutionally overbroad and consequently of no force or effect.

[95] The respondents submit that section 7 of the *Charter* guarantees them a hearing by the Refugee Division of the Board to determine their *Refugee Convention* refugee claims, and that paragraph 37(1)(*b*) breaches that *Charter* provision in that its effect is to deny them such a hearing if they are found to be inadmissible to Canada: *IRPA* para. 101(1)(*f*). The respondents also submit that in light of *Appulonappa*, the Board's interpretation of paragraph 37(1)(*b*) is constitutionally overbroad. Consequently, the respondents ask that this Court strike down paragraph 37(1)(*b*) on constitutional grounds which were not considered in the *B010 Appeal Decision*.

[96] A litigant who seeks to challenge the constitutional validity, applicability or operability of a legislative provision before a federal board, the Federal Court or this Court must complete a notice of constitutional question for the provision to be judged invalid, inapplicable or inoperative: *Federal Courts Act*, R.S.C. 1985, c. F-7 s. 57.

[97] In these appeals, the respondents completed such notices in this Court prior to the appeal hearings, and all of these notices allege both that paragraph 37(1)(*b*) is constitutionally overbroad and that its effect is contrary to section 7 of the *Charter*. However, the appellant Minister submits that the respondents should have also completed notices of constitutional question when they were

before the Board, and that he is prejudiced as a result of that failure since he could have submitted evidence respecting the constitutional issues now being raised before us.

[98] While it is true that no notice of constitutional question was completed before the Board (except in the case of B306 who provided a notice limited to the section 7 *Charter* arguments), in the circumstances of these appeals I do not believe this failure to be fatal.

[99] First, the issue of whether paragraph 37(1)(*b*) is constitutionally overbroad largely crystallized with the release of the *Appulonappa* decision by the Supreme Court of British Columbia on January 11, 2013. This was well after the Board held its hearings and made its decisions in the cases before us. I do not believe that this Court can simply ignore *Appulonappa*, particularly where proper notices of constitutional questions have been laid before this Court as a result of that decision.

[100] Second, where the factual foundation is sufficient to determine the constitutional issues, or where the only missing elements are "legislative" evidence (non-adjudicative evidence such as *Hansard* extracts or public reports) which can be easily added to the record, this Court may well be in a position to address the issues, particularly where, such as here, there appears to have been a change in the law brought about as a result of the *Appulonappa* decision: *R. v. Weir*, 1999 ABCA 275, 181 D.L.R. (4th) 30 at paras. 5-6, 14-15.

[101] This Court has held that, as a general principle, it will not entertain *Charter* arguments that are not supported by a proper evidentiary foundation: *Bekker v. Canada*, 2004 FCA 186, 323 N.R.

195; *Somodi v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 268, 393 N.R. 395. However, as I noted in *Little Red River Cree Nation No. 447 v. Laboucan*, 2010 FCA 253 at para. 10, the principal purpose of this principle is to avoid prejudice to the opposing party who could have adduced evidence concerning the arguments. Where no prejudice can be established, I see no reason why the constitutional arguments cannot be dealt with: see by analogy *Athey v. Leonati*, [1996] 3 S.C.R. 458 at paras. 51-52.

[102] In this case, the Minister has failed to identify exactly which facts are missing from the records of these appeals that would prejudice him with respect to the constitutional arguments raised by the respondents. The Minister, through counsel, referred to certain reports, almost all of which were already included in the various Appeal Books prepared for these appeals. The only "facts" identified by counsel which would not be in the records before us concern the legislative history of paragraph 37(1)(*b*) and of section 117 of the *IRPA*. These are not "facts" in the normal sense of the term, but rather references to past legislation which this Court can appraise *proprio motu*. As a result, I see no grounds for not addressing the constitutional issues set out in the respondents' respective notices of constitutional questions, particularly where all such notices have been duly served and filed.

*Are the Board's findings with respect to the meaning of "people smuggling" under paragraph 37(1(*b*) constitutionally overbroad?*

[103] The respondents essentially rely on the reasoning set out in *Appulonappa*, which they say applies to paragraph 37(1)(*b*) of the *IRPA* insofar as that paragraph is interpreted with reference to subsection 117(1), as it then read.

[104] The accused in *Appulonappa* were charged with the offence of human smuggling under subsection 117(1) of the *IRPA*, as it then read, as a result of their alleged involvement with the MV *Ocean Lady* carrying 76 Sri Lankan Tamils, without proper documentation, into Canadian waters,

in the autumn of 2009. The judge in *Appulonappa* found that the *Charter* was engaged by section 117 of the *IRPA* in light of the potential terms of imprisonment contemplated by that provision.

[105] The judge in *Appulonappa* noted (at para. 72 of the reasons) that Canada, Australia, the United Kingdom and the U.S., while all signatories to the *Smuggling of Migrants Protocol*, have all enacted legislation concerning human smuggling which is broader than the definition of migrant smuggling set out in that Protocol. In particular, in each of those countries, financial or material benefit is not an element of the offence of human smuggling. In the case of Canada, he found that this approach did not, in itself, breach the Constitution.

[106] However, the judge in *Appulonappa* also noted (at paras. 83 and 84 of the reasons) that, in light of its international commitments, Canada takes the view that persons who provide support to migrants for humanitarian reasons and those who provide to them support on the basis of close family ties, though technically contemplated by the offence of human smuggling set out in subsection 117(1) of the *IRPA*, are not intended to be prosecuted for that offence. It is on that basis that the judge concluded that the subsection was constitutionally overbroad.

[107] The following extracts from the reasons in *Appulonappa* clearly show that the judge in that case based the constitutional conclusions primarily on the ground that section 117 of the *IRPA* could technically allow humanitarian workers and close family members to be subject to criminal prosecution for the offence at issue:

> [142] The international instruments acknowledge that there is no intention to criminalize the activities of genuine humanitarian aid workers and/or family members who are assisting refugees, but s. 117 is so broad that its wording does in fact capture those persons committing criminal activity.

> […]
>
> [147] As noted earlier, the position of the Crown is that the provisions of s. 117 comply with the "requirement of the Protocol" which notes that family members and humanitarian workers are not considered to be migrant smugglers.
>
> [148] The Crown's position that the proposed hypotheticals are not reasonable, simply because there is no possibility that anyone could ever be charged under the section, is not tenable. The determination of whether or not a hypothetical is reasonable must be based upon the activity complained of, not upon the possibility of whether or not persons would ever be charged. When simply the activities are concerned, the hypotheticals are eminently reasonable. The hypothetical with respect to family members occurs frequently. The hypothetical with respect to humanitarian aid workers happens often, and in fact resulted in a charge (although ultimately stayed) against Ms. Hinshaw-Thomas.
>
> [149] The two hypotheticals are technically within the scope of "human smuggling" under s. 117, but they are not within the objectives that Canada is trying to achieve through s. 117. To the contrary, it is the clear intention of the government not to prosecute such people.
>
> [150] The Crown points to no valid objective for the section to be so wide that it captures such persons referred to in the hypotheticals.
>
> [151] A proper consideration of those hypotheticals supports the defence argument that s. 117 is unnecessarily broad, and goes beyond what is necessary to accomplish the government's objective, and infringes s. 7 of the *Charter*.
>
> [153] The overbreadth of the section makes it impossible for persons to know if certain activities (those of humanitarian aid workers and close family members) will result in charges under s. 117, despite Canada's intention to the contrary. One of the reasons for the rule against overbroad sections is that persons are entitled to prior notice as to what are the limits of proper behaviour, and what is criminal behaviour.
>
> [Emphasis added].

[108] The judge in *Appulonappa* (at para. 175), however refused to read down subsection 117(1) so as to exclude from its ambit humanitarian aid workers and close family members. He consequently declared section 117 of the *IRPA* of no force or effect. In so doing, he did not consider whether it would have been advisable to suspend that declaration for the time required by Parliament to address the issue.

[109] The *Appulonappa* decision is now before the British Columbia Court of Appeal, and this Court should consequently make no comment as to whether, within a criminal law context, section 117 of the *IRPA* is constitutionally overbroad, and if so, what is the proper constitutional remedy which applies. Our task is limited to considering the constitutional validity of paragraph 37(1)(*b*) of the *IRPA* providing for the inadmissibility to Canada of those who engage in people smuggling.

[110] I first note that by its very nature, paragraph 37(1)(*b*) of the *IRPA* does not apply to humanitarian aid workers who are Canadian citizens assisting individuals who enter Canada without proper documentation, nor does it apply to any other Canadian citizens. Indeed, the ambit of that paragraph is limited to permanent residents and foreign nationals, and no finding of inadmissibility to Canada could extend to a Canadian citizen, nor could any such finding be made under the *IRPA* in light of section 6 of the *Charter*. Consequently, whether or not subsection 117(1) captures Canadian citizens, be they humanitarian workers or not (an issue which is before the B.C. Court of Appeal), has no bearing on paragraph 37(1)(*b*).

[111] As for foreigners who are humanitarian aid workers, I recognize that there is a very remote possibility that they could be potentially found inadmissible to Canada under paragraph 37(1)(*b*). However, such a situation is much too remote to place into question the constitutional validity of the paragraph. A constitutional analysis based on over breadth should not be allowed to stray into remote or extreme hypothetical situations, but must be restricted to reasonable hypothetical situations: *Reference re Marine Transportation Security Regulations*, 2009 FCA 234 , 395 N.R. 1 at paras. 42-43; *Ontario v. Canadian Pacific Ltd.* [1995] 2 S.C.R. 1031 at paras. 76 to 81. If by some extraordinary circumstance the inadmissibility to Canada of a foreign humanitarian worker should

arise on the basis of paragraph 37(1)(*b*), the Board will need to consider, based on the evidence placed before it, whether there are constitutional grounds which would preclude it from making an inadmissibility finding in that specific case.

[112] The matter of close family members cannot be so easily dealt with. I agree that paragraph 37(1)(*b*) is not intended to render inadmissible to Canada close family members who can avail themselves of the *Refugee Convention* and who mutually assist themselves in concert to enter Canada without proper documentation.

[113] In this matter, paragraph 3(2)(*b*) of the *IRPA* sets out that one of the principal objectives of that legislation is to "fulfill Canada's international legal obligations with respect to refugees…". These obligations included adherence by Canada to Article 5 of the *Smuggling of Migrants Protocol* which specifically provides that 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 [smuggling of migrants]." This undertaking is reflected in domestic legislation through subsection 37(2) of the *IRPA*.

[114] The inadmissibility provision of paragraph 37(1)(*b*) of the *IRPA*, like any other statutory provision, must be interpreted with regard to its legislative purpose. That purpose is refusing admissibility to Canada for foreign nationals who engage in people smuggling within the context of a transnational crime. By any rational analysis, close family members who can avail themselves of the *Refugee Convention* and who mutually assist themselves in concert to enter Canada without proper documentation are not participating in a transnational crime. On the contrary, the

international instruments to which Canada adheres seeks to protect them, notably the *Smuggling of Migrants Protocol* itself as well as the *Refugee Convention*.

[115] Consequently, using a textual, contextual and purposeful interpretation of the *IRPA* read as whole and with proper regard to Canada's international obligations, I find that paragraph 37(1)(*b*) of the *IRPA* cannot and does not contemplate close family members who can avail themselves of the *Refugee Convention* and who mutually assist themselves to enter Canada without proper documentation. It was not the intention of Parliament to capture such family members under paragraph 37(1)(*b*). As a result, I need not consider the constitutional arguments raised by the respondents with respect to that issue.

[116] In any event, and as further discussed below, even if I had considered these constitutional arguments, I would have dismissed them on the ground that section 7 of the *Charter* is simply not engaged by paragraph 37(1)(*b*) of the *IRPA*. Whether section 7 of the *Charter* is engaged by section 117 of the *IRPA* in criminal matters is another question which I need not address in these appeals.

Does paragraph 37(1)(b) of IRPA engage section 7 of the Charter by precluding a refugee determination hearing ?

[117] The respondents further submit that section 7 of the *Charter* guarantees them a hearing to determine whether they are *Refugee Convention* refugees, and that paragraph 37(1)(*b*) is as a result constitutionally inapplicable in that its effect is to deny them such a hearing.

[118] The respondents note that a finding of inadmissibility under paragraph 37(1)(*b*) could lead to the removal of the affected foreign national to a jurisdiction where there may well be a well-

grounded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. They however recognize that such an inadmissibility finding will not normally lead to removal to a jurisdiction where the foreign national would be subject personally to a danger of torture or to a risk to life or of cruel and unusual punishment; however, they add that the protection against deportation to torture offered by the *IRPA* is itself subject to ministerial discretion. They therefore submit that the combined effect of potential removal to persecution and of the risk of removal to torture at the discretion of the Minister violates section 7 of the *Charter*.

[119] To support their section 7 *Charter* submissions, the respondents largely rely on *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S. C. R. 350 (*Charkaoui*) where the Supreme Court of Canada found (at para. 17) that "[w]hile the deportation of a non-citizen in the immigration context may not *in itself* engage s. 7 of the *Charter*, some features associated with deportation, such as detention in the course of the certificate process or the prospect of deportation to torture, may do so."

[120] I do not agree with the respondents' *Charter* submissions. For the reasons more fully set out below, although I recognize that deportation to torture may well engage section 7 of the *Charter*, the issue of deportation to torture is not before us. An inadmissibility finding under paragraph 37(1)(*b*) does not in itself engage section 7 of the *Charter*, though I do not exclude that this *Charter* provision could eventually be engaged should the Minister exercise his discretion in a manner that leads to the deportation to torture of the concerned foreign national.

[121] *Charkaoui* concerned the provisions of the *IRPA* respecting certificates of inadmissibility leading to the detention of a permanent resident or a foreign national deemed to be a threat to national security. In that case, the Supreme Court of Canada concluded that some of those provisions violated section 7 of the *Charter* "by allowing the issuance of a certificate of inadmissibility based on secret material without providing for an independent agent at the stage of judicial review to better protect the named person's interests": *Charkaoui* at para. 3.

[122] Although, as noted above, the Supreme Court of Canada found in *Charkaoui* that the prospect of deportation to torture may engage section 7 of the *Charter*, it also found that "[t]he issue of deportation to torture is consequently not before us here" since any claim that the concerned individuals would be at risk of torture if deported to their countries of origin "remains to be proven as part of an application for protection under Part 2 of the *IRPA*": *Charkaoui* at para. 15.

[123] More than two decades ago, this Court determined in *Berrahma v. Canada (Minister of Employment and Immigration)* (1991), 132 N.R. 202 (F.C.A.) (leave to appeal to the S.C.C. dismissed: 136 N.R. 236) that an inadmissibility finding under the *IRPA* does not engage section 7 of the *Charter* since such a finding is not the equivalent of removal or *refoulement*. This principle has been consistantly reiterated by this Court: *Rudolph v. Canada (Minister of Employment and Immigration)*, [1992] 2 F.C. 653 (F.C.A.), 91 D.L.R. (4th) 686; *Nguyen v. Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 696 (F.C.A.); *Jekula v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 F.C. 266 aff'd by 266 N.R. 355 (F.C.A.); *Sandhu v. Canada (Minister of Citizenship and Immigration)* (2000), 258 N.R. 100; *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85, [2005] 3 F.C.R. 487.

[124] The state of the law on this issue was aptly set out by Evans J. (as he then was) in *Jekula v. Canada (Minister of Citizenship and Immigration)*, above at paragraphs 31 to 33, and I can do no better than he in describing the applicable principles:

> [31] However, before the content of the principles of fundamental justice is considered in this context, the administrative action under review must deprive the applicant of the right to life, liberty and security of the person. The question is, therefore, whether a decision under paragraph 46.01(1)(a) has this effect. In my opinion it does not. First, while it is true that a finding of ineligibility deprives the claimant of access to an important right, namely the right to have a claim determined by the Refugee Division, this right is not included in "the right to life, liberty and security of the person": *Berrahma v. Minister of Employment and Immigration* (1991), 132 N.R. 202 (F.C.A.), at page 213; *Nguyen v. Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 696 (C.A.).
>
> [32] Second, it may well be a breach of the rights protected by section 7 for the government to return a non-citizen to a country where she fears that she is likely to be subjected to physical violence or imprisoned. However, a determination that a refugee claimant is not eligible to have access to the Refugee Division is merely one step in the administrative process that may lead eventually to removal from Canada. The procedure followed at the risk assessment to which the applicant will be entitled under section 53 before she is removed can be subject to constitutional scrutiny to ensure that it complies with the principles of fundamental justice, even though the procedure is not prescribed in the Act or regulations: *Kaberuka v. Canada (Minister of Employment and Immigration)*, [1995] 3 F.C 252 (T.D.), at page 271. Moreover, while holding that it was not inconsistent with section 7 for the *Immigration Act* to limit access to the Refugee Division, Marceau J.A. also said in *Nguyen v. Canada (Minister of Employment and Immigration)*, [1993] 1 F.C. 696 (C.A.), at pages 708-709:
>
> > It would be my opinion, however, that the Minister would act in direct violation of the *Charter* if he purported to execute a deportation order by forcing the individual concerned back to a country where, on the evidence, torture and possibly death will be inflicted. It would be, it seems to me . . . at the very least, an outrage to public standards of decency, in violation of the principles of fundamental justice under section 7 of the *Charter*.
>
> [33] In summary, section 7 rights are not engaged at the eligibility determination and exclusion order stages of the process. However, the applicant cannot be lawfully removed from Canada without an assessment of the risks that she may face if returned to Sierra Leone. And the manner in which that assessment is conducted must comply with the principles of fundamental justice.

[125] As a result, paragraph 37(1)(*b*) does not engage section 7 of the *Charter*. The issue of whether or not any of the respondents in these cases will be deported to a jurisdiction which could subject them personally to a danger of torture or to a risk to their life or to a risk of cruel and unusual punishment will, if necessary, be determined at a stage in the process under the *IRPA* which is subsequent to the inadmissibility finding. It is only at this subsequent stage that section 7 of the *Charter* may be engaged.

Did the Board fail to consider necessity or duress and the reasons of another of its members in the case of B306?

[126] The respondent B306 further submits that this Court should dismiss the appeal in his case on two further grounds: (a) that he acted out of necessity or duress, and (b) that the Board member who found him inadmissible to Canada failed to consider the statements to the contrary made by another Board member deciding his release from custody. I will consider each submission in turn.

[127] Dealing first with the justification of necessity, it is well established that it is of limited application: *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3 (*Latimer*) at para. 27. Three elements must be present for the justification to succeed:

> (a) First, there must be an urgent situation of clear and imminent peril, *i.e.* disaster must be imminent, or harm unavoidable and near: *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616, at p. 678; *Perka v. The Queen*, [1984] 2 S.C.R. 232, at p. 251 (*Perka*); *Latimer* at para. 29.
>
> (b) Second, there must be no reasonable legal alternative to disobeying the law, *i.e.* could the person realistically have acted to avoid the peril or to prevent the harm: *Perka* at pp. 251-252; *Latimer* at para. 30.
>
> (c) Third, there must be proportionality between the harm inflicted and the harm avoided: *Latimer* at para. 31.

[128] The first two elements are evaluated in accordance with a modified objective test which involves an objective evaluation, but one that takes into account the situation and characteristics of the concerned individual: *Latimer*, at paras. 32-32, *i.e.* the individual "must, at the time of the act, honestly believe, on reasonable grounds, that he faces a situation of imminent peril that leaves no reasonable legal alternative open." On the other hand, the third element dealing with proportionality is measured on a purely objective standard: *Latimer* at para. 34.

[129] In the case of B306, the Board found as a matter of fact that he was not facing an urgent situation of clear and imminent peril.

[130] The Board rightfully dismissed his submission that necessity flowed from his fear of returning to his country. Indeed, the record plainly shows that B306 traveled first to Thailand before boarding the MV *Sun Sea* where he could have made a refugee claim. Clearly his voyage to Canada was motivated by more than the fear of being returned to his country.

[131] The Board also found as a matter of fact that there was no evidence of an urgent situation of clear and imminent peril aboard the MV *Sun Sea* as a result of the level of B306's food rations or of his health condition: Board's decision at para. 34.

[132] In summary, B306 was in Thailand, not Sri Lanka, when he boarded the MS *Sun Sea*, and was facing no clear and imminent danger when aboard the MV *Sun Sea*. These factual conclusions of the Board based on the evidence placed before it, and to which this Court must defer, are incompatible with a claim of necessity.

[133] B306 also submits that he acted under duress as a result of his fear of the Captain of the MV *Sun Sea*. Yet the Board dismissed these allegations by finding that B306 had, in fact, voluntarily chosen to work and that there was no evidence whatsoever of coercion: Board's decision at para. 34. These are also reasonable findings which should not be lightly discarded.

[134] Finally, B306 submits that at a prior detention review hearing, another member of the Board had stated the following: "[B306] did provide some assistance to the crew in preparing their food for them and in keeping watch for other ships but I am not willing to find that on the basis of that [B306] engaged in people smuggling or trafficking in persons": Transcript of detention review hearing of January 31, 2011, reproduced in Appeal Book for A-498-12 at p. 80. That other Board member however also noted that "I am in no way meaning to prejudice what will happen at the admissibility hearing": *ibid*.

[135] B306 submits that (a) under the principles of either *res judicata* (also referred to as cause of action estoppel) or issue estoppel, the statement of that other Board member was binding with respect to the admissibility proceedings; and (b) that the failure to specifically address that statement in the Board member's reasons respecting his admissibility breached the rules of administrative fairness. Both of these submissions are unfounded.

[136] First, *res judicata* cannot apply here since the proceedings with respect to detention and release under the *IRPA* are unrelated to the inadmissibility proceedings under that statute. Both proceedings do not address the same cause of action, and as a result, the precondition for a finding

of *res judicata* is absent: *Yamani v. Canada (Minister of Citizenship and Immigration*, 2003 FCA 482 at paras 9-11; *Erdos v. Canada (Minister of Citizenship and Immigration*, 2005 FCA 419 at paras 15-16.

[137] Second, issue estoppel also has no application here. The doctrine of issue estoppel holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (*Penner*) at para. 29; *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 at paras. 24-25. As noted by Dickson J. in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at p. 255, issue estoppel does not apply if the question at issue arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. As further noted in *Penner* at para. 24, the question out of which the estoppel is said to arise must have been fundamental to the decision arrived at in the earlier proceeding, it must concern material facts and conclusions of law or mixed fact and law that were necessarily determined in the earlier proceedings.

[138] In this case, it is abundantly clear that the Board member dealing with detention and release did not finally determine the issue of whether B306 was engaged or not in people smuggling. On the contrary, that Board member specifically noted that he was in no way meaning to prejudice the admissibility hearing. His comments with respect to B306's involvement were clearly not meant to be a final determination of the issue, nor were they in any way fundamental to the detention or release decision. The elements of issue estoppel are therefore absent.

[139] Moreover, there is no breach of procedural fairness in this case since the issue of B306's involvement in people smuggling was not finally decided by the detention or release decision, and there was consequently no need for the Board member dealing with B306's admissibility hearing to address that decision.

Conclusions

[140] For the reasons set out above, I would allow each appeal, set aside the three judgments of the Federal Court, and giving the judgments that should have been given, I would dismiss all three judicial review applications.

[141] I would answer as follows the questions certified by Mosley J. in the case concerning J.P. and G.J.:

> **Question 1**: For the purposes of paragraph 37(1)(*b*) of the *IRPA* 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 1:** Yes, for the reasons set out in the *B010 Appeal Decision*.
>
> **Question 2:** Is the interpretation of paragraph 37(1)(*b*) of the *IRPA*, and in particular of the phrase "people smuggling" therein, reviewable on the standard of correctness or reasonableness?
>
> **Answer 2:** The interpretation of paragraph 37(1)(*b*) of the *IRPA* by the Board is reviewable on a standard of reasonableness.

[142] I would answer as follows the first question certified by Gagné J. in the case concerning B306:

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

Answer 1: Yes, for the reasons set out in the *B010 Appeal Decision*.

[143] The second question certified by Gagné J. is as follows:

> **Question 2:** For the application of paragraph 37(1)(*b*) and section 117 of the *IRPA*, is there a distinction to be made between aiding and 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 *IRPA*, as opposed to aiding and abetting the smugglers while within a vessel and in the course of being smuggled? In other words, in what circumstances would the definition of people smuggling in paragraph 37(1)(*b*) of the *IRPA* extend to the offences referred to in section 131 of the *IRPA*?

The appellant deemed the question to be too broad and refused to make submissions on it, while none of the respondents addressed the question in either their written or oral submissions. It is consequently not appropriate for this Court to answer this question.

[144] Finally, I would answer the questions certified by Zinn J. as follows in the case concerning Mr. Hernandez:

> **Question 1:** Is the interpretation of paragraph 37(1)(*b*) of the *IRPA*, and in particular the phrase "people smuggling" therein, by the Immigration and Refugee Protection Board, Immigration Division, reviewable on the standard of correctness or reasonableness?
>
> **Answer 1:** The interpretation of paragraph 37(1)(*b*) of the *IRPA* by the Board is reviewable on a standard of reasonableness.
>
> **Question 2:** Does the phrase "people smuggling" in paragraph 37(1)(*b*) of the *IRPA* require that it be done by the smuggler in order to obtain, "directly or indirectly, a financial or other material benefit" as is required in the *Smuggling of Migrants Protocol*?
>
> **Answer 2:** No.

"Robert M. Mainville"

J.A.

"I agree.
K. Sharlow J.A."

"I agree.
D.G. Near J.A."

SCHEDULE

Extracts from the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

3. (3) This Act is to be construed and applied in a manner that […] (*f*) complies with international human rights instruments to which Canada is signatory.	**3.** (3) L'interprétation et la mise en oeuvre de la présente loi doivent avoir pour effet : […] *f*) de se conformer aux instruments internationaux portant sur les droits de l'homme dont le Canada est signataire.
11. (1) A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.	**11.** (1) L'étranger doit, préalablement à son entrée au Canada, demander à l'agent les visa et autres documents requis par règlement. L'agent peut les délivrer sur preuve, à la suite d'un contrôle, que l'étranger n'est pas interdit de territoire et se conforme à la présente loi.
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.
36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants :
[…]	[…]
(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;	b) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans;
37. (1) A permanent resident or a foreign national is inadmissible on	**37.** (1) Emportent interdiction de territoire pour criminalité organisée

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 money laundering.

(2) 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.

42.1 (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(*b*) and (*c*) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.

(2) The Minister may, on the Minister's own initiative, declare that the matters referred to in section 34, paragraphs 35(1)(*b*) and (*c*) and

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.

(2) 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.

42.1 (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)*b*) ou *c*) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

(2) Le ministre peut, de sa propre initiative, déclarer que les faits visés à l'article 34, aux alinéas 35(1)*b*) ou *c*) ou au paragraphe 37(1) n'emportent

subsection 37(1) do not constitute inadmissibility in respect of a foreign national if the Minister is satisfied that it is not contrary to the national interest.

pas interdiction de territoire à l'égard de tout étranger s'il est convaincu que cela ne serait pas contraire à l'intérêt national.

(3) In determining whether to make a declaration, the Minister may only take into account national security and public safety considerations, but, in his or her analysis, is not limited to considering the danger that the foreign national presents to the public or the security of Canada.

(3) Pour décider s'il fait la déclaration, le ministre ne tient compte que de considérations relatives à la sécurité nationale et à la sécurité publique sans toutefois limiter son analyse au fait que l'étranger constitue ou non un danger pour le public ou la sécurité du Canada.

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.

45. The Immigration Division, at the conclusion of an admissibility hearing, shall make one of the following decisions:
[…]
(*d*) make the applicable removal order against a foreign national who has not been authorized to enter Canada, if it is

45. Après avoir procédé à une enquête, la Section de l'immigration rend telle des décisions suivantes :
[…]

d) prendre la mesure de renvoi applicable contre l'étranger non autorisé à entrer au Canada et dont il

not satisfied that the foreign national is not inadmissible, or against a foreign national who has been authorized to enter Canada or a permanent resident, if it is satisfied that the foreign national or the permanent resident is inadmissible.

n'est pas prouvé qu'il n'est pas interdit de territoire, ou contre l'étranger autorisé à y entrer ou le résident permanent sur preuve qu'il est interdit de territoire.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

99. (1) A claim for refugee protection may be made in or outside Canada.

99. (1) La demande d'asile peut être faite à l'étranger ou au Canada.

100. (2) The officer shall suspend consideration of the eligibility of the person's claim if

100. (2) L'agent sursoit à l'étude de la recevabilité dans les cas suivants :

(*a*) a report has been referred for a determination, at an admissibility hearing, of whether the person is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality; or

a) le cas a déjà été déféré à la Section de l'immigration pour constat d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée;

(*b*) the officer considers it necessary to wait for a decision of a court with respect to a claimant who is charged with an offence under an Act of Parliament that is punishable by a maximum term of imprisonment of at least 10 years.

b) il l'estime nécessaire, afin qu'il soit statué sur une accusation pour infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if
[…]
(*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).

101. (1) La demande est irrecevable dans les cas suivants :
[…]
f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)*c*) —, grande criminalité ou criminalité organisée.

103. (1) Proceedings of the Refugee Protection Division in respect of a claim for refugee protection are suspended on notice by an officer that

103. (1) La Section de la protection des réfugiés sursoit à l'étude de la demande d'asile sur avis de l'agent portant que :

(*a*) the matter has been referred to the Immigration Division to determine whether the claimant is inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality;

a) le cas a été déféré à la Section de l'immigration pour constat d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux, grande criminalité ou criminalité organisée;

or
[…]

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).
[…]

(3) Refugee protection may not result from an application for protection if the person

(*a*) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

113. Consideration of an application for protection shall be as follows:
[…]

(d) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (e)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the

[…]

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
[…]

(3) L'asile ne peut être conféré au demandeur dans les cas suivants :

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

113. Il est disposé de la demande comme il suit :
[…]

d) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa e)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

security of Canada;

114. (1) A decision to allow the application for protection has
[…]
(*b*) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

114. (1) La décision accordant la demande de protection a pour effet
[…]
s'agissant de celui visé au paragraphe 112(3), de surseoir, pour le pays ou le lieu en cause, à la mesure de renvoi le visant.

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

115. (1) Ne peut être renvoyée dans un pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Subsection (1) does not apply in the case of a person

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

(*a*) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

(*b*) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

(3) A person, after a determination under paragraph 101(1)(*e*) that the

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de

person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

l'alinéa 101(1)*e*), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.

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

117. (1) Il est interdit à quiconque d'organiser l'entrée au Canada d'une ou de plusieurs personnes ou de les inciter, aider ou encourager à y entrer en sachant que leur entrée est ou serait en contravention avec la présente loi ou en ne se souciant pas de ce fait.

NOTE: THE PRIOR VERSION OF THE SUBSECTION READ AS FOLLOWS:

NOTE : LA VERSION ANTÉRIEURE SE LISAIT COMME SUIT :

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.

133. A person who has claimed refugee protection, and who came to Canada directly or indirectly from the country in respect of which the claim is made, may not be charged with an offence under section 122, paragraph 124(1)(*a*) or section 127 of this Act or under section 57, paragraph 340(*c*) or section 354, 366, 368, 374 or 403 of the Criminal Code, in relation to the coming into Canada of the person, pending disposition of their claim for refugee protection or if refugee protection is conferred.

133. L'auteur d'une demande d'asile ne peut, tant qu'il n'est statué sur sa demande, ni une fois que l'asile lui est conféré, être accusé d'une infraction visée à l'article 122, à l'alinéa 124(1)*a*) ou à l'article 127 de la présente loi et à l'article 57, à l'alinéa 340*c*) ou aux articles 354, 366, 368, 374 ou 403 du Code criminel, dès lors qu'il est arrivé directement ou indirectement au Canada du pays duquel il cherche à être protégé et à la condition que l'infraction ait été commise à l'égard de son arrivée au Canada.

Extracts from the *Protocol against the Smuggling of Migrants by Land, Sea and Air*:

Article 1
Relation with the United Nations Convention against Transnational Organized Crime

1. This Protocol supplements the United Nations Convention against Transnational Organized Crime. It shall be interpreted together with the Convention.

Article premier
Relation avec la Convention des Nations Unies contre la criminalité transnationale organisée

1. Le présent Protocole complète la Convention des Nations Unies contre la criminalité transnationale organisée. Il est interprété conjointement avec la Convention.

Article 2
Statement of purpose

The purpose of this Protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, while protecting the rights of smuggled migrants.

Article 2
Objet

Le présent Protocole a pour objet de prévenir et combattre le trafic illicite de migrants, ainsi que de promouvoir la coopération entre les États Parties à cette fin, tout en protégeant les droits des migrants objet d'un tel trafic.

Article 3
Use of terms

For the purposes of this Protocol:

(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;

(b) "Illegal entry" shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State;

Article 3
Terminologie

Aux fins du présent Protocole:

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;

b) L'expression "entrée illégale" désigne le franchissement de frontières alors que les conditions nécessaires à l'entrée légale dans l'État d'accueil ne sont pas satisfaites;

Article 5
Criminal liability of migrants

Article 5
Responsabilité pénale des migrants

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.
Article 6 *Criminalization*	*Article 6* *Incrimination*
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; […]
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.

Extracts from the *United Nations Convention against Transnational Organized Crime*:

Article 3. Scope of application	*Article 3. Champ d'application*
2. For the purpose of paragraph 1 of this article, an offence is transnational in nature if:	2. Aux fins du paragraphe 1 du présent article, une infraction est de nature 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

(d) It is committed in one State but has substantial effects in another State.

c) Elle est commise dans un État mais implique un groupe criminel organisé qui se livre à des activités criminelles dans plus d'un État; ou

d) Elle est commise dans un État mais a des effets substantiels dans un autre État.

Article 34. Implementation of the Convention

3. Each State Party may adopt more strict or severe measures than those provided for by this Convention for preventing and combating transnational organized crime.

Article 34. Application de la Convention

3. Chaque État Partie peut adopter des mesures plus strictes ou plus sévères que celles qui sont prévues par la présente Convention afin de prévenir et de combattre la criminalité transnationale organisée.

Extracts from the *Convention Relating to the Status of Refugees*:

Article 31
Refugees Unlawfully in the Country of Refugee

1. 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 1, 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.

2. 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

Article 31
Réfugiés en situation irrégulière dans le pays d'accueil

1. Les Etats Contractants n'appliqueront pas de sanctions pénales, du fait de leur entrée ou de leur séjour irréguliers, aux réfugiés qui, arrivant directement du territoire où leur vie ou leur liberté était menacée au sens prévu par l'article premier, entrent ou se trouvent sur leur territoire sans autorisation, sous la réserve qu'ils se présentent sans délai aux autorités et leur exposent des raisons reconnues valables de leur entrée ou présence irrégulières.

2. Les Etats Contractants n'appliqueront aux déplacements de ces réfugiés d'autres restrictions que celles qui sont nécessaires ; ces restrictions seront appliquées seulement en attendant que

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.

le statut de ces réfugiés dans le pays d'accueil ait été régularisé ou qu'ils aient réussi à se faire admettre dans un autre pays. En vue de cette dernière admission les Etats Contractants accorderont à ces réfugiés un délai raisonnable ainsi que toutes facilités nécessaires.

Article 33
Prohibition of Expulsion or Return ("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.

Article 33
Défense d'expulsion et de refoulement

1. Aucun des Etats Contractants n'expulsera ou ne refoulera, de quelque manière que ce soit, un réfugié sur les frontières des territoires où sa vie ou sa liberté serait menacée en raison de sa race, de sa religion, de sa nationalité, de son appartenance à un certain groupe social ou de ses opinions politiques.

2. Le bénéfice de la présente disposition ne pourra toutefois être invoqué par un réfugié qu'il y aura des raisons sérieuses de considérer comme un danger pour la sécurité du pays où il se trouve ou qui, ayant été l'objet d'une condamnation définitive pour un crime ou délit particulièrement grave, constitue une menace pour la communauté dudit pays.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-29-13

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE MOSELY DATED DECEMBER 12, 2012, NO. IMM-2041-12

STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. J.P. AND G.J.
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 2, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	SHARLOW J.A. NEAR J.A.
DATED:	NOVEMBER 12, 2013

APPEARANCES:

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-498-12

APPEAL FROM A JUDGMENT OF THE HONOURABLE MADAM JUSTICE GAGNÉ DATED NOVEMBER 9, 2012, NO. IMM-2309-12

STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. B306
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 2, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	SHARLOW J.A. NEAR J.A.
DATED:	NOVEMBER 12, 2013

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-563-12

APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE ZINN, DATED DECEMBER 4, 2012, NO. IMM-2409-12

STYLE OF CAUSE:	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS v. JESUS RODRIGUEZ HERNANDEZ
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 2, 2013
REASONS FOR JUDGMENT BY:	MAINVILLE J.A.
CONCURRED IN BY:	SHARLOW J.A. NEAR J.A.
DATED:	NOVEMBER 12, 2013

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