



SUPREME COURT OF CANADA

CITATION: B010 v. Canada (Citizenship and Immigration), 2015
SCC 58

DATE: 20151127
DOCKET: 35388, 35688,
35685, 35677

BETWEEN:

B010
Appellant
and
Minister of Citizenship and Immigration
Respondent
- and -
**Attorney General of Ontario, Canadian Association of Refugee Lawyers,
Canadian Council for Refugees, Amnesty International (Canadian Section,
English Branch), David Asper Centre for Constitutional Rights and
United Nations High Commissioner for Refugees**
Interveners

AND BETWEEN:

J.P. and G.J.
Appellants
and
Minister of Public Safety and Emergency Preparedness
Respondent
- and -
**Attorney General of Ontario, Canadian Association of Refugee Lawyers,
Canadian Council for Refugees, Amnesty International (Canadian Section,
English Branch), David Asper Centre for Constitutional Rights,
United Nations High Commissioner for Refugees and
Canadian Civil Liberties Association**
Interveners

AND BETWEEN:

B306
Appellant
and
Minister of Public Safety and Emergency Preparedness
Respondent
- and -

**Attorney General of Ontario, Canadian Association of Refugee Lawyers,
Canadian Council for Refugees, Amnesty International (Canadian Section,
English Branch), David Asper Centre for Constitutional Rights,
United Nations High Commissioner for Refugees and
Canadian Civil Liberties Association**
Intervenors

AND BETWEEN:

Jesus Rodriguez Hernandez

Appellant

and

Minister of Public Safety and Emergency Preparedness

Respondent

- and -

**Attorney General of Ontario, Canadian Association of Refugee Lawyers,
Canadian Council for Refugees, Amnesty International (Canadian Section,
English Branch), David Asper Centre for Constitutional Rights,
United Nations High Commissioner for Refugees and
Canadian Civil Liberties Association**
Intervenors

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

REASONS FOR JUDGMENT: McLachlin C.J. (Abella, Rothstein, Moldaver, Karakatsanis, Wagner and Gascon JJ. concurring)
(paras. 1 to 78)

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B010 v. CANADA (CITIZENSHIP AND IMMIGRATION)

B010

Appellant

v.

Minister of Citizenship and Immigration

Respondent

and

**Attorney General of Ontario,
Canadian Association of Refugee Lawyers,
Canadian Council for Refugees,
Amnesty International (Canadian Section, English Branch),
David Asper Centre for Constitutional Rights and
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Interveners

- and -

J.P. and G.J.

Appellants

v.

Minister of Public Safety and Emergency Preparedness

Respondent

and

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Canadian Council for Refugees,
Amnesty International (Canadian Section, English Branch),
David Asper Centre for Constitutional Rights,
United Nations High Commissioner for Refugees and
Canadian Civil Liberties Association**

Intervenors

- and -

B306

Appellant

v.

Minister of Public Safety and Emergency Preparedness

Respondent

and

**Attorney General of Ontario,
Canadian Association of Refugee Lawyers,
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Amnesty International (Canadian Section, English Branch),
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Jesus Rodriguez Hernandez

Appellant

v.

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Interveners

Indexed as: B010 v. Canada (Citizenship and Immigration)

2015 SCC 58

File Nos.: 35388, 35688, 35685, 35677.

2015: February 16; 2015: November 27.

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

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

*Immigration law — Inadmissibility and removal — Organized criminality
— People smuggling — Migrants aided illegal entry of asylum-seekers to Canada in
course of collective flight to safety — Migrants seeking refugee status in Canada but*

found inadmissible based on grounds of organized criminal people smuggling — What conduct makes a person inadmissible to apply for refugee status for having engaged in people smuggling? — Whether people smuggling engaged in, in context of transnational crime, confined to activities conducted, directly or indirectly, for financial or other material benefit — What limits may be inferred from provision rendering persons inadmissible on grounds of organized criminality? — What is effect of requirement that people smuggling be in context of transnational crime? — Immigration and Refugee Protection Act, S.C. 2001, c. 27, s. 37(1)(b).

B010, J.P., G.J., B306 and H (the “migrants”) were all found inadmissible to Canada under s. 37(1)(b) of the *Immigration and Refugee Protection Act* (“IRPA”) on the ground that they had been engaged in organized criminal smuggling. The result of being ruled inadmissible under s. 37(1)(b) is that the refugee claimant is peremptorily excluded from Canada without consideration of his or her claim on the merits. The migrants all say they were simply helping fellow asylum-seekers flee persecution, and were not engaged in people smuggling.

H is a native of Cuba who was accepted as a refugee by the United States. Two years later, he purchased a boat with two others and used it to transport 48 Cubans to the United States without the knowledge of United States authorities. Convicted in the United States of alien smuggling and receiving a deportation order from the United States, he came to Canada and claimed refugee protection.

B010, J.P., G.J., and B306 are among a group of nearly 500 Tamils from Sri Lanka who boarded the cargo ship *Sun Sea* in Thailand. The organizers of the voyage promised to transport them to Canada for sums ranging from \$20,000 to \$30,000 per person. Shortly after departure, the Thai crew abandoned the ship, leaving the asylum-seekers on board to their own devices. Twelve of the migrants took over various duties during the three-month voyage across the Pacific Ocean to Canada. The ship was dilapidated, unsafe and crowded. Food was in short supply and the fear of interception was constant. B010 worked two three-hour shifts in the engine room each day, monitoring the temperature, water and oil level of the equipment. J.P., who was accompanied by his wife G.J., stood lookout, read the GPS and radar, and acted as an assistant navigator during the voyage. B306 volunteered to act as a cook and lookout. He cooked three meals a day for the crew, and used a telescope to spot approaching trawlers and notify the crew so that passengers could be hidden below deck to avoid interception.

The Immigration and Refugee Board (“Board”) found the migrants inadmissible to Canada, on the basis that s. 37(1)(b) of the *IRPA* covers all acts of assistance to illegal migrants and does not require a profit motive. On judicial review to the Federal Court, B010’s application was rejected while the applications of J.P., G.J., B306 and H were allowed. The Federal Court of Appeal rejected B010’s appeal and in the remaining cases, the court allowed the appeals and reinstated the Board’s decisions of inadmissibility.

Held: The appeals should be allowed and the cases remitted to the Board for reconsideration.

Section 37(1)(b) of the *IRPA* performs a gatekeeping function. People who fall within it cannot have their refugee claims determined, regardless of the merits. The respondent Ministers say that the term “people smuggling” in s. 37(1)(b) should be interpreted broadly as barring anyone who knowingly assisted a person to enter a country illegally. The migrants argue for a narrower interpretation that would allow them to have their refugee claims determined in Canada.

Acts committed by people who are not themselves members of criminal organizations, who do not act in knowing furtherance of a criminal aim of such organizations, or who do not organize, abet or counsel serious crimes involving such organizations, do not fall within s. 37(1)(b). The tools of statutory interpretation — plain and grammatical meaning of the words; statutory and international contexts; and legislative intent — all point inexorably to the conclusion that s. 37(1)(b) applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime.

A migrant who aids in his own illegal entry or the illegal entry of other refugees or asylum-seekers in their collective flight to safety is not inadmissible under s. 37(1)(b). Acts of humanitarian and mutual aid (including aid between family members) do not constitute people smuggling under the *IRPA*. To justify a finding of

inadmissibility on the grounds of people smuggling under s. 37(1)(b), the respondent Ministers must establish before the Board that the migrants are people smugglers in this sense. The migrants can escape inadmissibility under s. 37(1)(b) if they merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety.

The interpretation of s. 37(1)(b) of the *IRPA* taken by the Board was not within the range of reasonable interpretations. The migrants were found inadmissible on an erroneous interpretation of s. 37(1)(b) and are entitled to have their admissibility reconsidered on the basis of the interpretation here.

It is unnecessary to consider whether s. 37(1)(b) of the *IRPA* unconstitutionally violates s. 7 of the *Charter* on the basis that s. 37(1)(b) is overbroad in catching migrants mutually aiding one another and humanitarian workers, as the migrants are entitled to a new hearing on the basis of the proper interpretation of s. 37(1)(b). The argument is of no assistance in any event, as s. 7 of the *Charter* is not engaged at the stage of determining admissibility to Canada under s. 37(1).

Cases Cited

Referred to: *R. v. Appulonappa*, 2015 SCC 59; *Hernandez Febles v. Canada (Citizenship and Immigration)*, 2012 FCA 324, [2014] 2 F.C.R. 224, aff'd 2014 SCC 68, [2014] 3 S.C.R. 431; *Alberta (Information and Privacy Commissioner)*

v. Alberta Teachers' Association, 2011 SCC 61, [2011] 3 S.C.R. 654; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401; *United States of America v. Anekwu*, 2009 SCC 41, [2009] 3 S.C.R. 3; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340; *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655.

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Canadian Charter of Rights and Freedoms, ss. 1, 7.

Constitution Act, 1982, s. 52(1).

Criminal Code, R.S.C. 1985, c. C-46, s. 467.1(1) “criminal organization”.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 3, 11(1), 20(1), 34, 35, 36, 37, 41, 42, 44, 99, 101(1)(f), 112, 113, 114, 117, 118, 121, 124(1)(a), 133.

Immigration and Refugee Protection Regulations, SOR/2002-227, ss. 6, 50, 228.

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) “smuggling of migrants”, 6, 11, 19.

Protocol relating to the Status of Refugees, 606 U.N.T.S. 267.

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, art. 14(1).

United Nations Convention against Transnational Organized Crime, 2225 U.N.T.S. 209, arts. 1, 2(a) “organized criminal group”, 3, 5, 34.

Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948), art. 14.

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APPEALS from a judgment of the Federal Court of Appeal (Sharlow, Mainville and Near J.J.A.), 2013 FCA 262, [2014] 4 F.C.R. 371, 451 N.R. 278, 368 D.L.R. (4th) 524, 20 Imm. L.R. (4th) 199, 61 Admin. L.R. (5th) 1, [2013] F.C.J. No. 1236 (QL), 2013 CarswellNat 4158 (WL Can.), setting aside a decision of Mosley J., 2012 FC 1466, [2014] 2 F.C.R. 146, 423 F.T.R. 144, [2012] F.C.J. No. 1648 (QL), 2012 CarswellNat 5628 (WL Can.); a decision of Gagné J., 2012 FC

1282, [2014] 2 F.C.R. 128, 421 F.T.R. 52, 14 Imm. L.R. (4th) 212, [2012] F.C.J. No. 1424 (QL), 2012 CarswellNat 4444 (WL Can.); and a decision of Zinn J., 2012 FC 1417, 422 F.T.R. 159, 13 Imm. L.R. (4th) 175, 45 Admin. L.R. (5th) 267, [2012] F.C.J. No. 1531 (QL), 2012 CarswellNat 4784 (WL Can.). Appeals allowed.

Rod H. G. Holloway and Erica Olmstead, for the appellant B010.

Lorne Waldman, Tara McElroy and Clarisa Waldman, for the appellants J.P. and G.J.

Raoul Boulakia, for the appellant B306.

Ronald Poulton, for the appellant Jesus Rodriguez Hernandez.

Marianne Zoric and François Joyal, for the respondents.

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

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

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

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

Barbara Jackman and Audrey Macklin, for the intervener the David
Asper Centre for Constitutional Rights.

John Terry, Rana R. Khan and Ryan Lax, for the intervener the United
Nations High Commissioner for Refugees.

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

The judgment of the Court was delivered by

THE CHIEF JUSTICE —

I. Introduction

[1] The smuggling of human beings across international frontiers is a matter of increasing concern all over the world. Those who are smuggled pay large sums for what are frequently life-threatening journeys to countries for which they have no documentation or right of entry. Some of these migrants are refugees who have a well-founded fear of persecution in their home country and a right to protection under

Canadian and international law. The smugglers, for their part, cynically prey on these people's desperate search for better lives to enrich themselves without heed to the risks their victims face. The smugglers' activities are often controlled by extensive transnational criminal organizations which Canada and other states seek to combat through multilateral cooperation. Canada is a party to a number of international instruments aimed both at protecting refugees and combatting human smuggling. These commitments are reflected in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("*IRPA*"), and elsewhere in Canadian law.

[2] These appeals concern s. 37(1)(b) of the *IRPA*, which renders a person inadmissible to Canada, and effectively denies that person access to refugee determination procedures, if he or she has engaged in, in the context of transnational crime, activities such as people smuggling, trafficking in persons or money laundering.

[3] The appellants were all found inadmissible to Canada under s. 37(1)(b) of the *IRPA* on the basis of an interpretation that did not require that the conduct leading to inadmissibility be for profit or be connected with an organized criminal operation. Their situations vary. However, all say they were simply helping fellow asylum-seekers flee persecution, and were not engaged in people smuggling.

[4] Three questions arise. First, is "people smuggling" in s. 37(1)(b) confined to activities conducted, "directly or indirectly", for "a financial or other material benefit"? Second, what limits flow from s. 37(1), which provides that a person is

declared inadmissible on the grounds of “organized criminality”? Third, what is the effect of the requirement in s. 37(1)(b) that the smuggling be “in the context of transnational crime”?

[5] I conclude that s. 37(1)(b) of the *IRPA* applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. In coming to this conclusion, I outline the type of conduct that may render a person inadmissible to Canada and disqualify the person from the refugee determination process on grounds of organized criminality. I find, consistently with my reasons in the companion appeal in *R. v. Appulonappa*, 2015 SCC 59, that acts of humanitarian and mutual aid (including aid between family members) do not constitute people smuggling under the *IRPA*.

[6] I would return these matters to the Immigration and Refugee Board (“Board”) for a new hearing in accordance with these reasons.

II. Facts and Judicial History

A. *Facts*

[7] Mr. Hernandez is a native of Cuba who was accepted as a refugee by the United States in 2001. Two years later, he purchased a boat with two others and used it to transport 48 Cubans to the United States without the knowledge of U.S.

authorities. Convicted in the United States of alien smuggling and receiving a deportation order from the U.S., he came to Canada and claimed refugee protection.

[8] B306, J.P., G.J. and B010 are among a group of nearly 500 Tamils from Sri Lanka who boarded the cargo ship *Sun Sea* in Thailand. The organizers of the voyage promised to transport them to Canada for sums ranging from \$20,000 to \$30,000 per person. Shortly after departure, the Thai crew abandoned the ship, leaving the asylum-seekers on board to their own devices. Twelve of the migrants took over various duties during the three-month voyage across the Pacific Ocean to Canada. The ship was dilapidated, unsafe and crowded. Food was in short supply and the fear of interception was constant.

[9] B010 worked two three-hour shifts in the engine room each day, monitoring the temperature, water and oil level of the equipment, without, he says, remuneration or benefit.

[10] J.P., who was accompanied by his wife G.J., stood lookout, read the GPS and radar, and acted as an assistant navigator during the voyage, in return for which he and his wife lived in crew quarters and benefited from more humane conditions than most of the migrants. G.J. was initially ruled inadmissible for consideration as a refugee under s. 42(a) of the *IRPA*, as an accompanying family member of a person ruled inadmissible. She has since been admitted as a refugee to Canada, rendering her appeal in this case moot. However, her husband has been declared inadmissible under s. 37(1)(b) because of his work on the ship, and faces potential deportation.

[11] B306 volunteered to act as a cook and lookout in order to receive better rations because, he asserts, he was hungry and in poor health. He cooked three meals a day for the crew, and used a telescope to spot approaching trawlers and notify the crew so that passengers could be hidden below deck to avoid interception.

[12] The *IRPA* contemplates two streams of refugee claimants — people who apply for refugee status from outside the country and obtain a visa to enter Canada (s. 99(2)); and people who apply from inside Canada (s. 99(3)). The majority of refugee claimants to Canada fall into the first stream. The *Sun Sea* passengers and Mr. Hernandez fell into the second stream.

[13] Migrants in the second stream face deportation under either of two provisions. First, they may be treated as inadmissible under s. 41 of the *IRPA*, and made subject to a conditional removal order pursuant to s. 44. Second, they may be declared inadmissible under s. 37(1)(b) of the *IRPA* on grounds of organized criminal people smuggling.

[14] Most of the *Sun Sea* migrants — 451 of the 492— were ruled inadmissible under s. 41 and issued conditional removal orders. The appellants, however, were dealt with under s. 37(1)(b), on the ground that they had been engaged in organized criminal smuggling. The result of being ruled inadmissible under s. 37(1)(b) is that the refugee claimant is peremptorily excluded from Canada without consideration of his or her claim on the merits: s. 101(1)(f).

B. *Judicial History*

[15] The Board found the appellants inadmissible to Canada, on the basis that s. 37(1)(b) of the *IRPA* covers all acts of assistance to illegal migrants and, in particular, does not require a profit motive. It ruled that Mr. Hernandez was also inadmissible under s. 36(1)(b) (serious criminality) because of his prior conviction in the U.S. of alien smuggling.

[16] On judicial review to the Federal Court, different judges took different views on the scope of s. 37(1)(b). B010's application was rejected (Noël J., 2012 FC 569, [2014], 1 F.C.R. 95), while the applications of J.P. and G.J., B306 and Mr. Hernandez were allowed (Mosley J., 2012 FC 1466, [2014] 2 F.C.R. 146; Gagné J., 2012 FC 1282, [2014] 2 F.C.R. 128; and Zinn J., 2012 FC 1417, 422 F.T.R. 159, respectively).

[17] The cases were appealed to the Federal Court of Appeal, which opted for a broad view of the activity caught by s. 37(1)(b). B010's appeal was rejected (Evans, Dawson and Stratas JJ.A., 2013 FCA 87, [2014] 4 F.C.R. 326) on the ground that s. 37(1)(b) catches all acts of assistance to undocumented migrants, and in particular, does not require that the activity be conducted for financial or other material benefit. Taking the same broad view of s. 37(1)(b) in the remaining cases, the court (Sharlow, Mainville, and Near JJ.A., 2013 FCA 262, [2014] 4 F.C.R. 371) allowed the appeals and reinstated the Board's decisions of inadmissibility.

III. The Issues

[18] The main issue in these appeals is what conduct makes a person inadmissible to apply for refugee status for having engaged in people smuggling under s. 37(1)(b) of the *IRPA*. Is it any and all assistance to undocumented migrants to Canada, as the respondent Minister of Citizenship and Immigration and the respondent Minister of Public Safety and Emergency Preparedness (collectively referred to as “the Ministers”) contend? Or is the prohibited range of conduct narrower, as the appellants contend? If so, precisely what is the range of conduct caught by s. 37(1)(b)?

[19] The answer to this latter question depends on the answer to three more particular questions. First, is “people smuggling” in s. 37(1)(b) of the *IRPA* limited to activity that is done “in order to obtain, directly or indirectly, a financial or other material benefit”? Second, what limits may be inferred from s. 37(1), which provides that a person is declared inadmissible on the grounds of “organized criminality”? Third, what is the effect of the requirement in s. 37(1)(b) that the smuggling be “in the context of transnational crime”?

[20] If s. 37(1)(b) applies broadly to any assistance to undocumented migrants, as the Federal Court of Appeal held, a further issue arises: Does s. 37(1)(b) violate s. 7 of the *Canadian Charter of Rights and Freedoms* in a manner that is not justified under s. 1, with the result that it is unconstitutional? Related to this is

whether s. 7 of the *Charter* is properly engaged at the stage of determining admissibility as a refugee.

[21] A final issue arises from B306's assertion that his conduct is non-culpable because of duress and necessity.

IV. Discussion

A. *Standard of Review*

[22] The parties disagree as to the standard of review applicable to the Board's decision.

[23] There are potentially two issues to which the standard of review may be relevant: (1) the statutory interpretation of s. 37(1)(b) of the *IRPA*; and (2) the Board's application of s. 37(1)(b). This case turns on the statutory interpretation of the provision, which is determinative.

[24] Recent decisions in the Federal Court of Appeal have taken different views on whether questions of statutory interpretation involving consideration of international instruments should attract review on the standard of correctness or of reasonableness. In *Hernandez Febles v. Canada (Citizenship and Immigration)*, 2012 FCA 324, [2014] 2 F.C.R. 224, at paras. 22-25, the court applied a correctness

standard; while in B010's appeal, now before us, the court concluded that reasonableness was the appropriate standard.

[25] This being the home statute of the tribunal and Ministers, there is a presumption that the standard of review is reasonableness: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 34. The question is whether this presumption has been displaced in the appeals before us.

[26] We find it unnecessary to resolve this issue on these appeals. In our view, for the reasons discussed below, the interpretation of s. 37(1)(b) of the *IRPA* taken by the Board and supported by the Ministers was not within the range of reasonable interpretations.

B. *The Conduct Captured by Section 37(1)(b)*

[27] At the relevant time, s. 37(1)(b) provided as follows:

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

...

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

37. (1) [Activités de criminalité organisée] Emportent interdiction de territoire pour criminalité organisée les faits suivants :

...

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

In my view, there is no important difference between the English and French versions. (See relevant *IRPA* provisions set out in Appendix A.)

[28] Section 37(1)(b) of the *IRPA* performs a gatekeeping function. People who fall within it cannot have their refugee claims determined, regardless of the merits. The respondents say that the term “people smuggling” in s. 37(1)(b) should be interpreted broadly as barring anyone who knowingly assisted a person to enter a country illegally. This would catch the appellants, who argue for a narrower interpretation that would allow them to have their refugee claims determined in Canada.

[29] The range of conduct captured by s. 37(1)(b) of the *IRPA* is a matter of statutory interpretation. The modern rule of statutory interpretation requires us to read “the words of an Act . . . in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: R. Sullivan, *Sullivan on the Construction of Statutes* (6th ed. 2014), at p. 7; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26.

(1) The Words of Section 37(1)(b) Read in Their Ordinary and Grammatical Sense

[30] The starting point for the interpretation of s. 37(1)(b) is the ordinary and grammatical sense of the words used. At this point, the question is what the ordinary and grammatical sense of the words suggests on two questions: whether s. 37(1)(b) is confined to activity directed at “financial or other material benefit”; and what limits may be inferred from the phrases “on grounds of organized criminality” and “in the context of transnational crime”.

[31] Under the marginal note “Organized criminality”, s. 37(1) provides that “a foreign national is inadmissible on grounds of organized criminality for . . . (b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering”.

[32] The meaning of each of these phrases must be considered.

[33] I begin with the ordinary and grammatical meaning of “people smuggling”. The appellants argue that the ordinary meaning of this phrase involves a financial or other benefit to the smuggler. I do not agree. There is no express mention in s. 37(1)(b) of a profit motive and I cannot find a financial benefit requirement on the ordinary and grammatical meaning of the words alone.

[34] I turn next to the ordinary and grammatical meaning of “organized criminality”. While the phrase “organized crime” is generally understood as involving a profit motive, the phrase “organized criminality” is arguably broad enough to include organized criminal acts for non-pecuniary motives, such as terrorism or sexual exploitation.

[35] This leaves the ordinary and grammatical sense of the phrase “in the context of transnational crime”. The meaning of this phrase is arguably broader than that of “organized criminality”. First, the words “in the context of” suggest that a loose connection to transnational crime may suffice. Second, the phrase “transnational crime” is arguably broader than “transnational *organized* crime”. However, when the words “in the context of transnational crime” are read together with the words “organized criminality” with a view to finding a harmonious meaning for s. 37(1)(b) as a whole, it becomes clear that “transnational crime” in s. 37(1)(b), construed in its ordinary and grammatical sense, refers to organized transnational crime. Since the provision renders people inadmissible on grounds of “organized criminality”, the words “transnational crime” cannot be read as including non-organized individual criminality. In summary, the words of s. 37(1)(b), read in their ordinary and grammatical sense, suggest that the provision applies to acts of illegally bringing people into Canada, if that act is connected to transnational organized criminal activity.

(2) The Statutory Context of Section 37(1)(b)

[36] Reference to the ordinary grammatical sense of the words used is only the first step in the statutory interpretation of s. 37(1)(b). A statutory provision should be interpreted in its entire context and harmoniously with the scheme of the legislation. As we will see, the broader statutory context of s. 37(1)(b) suggests that the provision targets organized criminal activity in people smuggling for financial or other material benefit, and not asylum-seekers rendering each other mutual assistance.

[37] The first contextual consideration is the relationship between s. 37(1)(b) and the rest of s. 37(1). Subsection (1) introduces the concept of inadmissibility on grounds of organized criminality. Paragraphs (a) and (b) are instances of organized criminality. Section 37(1)(a) makes membership in criminal organizations one ground of inadmissibility, while s. 37(1)(b) makes “engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering” another. Read in the context of s. 37(1) as a whole, it is clear that the focus of s. 37(1)(b), like that of s. 37(1)(a), is organized criminal activity.

[38] The second consideration is the relationship between inadmissibility for people smuggling under s. 37(1)(b) and other grounds of inadmissibility under the *IRPA*. The respondents argue that interpreting “people smuggling” to require a financial or other material benefit requirement fails to catch smuggling undertaken for other nefarious purposes, such as sexual exploitation or terrorism. Confining s. 37(1)(b) to financial or other material benefit will thus leave a gap in the statutory scheme, they argue. This contention overlooks other inadmissibility provisions in the

IRPA. A person whose admission is not barred by s. 37(1)(b) may nevertheless be denied entry to Canada on grounds of national security (s. 34); human or international rights violations (s. 35); serious criminality (s. 36(1)); and criminality *simpliciter* (s. 36(2)).

[39] A third contextual consideration is the relationship between s. 37(1)(b) and the related offence provision in s. 117. As I explain in *Appulonappa* (released concurrently), the language of s. 117 is broad enough to catch anyone who assists an undocumented person to enter Canada. The respondents in these appeals in effect suggest that the narrower language of s. 37(1)(b) should be “read up” to mirror the broad language of s. 117, as was done by the Board and the Federal Court of Appeal.

[40] I cannot agree. In *Appulonappa*, I conclude that the broad scope of s. 117(1) exceeds Parliament’s purpose, rendering it overbroad and to this extent unconstitutional. A provision that is unconstitutionally overbroad cannot be used to widen a narrower provision. In any event, where Parliament has placed specific limits within a provision, these cannot be ignored on the ground that Parliament has cast a different provision more broadly.

[41] A fourth contextual consideration is the definition of “criminal organization” in s. 467.1(1) of the *Criminal Code*, R.S.C. 1985, c. C-46. The *Criminal Code* definition of “criminal organization” expressly requires a financial or other material benefit:

“criminal organization” means a group, however organized, that

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

(b) has as one of its main purposes or main activities the facilitation or commission of one or more serious offences that, if committed, would likely result in the direct or indirect receipt of a material benefit, including a financial benefit, by the group or by any of the persons who constitute the group.

It does not include a group of persons that forms randomly for the immediate commission of a single offence.

[42] While “organized criminality” and “criminal organization” are not identical phrases, they are logically and linguistically related and, absent countervailing considerations, should be given a consistent interpretation.

[43] The legislative history of s. 37(1)(b) of the *IRPA* and the *Criminal Code*’s definition of “criminal organization”, strongly supports this conclusion. Both provisions were enacted in anticipation of Canada’s obligations under the *United Nations Convention against Transnational Organized Crime*, 2225 U.N.T.S. 209 (generally known, and referred to here, as the “*Palermo Convention*”). As explained below, the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, 2241 U.N.T.S. 480 (“*Smuggling Protocol*”), is one of three protocols under this convention. (See relevant provisions in Appendix B.)

[44] The *Criminal Code* definition of “criminal organization” was amended in 2001 by Bill C-24, *An Act to amend the Criminal Code (organized crime and law*

enforcement) and to make consequential amendments to other Acts, S.C. 2001, c. 32.

On second reading of the bill in the House of Commons, the Minister of Justice at the time, the Hon. Anne McLellan, explained that the new definition reflected Canada's signature of the *Palermo Convention* (which was not then in force): *House of Commons Debates*, vol. 137, No. 046, 1st Sess., 37th Parl., April 23, 2001, at p. 2954. See also R.J. Currie and J. Rikhof, *International & Transnational Criminal Law* (2nd ed. 2013), at pp. 345-46.

[45] Similarly, s. 37(1)(b) of the *IRPA* was enacted in 2001 to deal with organized criminality in people smuggling and related activities pursuant to Canada's obligations under the *Palermo Convention* and the related *Smuggling Protocol*. As the Assistant Deputy Minister, Citizenship and Immigration, Joan Atkinson put it at the time, s. 37(1) introduced "new inadmissibility provisions specifically directed at that form of organized crime": House of Commons, Standing Committee on Citizenship and Immigration, *Evidence*, No. 3, 1st Sess., 37th Parl., March 13, 2001, at 10:40 (online).

[46] Thus the apparent similarity between the *IRPA* concept of "organized criminality" and the *Criminal Code* concept of "criminal organization" is no coincidence. Both provisions were enacted to give effect to the same international regime for the suppression of transnational crimes such as people smuggling. Section 37(1)(b) should be interpreted harmoniously with the *Criminal Code*'s definition of "criminal organization" as involving a material, including financial, benefit.

(3) The International Context of Section 37(1)(b)

(a) *International Law as Context: General Relevance*

[47] This Court has previously explained that the values and principles of customary and conventional international law form part of the context in which Canadian laws are enacted: *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, at para. 53. This follows from the fact that to interpret a Canadian law in a way that conflicts with Canada's international obligations risks incursion by the courts in the executive's conduct of foreign affairs and censure under international law. The contextual significance of international law is all the more clear where the provision to be construed "has been enacted with a view towards implementing international obligations": *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at p. 1371. That is the case with the *IRPA*, the refugee protection aspects of which serve principally to discharge Canada's obligations under the 1951 *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150, and its 1967 *Protocol relating to the Status of Refugees*, 606 U.N.T.S. 267 (together the "*Refugee Convention*"), but also, as explained below, Canada's obligations under the *Smuggling Protocol*.

[48] In keeping with the international context in which Canadian legislation is enacted, this Court has repeatedly endorsed and applied the interpretive presumption that legislation conforms with the state's international obligations: see, e.g., *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at pp. 409-10; *Ordon Estate v. Grail*, [1998] 3

S.C.R. 437, at paras. 128-31; *GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 39; *United States of America v. Anekwu*, 2009 SCC 41, [2009] 3 S.C.R. 3, at para. 25; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281, at para. 34; *Thibodeau v. Air Canada*, 2014 SCC 67, [2014] 3 S.C.R. 340, at para. 113. This interpretive presumption is not peculiar to Canada. It is a feature of legal interpretation around the world. See generally A. Nollkaemper, *National Courts and the International Rule of Law* (2011), at ch. 7.

[49] These principles, derived from the case law, direct us to relevant international instruments at the context stage of statutory interpretation. Furthermore, two interpretive provisions from s. 3 of the *IRPA* make Parliament's presumed intent to conform to Canada's international obligations explicit. Section 3(2)(b) expressly identifies one of the statute's objectives as "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". Similarly, s. 3(3)(f) instructs courts to construe and apply the *IRPA* in a manner that "complies with international human rights instruments to which Canada is signatory" (see *de Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436, [2006] 3 F.C.R. 655, at paras. 82-83 and 87). There can be no doubt that the *Refugee Convention* is such an instrument, building as it does on the right of persons to seek and to enjoy asylum from persecution in other countries as set out in art. 14 of the *Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

[50] I conclude that it is appropriate to consider the relevant international instruments in interpreting s. 37(1)(b): the *Palermo Convention* and its protocols, and the *Refugee Convention*.

(b) *The Palermo Convention and Its Protocols*

[51] In addition to the international context of Canadian legislation generally, and of the *IRPA* in particular, s. 37(1)(b) finds its origin in international law, namely the *Palermo Convention* and the related *Smuggling Protocol*. The *Palermo Convention* was opened for signature in December 2000, together with two supplementing protocols, the *Smuggling Protocol* and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, 2237 U.N.T.S. 319 (the “*Human Trafficking Protocol*”). (A third protocol, concerning the illicit manufacturing of and trafficking in firearms, was adopted later but has no bearing on these appeals.) A key distinction between the *Smuggling Protocol* and the *Human Trafficking Protocol* lies in the concepts of coercion and consent. The latter protocol defines human trafficking as involving threats or use of force, abduction, deception, fraud or other forms of coercion against the trafficked person. By contrast, the *Smuggling Protocol* applies to cases where the smuggler and the smuggled agree that the former will procure the latter’s illegal entry into a state, in consideration of a financial or other material benefit. While the lines between trafficking and smuggling may sometimes blur, the presence or absence of consent remains an organizing principle of the two *Palermo Convention* protocols.

[52] Article 6(1)(a) of the *Smuggling Protocol* requires states parties to adopt measures to establish migrant smuggling as a criminal offence, defined as 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). The term “financial or other material benefit” is also found in the definition of “organized criminal group” in art. 2(a) of the *Palermo Convention*.

[53] Both the *Palermo Convention* and its two original protocols were drafted with a view to the need of states parties to meet their obligations under the earlier *Refugee Convention*. This is specifically reflected in art. 19(1) of the *Smuggling Protocol*, the “saving clause”, which provides as follows:

1. Nothing in this 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 and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

(See also art. 14(1) of the *Human Trafficking Protocol*.)

[54] The *IRPA* was enacted soon after the adoption of the *Palermo* regime, in the drafting of which Canada played an active role. This timing suggests that Parliament had these instruments in mind when it enacted s. 37(1)(b). The parliamentary record supports this inference. As Assistant Deputy Minister Atkinson

said in explaining s. 37 before the House of Commons Standing Committee on Citizenship and Immigration:

Clause 37 deals with organized criminality. I would point out paragraph 37(1)(b), which is new. That is organized criminality:

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

So those are new inadmissibility provisions specifically directed at that form of organized crime.

(*Evidence*, No. 3, 1st Sess. 37th Parl., March 13, 2001, at 10:40 (online))

[55] Section 37(1)(b)'s express mention of the three activities of (a) people smuggling, (b) trafficking in persons, and (c) money laundering, indisputably refers to the *Palermo Convention* and its two protocols. Money laundering is addressed in the *Palermo Convention* itself, while its protocols target the other two activities.

[56] In summary, it is clear that s. 37(1)(b) must be read against the backdrop of Canada's commitment to combatting criminal activity related to people smuggling.

(c) *The Refugee Convention*

[57] Article 31(1) of the *Refugee Convention* provides:

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.

The import of this prohibition for domestic admissibility provisions is clear. As A.T. Gallagher and F. David put it, “an individual cannot be denied refugee status — or, most important, the opportunity to make a claim for such status through fair assessment procedures — solely because of the way in which that person sought or secured entry into the country of destination”: *The International Law of Migrant Smuggling* (2014), at p. 165. Obstructed or delayed access to the refugee process is a “penalty” within the meaning of art. 31(1) of the *Refugee Convention: ibid.*, at pp. 163-64.

[58] It is undisputable that just as s. 37(1)(b) must be read against the backdrop of Canada’s international commitments to combat organized criminal people smuggling and related activities, it must also be read in a way that is consistent with the *Refugee Convention*.

[59] Having introduced the relevant international instruments, I now turn to what light they shed on the interpretive issues arising from s. 37(1)(b) — first, whether s. 37(1)(b) requires activity directed at financial or other material benefit; and second, what conduct, more generally, is caught by s. 37(1)(b).

(d) *Financial or Other Material Benefit: Perspective From the International Instruments*

[60] The *Smuggling Protocol* defines migrant smuggling as the procurement of illegal entry “in order to obtain, directly or indirectly, a financial or other material benefit”. The purpose of including financial or other material benefit as part of the definition of migrant smuggling is explained in the interpretive notes to art. 6:

The reference to “a financial or other material benefit” as an element of the offences set forth in paragraph 1 was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties. It was not the intention of the protocol to criminalize the activities of family members or support groups such as religious or nongovernmental organizations.

(United Nations Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (2006), at p. 489).

As noted by Gallagher and David: “The relevant Interpretative Notes to the Protocol affirm that it was not the intention of the Protocol to criminalize the activities of family members or support groups such as religious or nongovernmental organizations” (p. 366). It thus “seems reasonably clear that certain benefits that may accrue from being involved in migrant smuggling, such as family reunification and safety, do not constitute ‘material’ benefits”: *ibid.*.

[61] The *Refugee Convention* supports the same conclusion.

[62] Article 31(1) of the *Refugee Convention* prohibits states parties from penalizing refugees on account of their illegal entry. To interpret s. 37(1)(b) as

omitting a financial or other benefit limitation would appear inconsistent with this rule.

[63] The respondents contend that art. 31(1) of the *Refugee Convention* refers only to criminal penalties. This interpretation runs counter to the purpose of art. 31(1) and the weight of academic commentary: J.C. Hathaway, *The Rights of Refugees Under International Law* (2005), at pp. 409-12; Gallagher and David, at pp. 164-68; G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd ed. 2007), at p. 266. The generally accepted view is that denying a person access to the refugee claim process on account of his illegal entry, or for aiding others to enter illegally in their collective flight to safety, is a “penalty” within the meaning of art. 31(1). The law recognizes the reality that refugees often flee in groups and work together to enter a country illegally. Article 31(1) thus does not permit a state to deny refugee protection (or refugee determination procedures) to refugees solely because they have aided others to enter illegally in an unremunerated, collective flight to safety. Rather, it targets those who assist in obtaining illegal entry for financial or other material benefit.

[64] Article 5 of the *Palermo Convention* provides further assistance in understanding the conduct targeted by s. 37(1)(b).

[65] Informed by the *Palermo Convention*, the phrase “in the context of transnational crime”, under s. 37(1)(b), of the *IRPA* captures the acts of (1) participating in the group’s actual criminal activities with knowledge the group has a

criminal aim (art. 5(1)(a)(ii)a); (2) participating in non-criminal acts of the group, with knowledge that the acts will further the group's criminal aim (art. 5(1)(a)(ii)b); or (3) organizing, abetting or counselling a serious crime involving the organized criminal group (art. 5(1)(b)).

[66] This supports the view that acts committed by people who are not themselves members of criminal organizations, who do not act in knowing furtherance of a criminal aim of such organizations, or who do not organize, abet or counsel serious crimes involving such organizations, do not fall within s. 37(1)(b).

(4) Harmonious Reading With the Intention of Parliament

[67] Finally, I come to the requirement that we interpret s. 37(1)(b) harmoniously with the intention of Parliament. In this case, Parliament's intention is gleaned mainly from the considerations that have already been discussed — the words of the provision, the legislative scheme and the context. The question at this point is whether there is other evidence that may point to a different intention on the part of Parliament.

[68] If Parliament, in enacting s. 37(1)(b) in 2001, intended to erase the distinction between those who act for financial or material benefit and those who act for humanitarian purposes or give mutual assistance, one might expect some sign of this in the parliamentary record. But the record reveals no evidence that Parliament sought to ignore this distinction or to target conduct unconnected to transnational

organized crime. Rather, the record supports the view that Parliament understood “people smuggling” in the sense that “migrant smuggling” is used in the *Smuggling Protocol*. There is nothing in the parliamentary record suggesting that Parliament sought to adopt a broader definition of people smuggling. Indeed, the Minister of the day expressly referred to the *Palermo Convention* and the *Smuggling Protocol* in her evidence on the new *IRPA* provisions before the Standing Committee on Citizenship and Immigration, without suggesting an intention to depart from the “financial or other material benefit” limitation (see *Evidence*, No. 2, 1st Sess., 37th Parl., March 1, 2001, at 9:30 to 9:35 (online)).

[69] In addressing s. 117 of what became the *IRPA* (considered in *Appulonappa*) before the Standing Committee on Citizenship and Immigration, Assistant Deputy Minister Atkinson testified that the bill did not seek to impose penalties on those who helped refugees come to Canada or those who engaged in smuggling for humanitarian reasons. Discretion (it was said) was conferred on the Attorney General under s. 117(4) as a safeguard to protect from prosecution those seeking to aid refugees on humanitarian grounds: Standing Committee on Citizenship and Immigration, *Evidence*, No. 9, 1st Sess., 37th Parl., April 5, 2001, at 10:50 (online); and *Evidence*, No. 27, 1st Sess., 37th Parl., May 17, 2001, at 10:35 to 10:40 (online). While s. 37(1)(b) was not directly addressed, those statements suggest that it was not Parliament’s intent to render refugees inadmissible under s. 37(1)(b) solely for providing mutual assistance to others in the course of their own illegal entry.

[70] To adopt the interpretation of s. 37(1)(b) urged by the Ministers would lead to anomalous and unintended consequences.

[71] It is well established that Parliament should be presumed not to intend absurd results when it enacts legislation. Take, for example, the scenario proposed by B010 involving a family fleeing persecution, where the mother arranges to procure false travel documents, the father pays for the documents, and the daughter hides the documents as they flee their home (A.F., at para. 59). Upon arrival in Canada, they promptly disclose that their travel documents were false, and claim asylum. Without a financial or material benefit component, each family member has engaged in “people smuggling” and is inadmissible under s. 37(1)(b). As B010 phrases it, “[w]ithout the financial benefit requirement, it is not possible to differentiate the ‘smuggler’ from the ‘smuggled’” (*ibid.*, at para. 60). The absurdity flows, in part, from the fact that, if each family member had procured, purchased, and concealed their own travel documents, without providing any mutual aid, it is undisputed that s. 37(1)(b) would not apply. Similarly, if a single person rather than a family arrived under the same circumstances, he or she would not be inadmissible.

(5) Conclusion on Section 37(1)(b) as Applied to These Cases

[72] The wording of s. 37(1)(b), its statutory and international contexts, and external indications of the intention of Parliament all lead to the conclusion that this provision targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. To

justify a finding of inadmissibility against the appellants on the grounds of people smuggling under s. 37(1)(b), the Ministers must establish before the Board that the appellants are people smugglers in this sense. The appellants can escape inadmissibility under s. 37(1)(b) if they merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety.

C. *The Defences of Duress and Necessity*

[73] B306 argues that in the event he is found to fall within s. 37(1)(b), he should be able to raise the criminal law defences of duress and necessity. The Ministers conceded that the defences are available in principle. However, I prefer not to decide the issue, in the absence of full argument on how these defences would fit into the scheme of s. 37(1)(b) as construed in these reasons. This said, I agree with the Federal Court of Appeal that there is no substance to B306's claim that the Board failed to consider B306's defences of duress and necessity.

D. *The Constitutionality of Section 37(1)(b) Under Section 7 of the Charter*

[74] The appellants argue in the alternative that s. 37(1)(b) of the *IRPA* unconstitutionally violates s. 7 of the *Charter* on the basis that s. 37(1)(b) is overbroad in catching migrants mutually aiding one another and humanitarian workers. As a result, they submit that s. 37(1)(b) is of no force or effect under s. 52(1) of the *Constitution Act, 1982*, to the extent it catches these groups. I have concluded that the appellants are entitled to a new hearing on the basis of the proper

interpretation of s. 37(1)(b). Therefore, I find it unnecessary to consider the appellants' constitutional challenge.

[75] The argument is of no assistance in any event, as s. 7 of the *Charter* is not engaged at the stage of determining admissibility to Canada under s. 37(1). This Court recently held in *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431, that a determination of exclusion from refugee protection under the *IRPA* did not engage s. 7, because “even if excluded from refugee protection, the appellant is able to apply for a stay of removal to a place if he would face death, torture or cruel and unusual treatment or punishment if removed to that place” (para. 67). It is at this subsequent pre-removal risk assessment stage of the *IRPA*'s refugee protection process that s. 7 is typically engaged. The rationale from *Febles*, which concerned determinations of “exclusion” from refugee status, applies equally to determinations of “inadmissibility” to refugee status under the *IRPA*.

V. Conclusion

[76] The tools of statutory interpretation — plain and grammatical meaning of the words; statutory and international contexts; and legislative intent — all point inexorably to the conclusion that s. 37(1)(b) applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. I conclude that a migrant who aids in his own illegal entry or the illegal entry of other refugees or asylum-seekers in their collective flight to safety is not inadmissible under s. 37(1)(b).

[77] The appellants were found inadmissible on an erroneous interpretation of s. 37(1)(b). They are entitled to have their admissibility reconsidered on the basis of the interpretation set out in these reasons. I would therefore allow their appeals and remit their cases for reconsideration by the Board. Mr. Hernandez, who was also found inadmissible under s. 36(1)(b), did not contest that finding in these proceedings, and this judgment does not disturb the Board's determination of that matter.

[78] The appeals are allowed with costs here and in the courts below.

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.

11. (1) [Application before entering Canada] A foreign national must, before entering Canada, apply to an officer for a visa or for any other document required by the regulations. The visa or document may be

issued if, following an examination, the officer is satisfied that the foreign national is not inadmissible and meets the requirements of this Act.

20. (1) [Obligation on entry] Every foreign national, other than a foreign national referred to in section 19, who seeks to enter or remain in Canada must establish,

(a) to become a permanent resident, that they hold the visa or other document required under the regulations and have come to Canada in order to establish permanent residence; and

(b) to become a temporary resident, that they hold the visa or other document required under the regulations and will leave Canada by the end of the period authorized for their stay.

36. (1) [Serious criminality] A permanent resident or a foreign national is inadmissible on grounds of serious criminality for

(a) having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, or of an offence under an Act of Parliament for which a term of imprisonment of more than six months has been imposed;

(b) having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or

(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

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.

41. [Non-compliance with Act] A person is inadmissible for failing to comply with this Act

(a) in the case of a foreign national, through an act or omission which contravenes, directly or indirectly, a provision of this Act; . . .

42. [Inadmissible family member] A foreign national, other than a protected person, is inadmissible on grounds of an inadmissible family member if

(a) their accompanying family member or, in prescribed circumstances, their non-accompanying family member is inadmissible; . . .

44. (1) [Preparation of report] An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

(2) [Referral or removal order] If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

(3) [Conditions] An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

Claim for Refugee Protection

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

(2) [Claim outside Canada] A claim for refugee protection made by a person outside Canada must be made by making an application for a visa as a Convention refugee or a person in similar circumstances, and is governed by Part 1.

(3) [Claim inside Canada] A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

PRE-REMOVAL RISK ASSESSMENT

Protection

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

(2) [Exception] Despite subsection (1), a person may not apply for protection if

(a) they are the subject of an authority to proceed issued under section 15 of the *Extradition Act*;

(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;

(c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or

(d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

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

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

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

(d) is named in a certificate referred to in subsection 77(1).

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

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

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

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

114. (1) [Effect of decision] A decision to allow the application for protection has

(a) in the case of an applicant not described in subsection 112(3), the effect of conferring refugee protection; and

(b) in the case of an applicant described in subsection 112(3), the effect of staying the removal order with respect to a country or place in respect of which the applicant was determined to be in need of protection.

(2) [Cancellation of stay] If the Minister is of the opinion that the circumstances surrounding a stay of the enforcement of a removal order

have changed, the Minister may re-examine, in accordance with paragraph 113(d) and the regulations, the grounds on which the application was allowed and may cancel the stay.

(3) [Vacation of determination] If the Minister is of the opinion that a decision to allow an application for protection was obtained as a result of directly or indirectly misrepresenting or withholding material facts on a relevant matter, the Minister may vacate the decision.

(4) [Effect of vacation] If a decision is vacated under subsection (3), it is nullified and the application for protection is deemed to have been rejected.

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.

General Offences

124. (1) [Contravention of Act] Every person commits an offence who

(a) contravenes a provision of this Act for which a penalty is not specifically provided or fails to comply with a condition or obligation imposed under this Act;

Prosecution of Offences

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.

Immigration and Refugee Protection Regulations, SOR/2002-227 (version in force at time)

6. [Permanent resident] A foreign national may not enter Canada to remain on a permanent basis without first obtaining a permanent resident visa.

Documents Required

50. (1) [Documents — permanent residents] In addition to the permanent resident visa required of a foreign national who is a member of a class referred to in subsection 70(2), a foreign national seeking to become a permanent resident must hold

(a) a passport, other than a diplomatic, official or similar passport, that was issued by the country of which the foreign national is a citizen or national;

(b) a travel document that was issued by the country of which the foreign national is a citizen or national;

(c) an identity or travel document that was issued by a country to non-national residents, refugees or stateless persons who are unable to obtain a passport or other travel document from their country of citizenship or nationality or who have no country of citizenship or nationality;

(d) a travel document that was issued by the International Committee of the Red Cross in Geneva, Switzerland, to enable and facilitate emigration;

(e) a passport or travel document that was issued by the Palestinian Authority;

(f) an exit visa that was issued by the Government of the Union of Soviet Socialist Republics to its citizens who were compelled to relinquish their Soviet nationality in order to emigrate from that country;

(g) a British National (Overseas) passport that was issued by the Government of the United Kingdom to persons born, naturalized or registered in Hong Kong; or

(h) a passport that was issued by the Government of Hong Kong Special Administrative Region of the People's Republic of China.

(2) [Exception — protected persons] Subsection (1) does not apply to a person who is a protected person within the meaning of subsection 95(2) of the Act and holds a permanent resident visa when it is not possible for the person to obtain a passport or an identity or travel document referred to in subsection (1).

228. (1) [Subsection 44(2) of the Act — foreign nationals] For the purposes of subsection 44(2) of the Act, and subject to subsections (3) and (4), if a report in respect of a foreign national does not include any grounds of inadmissibility other than those set out in the following circumstances, the report shall not be referred to the Immigration Division and any removal order made shall be

(a) if the foreign national is inadmissible under paragraph 36(1)(a) or (2)(a) of the Act on grounds of serious criminality or criminality, a deportation order;

(b) if the foreign national is inadmissible under paragraph 40(1)(c) of the Act on grounds of misrepresentation, a deportation order;

(c) if the foreign national is inadmissible under section 41 of the Act on grounds of

(i) failing to appear for further examination or an admissibility hearing under Part 1 of the Act, an exclusion order,

(ii) failing to obtain the authorization of an officer required by subsection 52(1) of the Act, a deportation order,

(iii) failing to establish that they hold the visa or other document as required under section 20 of the Act, an exclusion order,

(iv) failing to leave Canada by the end of the period authorized for their stay as required by subsection 29(2) of the Act, an exclusion order, or

(v) failing to comply with subsection 29(2) of the Act to comply with any condition set out in section 184, an exclusion order; and

(d) if the foreign national is inadmissible under section 42 of the Act on grounds of an inadmissible family member, the same removal order as was made in respect of the inadmissible family member.

(2) [Subsection 44(2) of the Act — permanent residents] For the purposes of subsection 44(2) of the Act, if a removal order is made against a permanent resident who fails to comply with the residency obligation under section 28 of the Act, the order shall be a departure order.

(3) [Eligible claim for refugee protection] If a claim for refugee protection is made and the claim has been determined to be eligible to be referred to the Refugee Protection Division or no determination has been made, a departure order is the applicable removal order in the circumstances set out in any of subparagraphs (1)(c)(i) and (iii) to (v).

(4) [Reports in respect of certain foreign nationals] For the purposes of subsection (1), a report in respect of a foreign national does not include a report in respect of a foreign national who

(a) is under 18 years of age and not accompanied by a parent or an adult legally responsible for them; or

(b) is unable, in the opinion of the Minister, to appreciate the nature of the proceedings and is not accompanied by a parent or an adult legally responsible for them.

APPENDIX B

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

Article 31

REFUGEES UNLAWFULLY IN THE COUNTRY OF REFUGEE

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

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 2. Use of terms

For the purposes of this Convention:

(a) "Organized criminal group" shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

Article 3. Scope of application

1. This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:

(a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and

(b) Serious crime as defined in article 2 of this Convention;

where the offence is transnational in nature and involves an organized criminal group.

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.

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.

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.

Article 11. Border measures

1. Without prejudice to international commitments in relation to the free movement of people, States Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of migrants.

...

5. Each State Party shall consider taking measures that permit, in accordance with its domestic law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Protocol.

Article 19. Saving clause

1. Nothing in this 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 and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.

2. The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are the object of conduct set forth in article 6 of this Protocol. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination.

Appeals allowed with costs.

Solicitors for the appellant B010: Legal Services Society, Vancouver.

*Solicitors for the appellants J.P and G.J.: Waldman & Associates,
Toronto.*

Solicitor for the appellant B306: Raoul Boulakia, Toronto.

*Solicitors for the appellant Jesus Rodriguez Hernandez: Poulton Law
Office, Toronto.*

Solicitor for the respondents: Attorney General of Canada, Toronto.

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

*Solicitors for the intervener the Canadian Association of Refugee
Lawyers: University of Ottawa, Ottawa; Refugee Law Office, Toronto.*

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

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 David Asper Centre for Constitutional Rights: Jackman Nazami & Associates, Toronto; University of Toronto, Toronto.

Solicitors for the intervener the United Nations High Commissioner for Refugees: Torys, Toronto; UNHCR, Toronto.

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