Immigration and Refugee Board of Canada

Immigration Division

Commission de l'immigration et du statut de réfugié du Canada

Section de l'immigration

ID File No. / N° de dossier de la SI : 0003-B1-01968
Client ID No. / N° ID client : XXXXX

Private Proceeding – Huis clos

Reasons and Decision – Motifs et décision

Between	The Minister of Public Safety and Emergency Preparedness Le ministre de la Sécurité publique et de la Protection civile	**Entre**
	And / et	**et**
Person(s) Concerned	**XXXXX XXXXX**	**Intéressé(e)(s)**
Date(s) of Hearing	**11 January 2012**	**Date(s) de l'audience**
Place of Hearing	**Toronto**	**Lieu de l'audience**
Date of Decision	**13 April 2012**	**Date de la décision**
Panel	**A. Laut**	**Tribunal**
Counsel for the Minister	**K. Boothroyd**	**Conseil du ministre**
Counsel for the Person(s) Concerned	**P. Vassan Barrister and Solicitor**	**Conseil(s) pour l'intéressé(e) / les intéressé(e)(s)**

REASONS FOR DECISION

[1] This is a record of reasons for a decision made under the provisions of the *Immigration and Refugee Protection Act (IRPA)* concerning **XXXXX XXXXX** following an admissibility hearing conducted pursuant to subsection 44(2) of *IRPA*.

INTRODUCTION

[2] The Canada Border Services Agency (hereinafter CBSA) alleges that **XXXXX XXXXX** is a foreign national who is inadmissible under paragraph 37(1)(b) of *IRPA*. Paragraph 37(1)(b) of the *IRPA* states:

> A permanent resident or foreign national is inadmissible on grounds of organized criminality for engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

[3] Mr. **XXXXX** was one of 492 individuals who arrived in Canada on 13 August 2010 aboard the MV *Harin Panich 19* (renamed for this voyage the *Sun Sea)*. Mr. **XXXXX** made a claim for refugee protection in Canada, which has been suspended pending the outcome of this hearing. The hearing was conducted in the absence of the public.

[4] CBSA alleges that Mr. **XXXXX** performed various duties as a member of the crew of the *Sun Sea* that brought the ship from Thailand to Canada. It is alleged that by acting as a **XXXXX XXXXX** on a vessel that brought undocumented migrants to Canada, he engaged in people smuggling in the context of transnational crime.

STANDARD OF PROOF

[5] According to section 33 of the *IRPA*, the standard of proof with respect to an allegation under paragraph 37(1)(b) is "reasonable grounds to believe".

[6] The "reasonable grounds to believe" standard has been confirmed by the Supreme Court of Canada[1] as requiring something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information. This standard applies to questions of fact.

THE EVIDENCE AND FINDINGS

[7] The evidence consisted of Exhibits M-1 through M-5 presented by counsel for CBSA. CBSA called Mr. **XXXXX XXXXX** as a witness. Counsel for Mr. **XXXXX XXXXX** submitted no documents at the hearing. She submitted a newspaper article along with her written submissions and asked that this be marked as an Exhibit. No objection was made to the panel receiving this evidence and it was marked as Exhibit P-1 and included in the record.

[8] Mr. **XXXXX XXXXX** is a 39 year old citizen of Sri Lanka by virtue of his birth in that country. He is not a Canadian citizen or a permanent resident. He is a foreign national. These facts are not in dispute. Having carefully reviewed all of the evidence the panel is satisfied that Mr. **XXXXX XXXXX** deliberately chose to join the **XXXXX** of the *Sun Sea*. He made this agreement with the organizers before boarding. Mr. **XXXXX** was fully aware that he and the others **XXXXX** to Canada required passports and visas. The reason he and the other persons travelled on the *Sun Sea* was their desire to evade these requirements. Mr. **XXXXX** performed a **XXXXX** and other duties throughout the four month voyage. He was a **XXXXX**. The reasons for these conclusions are the following.

[1] *Mugesera v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 100, 2005 SCC 40.

[9] Mr. **XXXXX XXXXX** has primarily lived in Sri Lanka, but he does have relevant experience working **XXXXX** and **XXXXX XXXXX**. He states he worked as an **XXXXX XXXXX** from 1996 until 1998. He had no training when he first boarded; **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**. He passed through customs and immigration controls regularly as a **XXXXX XXXXX**. He used a genuine passport and a **XXXXX XXXXX**, which he claims was forged.[2]

[10] Mr. **XXXXX XXXXX** also travelled extensively between 2004 and 2006. He owned a **XXXXX XXXXX XXXXX XXXXX**. In order to facilitate his travel he obtained a Sri Lankan passport and where required, entry visas for the other countries. He **XXXXX XXXXX** at least **XXXXX** times during this period, legally passing through customs and immigration controls in several countries. Prior to his voyage on the *Sun Sea,* he was an experienced **XXXXX XXXXX**, both by ship and by plane. He was aware of international requirements for passports and visas. He was aware that Sri Lankan nationals required passports and visas to travel legally to Canada. His sister had paid a smuggler to evade these requirements when she came to Canada.[3]

[11] Mr. **XXXXX XXXXX** and his family sought refuge in India in **XXXXX XXXXX** 2009. He returned to Sri Lanka in **XXXXX** 2009 to explore the prospect of starting a business. He decided he wished to leave Sri Lanka permanently. While in Colombo he spoke to **XXXXX**, an organizer of the smuggling operation. **XXXXX** was recruiting people for a sea voyage to Canada as early as their conversation in **XXXXX** 2009. He was told to look at information about the *Ocean Lady* on the internet as proof that a sea voyage to Canada could be successful.

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[2] Exhibit M-1, pp. 41-43, 78-79, 195-197.

[3] Exhibit M-1, p. 11, p. 17, Transcript January 11, 2012 pp. 45-50.

[12] Mr. **XXXXX XXXXX** decided that he could not afford the $ **XXXXX** that it would cost to arrange fraudulent documents to facilitate passage to Canada by air. He was initially asked by the organizers to pay $ **XXXXX** for passage to Canada by ship; he could not afford to pay this amount. Early in his discussions with the organizers, he told one of them that he had previous experience **XXXXX**. After further discussions, the organizers agreed to lower the price of his passage first to $ **XXXXX** and finally to $ **XXXXX**. He paid $ **XXXXX** upfront and signed a contract agreeing to pay the rest of the money upon the arrival of the ship in Canada. Similar contracts have been filed in evidence signed by other migrants.

[13] Mr. **XXXXX XXXXX** obtained a visa for Thailand. He states that he travelled to Bangkok, Thailand on **XXXXX** 2010. He remained in Bangkok moving between various safe houses arranged by **XXXXX**, one of the organizers of the voyage. The panel is satisfied that there are reasonable grounds to believe that Mr. **XXXXX XXXXX** agreed to join the **XXXXX**. In return, the organizers offered him a lower fee for the voyage to Canada.[4]

[14] The *Harin Panich 19* was purchased by one of the organizers for $175,000 on 30 March 2010. The vessel was barely seaworthy; it had a small galley, one washroom and a cabin meant to accommodate a crew of 13 persons. No accommodation or facilities for passengers existed. The vessel was designed for costal navigation, not for ocean voyages. It had limited navigation equipment. On 1 April 2010, the vessel arrived in the vicinity of the port of Songkhla, Thailand, piloted by her Thai crew.[5]

[15] Mr. **XXXXX XXXXX** stated that he and eight other persons were taken by **XXXXX** from Bangkok to the seaport of Songkhla on 13 April 2010. He states that his Sri Lankan passport was taken from him before he boarded. He now claims that he believed no documents were required in order to make a refugee claim on arrival in Canada. He now claims to have no knowledge of the other passengers, how they came to be on the vessel and if they had passports. When questioned by CBSA in the past, he gave extremely detailed information regarding who

[4] Exhibit M-1, pp. 50-55, pp. 100-101, Exhibit M-2, Tab 2.
[5] Exhibit M-2, Tab 8-9, Exhibit M-3.

was responsible for smuggling particular groups of passengers, how the passengers boarded, who the organizers were and the fact that the passengers were not documented.

[16] The panel accepts his previous statements as more credible. Clearly he was aware that he and the other persons aboard the *Sun Sea* were evading the authorities of Thailand and travelling illegally to Canada. This is confirmed by his previous statements and his knowledge of international travel requirements. The crew did not register the departure of the vessel, did not have a manifest, did not carry a legal cargo, but rather hundreds of undocumented migrants, and did not have passports or seaman's books themselves. The vessels name was painted over and it did not fly a flag of registration. Navigation of a vessel under an unregistered name without a flag of registration is unlawful. The vessel deliberately evaded contact with authorities during the voyage. He was aware that he and the other passengers paid enormous amounts of money, specifically to evade Canada's requirements for passports and visas. He was aware that the voyage intended to bring migrants to Canada illegally.[6]

[17] Mr. **XXXXX** and nine others, including the Captain, boarded the *Sun Sea* on 14 April 2010. Three others, including the chief engineer, boarded the next day. The Thai crew departed. He claims that the persons who boarded on these two days were not brought onboard as a crew and he had no intention of acting as a **XXXXX** at this time. He claims that the organizers advised him that they intended to bring another crew onboard to sail the ship. When that crew did not appear, the Captain called a meeting and **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**. During the next two months the real crew never appeared and eventually the **XXXXX XXXXX** agreed to sail the vessel across the Pacific Ocean to Canada. Two persons who were asked to act as **XXXXX XXXXX** refused to participate and spent the voyage below decks.

[18] Mr. **XXXXX XXXXX** has always claimed that the crew was put together essentially by accident. The panel does not find his claim to be credible. The persons who boarded the vessel acted as the crew of the *Sun Sea* as it sailed to at least five different locations around the Gulf of Thailand, during more than a two month period between 19 April and 28 June 2010. During this

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6 Exhibit M-5, Article 7-8, *Canada Shipping Act;* Exhibit M-1, pp. 108-137, pp. 150-210.

period, the vessel rendezvoused with fishing vessels used by the organizers to transport supplies and migrants on several occasions. The same persons who first boarded in April acted as the **XXXXX XXXXX** the *Sun Sea* throughout the voyage across the Pacific Ocean to Canada. Neither task could have been accomplished by a random group of amateurs.

[19] The organizers recruited passengers for the voyage over an extended period, receiving up to $5,000-10,000 in advance from each passenger. This was a complex operation which took place in several stages. The organizers required the capacity to contact hundreds of prospective migrants and convince them to deposit thousands of dollars with the organizers as a deposit for their passage. This involved bank transfers, both in Sri Lanka and from relatives of migrants who lived abroad. The organizers required the capacity to arrange for visas, airline tickets and other documents to permit the migrants to travel from Sri Lanka to Thailand. The organizers arranged for transportation to Thailand and for hotels in which the passengers stayed for one to five months. Information provided by counsel for Mr. **XXXXX XXXXX** indicates that millions of dollars in profits were made by **XXXXX XXXXX** and the other organizers.[7]

[20] The panel concludes that when the *Sun Sea* departed for Canada the organizers had already received several million in deposits from the 493 persons who sought passage to Canada (one died during the voyage thus 492 arrived). The organizers had accepted promises from the migrants for payments of 10 to 20 times the deposit, payable only if the *Sun Sea* arrived in Canada. It is trite to say that the success of this potentially very profitable enterprise <u>fundamentally depended</u> on the organizers ability to recruit a crew capable of navigating and maintaining the vessel. Mr. **XXXXX XXXXX** claim that the organizers left the navigation of the ship and their multimillion dollar profit to a random group of amateurs assembled at the last moment strains credulity. Clearly this is a fabrication intended to diminish his degree of responsibility for agreeing to act as **XXXXX XXXXX**. The fact that he has consistently maintained this fabrication does not make it credible.

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[7] Exhibit M-1, p. 29, Exhibit P-1, pp. 1-4.

[21] When the *Sun Sea* was boarded by Canadian officials, Mr. **XXXXX XXXXX XXXXX XXXXX** and was **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**. Mr. **XXXXX XXXXX** confirmed this identification as a **XXXXX XXXXX** to CBSA officials. He provided those officials with assistance in locating the **XXXXX XXXXX**.[8]

[22] Mr. **XXXXX XXXXX** was detained and given access to counsel. He was questioned by CBSA on 14 occasions between 17 August 2010 and 4 March 2011. The transcripts of his statements have been provided in evidence in Exhibit M-1, Tab-2. His counsel has made no submissions contesting the accuracy of his statements as recorded in the transcripts. She has had the opportunity to review the recordings and agrees that the transcripts are accurate and that no translation errors occurred. The panel finds that the information provided by Mr. **XXXXX XXXXX** about his role on the *Sun Sea* in his statements is sufficient in and of itself to find that he was a **XXXXX XXXXX** until his arrival in Canada.

[23] He stated during the first interview on 17 August 2010 that he "**XXXXX XXXXX XXXXX XXXXX XXXXX**". He claimed that the Captain trained **XXXXX** people to be the crew. While he provided much more detail during the subsequent interviews, he did not ever deny that he had been **XXXXX XXXXX** persons who **XXXXX XXXXX XXXXX XXXXX**. He did not change his statements about who the other **XXXXX XXXXX** were. He provided detailed information indicating that the persons who performed the duties of the crew **XXXXX XXXXX**. He identified particular persons as **XXXXX XXXXX**, always including himself in that list. He provided details **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX** and how those roles were **XXXXX XXXXX**. He provided detailed information about the **XXXXX XXXXX XXXXX XXXXX** and how they gave **XXXXX XXXXX XXXXX XXXXX**.

[24] He provided detailed information about his own duties as a **XXXXX XXXXX**. He stated that he **XXXXX XXXXX**. **XXXXX** was sometimes present during his

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8 Exhibit M-2, Tab-4, pp. 46-47.

XXXXX, but there were **XXXXX** five other members of the crew who regularly were. **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**. He stated that during his **XXXXX** he was responsible **XXXXX XXXXX**.[9]

[25] Mr. **XXXXX** initially claimed that he first met the Captain of the *Sun Sea* while they were being taken to Songkhla in a van. He later said that they had met two to three days before in a safe house in Bangkok. He was shown photos from his own camera which depicted **XXXXX XXXXX**, and two other crew members in Bangkok relaxing and shopping. He admitted that this took place at least two weeks before they boarded the *Sun Sea*. The panel finds it reasonable to conclude that the crew members were together before the voyage to facilitate their boarding a vessel together as soon as possible. Mr. **XXXXX XXXXX** claim that their association was spontaneous is not plausible and inconsistent with the photographs he took.[10]

[26] The panel finds that there are reasonable grounds to believe that Mr. **XXXXX** was chosen to be **XXXXX XXXXX** before he boarded the ship. The panel concludes that Mr. **XXXXX** agreed to act as a **XXXXX** prior to boarding the *Sun Sea*, knowing that he would be **XXXXX XXXXX** undocumented migrants to Canada. The panel concludes that Mr. **XXXXX XXXXX XXXXX XXXXX** for four months, **XXXXX** the *Sun Sea* as necessary during his **XXXXX**, **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**. He did so under the **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX** of the voyage. In doing so, he aided the persons onboard in coming to Canada.

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9 Exhibit M-1, pp. 50-55, pp. 70-88, pp. 98-99, pp. 156-188.

10 Exhibit M-1, pp. 108-137.

ANALYSIS

[27] In order to show that Mr. **XXXXX** is described in paragraph 37(1)(b) of the *IRPA*, CBSA must provide reasonable grounds to believe the facts underlying the following key elements of the paragraph. The panel must correctly determine the applicable law:

- That Mr. **XXXXX** is a foreign national;
- That Mr. **XXXXX** engaged in people smuggling; and
- That the people smuggling occurred in the context of transnational crime.

DEFINITION OF TRANSNATIONAL CRIME

[28] "Transnational crime" is not defined in the *IRPA* or any other domestic legislation. *IRPA* requires that the Act be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. The *United Nations Convention Against Transnational Organized Crime (*the UNCATOC) defines "transnational crime" at Article 3, paragraph 2:

2 For the purpose of paragraph 1 of this article, an offence is transnational in nature if:

a) It is committed in more than one State;

b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;

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.

[29] In the absence of any submissions to the contrary, the panel finds that the UNCATOC definition of transnational crime is the appropriate interpretative aid to rely upon to define "transnational crime" for the purposes of paragraph 37(1)(b) of the *IRPA*. The interpretation of transnational crime was not argued by the parties.

[30] In this case, the *Sun Sea* travelled from the territorial waters of Thailand and ended the voyage in the territorial waters of Canada. The movement of the passengers aboard the *Sun Sea* occurred in more than one state, from Thailand to Canada. A substantial part of the preparation, planning, direction and control of the voyage took place in Thailand. The organizers arranged for the migrants to travel to Thailand, stay in safe houses, they purchased a Thai ship and organized the crew in Thailand. The illegal movement of 492 persons from Thailand to Canada has had a significant impact on Canada. Substantial resources have been, and continue to be, expended on processing these cases. The Minister has established the transnational context for this case. The question that remains is whether Mr. **XXXXX** engaged in people smuggling.

DEFINITION OF PEOPLE SMUGGLING

Positions of the Parties

[31] The term "people smuggling" is not defined in paragraph 37(1)(b) of the *IRPA*. Both parties made submissions on the relevance of section 117 of the *IRPA* (the criminalization of "organizing entry into Canada") and the consideration of international instruments in defining people smuggling.

[32] The Minister relies on section 117 of the *IRPA* to define people smuggling in paragraph 37(1)(b) of the *IRPA*.

[33] Subsection 117(1) of the *IRPA* reads:

> 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.

[34] The Minister submits that, in order to establish that Mr. **XXXXX** engaged in people smuggling, the Minister must demonstrate that:

i. the person being smuggled did not have the required documents to enter Canada;
ii. the person being smuggled was coming into Canada;
iii. the person concerned was organizing, inducing, aiding or abetting the person being smuggled to enter Canada; and
iv. the person concerned had knowledge of the lack of required documents.

[35] These elements are laid out in *R. v. Alzehrani*[11], which is an Ontario Superior Court of Justice case addressing an allegation under section 117 of the *IRPA*. The Minister notes that the Immigration Division has adopted this definition in other cases of allegations under paragraph 37(1)(b). He provided copies of recent decisions of various members which employ a similar, but not identical definition.

[36] The Minister has provided evidence that only nine of the 492 migrants who arrived on the *Sun Sea* were in possession of original passports. All of the migrants sought to remain in Canada permanently; none were in possession of a permanent resident visa to permit them to lawfully fulfill this purpose. Departure orders or deportation orders have been issued in all cases. None of the migrants had the proscribed documents permitting them to enter Canada. The person concerned aided the migrants in being smuggled to Canada by performing duties as a crew member on the vessel that transported them from Thailand to Canada. He knew that he and the other migrants had paid large sums of money to the organizers to board the ship and evade the requirements for passports and visas, which would be required to board a ship travelling legally or an aircraft bound for Canada.

[37] Counsel for Mr. **XXXXX** submits that a more restrictive interpretation of section 37(1)(b) of the *IRPA* should be taken and that using the definition found in section 117 of the *IRPA* results in an overly broad definition of people smuggling. Counsel submits that arriving at a definition is a matter of applying the principles of statutory interpretation to the term people smuggling. Counsel submits that proper application of these principles should lead to a definition of smuggling as “the illegal entry into Canada for material benefit or profit”.

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[11] (2008), 75 Imm. L.R. (3d) 304.

[38] Counsel submits that the ordinary meaning of the term "smuggling" emphasizes clandestine or secretive behaviour engaged in to avoid border controls. She bases this argument on dictionary definitions that define the smuggling of goods rather than people. She argues that the French wording has equal status and must be given equal authority. She submits that the words found in the French text "passage de clandestine", emphasize the secret movement of illegal immigrants or stowaways. She submits that the ordinary meaning of the words people smuggling should be limited to bringing people <u>into Canada</u> secretly. She argues that Canadian border controls must have been successfully evaded in order for people smuggling to have occurred.

[39] Counsel argues that s. 37(1)(b) must be interpreted in a manner consistent with the purpose and objectives of *IRPA*. While noting that *IRPA* in s. 3(1)(i) prioritizes denying access to Canadian territory to persons who are criminals or security risks, she argues that those objectives which relate to Canada's treatment of refugee's set out in s. 3(2) must be emphasized in interpreting this admissibility provision. She argues that the definition of smuggling must protect the rights of refugees. She argues that applying the definition proposed by CBSA would catch innocent victims of smugglers. She argues that the purpose of the provision is clearly to catch those who bring migrants across a border illegally in order to profit. To find otherwise could lead to family members, human rights workers and others who seek to assist genuine refugees being caught within the definition.

[40] Counsel argues that s. 3(3)(f) of *IRPA* requires that *IRPA* be interpreted in a fashion which is consistent with international human rights instruments to which Canada is a signatory, unless there is clear statutory language to the contrary. She argues that the United Nations Convention against Transnational Organized Crime (UNCATOC) and the Protocol against the smuggling of Migrants by Land, Sea and Air (the Protocol), which Canada has signed and ratified, form a proper basis for interpreting the term people smuggling. She argues that the definitions found within these instruments contain two key elements absent from s. 117.

[41] First, the definition of smuggling of migrants found in the Protocol requires “the illegal entry of a person into a State Party”. Illegal entry is defined as “crossing borders” without complying with legal requirements of the State. She argues that this definition requires that a person cross an international border and she goes further to state this must be the Canadian border. In this case, she argues that no smuggling occurred because all of the passengers on the Sun Sea were taken to a port-of-entry under Canadian Navy escort and examined by CBSA after their arrival at a port-of-entry. She argues that none of the migrants actually clandestinely crossed the border in order to evade proper examination and therefore none of them were smuggled.

[42] Second, the definition of smuggling of migrants contained in UNCATOC requires “procurement, in order to obtain directly or indirectly, a financial or other material benefit”. She argues that omitting this element from the definition could lead to persons who participate in smuggling for humanitarian reasons or genuine refugees being found inadmissible. She argues that this could not be what Parliament intended and that it is inconsistent with Canada’s obligations under the UN Convention on Refugees.

THE LAW – PEOPLE SMUGGLING

[43] Paragraph 37(1)(b) of the *IRPA* does not define people smuggling. Undefined terms, in any statute, are subject to the principles of statutory interpretation. The Supreme Court of Canada has clearly laid out the preferred test, adopting that set out by Ruth Sullivan citing E. Driedger.

> Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[12]

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[12] Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 SCR 27.

[44] The panel, after carefully considering the submissions and applicable law, has concluded that an appropriate definition for engaging in activities such as "people smuggling" is engaging in activities which further the unlawful movement of person(s). The person engaged in these activities may organize, induce, aid or abet the acts. The acts must take place in the context of transnational crime, so more than one state must be involved in the fashion set out in the UNCATOC. The acts must be unlawful in one or both of the States. The person must be aware of the nature of the activities at the time they engage in them. The reasons for reaching this conclusion and the panel's analysis of the application of this definition to this case follow.

The words of the Act in their entire context

[45] The analysis must begin with an examination of the words of the Act in their entire context. The Act places people smuggling within the context of transnational crime. The activities which form the basis for a finding of inadmissibility described by section 37(1)(b) must be committed in relation to more than one state.

- **a)** It is committed in more than one State;
- **b)** It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- **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.

[46] The section requires the person concerned to have engaged in one of the enumerated activities, or a similar activity. The enumerated activities also include trafficking in persons and money laundering. The conduct which constitutes trafficking in persons has been criminalized and more fully defined for the purpose of prosecution both in *IRPA* and the Criminal Code of Canada. The conduct which constitutes money laundering has been criminalized and more fully defined for the purpose of prosecution in the Criminal Code and in the Proceeds of Crime (Money Laundering) and Terrorist Financing Act.[13]

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[13] *IRPA* s. 118, Criminal Code of Canada s. 279.01-279.04, Proceeds of Crime (Money Laundering) and Terrorist Financing Act, S.C. 2000, c. 17, Criminal Code of Canada s. 462.31(1).

[47] The conduct is always international in scope or effect. In order to effectively combat transnational offences, many nations, including Canada, have sought international agreement to establish minimum standards for criminalizing offences. A portion of Canada's response is s. 117, which criminalizes coming into Canada without a proscribed document. A further response is s. 124(1)(a), which along with s. 148(1), criminalizes owning or operating a means of transportation used to bring improperly documented persons to Canada. The offences created under *IRPA* are not inconsistent with the UN Convention or Protocol; they are simply broader.

[48] The Convention and Protocol in no way prohibits a signatory from establishing criminal consequences for behaviour which are broader in scope than that provided for in the Protocol. Nothing prevents a signatory from providing for deportation based on a definition of people smuggling, which is broader than the scope of criminal activity described in the Protocol. The fact that Parliament has chosen to do more than the minimum called for by the United Nations agreements is not inconsistent with Canada's international obligations under the Convention, Protocol or Refugee convention.

[49] The submissions of both parties fail to place the term people smuggling within the context of transnational crime. While the Minister’s position covers the particular facts of this case, the panel does not find that it provides a proper basis for defining people smuggling. The Minister’s position limits the scope of the section to persons who seek to bring others into Canada. Parliament referred to transnational crime in drafting s. 37(1)(b). The panel is of the view that persons engaged in smuggling in relation to any international border fall within the reach of the section. Provided that their acts are illegal in the relevant jurisdiction, persons knowingly involved in smuggling persons across the US-Mexico border, or by ship out of Thailand’s territorial waters into Australian waters, all fall within the scope of the section.

[50] Nothing in the language or intent of the provision limits the application to cases where bringing a person into Canada was the ultimate object of the smuggler. If Parliament had intended to limit the definition in s. 37(1)(b) to the elements found in s. 117, then it would have specifically referred to s. 117 in defining people smuggling. Where Parliament intends to apply a definition in more than one section of the Act, apply a definition set out in other domestic

legislation, or an international agreement, then this is clearly stated in *IRPA*.[14] The fact that people smuggling has not been defined by reference to any other source leads the panel to conclude that Parliament intended the definition to be broader and more flexible. In the panel's view, s. 117 sets out one of the crimes that taken together can be better characterized as the illegal movement of persons. It may be applicable in some cases in defining the elements of illegal movement where the transnational crime relates to Canada. To limit the meaning of people smuggling to the conduct defined by s. 117 would narrow the scope of section unnecessarily without reference to the statutory language.

[51] The context within which the words of s. 37(1)(b) are found is that of the inadmissibility provisions of *IRPA* which deal with security, human or international rights violations, serious criminality and organized criminality. These provisions looked at as a whole have common characteristics and consequences for those found to be inadmissible. As will be discussed later, they have also been found to have a common purpose and objective.

[52] The provisions found in s. 34-37 of *IRPA* are all to be interpreted pursuant to the evidentiary rules set out by s. 33. The standard for determining the facts which establish inadmissibility is therefore reasonable grounds to believe, not a balance of probabilities. Facts may arise from acts or omissions. Facts include those that have occurred, are occurring or may occur. These rules are not applied to the other inadmissibility provisions of the Act and serve to provide a flexible scheme for making determinations regarding the most serious allegations of inadmissibility. These allegations render inadmissible persons who are members of groups or who participate in activities that threaten the safety or security of Canadians. The activities described vary greatly in their nature. Parliament, in the words of the Supreme Court, has chosen a lower, more flexible standard of proof to make it clear that these most serious crimes deserve extraordinary condemnation.[15]

[53] The provisions found in s. 34-37, when read within the overall scheme of *IRPA,* all have several common effects on those found described. Persons alleged to have engaged in such

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14 For example s, 4 regulations, s. 35(1)(a) referencing the Crimes Against Humanity and War Crimes Act, s. 2 referring to the Convention Against Torture and the Refugee Convention.

15 *Mugesara ibid*, para. 115.

conduct have the right to a hearing in which they have full participatory rights. These hearings often focus on defining the terms used by Parliament, as many were left undefined. Persons found described after such a hearing are subject to a deportation order, and if removed, require consent to return to Canada at any time in the future. While they have a right to seek leave to commence an application for judicial review of a decision, other rights afforded to persons found inadmissible on other grounds are not afforded to such persons.

[54] Pursuant to s. 64, persons found inadmissible on these grounds are not permitted to Appeal to the Appeal Division (this does not apply to criminality and applies to serious criminality only with respect to a crime that was punished in Canada by a term of imprisonment of at least two years). Pursuant to s. 101, claimants found inadmissible on these grounds are generally not eligible to have their claim referred to the Refugee Division. Pursuant to s. 112(3) and s. 113(c) persons found to be inadmissible on these grounds may make application for a *Pre-Removal Risk Assessment* (PRRA) based only on the grounds found in s. 97 and may not receive refugee protection as a result.

[55] Contrary to counsel's submission, these consequences are clearly meant to apply to refugee claimants. The consequences of engaging in these types of activities, including people smuggling, apply to all foreign nationals, persons already determined to be Convention refugees and permanent residents alike. Counsel submits that the Act should not render persons inadmissible for using a smuggler to come to Canada. The scheme of the Act makes it clear that being smuggled does not render a claimant inadmissible or ineligible. The Act also defers prosecution while a claim is pending. Engaging in people smuggling is not treated in the same fashion. Parliament has placed no restriction on pursuing an allegation of inadmissibility where a claimant is alleged to have engaged in people smuggling. Indeed Parliament has explicitly indicated in s. 101(f) that persons who are found to have engaged in people smuggling are ineligible to make a claim. Where such a claim has been referred, it may be suspended pursuant to 103(1)(a), pending the decision of the Immigration Division. Where the person has been found described, the claim may be terminated pursuant to s. 104(2).

[56] Contrary to Counsel's submission, the scheme of the Act does not restrict the rights or condemn the behaviour of persons who have simply used a smuggler to come to Canada to make a refugee claim. Parliament has made it clear in s. 133 that claimants will not be prosecuted for such conduct "pending disposition of their claim for refugee protection or if refugee protection is conferred". The Federal Court has made it clear that deferral of prosecution is not a blanket protection from prosecution and in no way limits the applicability of the inadmissibility provisions of the Act. The case before the panel does not involve prosecution. The case does not involve an allegation based on the person concerned simply using the services of a smuggler. The allegation is based on his assisting in the operating of an illegal means of transportation used to bring other undocumented migrants to Canada.[16]

[57] Counsel argues that, if interpreted broadly, the scheme could be applied to human rights workers or family members who do not seek to profit, but simply to assist a claimant in genuine need of protection. Consistent with all provisions in s. 34-37, a person found to be inadmissible may apply pursuant to s. 37(2) for relief. The focus of such an application is an evaluation of whether the person's presence would be detrimental to national security. It is the not the proper focus of an admissibility hearing, unless they are relevant to an issue of fact, to assess the motives of a person who has engaged in people smuggling or other serious conduct. The jurisprudence has made it clear that a party may seek relief either before or after a finding at an admissibility hearing. The consequences of engaging in behaviour described in s. 34-37 and the restrictions on the remedies of persons found inadmissible on these grounds are further evidence that Parliament sought to condemn such behaviour in the broadest terms. The Act is constructed to increase the likelihood that persons who engage in such behaviour will be deported as a consequence.

The words of the Act in their grammatical and ordinary sense

[58] The Act renders inadmissible persons who engage in activities such as people smuggling in the context of transnational crime. Counsel cites definitions which concern the smuggling of

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[16] *Uppal* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FC 338 (CanLII).

goods and argues that these are applicable. Counsel argues that these definitions emphasize the clandestine or secret movement of goods across an international border in contravention of the law in order to avoid border controls. The panel finds that the definitions are of limited utility in the context of defining people smuggling. The definitions were developed to describe the illegal movement of goods. The definition of people smuggling has to describe the illegal movement of persons and take into account the context within which people smuggling occurs.

[59] The panel accepts that an element of the ordinary meaning of people smuggling involves the movement of persons illegally with respect to more than one country, usually by seeking to move them to or across an international border. The panel accepts that the means employed by smugglers will often involve the secret or clandestine movement of persons, using fraudulent documents, assumed identities or illegal transportation. However, since these are the very acts which are illegal, requiring the definition to include the word clandestine adds nothing which helps to clarify the definition.

[60] The panel finds that it is sufficient to focus on the contravention of Canadian, other national or international law regulating the movement of persons. It is not necessary to add the element of secrecy and it is inappropriate to focus solely on crossing the Canadian border. The section references transnational crime which applies to acts committed in any country and the panel finds it was clearly meant to apply to any international border, not just the Canadian border. Adding the additional elements to the definition does not help to define the term.

[61] Counsel seeks to draw an analogy between the evasion of customs controls and the evasion of immigration controls. She argues that if a party reports goods at a border and is subject to customs examination, this cannot be understood as smuggling. She argues that persons who report to a port-of-entry for an immigration examination cannot be understood as having been smuggled by those who illegally assisted them in appearing there. While this is true of a customs examination, the panel finds it of no assistance in defining people smuggling.

[62] Decisions regarding the admission of either goods or persons are normally exercised by appointed officers at a port-of-entry. However, the legal context governing the entry of goods is different than that governing the entry of persons. The legal context may lead to the objective of

those engaged in smuggling persons being different than that of those engaged in smuggling goods. In the Canadian context, a person smuggling goods is likely to seek to clandestinely bring the goods into Canada either because they are illegal goods, such as narcotics, or goods on which they seek to avoid customs duties, such as alcohol or cigarettes. The objective of the person smuggling goods cannot be achieved by reporting them to an officer at a port-of-entry. If the goods are detected they may be subject to seizure, the imposition of duties, penalties and if the goods are illegal, the smuggler may be subject to criminal prosecution. The illegal or undeclared goods must cross the border clandestinely in order for the objective of the smuggler to be achieved.

[63] People smuggling is based on a goal that the parties agree to. The object of the people smuggler is to ensure that the person arrives at their agreed-on destination. In some circumstances, that goal may not be achieved unless the person successfully clandestinely crosses a border in contravention of the law. However, in the Canadian context, claimants frequently arrive without a passport or visa, and this fact alone does not affect their ability to pursue a refugee claim. People smuggling does not necessarily require that the person being smuggled actually cross the border secretly in order for the agreed on goal to be achieved.

[64] The objective of illegal migrants is often simply to arrive at a Canadian port-of-entry and make a refugee claim. The objective of those engaged in people smuggling is to create the conditions necessary to achieve this. People smugglers engage in their activities to further the objectives of migrants who seek to travel without complying with the law. They may do so because they do not have the required documents. They may seek fraudulent or falsely obtained documents to allow them to board legal means of transportation. They may seek to travel using illegal means of transportation, such as the trunk of a vehicle or a ship which does not require documents in order to board. The evidence in this case is a clear example. The organizers of the *Sun Sea's* voyage were paid several million dollars before the ship left Thailand. The contacts signed by the migrants promised payment of 10 to 20 times that amount provided that the vessel arrived in Canada. The contracts were not contingent on the migrants entering Canada by clandestine means or the migrants being granted status in Canada.[17]

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[17] Exhibit M-2, pp. 16-25.

[65] The object of the migrants was to arrive in Canada and make a refugee claim. The object of the smugglers was to create the conditions to achieve this. Neither the organizers nor the migrants could achieve their ends by complying with the law. The migrants did not have visas and most did not have passports. To fulfil the bargain the organizers had to arrange transportation that could evade legal requirements for international travel. They required a ship <u>and a crew</u> capable of operating the ship and who were willing to transport persons illegally.

[66] The plain meaning drawn from these examples further focuses the panel on illegal movement of persons, which is broader than, but includes the definitions proposed by both counsels. The panel finds that the plain meaning of people smuggling focuses on any illegal movement of persons. This includes, but is not limited to, the Canadian border. This includes, but is not limited to, the meaning proposed by Counsel, illegal entry by clandestine means and the type of conduct proposed by the Minister, knowingly facilitating coming into Canada of persons who do not hold required documents.

[67] Counsel submits that the French text is equally authoritative; the panel accepts that this is correct. The common meaning is to be sought where there is a conflict or where one version of the text is clearly narrower. Counsel submits that both the English and French texts emphasize the secret or clandestine nature of smuggling. The words in the French text “passage de clandestine” translate as "passage of illegals". In the panel’s view, there is no conflict between the language or meaning of the French and English text which requires resolution. The language in both versions of the text focuses on the illegal movement of persons. Both versions focus the panel’s attention on any violations of the legal requirements for international travel. For the reasons already given, the panel finds no assistance provided by adding the requirement that the illegal act took place clandestinely.

The words of the Act harmoniously with the scheme of the Act

[68] *IRPA* provides a complete scheme for governing the assessment, admission, protection and removal of persons who seek to come into Canada. It has long been held that the most fundamental principle of Immigration law, one enshrined in the Constitution, is that non-Citizens do not have an unqualified right to enter or remain in Canada. Parliament has imposed a scheme governing non-Citizens that is intended to control who enters Canada. The scheme involves a staged screening process which imposes obligations on those seeking admission and those assisting them. Persons seeking admission are required to possess proscribed documents, establish that they are admissible and comply with all requirements and obligations of the Act. Persons assisting others in coming to Canada are required to ensure that those persons comply with the requirement to hold any proscribed document.[18]

[69] The scheme includes assessments carried out prior to a person approaching the border to seek admission. Persons seeking lawful permission to come to Canada may be required to provide information to visa and medical officers and undergo security assessments. If they intend to remain permanently then they must be assessed within one of the proscribed classes provided by the regulations. The ability to gather and verify information prior to a party boarding a means of transportation bound for Canada provides authorities the ability to reject applications made by those who pose at threat to safety or security. In an era of cheap, frequent and easy international travel, it provides a means of protecting Canadian sovereignty.

[70] People smuggling is intended to subvert the lawful requirements and processes of the Act and allow persons who seek to avoid the screening process to arrive in Canada. The means of doing so include, but are by no means limited to, using fraudulent identity documents and visas, using false information to obtain a genuine document and using illegal means of transportation to bring undocumented persons to Canada. Persons engaged in people smuggling undermine the requirements for lawful travel and Canada's interest in protecting its sovereignty and security.

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[18] *Canada (Minister of Employment and Immigration)* v. *Chiarelli*, 1992 CanLII 87 (SCC), [1992] 1 SCR 711.

[71] Persons seeking admission normally require a passport and a visa to board a vehicle carrying them to Canada. The scheme of the Act also governs the obligations of persons who operate a vehicle which transports persons to Canada. Pursuant to s. 148(1), persons operating a vehicle, including a vessel, are obliged not to carry to Canada any person who does not hold a prescribed document. Failure to fulfil an obligation under the Act is an offence specified in s. 124(1)(a). Persons operating a vessel may be found not responsible for such conduct pursuant to s. 124(3) if they establish that they exercised all due diligence to prevent the commission of the offence. The defence set out in s. 124(3) serves to protect travel agents, the crews of vessels and others who diligently comply with the requirements to ensure persons boarding their means of transportation have proper documents.

[72] The scheme provides for an assessment of every person boarding a vehicle coming to Canada. This provides a further means of ensuring persons who are inadmissible or who pose a threat do not reach the border. The requirement to present proscribed documents when boarding is frequently the requirement that smugglers seek to undermine.

[73] The scheme provides for an assessment of any person arriving in Canada. All persons are required to report for examination, normally at a port-of-entry. Non citizens must establish that they hold proscribed documents, are admissible and can comply with all requirements of the Act. The scheme provides this assessment to ensure that persons granted entry comply with the Act and do not pose a threat to safety or security. The Act provides a scheme for controlling the entry of those considered to be a risk. Persons seeking admission are subject to examination and where grounds of admissibility arise, they are subject to a report, detention, a hearing and removal. Where a person engaged in people smuggling seeks admission they face possible deportation. The scheme of the Act provides levels of assessment to control smuggling and to deny admission to those who engage in it.

The words of the Act read harmoniously with the object of the Act and the intent of Parliament

[74] The words people smuggling are found within the inadmissibility provisions set out in s. 34-37 of *IRPA*. The panel finds that all of these sections have a common object and intent. In interpreting s. 33, the common evidentiary standard applied to these sections, the Supreme Court found that Parliament intended that the acts described by these sections be subject to extraordinary condemnation. These inadmissibility provisions of *IRPA* have consistently been found to have the object of protecting Canadian society by facilitating the removal of persons who constitute a risk to society or to the security of Canada because of their conduct. The Courts have consistently found that Parliament's intent in enacting these provisions was to prioritize safety and security. Parliament clearly intended to deny the use of Canadian territory to those engaged in the activities described in these provisions. One of the mechanisms chosen for doing so is the deportation of those involved in these types of behaviours.[19]

[75] Counsel argues that defining smuggling as "the illegal entry into Canada for material benefit or profit" would render **XXXXX** and those who planned and benefited from the voyage of the *Sun Sea* inadmissible, while rendering the section inapplicable to those who only assisted the organizers in order to reach Canada and make a refugee claim. With respect, Counsel's submissions do not accurately characterize the effect of interpreting the provision narrowly. If no one on board the Sun Sea was smuggled then none of the organizers could be denied admission into Canada pursuant to 37(1)(b). Despite making millions in profits by gambling the lives of 493 persons, in order to make millions more in profit, the organizers would not be inadmissible because the Canadian Navy intercepted the ship and took the undocumented migrants aboard to a port-of entry. The panel finds this inconsistent with Parliament's intent.

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[19] *Mugesara*, ibid; *Medovarski* v. *Canada (Minister of Citizenship and Immigration)*; *Esteban* v. *Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 (CanLII), [2005] 2 SCR 539; *Sittampalam* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 (CanLII), [2007] 3 FCR 198; *Singh* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FCA 417 (CanLII), [2006] 3 FCR 70; *Cha* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FCA 126 (CanLII), [2007] 1 FCR 409; *Nazifpour* v. *Canada (Minister of Citizenship and Immigration)*, 2007 FCA 35 (CanLII), [2007] 4 FCR 515.

[76] Counsel submits that s. 37(1)(b), an enforcement provision, should be interpreted in a restrictive fashion to accord with the objects set out in s. 3(2), relating to refugees. She cites not a single authority in support of this argument; it is doubtful that any exist. She does not address the clear interpretations of the enforcement provisions arrived at by the courts in the last decade. The panel has not been persuaded that the interpretation suggested by counsel is consistent with the object of *IRPA* or the intent of Parliament.

[77] Limiting the definition to persons who secure the illegal entry into Canada of a person for financial gain or material benefit, where the Act contains no clear language requiring these elements, would frustrate the object of the Act. Counsel's submission, if followed, leads to absurdities and would not serve to protect Canada. Surely Parliament intended to deny admission to those engaged in people smuggling in other jurisdictions. Under counsel's submissions, such persons would be admissible. Surely Parliament intended to deny admission to smugglers who act for other motives. Criminal organizations have sought to smuggle persons to Canada in order to avoid that person being prosecuted for a serious crime. Under counsel's definition, so long as the organization sought no financial or material benefit, or the person made a refugee claim at a port-of-entry rather than entering Canada clandestinely, the smugglers would be admissible. Surely Parliament did not intend those who deliberately smuggle criminals to be admissible if they act for a motive other than profit. Under counsel's submission, if the *Sun Sea* had gone to Australia instead of Canada the organizers would be admissible, even if they were paid millions of dollars. The panel cannot accept that this conforms with the object of the Act.

[78] The activities described in sections 34-37 are frequently described in terms which were not defined by Parliament when enacting *IRPA*. The courts have consistently ruled that this was a deliberate choice intended to foster a broad and flexible interpretation of the terms used to describe acts rendering a person inadmissible. Terms such as terrorism, membership, organization, subversion and punishment have all been given a broad, flexible interpretation in order to respect Parliament's intent to provide for the expeditious removal from Canada of those who engage in such activities. Parliament chose, for the most part, not to refer to other pieces of legislation, such as the Criminal Code, which contain definitions for many of the terms used in these sections. Only in s. 35(1) and s. 36 are references made to other legislation. Parliament

also chose not to refer to the sections of *IRPA* which criminalize certain behaviours, which also can lead to a finding of inadmissibility. The courts have consistently ruled that not defining these terms in the admissibility provisions was a deliberate choice. The Courts have chosen to interpret the terms used in the admissibility provisions in a broad, flexible manner, not limited by definitions that exist in other contexts.[20]

[79] Finally, Counsel argued that the provision must be interpreted in light of Paragraph 3(3)(f) of the *IRPA*. This provision requires that the Act be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. As already noted s. 37(1)(b), is not inconsistent with the UNCATOC and the Protocol. The Protocol calls for signatory State Parties to adopt legislative and other measures as may be necessary to establish as criminal offences the smuggling of migrants. The Convention and Protocol establish minimum expectations regarding the acts which will be criminalized in the Parties domestic legislation. Canada has chosen to criminalize a broader range of Acts. Canada has not chosen to limit the definition employed to determine admissibility to that employed in other sections of *IRPA* or in the Protocol. This is consistent with the object of the Act and Parliament's intent. It is not inconsistent with Canada's international obligations.[21]

Elements of people smuggling and application to this case

[80] The panel finds that "people smuggling" for the purposes of paragraph 37(1)(b) of the *IRPA* is engaging in activities which further the unlawful movement of one or more persons. The person engaged in people smuggling may be inadmissible for engaging in these activities if they organize, induce, aid or abet the acts. The acts must take place in the context of transnational crime, so more than one state must be involved in the fashion set out in the UNCATOC. The acts must be unlawful in one or both of the States. The person must be aware of the nature of the activities at the time they engage in them.

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[20] *Suresh* v. *Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (CanLII), [2002] 1 SCR 3; *Poshteh* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 (CanLII); *Sittampalam* v. *Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326 (CanLII), [2007] 3 FCR 198; *Gebreab* v. *Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1213 (CanLII), *Martin* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 60 (CanLII).

[21] Article 2 of the *Protocol Against the Smuggling of Migrants by Land, Sea and Air.*

[81] Mr. **XXXXX** was involved in the **XXXXX XXXXX XXXXX XXXXX** that brought 491 other persons to Canada. When he chose to **XXXXX XXXXX** and **XXXXX XXXXX** in the movement of these persons from Thailand to Canada by **XXXXX XXXXX** he assumed responsibilities and obligations under *IRPA*. The panel finds there are reasonable grounds to believe that he knowingly **XXXXX XXXXX XXXXX XXXXX**, the *Sun Sea*, in order to carry persons from Thailand to Canada who did not hold proscribed documents. None of the 491 other persons onboard held a permanent resident visa but all sought to remain permanently. Nine of the persons on board held a passport, 482 of the other persons did not. For the reasons already given the panel concludes that he was aware that the persons on board were not in possession of passports and visas and like him were paying to evade this requirement. When he began to **XXXXX XXXXX XXXXX XXXXX**, knowing that it was carrying these persons to Canada, Mr. **XXXXX XXXXX XXXXX XXXXX** engaged in people smuggling. The activity described is unlawful pursuant to s. 124(1)(a) and 148(1) of *IRPA*. There is no evidence, pursuant to s. 124(3), that he exercised all due diligence in order to ensure that all persons on the vehicle held the proscribed documents required under *IRPA*.

[82] The parties focused their submissions on s. 117(1); therefore the panel will also make a finding respecting this section. The panel has had the opportunity to read a number of my colleague's rulings on this issue. The panel accepts that the elements required to find a violation of section 117(1) were considered in *R. v. Alzehrani*[22], with reference to prior case law. At paragraph 10, the Court held that in order to establish a breach of this section, the Crown must prove that:

i. the person being smuggled did not have the required documents to enter Canada;
ii. the person was coming into Canada;
iii. the accused was organizing, inducing, aiding or abetting the person to enter Canada; and
iv. the accused had knowledge of the lack of required documents.

[83] In *Alzehrani*,[23] the Court states at paragraph 56 that, with respect to section 117 of the *IRPA*:

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22 *Ibid*, footnote 11.
23 *Ibid*, footnote 11.

> The plain meaning of the statute is clear. It is only the assisting of persons who do not have passports or similar documents that is the subject matter of this offence.

[84] In this case, the Minister has sought to establish the elements of the offence under section 117, as set out in *Alzehrani*[24]. The panel finds that this is the transnational crime at issue in this particular case. However, the applicable standard of proof for paragraph 37(1)(b) is "reasonable grounds to believe" and not the criminal standard of proof of "beyond a reasonable doubt".

Element 1 – Did the individuals from the MV *Sun Sea* have the required documents to enter Canada?

[85] Mr. **XXXXX** and 491 other persons arrived in Canada aboard the vessel that had been named *Sun Sea* for the purpose of this voyage. All of these persons declared their intent to remain in Canada on a permanent basis and made refugee claims upon their arrival in Canada. *IRPA* and the *Immigration and Refugee Protection Regulations (*the Regulations) require that a foreign national seeking to remain in Canada on a permanent basis must have a permanent resident visa[25] and a passport or other similar document listed under subsection 50(1) of the Regulations. Persons who are making refugee claims in Canada are not exempted from having these required documents for entry to Canada. Other sections of the *IRPA* provide for relief from the consequences of a removal order issued for failing to comply with the documentary requirements of entry if a refugee claimant is found to be a Convention refugee or person in need of protection.

[86] Nine of the persons onboard had passports. None of them held a permanent resident visa. Four hundred and fifty-one reports were prepared alleging non-compliance with the Act for not possessing one or more documents required to establish permanent residence in Canada. The other persons were dealt with as dependents of an inadmissible person.[26]

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[24] *Ibid*, footnote 11.
[25] Paragraph 20(1)(a) of the *IRPA* and Section 6 of the Immigration and Refugee Protection Regulations.
[26] Exhibit M-2, Tab 7.

[87] The panel finds that there are reasonable grounds to believe the persons onboard the *Sun Sea* all sought to reside in Canada permanently and made refugee claims in Canada. None of these persons had the proscribed visa. Four hundred and eighty-two of the persons Mr. **XXXXX** aided in coming to Canada did not have a passport or other documents required under subsection 50(1) of the Regulations, required to enter Canada.

Element 2 – Were the individuals from the MV *Sun Sea* coming into Canada?

[88] Counsel for Mr. **XXXXX** submits that the act of people smuggling is not complete unless the border is crossed. She submits that the act of smuggling did not occur in this case because all of the persons on the *Sun Sea* were directed to a port-of-entry and examined by the authorities on their entry into Canadian territory. The panel has already outlined reasons for rejecting this as part of the definition of smuggling.

[89] There are a number of cases decided under the former Immigration Act that are useful in interpreting the phrase "coming into Canada".[27] In *R. v. Mossavat*,[28] the Court of Appeal for Ontario provided the following endorsement:

> We are in substantial agreement with the reasons of Langdon J. The phrase "comes into Canada" in s. 94(1)(b) of the *Immigration Act* is not ambiguous and should be given its plain meaning. A person comes into Canada when that person physically arrives in Canadian territory. That plain meaning accords with the fundamental object of the *Immigration Act* which is to control both who and what enters Canadian boundaries: *Dehghani v. Canada (Minister of Employment and Immigration)* 1993 CanLII 128 (S.C.C.), (1993), 20 C.R. (4th) 34 at 48-49 (S.C.C.).

[90] In *R. v. Godoy*,[29] the Court states at paragraph 35:

> The claimants in this case came into Canada when they arrived in Canadian territory, presumably Fort Erie. If the accused aided, abetted or induced them in arriving at Fort Erie, Canada, to present their claims, she in one of these ways assisted them to "come into Canada".

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27 Section 94.1 and 94.2 of the former *Immigration Act* were replaced by section 117 in the *IRPA*.

28 1995 CanLII 223 (ON CA).

29 (1996) 34 Imm. L.R. (2d) 66 [Ont. Ct. J.(Prov. Div.)].

[91] In *R. v. Chen*,[30] the Court states at paragraph 17:

> I believe that the objects of section 94.1 and 94.2 of the Immigration Act are consistent with an interpretation that is not restrictive in the manner contemplated by the defence. The activities of individuals who assist people to illegally "come into Canada" should logically include those who are involved in such operations regardless of whether it occurs before the entry (see Mossavat) or after the entry (see Bell). Failure to adopt such an interpretation would defeat the intention and purpose of the legislation and would be contrary to the goal of the drafters of the section.

[92] The case law suggests that a plain meaning of the phrase "coming into Canada" should be adopted and that arrival at the border of Canadian territory is included in the meaning of "coming into Canada".

[93] The *Sun Sea* and its 492 passengers travelled from Thailand to Canada. Mr. **XXXXX** was told that the ship would be coming to Canada as early as December 2009. He knew the ship was coming to Canada when he **XXXXX** and began to **XXXXX** of the ship. The panel finds that all 492 passengers from the *Sun Sea*, including Mr. **XXXXX**, were "coming into Canada".

Element 3 – Did Mr. XXXXX organize, induce, aid or abet a person to enter Canada?

[94] In his interviews with the CBSA[31], Mr. **XXXXX** stated repeatedly that he agreed to **XXXXX XXXXX** of the *Sun Sea* after he boarded, but before it began the voyage to Canada. He admitted that he **XXXXX XXXXX XXXXX XXXXX**, which included **XXXXX XXXXX** and **XXXXX XXXXX**. He stated that he used the **XXXXX XXXXX**, the **XXXXX XXXXX**, **XXXXX XXXXX** as needed and **XXXXX XXXXX** of the vessel. He provided detailed information **XXXXX XXXXX XXXXX XXXXX**, always including himself as **XXXXX XXXXX**.

[95] During the admissibility hearing he denied being a **XXXXX XXXXX**. He testified that he **XXXXX XXXXX XXXXX XXXXX**, but did not **XXXXX XXXXX**. He testified that he **XXXXX XXXXX**. He testified that he used the **XXXXX XXXXX XXXXX XXXXX** on two

30 [1998] O.J. No.5506 [Ct.J.(Prov. Div.)].
31 Exhibit M-1.

occasions. His testimony is inconsistent with his prior statements and clearly an attempt to diminish his responsibility for choosing to **XXXXX XXXXX**. He clearly stated that two persons asked to **XXXXX XXXXX** refused to do so. The panel finds his statements in Exhibit M-1 to more credibly explain his duties **XXXXX XXXXX** on the *Sun Sea*.

[96] In Exhibit M-2, the Minister presented a transcript of the testimony provided by Captain Phillip John Nelson, who is the president of the Council of Marine Carriers in Vancouver, BC. Captain Nelson provided opinion evidence during another MV *Sun Sea* admissibility hearing on the roles, responsibilities, hierarchy, training requirements, equipment and complement of crew in the wheelhouse of sea-going vessels.

[97] Captain Nelson testified to the role of the **XXXXX XXXXX** as the person responsible for **XXXXX XXXXX XXXXX XXXXX**, **XXXXX XXXXX XXXXX XXXXX** and **XXXXX XXXXX XXXXX XXXXX**. This is consistent with Mr. **XXXXX XXXXX** account of his role in **XXXXX XXXXX XXXXX XXXXX**.

[98] I find that there are reasonable grounds to believe that, in performing the duties he agreed to as a **XXXXX XXXXX XXXXX XXXXX** throughout the journey from Thailand to Canada, Mr. **XXXXX XXXXX XXXXX XXXXX** in coming into Canada and in turn aided the 491 other persons onboard *Sun Sea* in coming into Canada.

Element 4 – Did Mr. XXXXX XXXXX XXXXX XXXXX have knowledge of the lack of required documents by passengers of the MV *Sun Sea*?

[99] In an interview with the CBSA, Mr. **XXXXX XXXXX** stated that the agent in Thailand, **XXXXX**, who brought him to the MV *Sun Sea*, took his passport from him[32]. In a later interview, he provided a detailed description of who the organizers of the smuggling operation were, who had arranged for specific individuals to board and admitted that he was aware that the persons onboard were travelling without documents.

[32] Exhibit M-1, p. 17, p. 21, Tab 10.

[100] In testimony, Mr. **XXXXX** stated that he was not aware if the other persons had documents. He stated repeatedly that he believed that persons seeking to make a refugee claim in Canada did not require visas or passports. The panel found his answers to these questions extremely evasive. He eventually admitted that he was aware that Sri Lankan nationals required passports and visas to travel legally to Canada. The panel finds that he was fully aware that he and the other passengers required passports and visas to come to Canada and sought to evade giving an honest answer to this question in an attempt to diminish his responsibility for **XXXXX XXXXX**.

[101] Mr. **XXXXX** was an experienced traveller, with significant experience with the requirements for legal international travel, before he boarded the *Sun Sea*. He had two years experience travelling by ship and two years experience travelling by plane to various countries. He had obtained valid passports and entry visas and passed through immigration controls many times. He did not board a plane to come to Canada because he did not have the $ **XXXXX** fee a smuggler would have required to obtain fraudulent documents for him. His sister had used fraudulent documents to come to Canada. He was aware that boarding the *Sun Sea* was a means of avoiding the legal requirements for travel to Canada.

[102] Even if I accepted Mr. **XXXXX** testimony in the admissibility hearing that he did not know if the agent had taken passports from others, then I find that there is sufficient evidence to conclude that he was wilfully blind to the fact that passengers did not have the required documents for entry to Canada.

[103] *Alzehrani*[33] specifically addresses the principle of wilful blindness as it applies to knowledge of lack of required documents for entry to Canada.

[104] At paragraphs 34 and 35, the Court states:

> Wilful blindness is the equivalent of knowledge; it is knowledge that is imputed to an accused who suspected the truth, knew its probability, but deliberately refrained from making the inquiry that would have confirmed his suspicion, because he wished to avoid actual knowledge: *R. v. Sansregret*, [1985] 1 S.C.R. 570 at 585-586.

[105] The panel finds that there are reasonable grounds to believe, that, when he **XXXXX XXXXX** to Canada, Mr. **XXXXX** had knowledge of that the persons travelling on the *Sun Sea* did not have the documents required to lawfully come into Canada.

[106] Given his prior travel experience, his familiarity with the requirements for passports and visas, his acknowledgement that he could not come to Canada by plane because he lacked the required documents, his acknowledgement that his own passport was taken before he boarded and his previous detailed statements about the organization of the smuggling operation, the panel finds that at a minimum he was wilfully blind to the likelihood that the persons he assisted in coming to Canada also did not possess the required documents.

CONCLUSION

[107] I find that the essential elements of people smuggling have been made out in this case. I find that there are reasonable grounds to believe that Mr. **XXXXX** is a foreign national who engaged, in the context of transnational crime, in people smuggling.

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[33] *Ibid*, footnote 11.

NOTICE OF DECISION

[108] I find that **XXXXX XXXXX** is inadmissible under paragraph 37(1)(b) of the *IRPA*. Pursuant to paragraph 45(d) of the *IRPA* and paragraph 229(1)(e) of the Regulations, I am required to make a Deportation Order against Mr. **XXXXX**. The order is attached to this decision.

(signed)

A. Laut

13 April 2012

Date

Judicial Review – Under section 72 of the *Immigration and Refugee Protection Act*, you may make an application to the Federal Court for judicial review of this decision, with leave of that Court. You may wish to get advice from counsel as soon as possible, since there are time limits for this application.

KEYWORDS: IMMIGRATION DIVISION - INADMISSIBILITY - TRANSNATIONAL CRIME - PEOPLE SMUGGLING - ELEMENTS TO BE PROVEN - MV SUN SEA - UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME (UNCATOC) - OPERATION OF VEHICLE - ENTRY INTO CANADA - STATUTORY INTERPRETATION