SUPREME COURT OF CANADA

CITATION: R. *v*. Appulonappa, 2015 SCC 59

DATE: 20151127
DOCKET: 35958

BETWEEN:

Francis Anthonimuthu Appulonappa
Appellant
and
Her Majesty The Queen
Respondent

AND BETWEEN:

Hamalraj Handasamy
Appellant
and
Her Majesty The Queen
Respondent

AND BETWEEN:

Jeyachandran Kanagarajah
Appellant
and
Her Majesty The Queen
Respondent

AND BETWEEN:

Vignarajah Thevarajah
Appellant
and
Her Majesty The Queen
Respondent
- and -
Attorney General of Ontario, Amnesty International (Canadian Section, English Branch), British Columbia Civil Liberties Association, Canadian Civil Liberties Association, Canadian Council for Refugees and Canadian Association of Refugee Lawyers
Interveners

CORAM: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

REASONS FOR JUDGMENT: (paras. 1 to 86)	McLachlin C.J. (Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Francis Anthonimuthu Appulonappa *Appellant*

v.

Her Majesty The Queen *Respondent*

- and -

Hamalraj Handasamy *Appellant*

v.

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Jeyachandran Kanagarajah *Appellant*

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2015 SCC 59

File No.: 35958.

2015: February 17; 2015: November 27.

Present: McLachlin C.J. and Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Right to liberty — Fundamental justice — Overbreadth — People smuggling — Migrants seeking refugee status in Canada charged with offence of organizing, inducing, aiding or abetting persons coming into Canada without valid documentation — Trial judge finding that offence provision overbroad and therefore unconstitutional because it criminalizes not only organized people smuggling, but helping close family members to come to Canada and humanitarian assistance to refugees — Whether offence provision infringes s. 7 of Canadian Charter of Rights and Freedoms — If so, whether infringement justifiable under s. 1 of Charter — If no, what is appropriate remedy for constitutional infirmity — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 117.

Immigration law — Offences — People smuggling — Migrants seeking refugee status in Canada charged with offence of organizing, inducing, adding or abetting persons coming into Canada without valid documentation — Whether offence provision unconstitutional — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 117.

In 2009, a vessel was apprehended off the west coast of Vancouver Island, in British Columbia. Seventy-six people, among them A, H, K and T (the "migrants") were aboard. All were Tamils from Sri Lanka. They claimed to have fled Sri Lanka because their lives were endangered. They asked for refugee status in Canada. None had the required legal documentation. The migrants are alleged to have

been the point persons for a transnational for-profit operation to smuggle undocumented migrants from Southeast Asia to Canada. The majority of passengers each paid, or promised to pay, $30,000 to $40,000 for the voyage. The migrants are said to have been responsible for organizing the asylum-seekers in Indonesia and Thailand prior to boarding the freighter, and serving as the chief crew of the ship on the voyage to Canada — H as captain, T as chief engineer, and K and A as key crew members.

The migrants were charged under s. 117 of the *Immigration and Refugee Protection Act* ("*IRPA*"), which makes it an offence to "organize, induce, aid or abet" the coming into Canada of people in contravention of the *IRPA*. Consequences of conviction could include lengthy imprisonment and disqualification from consideration as a refugee. Before their trial, the migrants challenged the constitutionality of s. 117 of the *IRPA*, on the ground that it infringes the right to life, liberty and security of person enshrined in s. 7 of the *Charter*. The trial judge ruled the provision was unconstitutional. The Court of Appeal reversed that decision, found the provision to be constitutional and remitted the matter for trial. Section 117 as it was at the time of the alleged offences is no longer in force and the constitutionality of the current s. 117 is not before the Court.

Held: The appeals are allowed and the charges are remitted for trial. Section 117 is unconstitutional insofar as it permits prosecution for humanitarian aid

to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members.

Participating in the unauthorized entry of other people into Canada may result in prosecution and imprisonment and/or substantial fines upon conviction under s. 117 of the *IRPA*. The migrants contend that s. 117 violates s. 7 of the *Charter* because the provision catches two categories of people outside its purpose — people who assist close family members to come to Canada and humanitarians who assist those fleeing persecution to come to Canada, in each case without required documents. They say that s. 117 is therefore overbroad. They also argue that s. 117 offends the principles of fundamental justice because its impact on liberty is grossly disproportionate to the conduct it targets, because it is unconstitutionally vague, and because it perpetuates inequality.

Insofar as s. 117 permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members, it is unconstitutional. The purpose of s. 117 is to criminalize the smuggling of people into Canada in the context of organized crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada. A broad punitive goal that would prosecute persons with no connection to and no furtherance of organized crime is not consistent with Parliament's purpose as evinced by the text of

s. 117 read together with Canada's international commitments, s. 117's role within the *IRPA*, the *IRPA's* objects, the history of s. 117, and the parliamentary debates.

The scope of s. 117 is overbroad and interferes with conduct that bears no connection to its objective. The overbreadth problem cannot be avoided by interpreting s. 117(1) as not permitting prosecution of persons providing humanitarian, mutual or family assistance. Such an interpretation would require the Court to ignore the ordinary meaning of the words of s. 117(1), which unambiguously make it an offence to "organize, induce, aid or abet" the undocumented entry. To adopt this interpretation would violate the rule of statutory interpretation that the meaning of the words of the provision should be read in their grammatical and ordinary sense. It would also require statements from the legislative debate record suggesting Parliament knew in advance that the provision was overbroad to be ignored.

Parliament itself understood when it enacted s. 117 that the provision's reach exceeded its purpose by catching those who provide humanitarian, mutual and family assistance to asylum-seekers coming to Canada, but argued that this overbreadth was not a problem because the Attorney General would not permit the prosecution of such people. Section 117(4), which requires the Attorney General to authorize prosecutions, does not cure the overbreadth problem created by s. 117(1). Ministerial discretion, whether conscientiously exercised or not, does not negate the fact that s. 117(1) criminalizes conduct beyond Parliament's object, and that people

whom Parliament did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment. So long as the provision is on the books, and so long as it is not impossible that the Attorney General could consent to prosecute, a person who assists a family member or who provides mutual or humanitarian assistance to an asylum-seeker entering Canada faces a possibility of imprisonment.

Section 117 of the *IRPA* is overbroad and this overbreadth cannot be justified under s. 1 of the *Charter*. While the objective of s. 117 is clearly pressing and substantial and some applications of s. 117 are rationally connected to the legislative object, the provision fails the minimal impairment branch of the s. 1 analysis. It follows that s. 117 is of no force or effect to the extent of its inconsistency with the *Charter*. The extent of the inconsistency that has been proven is the overbreadth of s. 117 in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents. In this case, the preferable remedy is to read down s. 117 of the *IRPA*, as it was at the time of the alleged offences, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the *Charter*. This remedy reconciles the former s. 117 with the requirements of the *Charter* while leaving the prohibition on human smuggling for the relevant period in place.

In view of the conclusion that s. 117 is overbroad, it is unnecessary to consider the argument that s. 117 offends s. 7 of the *Charter* by depriving persons of liberty in a manner that violates the principles of fundamental justice against gross disproportionality and vagueness.

Cases Cited

Referred to: *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58; *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101; *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773; *R. v. Chartrand*, [1994] 2 S.C.R. 864; *R. v. Heywood*, [1994] 3 S.C.R. 761; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494; *R. v. Gladue*, [1999] 1 S.C.R. 688; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167; *R. v. Oakes*, [1986] 1 S.C.R. 103; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *Schachter v. Canada*, [1992] 2 S.C.R. 679.

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Act to amend The Immigration Act, S.C. 1919, c. 25, s. 12(4).

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Freezing Assets of Corrupt Foreign Officials Act, S.C. 2011, c. 10.

Geneva Conventions Act, R.S.C. 1985, c. G-3.

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Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3, 37(1)(*b*), Part 3, 117 [am. 2012, c. 17, s. 41], 118, 121, 133.

Protecting Canada's Immigration System Act, S.C. 2012, c. 17, s. 41(1) and (4).

Special Economic Measures Act, S.C. 1992, c. 17.

Treaties and Other International Instruments

Convention relating to the Status of Refugees, 189 U.N.T.S. 150, arts. 31(1), 33.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 U.N.T.S. 480, arts. 2, 3(a), 6(1), (3), (4), 19(1).

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2237 U.N.T.S. 319.

United Nations Convention against Transnational Organized Crime, 2225 U.N.T.S. 209, arts. 1, 5, 34.

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APPEALS from a judgment of the British Columbia Court of Appeal (Neilson, Bennett and Hinkson JJ.A.), 2014 BCCA 163, 355 B.C.A.C. 98, 607 W.A.C. 98, 373 D.L.R. (4th) 1, 310 C.C.C. (3d) 193, 11 C.R. (7th) 154, 308 C.R.R. (2d) 293, 25 Imm. L.R. (4th) 1, [2014] B.C.J. No. 762 (QL), 2014 CarswellBC 1135 (WL Can.), setting aside the orders of Silverman J. and directing a new trial, 2013 BCSC 31, 358 D.L.R. (4th) 666, 275 C.R.R. (2d) 1, 99 C.R. (6th) 245, 13 Imm. L.R. (4th) 207, [2013] B.C.J. No. 35 (QL), 2013 CarswellBC 15 (WL Can.); and 2013 BCSC 198, [2013] B.C.J. No. 217 (QL), 2013 CarswellBC 299 (WL Can.). Appeals allowed and charges remitted for trial.

Fiona Begg and *Maria Sokolova*, for the appellant Francis Anthonimuthu Appulonappa.

Peter H. Edelmann and *Jennifer Ellis*, for the appellant Hamalraj Handasamy.

Micah B. Rankin and *Phillip C. Rankin*, for the appellant Jeyachandran Kanagarajah.

Gregory P. DelBigio, *Q.C.*, and *Lisa Sturgess*, for the appellant Vignarajah Thevarajah.

W. Paul Riley and *Banafsheh Sokhansanj*, for the respondent.

Hart Schwartz and *Padraic Ryan*, for the intervener the Attorney General of Ontario.

Chantal Tie, *Laïla Demirdache* and *Michael Bossin*, for the intervener Amnesty International (Canadian Section, English Branch).

Marlys A. Edwardh and *Daniel Sheppard*, for the intervener the British Columbia Civil Liberties Association.

Andrew I. Nathanson and *Gavin Cameron*, for the intervener the Canadian Civil Liberties Association.

Angus Grant, *Catherine Bruce*, *Laura Best* and *Fadi Yachoua*, for the intervener the Canadian Council for Refugees.

Andrew J. Brouwer, *Jennifer Bond* and *Erin Bobkin*, for the intervener the Canadian Association of Refugee Lawyers.

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] On October 17, 2009, a vessel called the *Ocean Lady* was apprehended off the west coast of Vancouver Island, in British Columbia. Seventy-six people, among them the appellants, were aboard. All were Tamils from Sri Lanka. They claimed to have fled Sri Lanka because their lives were endangered in the aftermath of the civil war in that country. They asked for refugee status in Canada. None had the required legal documentation.

[2] The Crown claims that the four appellants — the captain and chief crew of the vessel — were the organizers of the venture. The Crown alleges that the majority of passengers each paid, or promised to pay, $30,000 to $40,000 for the voyage.

[3] The appellants were charged under s. 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), which makes it an offence to "organize, induce, aid or abet" the coming into Canada of people in contravention of the *IRPA*. Consequences of conviction could include lengthy imprisonment and disqualification from consideration as a refugee.

[4] Before their trial, the appellants challenged the constitutionality of s. 117 of the *IRPA*, on the ground that it infringes the right to life, liberty and security of person enshrined in s. 7 of the *Canadian Charter of Rights and Freedoms*. The trial judge ruled that the provision was unconstitutional because it criminalized not only organized people smuggling, but helping close family members to come to Canada and humanitarian assistance to refugees. The British Columbia Court of Appeal reversed that decision, and found the provision to be constitutional.

[5] For the reasons that follow, I conclude that, insofar as s. 117 permits prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers or assistance to family members it is unconstitutional.

II. Facts and Judicial History

A. *Facts*

[6] Canadian authorities intercepted the freighter ship *Ocean Lady* offshore of Vancouver Island. They found 76 passengers aboard; all were Tamil asylum-

seekers from Sri Lanka who had boarded the ship in Southeast Asia: 24 boarded the ship in Indonesia between June and August 2009, and 52 in Thailand in September 2009. None of the 76 migrants had the proper documentation to enter Canada. Most had agreed to pay a sum of between $30,000 and $40,000 to come to Canada. Typically, down payments of $5,000 were exacted prior to boarding, together with undertaking a debt of another $25,000 to $35,000 to be paid subsequent to arrival in Canada.

[7] The four appellants, Francis Anthonimuthu Appulonappa, Hamalraj Handasamy, Jeyachandran Kanagarajah and Vignarajah Thevarajah, are alleged to have been the point persons for a transnational for-profit operation to smuggle undocumented migrants from Southeast Asia to Canada. They are said to have been responsible for organizing the asylum-seekers in Indonesia and Thailand prior to boarding the freighter, and serving as the chief crew of the ship on the voyage to Canada — Mr. Handasamy as captain, Mr. Thevarajah as chief engineer, and Mr. Kanagarajah and Mr. Appulonappa as key crew members.

[8] The appellants were charged with the offence of "Organizing entry into Canada" found in s. 117 of the *IRPA*, which, at the relevant time, provided:

> **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.

[9] The IRPA was amended by the *Protecting Canada's Immigration System Act*, S.C. 2012, c. 17, ss. 41(1) and 41(4), whereby s. 117(1) was replaced by a new subsection and two subsections were added, which came into force on December 15, 2012. Section 117 as it was at the time of the alleged offences of the appellants is therefore no longer in force. The constitutionality of the current s. 117 is not before us.

B. *British Columbia Supreme Court, 2013 BCSC 31, 358 D.L.R. (4th) 666*

[10] The appellants brought an application before Silverman J. on a *voir dire* for a declaration that s. 117 of the *IRPA* is unconstitutionally overbroad. They did not contend that s. 117 is unconstitutional as it applied to the allegations against them, which are that they were part of a for-profit smuggling operation. However, they argued that s. 117 is unconstitutional because it may lead to the conviction of humanitarian workers or family members assisting asylum-seekers for altruistic reasons. They argued that convicting people in these categories exceeds the legislative intent of s. 117 and infringes the guarantee of liberty contrary to the principle of fundamental justice against overbreadth. This violation of the liberty guarantee in s. 7 of the *Charter* was not justified under s. 1 of the *Charter*, they submitted.

[11] The Crown accepted that the purpose of s. 117 was not to convict persons helping close family members come to Canada or persons providing legitimate humanitarian aid to people coming to Canada. However, it argued that this did not

render s. 117 overbroad because s. 117(4) of the *IRPA* required that the Attorney General authorize prosecution, which would allow him to screen out people in these categories.

[12] Silverman J. concluded that, as the Crown contended, the purpose of s. 117 does not extend to prosecution of genuine humanitarian aid workers or family members. Because s. 117 permits the prosecution of such persons, it violates the s. 7 guarantee of liberty in a way that is overbroad, and hence not in accord with the principles of fundamental justice. Silverman J. held that s. 117 could not be interpreted or "read down" to make it *Charter* compliant and that the prior consent to prosecution required by s. 117(4) did not save s. 117 from being unconstitutionally overbroad. Nor, in his view, was the overbreadth justified under s. 1 of the *Charter*. Silverman J. therefore declared s. 117 of the *IRPA* to be inconsistent with s. 7 of the *Charter* and hence of no force or effect under s. 52 of the *Constitution Act, 1982*. He ordered that the indictments of the appellants be quashed: 2013 BCSC 198.

C. *British Columbia Court of Appeal, 2014 BCCA 163, 355 B.C.A.C. 98*

[13] Before the Court of Appeal, the Crown changed its submission on the purpose of s. 117 of the *IRPA*. It submitted that s. 117 was enacted to prevent all organizing or assisting of unlawful entry of others into Canada, including assistance to close family members and humanitarian assistance. This, the Crown said, was required to further Canada's goals of: (1) controlling who enters its territory; (2) protecting the health, safety, and security of Canadians; (3) preserving the integrity

and efficacy of Canada's lawful immigration and refugee claims regimes; and (4) promoting international justice and cooperation with other states on matters of security.

[14] The Court of Appeal accepted this revised submission as the purpose of s. 117 of the *IRPA* and on that basis held it to be constitutional. Neilson J.A. (Bennett and Hinkson JJ.A. concurring) concluded that Canadian laws criminalizing assistance to undocumented migrants have not historically allowed exceptions based on the offender's motive or other characteristics. When the provision at issue was enacted in 1988, the question of whether humanitarian workers should be exempted received attention, but Parliament, concerned about "definitional difficulties" and "loopholes", rejected creating an exception for these groups. The purpose of s. 117 therefore aligned with its reach, and the provision was not overbroad.

[15] The court added that the s. 117(4) requirement of the Attorney General's consent to prosecute would guard against improper prosecutions on humanitarian grounds, family grounds or other grounds. If the Attorney General were to authorize prosecution of people assisting close family members or providing humanitarian assistance, the vice would not be overbreadth of s. 117(1), but the improper exercise of ministerial discretion under s. 117(4).

[16] In the result, the Court of Appeal allowed the appeal, overturned the declaration of invalidity, set aside the acquittals and remitted the matter for trial.

III. The Statutory Scheme

[17] The *IRPA* (relevant provisions set out in Appendix A) is a complex statute dealing with the entry into Canada of foreign nationals through two processes — the immigration process and the refugee protection process. We are here concerned primarily with the refugee protection process. The *IRPA* aims to establish "fair and efficient [refugee] procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings": *IRPA*, s. 3(2)(*e*). Both goals are underpinned by Canada's adhesion to international conventions and protocols, discussed more fully below.

[18] A significant concern for the integrity of Canada's refugee protection system is the threat posed to it by the entry to Canada of unauthorized persons outside the lawful refugee regime. As part of combating this threat, the *IRPA* contains two provisions which sanction individuals for helping others to enter Canada without the documents required by border authorities.

[19] Section 37(1)(*b*) of the *IRPA* renders a person inadmissible to Canada where the person has "engag[ed], in the context of transnational crime", in people smuggling, and, in effect, prevents that person's refugee claim from being determined on its merits. Section 117, under the marginal note "Organizing entry into Canada", creates an offence. At the relevant time, it read:

> **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.[1]

[20] Sections 117(2) and 117(3) provide penalties of imprisonment and fines. At the time of the charges at issue in this case, s. 121(1)(*c*) of the *IRPA* under the marginal note "Aggravating factors," stipulated that committing the offence for profit was a fact to be considered in sentencing under s. 117.[2]

[21] Subsection (4) provides a screening mechanism for instituting proceedings under s. 117 — prosecutions can proceed only with the consent of the Attorney General.

[22] In summary, participating in the unauthorized entry of other people into Canada may have two consequences under the *IRPA*. First, it may result in prosecution and imprisonment and/or substantial fines upon conviction under s. 117. Second, it may render a person who engages in certain proscribed activities inadmissible to Canada under s. 37(1)(*b*). The first consequence — prosecution under s. 117 — is the subject of this appeal. The second consequence — inadmissibility to Canada — is the subject of the companion appeals in *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58.

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[1] The current version reads: "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."

[2] In the current version of the *IRPA*, the content of this provision, as amended, is now contained in s. 117 itself.

IV. The Issues

[23] The *Charter* applies to foreign nationals entering Canada without the required documentation: *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. Section 7 of the *Charter* provides:

> **7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

As a penal provision with potential sentences up to life imprisonment, it is clear that s. 117 of the *IRPA* threatens liberty and hence engages s. 7 of the *Charter*: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 492.

[24] The main issue before us is whether s. 117 of the *IRPA* threatens liberty, protected by s. 7 of the *Charter*, in a manner contrary to the principles of fundamental justice. If the answer is yes, a second question arises: Is the infringement justified under s. 1 of the *Charter*? If the answer to this second question is no, a final question arises: What is the appropriate remedy for the constitutional infirmity in s. 117?

[25] The appellants contend that s. 117 violates s. 7 of the *Charter* because the provision catches two categories of people outside its purpose — people who assist close family members to come to Canada and humanitarians who assist those fleeing persecution to come to Canada, in each case without required documents. The appellants say that s. 117 is therefore overbroad, contrary to the principles of

fundamental justice. They also argue that s. 117 offends the principles of fundamental justice because its impact on liberty is grossly disproportionate to the conduct it targets, because it is unconstitutionally vague, and because it perpetuates inequality.

V. Discussion

A. *Does Section 117 of the IRPA Violate Section 7 of the Charter?*

(1) Overbreadth

[26] A law is said to violate our basic values by being overbroad when "the law goes too far and interferes with some conduct that bears no connection to its objective": *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para. 101. As stated in *Bedford*, "[o]verbreadth allows courts to recognize that the law is rational in some cases, but that it overreaches in its effect in others": at para. 113; see also *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331, at para. 85.

[27] The first step in the overbreadth inquiry is to determine the object of the impugned law. The second step is to determine whether the law deprives individuals of life, liberty or security of the person in cases that do not further that object. To the extent the law does this, it deprives people of s. 7 rights in a manner that infringes the principles of fundamental justice.

[28] The appellants argue that s. 117 is overbroad, not as it applies to the conduct alleged against them, but as it applies to other reasonably foreseeable situations. It is indeed established that a court may consider "reasonable hypotheticals" to determine whether a law is consistent with the *Charter*: see *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773.

[29] The first scenario the appellants ask us to consider is the situation of a person assisting a close family member to flee to Canada. The appellants cite as examples a mother carrying her small child, or the father of a household taking his family dependents with him aboard a boat. This scenario could also encompass cases of mutual assistance among unrelated asylum-seekers. Indeed, refugees mutually assisting one another in their collective flight to safety is not meaningfully different from family members assisting one another and, as showed by the companion case *B010*, is a reasonably foreseeable situation.

[30] The second scenario advanced by the appellants is the case of a person who, for humanitarian motives, helps people to flee from persecution. History is replete with examples of people who have aided others to flee persecution for humanitarian reasons. Sometimes the person is acting as an individual. Sometimes the person is a member of an organization devoted to helping people flee lands where they face threats and persecution. Church groups may help undocumented people find refugee protection in Canada: *House of Commons Debates*, vol. 7, 2nd Sess., 33rd Parl., August 12, 1987, at p. 8002 (Hon. Gerry Weiner, Minister of State for

Immigration). Humanitarian aid to fleeing people is not merely hypothetical; it is a past and current reality.

(a) *The Object of Section 117 of the IRPA*

[31] As discussed, overbreadth analysis turns on whether the reach of the law exceeds its object. The first step is therefore to determine the object of s. 117.

[32] The Crown argues that the purpose of s. 117 is to catch all acts that in any way assist the entry of undocumented migrants. On this interpretation, s. 117 cannot be overbroad. The appellants, by contrast, submit that the offence of "human smuggling" has a narrower purpose than the Crown asserts, making it overbroad in catching all acts of assistance.

[33] As with statutory interpretation, determining legislative purpose requires us to consider statements of legislative purpose together with the words of the provision, the legislative context, and other relevant factors: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at pp. 268-87; *R. v. Chartrand*, [1994] 2 S.C.R. 864, at pp. 879-82. Where legislation is enacted in the context of international commitments, international law may also be of assistance.

[34] For the reasons that follow, I agree with the appellants that the purpose of s. 117 is narrower than that asserted by the Crown. The text of s. 117 is admittedly broad. However, a narrow purpose emerges from: (1) the international instruments to

which Canada has subscribed; (2) the role of s. 117 in relation to the statute as a whole, in particular s. 37(1); (3) the *IRPA*'s statements of legislative purpose; (4) the evolution of s. 117; and (5) the parliamentary debates. Considering these indicia of purpose, it becomes evident that the true purpose of s. 117 is to combat people smuggling. The meaning of "people smuggling", a term found in s. 37(1)(*b*) of the *IRPA*, is the subject of the companion case *B010*, and excludes mere humanitarian conduct, mutual assistance or aid to family members. I conclude that s. 117 violates the *Charter* by catching these categories of conduct outside the provision's purpose.

(i) The Text of the Provision

[35] At the relevant time, the text of s. 117 read as follows:

> **117**. (1) [Organizing entry into Canada] 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.
>
> (2) [Penalties — fewer than 10 persons] A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable
>
> *(a)* on conviction on indictment
>
> (i) for a first offence, to a fine of not more than $500,000 or to a term of imprisonment of not more than 10 years, or to both, or
>
> (ii) for a subsequent offence, to a fine of not more than $1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and
>
> (*b*) on summary conviction, to a fine of not more than $100,000 or to a term of imprisonment of not more than two years, or to both.

> (3) [Penalty — 10 persons or more] A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.
>
> (4) [No proceedings without consent] No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

[36] All agree that the text of s. 117(1) is broad enough to catch assistance to close family members and humanitarian assistance. It may be argued that since Parliament used these words, that is what it intended. However, the doctrine of overbreadth recognizes that sometimes "the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective": *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 792; *Bedford*, at para. 101; *Carter*, at para. 85. The potential for "failures of instrumental rationality", in which a given law is not a rational means to achieve a legislative objective, requires courts to go further than the text alone, and ask whether other considerations suggest Parliament's purpose was narrower: *Bedford*, at para. 107.

[37] Before leaving the text, it may be noted that despite the broad wording of the subsection that provides the elements of the offence (s. 117(1)), other portions of the text of s. 117 support the view that Parliament's purpose was *not* to criminalize family or humanitarian assistance. The marginal note of s. 117, "Organizing entry into Canada", read with the subheading "Human Smuggling and Trafficking", while not to be accorded great weight (see Sullivan, at pp. 465-68) suggests that the

provision is aimed at activity in connection with the smuggling of persons in the context of organized crime, as contrasted with providing humanitarian assistance or aiding close family members to enter a country without the required documents.[3]

[38] Sections 117(2) and 117(3) also support the view that Parliament's intent was to catch smuggling activity in the context of organized crime, rather than humanitarian, mutual or family assistance. These subsections provide for significantly increased sanctions based on the number of persons brought in. This suggests a heightened focus on large-scale smuggling operations.

[39] Finally, the requirement in s. 117(4) that no prosecution occur without the Attorney General's consent suggests that s. 117 was not intended to convict everyone who falls within s. 117(1)'s broad ambit, as discussed more fully below.

(ii) Canada's International Obligations

[40] As a matter of statutory interpretation, legislation is presumed to comply with Canada's international obligations, and courts should avoid interpretations that would violate those obligations. Courts must also interpret legislation in a way that

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[3] While the French subheading — "Organisation d'entrée illégale au Canada" — does not refer to smuggling or other criminality, it matches the marginal note of the English version, which falls underneath the subheading "Human Smuggling and Trafficking". Accordingly, the shared meaning rule of statutory interpretation in the case of bilingual legislation (Sullivan, at p.118-19) dictates that the activity of organizing illegal entry is a subset of human smuggling and trafficking. The broadest potential interpretation would therefore be that it covers either of smuggling or trafficking. More plausibly, since it is undisputed that s. 118 deals with trafficking, that leaves s. 117 as the provision that concerns smuggling.

reflects the values and principles of customary and conventional international law: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 34. Section 3 of the *IRPA* also requires that the *IRPA* be interpreted in a manner that complies with Canada's international obligations, including "international human rights instruments to which Canada is signatory": s. 3(3)(*f*); see also s. 3(2)(*b*). The relevant international instruments to which Canada has subscribed should therefore shed light on the parliamentary purpose behind s. 117 of the *IRPA*.

[41] The provisions of the *IRPA* relating to the fight against the assisting of unauthorized entry of persons to Canada respond to Canada's international commitments related to these matters in the *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150 ("*Refugee Convention*"), the *United Nations Convention against Transnational Organized Crime*, 2225 U.N.T.S. 209, the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime*, 2241 U.N.T.S. 480 ("*Smuggling Protocol*"), and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, 2237 U.N.T.S. 319.

[42] The *Refugee Convention* reflects humanitarian concerns. It provides that states must not impose penalties for illegal entry on refugees who come directly from territories in which their lives or freedom are threatened and who are present on the

territory of the foreign state without authorization, "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence": art. 31(1).

[43] Consistent with this, s. 133 of the *IRPA* provides that foreign nationals who enter Canada without documents cannot be charged with illegal entry or presence while their refugee claims are pending. As I explain in *B010*, art. 31(1) of the *Refugee Convention* seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognize that persons often seek refuge in groups and work together to enter a country illegally. To comply with art. 31(1), a state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety.

[44] The *Smuggling Protocol* is concerned with stopping the organized crime of people smuggling. It seeks to prevent and combat the smuggling of migrants and to promote cooperation among states to this end, while protecting the rights of smuggled migrants: art. 2. Article 6(1)(a) requires signatory states to adopt measures to establish migrant smuggling as a criminal offence. The *Smuggling Protocol* includes as a minimum definition for this offence, procuring illegal entry of a person into a state of which the person is not a national or a permanent resident, "in order to obtain, directly or indirectly, a financial or other material benefit": art. 3(a). As I explain in *B010*, the *Smuggling Protocol* was not directed at family members or

humanitarians: paras. 60 and 68. Furthermore, while the *Smuggling Protocol* permits subscribing states to enact national laws criminalizing migration-related offences, it includes a "saving clause" that provides that nothing in the *Smuggling Protocol* "shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law": art. 19(1). It would depart from the balance struck in the *Smuggling Protocol* to allow prosecution for mutual assistance among refugees, family support and reunification, and humanitarian aid. This suggests that the Crown's broad interpretation of s. 117's purpose is inconsistent with the *Smuggling Protocol*'s object of protecting the rights of smuggled migrants.

[45] In dealing with conflicting statements of the legislative objects of a statute, the way forward lies in an interpretation which harmonizes obligations in the international instruments to which Canada is a party in a way that avoids conflict and gives expression to each of the various commitments. I conclude that read together in this way, Canada's international commitments support the view that the purpose of s. 117 is to permit the robust fight against people smuggling in the context of organized crime. This excludes criminalizing conduct that amounts solely to humanitarian, mutual or family aid.

(iii) The Role of Section 117 Within the *IRPA*

[46] Section 117 of the *IRPA* must also be read harmoniously with other provisions of the statute.

[47] Section 117 of the *IRPA* falls under Part 3 of the *IRPA*, entitled "Enforcement". Section 117 of the *IRPA* and the provisions that follow it fall under the subheading "Human Smuggling and Trafficking". Section 118 creates the offence of human trafficking, leaving s. 117, as noted, to constitute the offence of human smuggling. The only other references in the *IRPA* to smuggling or trafficking are contained in s. 37(1)(*b*), which renders inadmissible to Canada a person who has engaged in smuggling or trafficking in persons.

[48] As explained in *B010*, the conduct captured by s. 37(1)(*b*) is that which is set out in the *Smuggling Protocol*. In that context, people smuggling only occurs for "financial or other material benefit" and "in the context of transnational crime". Reading the inadmissibility and enforcement provisions of the *IRPA* harmoniously and as part of an integrated scheme therefore supports the view that the purpose of s. 117 is to penalize organizing or abetting illegal entry to Canada through acts knowingly connected to and furthering transnational organized crimes or criminal aims, to obtain, directly or indirectly, a financial or other material benefit. This excludes humanitarian, mutual or family assistance.

(iv) Statements of Legislative Purpose

[49] The first, "most direct and authoritative evidence" of the legislative purpose of a provision is found in statements of purpose in the legislation itself — whether at the beginning of a statute, in the section in which a provision is found, or in sections providing interpretive guidelines: Sullivan, at pp. 274-76.

[50] In *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, at paras. 29-30, this Court held that the *Refugee Convention* has the broad general aim of providing humanitarian refuge for those fleeing persecution while recognizing the need to protect states' borders.

[51] As discussed in *B010*, the object provisions of the *IRPA* establish that both of these broad goals are important to the *IRPA* as well. It follows that s. 117 should be interpreted in a balanced way that respects both the security concerns as well as the humanitarian aims of the *IRPA*. An interpretation of s. 117 that catches all acts of assistance to undocumented migrants arguably allows security concerns to trump the humanitarian aims of the *IRPA*.

[52] The Crown's view that the purpose of s. 117 is to catch all acts of assistance to undocumented migrants relies heavily on the fact that among the purposes of the *IRPA* is to control Canada's borders to prevent migrants from entering the country illegally, for reasons of security, health and safety. To be sure, this is an important goal of the *IRPA*. It is reflected in the s. 3(2)(*h*) objective "to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals": see also s. 3(1)(*i*). It is likewise evinced by the aim "to protect the health and safety of Canadians and to maintain the security of Canadian society": s. 3(2)(*g*): see also s. 3(1)(*h*).

[53] A concern with security is also reflected in the specific legislative objects of *An Act to amend the Immigration Act and the Criminal Code in consequence thereof*, R.S.C. 1985, c. 29 (4th Supp.), the statute which enacted what later became s. 117 of the *IRPA* (the "1988 amendments"):

> **1.** The *Immigration Act* is amended by adding thereto, immediately after Section 2 thereof, the following heading and section:
>
> "*Purposes of Amendments*…
>
> **2.1** . . .
>
> . . .
>
> (*a*) to preserve for persons in genuine need of protection access to the procedures for determining refugee claims;
>
> (*b*) to control widespread abuse of the procedures for determining refugee claims, particularly in light of organized incidents involving large-scale introduction of persons into Canada to take advantage of those procedures;
>
> (*c*) to deter those who assist in the illegal entry of persons into Canada and thereby minimize the exploitation of and risks to persons seeking to come to Canada; and
>
> (*d*) to respond to security concerns, including the fulfilment of Canada's obligations in respect of internationally protected persons."

[54] The same statute, however, also recognized humanitarian commitments, including a stated objective "to preserve for persons in genuine need of protection access to the procedures for determining refugee claims" and concern for "exploitation" and risks to persons wishing to come to Canada: ss. 2.1(*a*) and 2.1(*c*).

[55] The *IRPA*'s general objects further illustrate the importance of its broad humanitarian aims. Section 3(2)(*c*) speaks of "Canada's humanitarian ideals". The stated objects include "saving lives and offering protection to the displaced and persecuted" and "safe haven to persons with a well-founded fear of persecution": ss. 3(2)(*a*) and 3(2)(*d*) Similarly, the objectives include striving to comply with "international human rights instruments to which Canada is signatory": s. 3(3)(*f*); see also s. 3(2)(*b*).

[56] The *IRPA* also reveals a commitment to family, through stated objects of facilitating family reunification in Canada: s. 3(2)(*f*).

[57] In sum, while the security goals of the *IRPA* and the amendment that became s. 117 are important, they do not supplant Canada's commitment to humanitarian aid and family unity. Both broad aims must be respected. This is accomplished by interpreting s. 117 as targeting organized smuggling operations having a criminal dimension, thereby excluding humanitarian, mutual and family aid. Under the Crown's interpretation of s. 117, a father offering a blanket to a shivering child, or friends sharing food aboard a migrant vessel, could be subject to prosecution. This is incompatible with the refugee protection objects of the *IRPA* and the amendment that became s. 117.

(v) The Legislative Evolution of Section 117

[58] The legislative history of a provision may assist in determining its purpose: Sullivan, at pp. 286-87.

[59] Canada has had laws criminalizing the assisting of undocumented migrants to enter the country since 1902. Early incarnations of the offence were focused on organizing illegal arrival by rail or ship, with little concern for the plight of the migrants, who were typically expelled: *An Act to amend the Immigration Act*, S.C. 1902, c. 14, s. 2; *Immigration Act*, R.S.C. 1906, c. 93, ss. 65 and 66.

[60] In 1919, s. 12(4) of *An Act to amend The Immigration Act*, S.C. 1919, c. 25, made it an offence to transport into Canada, harbour or conceal the entry of prohibited immigrants. The provision was a summary conviction offence, with a maximum penalty of six months imprisonment and/or fines. Broadly similar offences were preserved in the 1952 and 1976 iterations of the *Immigration Act*.

[61] In 1988, "in light of organized incidents involving large-scale introduction of persons into Canada", amendments introduced a new offence which, with minor changes, is the offence currently found in s. 117 of the *IRPA*: s. 1 of the 1988 amendments adding s. 2.1(*b*). It criminalized third party assistance to undocumented migrants. In so doing, it established maximum penalties where the number of undocumented entrants was small: six months imprisonment and/or $2,000 fines on summary conviction, and five years imprisonment and/or $10,000 fines on indictment. By contrast, where the undocumented entrants numbered 10 or more, proceedings were exclusively by indictment, and the maximum penalty was 10 years

imprisonment and/or fines up to $500,000: s. 9 of the 1988 amendments adding ss. 94.1 and 94.2. Thus, at the inception of what would become s. 117, greater culpability already attached to large-scale breaches, reflecting greater organizational activity on the part of the accused or others with whom the accused acted in concert. The offence created in 1988 also included a new screening mechanism: no proceedings could be instituted under ss. 94.1 or 94.2 without the consent of the Attorney General: s. 9 of the 1988 amendments adding s. 94.3.

[62] The current s. 117 was part of a new comprehensive statute dealing with immigration and refugee protection, the *IRPA*, enacted in 2001. The offence remained substantially the same as previously, preserving the differing penalties based on scale, and the charge-screening mechanism. However, maximum penalties were significantly increased, while another provision was added to guide sentencing under the offence. Section 121 provided that in determining the penalty to be imposed under s. 117, the court was to take into account: (1) bodily harm or death to the migrant; (2) association with a criminal organization; (3) profit from the operation; and (4) harm to or degrading treatment of the migrants. These changes came on the heels of the adoption of the *Smuggling Protocol*, which obliged state parties to criminalize the smuggling of migrants done for financial or other material benefit and to adopt legislative measures to establish aggravating circumstances such as harm to and degrading treatment of migrants: art. 6(1) and 6(3). The second factor in s. 121 reflected a more significant link between the offensive conduct and organized crime.

The first and fourth factors recognized more serious crime. The third factor may be an indicator of either or both.

[63] From this brief survey of the historical evolution of prohibitions on assisting the entry to Canada of undocumented people, I draw the following conclusions: (a) the prohibitions have, for over a century, focused on smuggling activity tied to organizing and furthering the illegal entry, not aid merely incidental to it; (b) successive revisions to the provision have coupled increased penalties with more precise targeting of organized crime-related smuggling activity, and the 2001 revision in particular followed in the footsteps of key developments in international law; and (c) s. 117, from its inception in 1988 and as continued and revised by the *IRPA* in 2001, provided a filter to screen out assistance not associated with organized criminal smuggling, namely innocent humanitarian acts, mutual aid and assistance to family members.

(vi) The Parliamentary Debates

[64] Statements made in the legislature leading up to the enactment of a provision may supply evidence of its purpose: Sullivan, at p. 277; *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, at para. 37; *Global Securities Corp. v. British Columbia (Securities Commission)*, 2000 SCC 21, [2000] 1 S.C.R. 494, at para. 25; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 45; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 17.

[65] The parliamentary debates establish that the original enactment of the offence in 1988 was motivated by incidents of organized large-scale smuggling of undocumented migrants by sea. Concerns were expressed in the debates about protecting the health, safety and security of Canadians and Canadian society, the integrity and efficacy of Canada's lawful immigration and refugee regimes, and Canada's ability to control its borders and the domestic and international interests tied to them. Concerns were also expressed about the safety and protection of genuine refugees, and not subjecting humanitarian groups to prosecution. Then Minister Benoît Bouchard summarized Parliament's purpose as follows in the Committee meetings of August 25, 1987:

> We are going to put a stop to the large-scale trafficking of illegal migrants by smugglers. There has been much discussion about amending these sections of the bill. We have all pressed lawyers and legislative drafters to consider alternatives to the current wording. We looked at phrases such as religious group, profit, reward, smuggle and clandestine entry, but every possibility creates loopholes and undermines our ability to prosecute the unscrupulous. We cannot let such individuals escape sanction by adding phrases which create insurmountable problems of proof and create gaps through which the unscrupulous would march.
>
> (House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-84*, No. 9, 2nd Sess., 33rd Parl., at p. 24)

[66] It thus emerges from the 1987 debates that the reason s. 117(1) of the *IRPA* permits prosecution of those providing humanitarian assistance to fleeing refugees or assistance to close family members is not because Parliament wanted to capture such persons, but because of a drafting dilemma — it was feared that a categorical approach to exceptions would inadequately respond to the multi-faceted

and complex nature of real-life smuggling cases. Parliament agreed that those offering humanitarian assistance and mutual aid were not meant to be prosecuted under s. 117 of the *IRPA*. However, instead of legislatively exempting such people from potential criminal liability, it sought to screen them out at the prosecution stage by requiring the Attorney General's consent to prosecute.

[67] The debates on the enactment of the *IRPA* in 2001 echo these pre-occupations. Again, members of Parliament expressed concerns that s. 117 might criminalize people who assist family members to come to Canada or people who provide humanitarian aid to asylum-seekers. The government's response was that these fears were misplaced because they focused exclusively on s. 117(1) and overlooked s. 117(4) which was expected to prevent these and other unintended prosecutions. The following excerpts from the parliamentary debates summarize those discussions:

> **Mr. John McCallum**: . . . we heard a fair amount of testimony in our hearings from people doing humanitarian work, reverends and saintly people, if you will, and the last people in the world we would want to prosecute. Yet, if you read that literally, it looks like some of these people who are helping refugees could be prosecuted. Or if my sister is in a bad country and I help her, it looks like I can be prosecuted. How does that work?
>
> **Mr. Daniel Therrien [General Counsel]**: The protection against such prosecutions is in subclause 117(4), which provides that no prosecution under the smuggling provision can occur without the consent of the Attorney General . . .
>
> . . .

> **Ms. Joan Atkinson [Assistant Deputy Minister]**: . . . Subclause 117(4) is what's in the current act . . . It is in place . . . in the current act, and as Daniel has said, there has been no prosecution of anyone who was involved in trying to help refugees come to Canada. That is the safeguard. All the circumstances will be reviewed by the Attorney General to put in humanitarian considerations without defining what that means [otherwise] you don't have the flexibility you need . . . to be able to consider all the individual circumstances in a case before any decision is taken to prosecute.
>
> (House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, 1st Sess., 37th Parl., May 17, 2001 (online), at 10:35)

[68] These excerpts from the parliamentary debates make it clear that Parliament understood that s. 117(1) criminalized assistance to family members and humanitarian assistance, and was relying on ministerial discretion to prevent prosecution. General Counsel Therrien and Assistant Deputy Minister Atkinson did not deny that s. 117 caught these cases, but defended this overreach far beyond any reasonable definition of the targeted smuggling activity on the basis that the Attorney General's permission under s. 117(4) would be an adequate "safeguard" against inappropriate prosecutions.

[69] In sum, we may fairly infer the following from the debate surrounding the adoption of s. 117 of the *IRPA*: From the beginning, the government conceded that the words of s. 117(1) had been cast broadly enough to catch family and humanitarian assistance to undocumented migrants. At the same time, the government made it clear that s. 117 was not intended to catch persons aiding family members or providing humanitarian or mutual aid. The risk would be alleviated, or so the

government asserted, by the requirement that the Attorney General authorize prosecutions under s. 117(4) of the *IRPA*.

(vii) <u>Conclusion on the Purpose of Section 117 of the *IRPA*</u>

[70] The foregoing considerations establish that the purpose of s. 117 is to criminalize the smuggling of people into Canada in the context of organized crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada. A broad punitive goal that would prosecute persons with no connection to and no furtherance of organized crime is not consistent with Parliament's purpose as evinced by the text of s. 117 read together with Canada's international commitments, s. 117's role within the *IRPA*, the *IRPA*'s objects, the history of s. 117, and the parliamentary debates.

(b) *The Scope of Section 117 of the IRPA*

[71] I now turn to the scope of s. 117 of the *IRPA* to see whether it "goes too far and interferes with some conduct that bears no connection to its objective": *Bedford*, at para. 101.

[72] The scope of s. 117(1) is plain. The provision admits of no ambiguity. Parliament itself understood when it enacted s. 117 that the provision's reach exceeded its purpose by catching those who provide humanitarian, mutual and family assistance to asylum-seekers coming to Canada, but argued that this overbreadth was

not a problem because the Attorney General would not permit the prosecution of such people. We cannot avoid the overbreadth problem by interpreting s. 117(1) as not permitting prosecution of persons providing humanitarian, mutual or family assistance. Such an interpretation would require the Court to ignore the ordinary meaning of the words of s. 117(1), which unambiguously make it an offence to "organize, induce, aid or abet" the undocumented entry. To adopt this suggestion would violate the rule of statutory interpretation that the meaning of the words of the provision should be read in their "grammatical and ordinary sense": Sullivan, at p. 28. It would also require us to ignore statements from the legislative debate record suggesting Parliament knew in advance that the provision was overbroad.

[73] I conclude that s. 117(1) appears to criminalize some conduct that bears no relation to its objective, raising the spectre that s. 117 as a whole is overbroad. The remaining question is whether the requirement under s. 117(4) that the Attorney General authorize prosecution saves s. 117 from the charge or overbreadth by effectively narrowing the scope of s. 117(1).

[74] In my view, s. 117(4) does not cure the overbreadth problem created by s. 117(1). Ministerial discretion, whether conscientiously exercised or not, does not negate the fact that s. 117(1) criminalizes conduct beyond Parliament's object, and that people whom Parliament did not intend to prosecute are therefore at risk of prosecution, conviction and imprisonment. So long as the provision is on the books, and so long as it is not impossible that the Attorney General could consent to

prosecute, a person who assists a family member or who provides mutual or humanitarian assistance to an asylum-seeker entering Canada faces a possibility of imprisonment. If the Attorney General were to authorize prosecution of such an individual, despite s. 117's limited purpose, nothing remains in the provision to prevent conviction and imprisonment. This possibility alone engages s. 7 of the *Charter*. Further, as this Court unanimously noted in *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 17, per Moldaver J.: ". . . prosecutorial discretion provides no answer to the breach of a constitutional duty". See also *Nur*.

[75] Implicit in the Court of Appeal's position is that the problem of humanitarian workers or family members prosecuted under s. 117 of the *IRPA* is a problem of administrative law, and that if a constitutional attack is to be made, it should be made against improper exercise of the Attorney General's duty under s. 117(4) not to prosecute such persons. I cannot agree. As noted, although the purpose of s. 117 of the *IRPA* was not to capture such persons, nothing in the provision actually enacted disallows it. As a result, an individual charged with an offence under s. 117 would have difficulty challenging the decision. Further, judicial review of such discretion is not currently available, and there are good reasons why it may not be desirable. As the Court observed in *Anderson*, judicial oversight of Crown decisions whether to prosecute puts at risk the discrete roles of different actors in our adversarial system:

> There has been a long-standing and deeply engrained reluctance to permit routine judicial review of the exercise of [prosecutorial] discretion. . . .

> The imposition of a sweeping duty that opens up for routine judicial review all of the aforementioned decisions is contrary to our constitutional traditions. [para. 32]

[76] It may also be noted that judicial review of the Attorney General's decision to authorize prosecution under s. 117(4) may have undesirable consequences for other federal statutes in which a similar clause is present: see e.g. *Freezing Assets of Corrupt Foreign Officials Act*, S.C. 2011, c. 10; *Foreign Extraterritorial Measures Act*, R.S.C. 1985, c. F-29; *Special Economic Measures Act*, S.C. 1992, c. 17; *Crimes Against Humanity and War Crimes Act*, S.C. 2000, c. 24; *Geneva Conventions Act*, R.S.C. 1985, c. G-3. At this point, it suffices to note that judicial review does not answer the constitutional non-conformity of s. 117(1).

[77] I conclude that s. 117 of the *IRPA* is overbroad. The remaining issue is whether this overbreadth is justified under s. 1 of the *Charter* as a reasonable measure in a free and democratic society.

(2) Gross Disproportionality, Vagueness and Equality

[78] In addition to the overbreadth claim, some of the appellants assert that s. 117 offends s. 7 by depriving persons of liberty in a manner that violates the principles of fundamental justice against gross disproportionality and vagueness. They also claim that equal treatment under the law is a principle of fundamental justice within the meaning of s. 7, and that s. 117 violates it. In view of my conclusion that s. 117 is overbroad, I find it unnecessary to consider these arguments.

B. *Is the Inconsistency With Section 7 Justified Under Section 1 of the Charter?*

[79] The test to determine infringement of a right may be constitutionally justified under s. 1 of the *Charter* was set out in *R. v. Oakes*, [1986] 1 S.C.R. 103. The first step of the s. 1 analysis asks whether the Crown has demonstrated a pressing and substantial objective: *Oakes*, at pp. 138-39. The broad purpose of s. 117 of the *IRPA* is to combat organized crime-related people smuggling, without criminalizing family assistance, mutual aid or humanitarian aid to asylum-seekers coming to Canada. This objective is clearly pressing and substantial.

[80] The second step of the s. 1 analysis asks whether the legislative objective is rationally connected to the limit the law imposes on the right at issue. Not all applications of s. 117 are rationally connected to the legislative object; notably, s. 117 of the *IRPA*, as discussed, catches mutual and family as well as humanitarian aid which I earlier concluded was not Parliament's object to criminalize. However, since other applications of s. 117 are rationally connected to the legislative object, this suffices to satisfy the rational connection stage of the analysis: *Heywood*, at p. 803. A rational *connection*, not a complete rational *correspondence*, is all this branch of *Oakes* requires.

[81] The third step of the s. 1 analysis asks whether the offending law is tailored to its objective: *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713. Evidently, where a law goes too far, it is a challenge to satisfy minimal impairment. In *Heywood*, Cory J. concluded (at p. 803) that "for the same reasons that [the law] is

overly broad, it fails the minimal impairment branch of the s. 1 analysis". The record here shows why that will not *always* necessarily be the case.

[82] The Crown's position appears to be that even though the provision is overbroad, it is nevertheless minimally impairing, because although imperfect, there was no better alternative. As discussed, the government recognized in advance that the provision would catch conduct it did not intend to criminalize. However, Parliament nevertheless enacted an overbroad provision because it was concerned that wording exempting this conduct would create unacceptable loopholes. Section 1 of the *Charter* does not allow rights to be limited on the basis of bare claims, but requires the Crown to provide a *demonstrable justification* for inconsistencies with *Charter* rights: *Oakes*, at pp. 136-37. The Crown has not satisfied its burden under s. 1.

VI. Remedy

[83] Section 52(1) of the *Constitution Act, 1982* provides:

> **52.** (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

It follows that s. 117 is of no force or effect to the extent of its inconsistency with the *Charter*.

[84] The extent of the inconsistency that has been proven is the overbreadth of s. 117 in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents.

[85] The appellants ask the Court to strike s. 117 down in its entirety. Section 117, as it was at the time of the alleged offences, has been replaced. In the particular circumstances of this case, I conclude that the preferable remedy is to read down s. 117 as not applicable to persons who give humanitarian, mutual or family assistance. This remedy reconciles the former s. 117 with the requirements of the *Charter* while leaving the prohibition on human smuggling for the relevant period in place. This remedy is consistent with the guidance this Court gave in *Schachter v. Canada*, [1992] 2 S.C.R. 679.

VII. Conclusion

[86] I would allow the appeals and read down s. 117 of the *IRPA*, as it was at the time of the alleged offences, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the *Charter*. The charges are remitted for trial on this basis.

APPENDIX A

Immigration and Refugee Protection Act, S.C. 2001, c. 27 (version in force at time)

3. (1) [Objectives — immigration] The objectives of this Act with respect to immigration are

(*a*) to permit Canada to pursue the maximum social, cultural and economic benefits of immigration;

(*b*) to enrich and strengthen the social and cultural fabric of Canadian society, while respecting the federal, bilingual and multicultural character of Canada;

(*b.1*) to support and assist the development of minority official languages communities in Canada;

(*c*) to support the development of a strong and prosperous Canadian economy, in which the benefits of immigration are shared across all regions of Canada;

(*d*) to see that families are reunited in Canada;

(*e*) to promote the successful integration of permanent residents into Canada, while recognizing that integration involves mutual obligations for new immigrants and Canadian society;

(*f*) to support, by means of consistent standards and prompt processing, the attainment of immigration goals established by the Government of Canada in consultation with the provinces;

(*g*) to facilitate the entry of visitors, students and temporary workers for purposes such as trade, commerce, tourism, international understanding and cultural, educational and scientific activities;

(*h*) to protect the health and safety of Canadians and to maintain the security of Canadian society;

(*i*) to promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks; and

(*j*) to work in cooperation with the provinces to secure better recognition of the foreign credentials of permanent residents and their more rapid integration into society.

(2) [Objectives — refugees] The objectives of this Act with respect to refugees are

(*a*) to recognize that the refugee program is in the first instance about saving lives and offering protection to the displaced and persecuted;

(*b*) to fulfil Canada's international legal obligations with respect to refugees and affirm Canada's commitment to international efforts to provide assistance to those in need of resettlement;

(*c*) to grant, as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution;

(*d*) to offer safe haven to persons with a well-founded fear of persecution based on race, religion, nationality, political opinion or membership in a particular social group, as well as those at risk of torture or cruel and unusual treatment or punishment;

(*e*) to establish fair and efficient procedures that will maintain the integrity of the Canadian refugee protection system, while upholding Canada's respect for the human rights and fundamental freedoms of all human beings;

(*f*) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

(*g*) to protect the health and safety of Canadians and to maintain the security of Canadian society; and

(*h*) to promote international justice and security by denying access to Canadian territory to persons, including refugee claimants, who are security risks or serious criminals.

(3) [Application] This Act is to be construed and applied in a manner that

(*a*) furthers the domestic and international interests of Canada;

(*b*) promotes accountability and transparency by enhancing public awareness of immigration and refugee programs;

(*c*) facilitates cooperation between the Government of Canada, provincial governments, foreign states, international organizations and non-governmental organizations;

(*d*) ensures that decisions taken under this Act are consistent with the *Canadian Charter of Rights and Freedoms*, including its principles of equality and freedom from discrimination and of the equality of English and French as the official languages of Canada;

(*e*) supports the commitment of the Government of Canada to enhance the vitality of the English and French linguistic minority communities in Canada; and

(*f*) complies with international human rights instruments to which Canada is signatory.

37. (1) [Organized criminality] A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

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

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

PART 3

ENFORCEMENT

Human Smuggling and Trafficking

117. (1) [Organizing entry into Canada] 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.

(2) [Penalties — fewer than 10 persons] A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(*a*) on conviction on indictment

(i) for a first offence, to a fine of not more than $500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(ii) for a subsequent offence, to a fine of not more than $1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(*b*) on summary conviction, to a fine of not more than $100,000 or to a term of imprisonment of not more than two years, or to both.

(3) [Penalty — 10 persons or more] A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.

(4) [No proceedings without consent] No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

118. (1) [Offence — trafficking in persons] No person shall knowingly organize the coming into Canada of one or more persons by means of abduction, fraud, deception or use or threat of force or coercion.

(2) [Definition of "organize"] For the purpose of subsection (1), "organize", with respect to persons, includes their recruitment or transportation and, after their entry into Canada, the receipt or harbouring of those persons.

121. (1) [Aggravating factors] The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether

(*a*) bodily harm or death occurred during the commission of the offence;

(*b*) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;

(*c*) the commission of the offence was for profit, whether or not any profit was realized; and

(*d*) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

(2) [Definition of "criminal organization"] For the purposes of paragraph (1)(*b*), "criminal organization" means 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.

133. [Deferral] 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.

APPENDIX B

Convention relating to the Status of Refugees, 189 U.N.T.S. 150

Article 31

REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGE

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.

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.

United Nations Convention against Transnational Organized Crime, 2225 U.N.T.S. 209

Article 1. Statement of purpose

The purpose of this Convention is to promote cooperation to prevent and combat transnational organized crime more effectively.

Article 5. Criminalization of participation in an organized criminal group

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:

(i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law, involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

a. Criminal activities of the organized criminal group;

b. Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(b) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

2. The knowledge, intent, aim, purpose or agreement referred to in paragraph 1 of this article may be inferred from objective factual circumstances.

3. States Parties whose domestic law requires involvement of an organized criminal group for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article shall ensure that their domestic law covers all serious crimes involving organized criminal groups. Such States Parties, as well as States Parties whose domestic law requires an act in furtherance of the agreement for purposes of the offences established in accordance with paragraph 1 (a) (i) of this article, shall so inform the Secretary-General of the United Nations at the time of their signature or of deposit of their instrument of ratification, acceptance or approval of or accession to this Convention.

Article 34. Implementation of the Convention

1. Each State Party shall take the necessary measures, including legislative and administrative measures, in accordance with fundamental principles of its domestic law, to ensure the implementation of its obligations under this Convention.

2. The offences established in accordance with articles 5, 6, 8 and 23 of this Convention shall be established in the domestic law of each State Party independently of the transnational nature or the involvement of an organized criminal group as described in article 3, paragraph 1, of this Convention, except to the extent that article 5 of this Convention would require the involvement of an organized criminal group.

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.

Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2241 U.N.T.S. 480

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 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;

Article 6. Criminalization

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:

(a) The smuggling of 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.

Appeals allowed.

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Solicitors for the appellant Vignarajah Thevarajah: Gregory P. DelBigio, Q.C., Vancouver; Lisa Sturgess, Vancouver.

Solicitor for the respondent: Public Prosecution Service of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener Amnesty International (Canadian Section, English Branch): South Ottawa Community Legal Services, Ottawa; Community Legal Services Ottawa Centre, Ottawa.

Solicitors for the intervener the British Columbia Civil Liberties Association: Sack Goldblatt Mitchell, Toronto.

Solicitors for the intervener the Canadian Civil Liberties Association: Fasken Martineau DuMoulin, Vancouver.

Solicitors for the intervener the Canadian Council for Refugees: Angus Grant, Toronto; Refugee Law Office, Toronto; Laura Best & Fadi Yachoua, Vancouver.

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