IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Appulonappa,*
2013 BCSC 31

Date: 20130111

Docket: 25796

Registry: Vancouver

Regina

v.

Francis Anthonimuthu Appulonappa

Hamalraj Handasamy

Jeyachandran Kanagarajah

Vignarajah Thevarajah

[CONTENT REDACTED]

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment on *Voir Dire*

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Place and Date of Hearing: Vancouver, B.C.

November 13-15,

November 28-30, 2012

Place and Date of Judgment: Vancouver, B.C.

January 11, 2013

EXECUTIVE SUMMARY

[1] This Executive Summary of the full decision which follows is prepared for the purpose of enabling a shorter oral reading in Court. The full written decision commences immediately after this summary.

[2] In this application, the accused apply under s. 7 of the *Charter of Rights and Freedoms* for an order declaring that s. 117 of the *Immigration and Refugee Protection Act* (*IRPA*) infringes s. 7 of the *Charter*.

[3] Section 117, as it existed at the time of the alleged offence in this matter, reads as follows:

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

[4] The accused argue that since s. 117 attempts to criminalize any person who commits any of the acts referred to in this section, it casts too wide a net. Inadvertently, it captures the acts of certain categories of persons (humanitarian workers and close family members), and conduct, which the Crown agrees are not intended to be prosecuted under the section, and which the government has no intention of prosecuting under the section. The section is therefore vague and/or overbroad and inconsistent with principles of fundamental justice.

[5] The Crown argues that the section is not vague and overbroad, and is consistent with Canada's legitimate goals and international obligations to combat the offence of human smuggling.

[6] Canada is a signatory to various international instruments.

[7] Those instruments include a definition of "smuggling of migrants" which includes "a financial or other material benefit" as an element.

[8] That definition of "human smuggling" is a minimum negotiated standard.

[9] That international definition of "smuggling of migrants" is not required to be adopted verbatim by the member states, including Canada.

[10] The member states are permitted, and even encouraged, to pass their own relevant legislation, which may be broader than that of the international agreements.

[11] Canada, and most countries, has passed its own relevant legislation which is broader than the international minimum negotiated standard.

[12] Canada's response is found in s. 117 of *IRPA*. It does not include "a financial or other material benefit" as an element.

[13] Genuine refugees who make it to Canada are not to be prosecuted. Canada has enshrined this in *IRPA* s. 133.

[14] It is clear from the international instruments that legitimate humanitarian aid workers and family based persons who assist refugees are not persons intended to be prosecuted for the assistance they provide.

[15] The Crown's position on this application is that s. 117 encompasses the foregoing proposition.

[16] While the intention to not prosecute such persons is clear, that intention is not expressed as an exclusion to the definition of human smuggling under the Protocol, nor in any other international instruments as a matter of law, nor in s. 117 of the *IRPA*.

[17] One of the leading cases with respect to overbreadth is *R. v. Heywood*, [1994] 3 S.C.R. 761.

[18] It is necessary to first determine what are the objectives of the government in passing the legislation in question. It is then necessary to consider the means chosen by the State to achieve that objective.

[19] The principles of fundamental justice under s. 7 of the *Charter* require that the means chosen by the State to achieve a legitimate state objective are not broader than is necessary to accomplish that objective.

[20] In this case, the objective in passing the legislation is to combat human smuggling in accordance with Canada's international obligations.

[21] The defence argues that s. 117 (the means chosen by the government) captures a broader range of conduct, and persons, than is necessary to achieve the government's objective.

[22] The Crown argues that s. 117 is a legitimate and appropriate response to Canada's domestic and international obligations, and while it may be broad, it is necessary that it be broad in order to combat human smuggling. It is not overbroad in the context of the government's objective and the means necessary for attaining that objective. Parliament is entitled to deference in the means that it has chosen to fulfill its objective. Interfering with such a decision consciously made by Canada would be an unwarranted judicial intervention into an area properly within the power of Parliament, and exercised properly by that Parliament.

[23] The Crown also argues that *IRPA* provides an absolute legal prohibition to the prosecution of genuine humanitarian aid workers or family based members involved in legitimate activities. This prohibition is found in s. 117(4) of *IRPA* which prohibits

prosecution in the absence of the consent of the Attorney General. The Crown argues that the Attorney General would not provide consent for any of the aforementioned persons to be prosecuted under s. 117, and could not legally provide such consent because of the requirement that Canada abide by its international obligations. Therefore, s. 117(4) is a complete answer to the overbreadth argument.

[24] In all the circumstances, I am satisfied that s. 117 is unnecessarily broad in that it captures a broader range of conduct, and persons, than is necessary to achieve the government's objective, and thereby infringes s. 7 of the *Charter*.

[25] If s. 117(1) is overbroad, the existence of s. 117(4) does not change that, and therefore cannot save the section.

[26] I am satisfied that the section cannot be saved by s. 1 of the *Charter*.

[27] The only appropriate remedy is that s. 117 be declared, in the words of s. 52 of the *Constitution Act*, to be of no force or effect.

[28] The Introduction to the full written Judgment commences at paragraph 29.

INTRODUCTION

[29] In this application, the accused apply under s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], for an order declaring that s. 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], infringes s. 7 of the *Charter*, is not saved by s. 1, and is therefore of no force or effect according to s. 52 of the *Constitution Act, 1982,* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act, 1982*].

[30] The accused are charged with an offence under *IRPA* s. 117(1), colloquially known as "human smuggling". These words appear in the heading to the section, although not in the section itself.

[31] The application has been argued prior to jury selection, which is set for January 16, 2013.

[32] Section 117, as it existed at the time of the alleged offence in this matter, reads as follows:

117. (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.

(2) 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) 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 for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

[33] On June 28, 2012, an act to amend *IRPA* was assented to. Amendments to s. 117 came into force on December 15, 2012.

[34] Note that all references to *IRPA* in this judgment, unless stated otherwise, are to those sections of *IRPA* which was in force at the time of the alleged offence.

[35] It is common ground that a refugee, who attends at a Canadian port of entry, is entitled to *Charter* rights. Upon attendance, their s. 7 rights are engaged and they are entitled to fairness of process: *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177.

[36] Section 7 entitles persons to fundamental principles of justice where issues of life, liberty or security of the person are involved. In this case, it is common ground that the potential penalty for conviction under s. 117 gives rise to that principle.

[37] It is also common ground that it is a legitimate, necessary, and even laudable goal of government to attack and criminalize what is commonly referred to as human smuggling.

[38] However, the accused argue that since s. 117 attempts to criminalize any person who commits any of the acts referred to in this section, it casts too wide a net. Inadvertently, it captures the acts of certain categories of persons (humanitarian workers and close family members), and conduct, which the Crown agrees are not intended to be prosecuted under the section, and which the government has no intention of prosecuting under the section. The section is therefore vague and/or overbroad and inconsistent with principles of fundamental justice.

[39] The Crown argues that the section is not vague and overbroad, and is consistent with Canada's legitimate goals and international obligations to combat the offence of human smuggling.

[40] Section 7 of the *Charter* reads as follows:

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

[41] Section 52 of the *Constitution Act, 1982* reads as follows:

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

[CONTENT REDACTED]

[42] **[CONTENT REDACTED]**

[43] **[CONTENT REDACTED]**

[44] **[CONTENT REDACTED]**

THE EVIDENCE AND OTHER MATERIALS

[45] Two expert witnesses gave evidence on this *voir dire*:

1. Catherine Dauvergne - an expert called by the defence and qualified with respect to refugee-related issues (the "defence expert").

2. Yvon Dandurand - an expert called by the Crown and qualified with respect to various human smuggling issues (the "Crown expert").

[46] The area where refugee-related issues and human smuggling issues intersect is the area with which this application is concerned.

[47] In addition to the two witnesses, numerous bound and tabbed document books were presented with various types of documents at various tabs. Different types of documents were contained within the same bound books. Some of these documents did not need to be marked as exhibits at all (cases, statutes), others arguably needed to be marked, while others appeared not useful or worthy of consideration.

[48] Rather than address each document at each tab as they arose, with the possible need to unbind the books in order to remove certain documents, it was agreed that the entirety of the bound books would be marked as exhibits on the *voir dire*, with the understanding that counsel could make submissions at the end as to what could or could not be considered by me and for what purposes.

[49] We proceeded on that basis.

[50] The types of documents presented include (but are not limited to):

1. cases;

2. statutes;

3. United Nations Treaties;

4. United Nations Protocols;

5. United Nations background documents;

6. various newspaper articles and news releases; and

7. various scholarly articles.

[51] I am satisfied that the correct approach in this *voir dire* to all of these documents is found in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, where the Supreme Court said this at 1099:

It is necessary to draw a distinction at the outset between two categories of facts in constitutional litigation: "adjudicative facts" and "legislative facts". These terms derive from Davis, *Administrative Law Treatise* (1958), vol. 2, para. 15.03, p. 353. (See also Morgan, "Proof of Facts in Charter Litigation", in Sharpe, ed., *Charter Litigation* (1987).) Adjudicative facts are those that concern the immediate parties: in Davis' words, "who did what, where, when, how and with what motive or intent ...." Such facts are specific, and must be proved by admissible evidence. Legislative facts are those that establish the purpose and background of legislation, including its social, economic and cultural context. Such facts are of a more general nature, and are subject to less stringent admissibility requirements: ....

[52] More specifically, the documents that are before me for consideration include the following:

1. Various Canadian statutes.

2. Various international documents to which Canada is a signatory.

3. Various Conventions including:

   (a) 1951 United Nations Convention Relating to the Status of the Refugees (the “Refugee Convention”);

   (b) United Nations Convention Against Corruption;

   (c) United Nations Convention on Transnational Organized Crime (UNCTOC);

   (d) Vienna Convention on the Law of Treaties (1969).

4. Various Protocols, including the following:

   (a) Protocols of the UNCTOC;

   (b) Protocols of the Convention against Corruption;

(c) Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime (2000) (the "Migrant Smuggling Protocol");

(d) Refugee Convention Protocol.

5. Various documents relating to UNCTOC including:

(a) Protocols;

(b) Travaux Prẻparatoires - Interpretative Notes for the Official Records of the Negotiation of the UNCTOC and the Protocols Thereto (2000);

(c) Legislative Guides for the Implementation - the UNCTOC and the Protocols Thereto

(d) Legislative Guide for the Implementation of the Migrant Smuggling Protocol.

6. Statutes of various foreign countries, including:

(a) Australia;

(b) United States of America;

(c) United Kingdom.

7. Various documents from the United Nations Office of Drugs and Crime (UNODC), including:

(a) In-depth Training Manual on Investigating and Prosecuting the Smuggling of Migrants (the "Training Manual");

(b) Assessment Guide to the Criminal Justice Response to the Smuggling of Migrants (2012);

(c) various Issue Papers relating to migrant smuggling.

8. Documents from the Canadian Council for Refugees.

LEGISLATIVE CONTEXT

[53] Canada is a signatory to a number of United Nations, human rights and international instruments ("international instruments") concerning refugees, and concerning human smuggling. These instruments create international obligations by which Canada must abide. Among other things, Canada has agreed, along with the international community, to criminalize human smuggling.

[54] In that regard, *IRPA* s. 3(1) sets out its objectives with respect to immigration; *IRPA* s. 3(2) sets out its objectives with respect to refugees; and *IRPA* s. 3(3) states that it is to be construed and applied in the manner then set out.

[55] Section 3(2) states the following:

3. (2) *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.
>
> [Emphasis added.]

[56] Section 3(3) states the following:

(3) *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.

[Emphasis added.]

What is Human Smuggling?

[57] One of the difficulties faced by the countries, such as Canada, who are signatories of the various international instruments in question, is that, while there is a strong sense of the type of behaviour which is to be discouraged and criminalized, there is no commonly accepted definition for "human smuggling".

[58] In order to understand the international effort to battle human smuggling, it is necessary to understand the approach taken towards refugees.

<u>Refugees</u>

[59] Canada, and the international community generally, while not encouraging refugees to make their way to our shores, exempts them from criminal liability for whatever illegal actions they may have taken in order to successfully arrive here. Such illegal actions invariably include arriving here with forged, or completely without, the documentation required for entry.

[60] This reality is aptly described by Simon Brown L.J. at 673 in *R. v. Uxbridge Magistrates' Court and another, Ex p Adimi*, [2001] Q.B. 667 (U.K.):

The problems facing refugees in their quest for asylum need little emphasis. Prominent amongst them is the difficulty of gaining access to a friendly shore. Escapes from persecution have long been characterised by subterfuge and false papers. As was stated in a memorandum from the Secretary-General of the United Nations in 1950:

> "A refugee whose departure from his country of origin is usually a flight, is rarely in a position to comply with the requirements for legal entry (possession of national passport and visa) into the country of refuge."

[61] Article 31 of the Refugee Convention to which Canada is a signatory, specifically accounts for this reality, and prohibits signatories from imposing penalties for illegal entry:

31(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.

[62] Section 133 of *IRPA* is an attempt to implement Canada's international obligations with respect to Article 31 of the Convention:

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

[63] Section 133 defers, or prohibits, prosecution for the act of arriving at a port of entry to Canada and making a legitimate refugee claim without a visa or documentation.

[64] Both Article 31, and s. 133 of *IRPA* provide protection from prosecution for legitimate asylum claimants, but does not protect those who organize, induce, aid or abet, their arrival in Canada as s. 117 is not among the list of offences referred to in s. 133.

Internationally

[65] Internationally, there is a definition (the "definition") in Article 3 of the Migrant Smuggling Protocol which defines "smuggling of migrants" as follows:

... 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.

[66] It is noteworthy that the foregoing definition includes, as an element, the motive of "... a financial or other material benefit ...."

[67] Article 2 of the Protocol notes the following: "The purpose of this protocol is to prevent and combat the smuggling of migrants, as well as to promote cooperation among state parties to that end, while protecting the rights of smuggled migrants."

[68] In the 2011 Issue Paper entitled "Smuggling Migrants by Sea", the UNODC notes that migrant smuggling is a criminal business which is competitively run as such. There are several criminals involved in such an operation including the smuggler at the top of the enterprise, recruiters, transporters, guides, enforcers who guard migrants, and others. All of these persons may be considered "smugglers" for the purposes of the Migrant Smuggling Protocol.

[69] Individual countries, including Canada, are entitled to pass their own legislation, which may be broader than the definition included in the Protocol:

1. The Crown expert testified that the definition of "smuggling of migrants" set out in the Protocol provides a "negotiated minimum" standard necessary to provide a solid basis for more effective international cooperation of this criminal activity.
2. Article 6(1) of the Protocol sets out that:

> 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 benefit:
>
> (a) the smuggling of migrants.

3. Article 6(4) of the Protocol and Article 34(3) of the Convention, reflect that the "negotiated minimum" standard defining the "smuggling of migrants" does not preclude a State Party from enacting legislation that more broadly criminalizes conduct in order to protect state interests.

[70] Human smuggling is something distinct from human trafficking:

1. The Crown expert argues that human smuggling focuses on the movement of migrants, while human trafficking focuses on the exploitation of migrants.

2. He also notes that human smuggling invariably involves the consent of the migrant, although they often do not know (and do not consent) that they may become victims of human trafficking.

3. He also notes that human trafficking may occur within the borders of a country, while human smuggling, by definition, involves the crossing, or at least an attempt to cross international boundaries.

Other Countries

[71] Different countries have different definitions, either express or implied, of human smuggling.

[72] Australia, the United Kingdom, and the United States of America, like Canada, are signatories to the relevant international documentation, including the Migrant Smuggling Protocol. All three of those countries have all enacted legislation concerning human smuggling which is broader than the minimum standard definition in the Migrant Smuggling Protocol. In each of those countries, financial or material benefit is not an element of the offence of human smuggling.

Canada's Response

[73] Canada's response to its international obligations concerning human smuggling has been to enact s. 117 of *IRPA*. With respect to human trafficking, it has enacted s. 118.

[74] The parties agree that Canada's implied definition for human smuggling, as found in s. 117, must be interpreted in accordance with its international obligations. In that regard:

1. Sections 3(2)(a) and (b) of *IRPA* states clearly that one of its objectives is the protection of refugees in need of assistance.
2. Section 3(3)(f) of *IRPA* requires that it be construed and applied in a manner which complies with the international instruments to which Canada is a signatory. These instruments include the Migrant Smuggling Protocol.

[75] The Crown expert testified that Canada's definition (as implied in s. 117) goes well beyond the minimum standard set out in the Protocol. He also noted that most countries go beyond that minimum standard in their domestic legislation.

[76] The Federal Court has on a number of occasions been asked to consider the meaning of "people smuggling", a phrase used in s. 37 of *IRPA*. Section 37 addresses the question of "inadmissibility" to Canada, while s. 117 addresses criminal conduct. Some of those cases include: *B010 v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 569; *Hernandez v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1417; *J.P. and G.J. v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1466 and *B072 v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 899.

[77] In *B010*, the Federal Court found the provisions of s. 117 of *IRPA* to be a legitimate implementation of the Migrant Smuggling Protocol, Mr. Justice Noël commented at para. 48:

... [S]ection 117 is in fact the provision that, for Canadian domestic purposes, criminalizes the smuggling of human beings into Canada. While it is broader in scope than the definition set out in the Protocol and does not have the more restricted scope sought by the applicant, it remains the legislative answer to Canada's obligations undertaken by its adherence to the Protocol since it clearly condemns the act of human smuggling (albeit to a broader extent) and remains a legitimate response to valid human rights concerns. Furthermore, in the unlikely event section 117's broader definition should somehow conflict with the Convention or Protocol, it is worth remembering that a validly enacted legislation will prevail over international law (*Statutory Interpretation*, above, at 33).

[78] The Federal Court concluded that the broader definition of human smuggling found in s. 117 did not hinder its compliance with the Protocol.

[79] Section 117 does not make express reference to "human smuggling". Nor is there a definition for "human smuggling" anywhere in *IRPA*. That phrase does, however, appear in the heading above s. 117. In that regard, the Court in *B010* said the following at para. 39:

... given the significant emphasis that has been placed on the term 'human smuggling' located in the heading above section 117, I note that it is well accepted that headings may be treated as an integral part of the context and relied on as "intrinsic aides" to interpret a statute or to examine its structure (*R v Lohnes*, [1992] 1 SCR 167 at para 23, [1992] SCJ 6; *Charlebois v Saint John (City)*, 2005 SCC 74, [2005] 3 SCR 563; *Statutory Interpretation*, above, at 142-144). Accordingly, I find it reasonable to utilize the heading above section 117 in order to give added credence to the existence of a link between it and subsection 37(1).

[80] The Court also compared ss. 117 and 37 and the two phrases – "people smuggling" and "human smuggling":

[40] ... I do not ignore there is a difference between the terms ‘people smuggling’ and ‘human smuggling’ found respectively in para 37(1)(b) and the heading above section 117. However, when considering the textual analysis technique by which different words appearing in the same statute should be given different meanings, as exemplified by Justice Dickson in *R v Frank*, (1977) 75 DLR (3d) 481, [1978] 1 SCR 95, I see no meaningful or plausible reason in this case to distinguish between the act of ‘people smuggling’ and that of ‘human smuggling.’ Both provisions are clearly meant to address the same criminal activity: the smuggling of human beings.

[41] Should this difference in terms remain a concern, I would point out that the definition relied on by the applicant found in article 3 of the Protocol also refers not to ‘people smuggling,’ but instead to the ‘smuggling of migrants.’ Nevertheless, it is this Court’s view that all three terms clearly seek to address the same act and so the only question that remains is whether ‘people smuggling’ had to be interpreted on its own, or whether it was reasonable for the ID to also rely on section 117, but not to adopt all components found in article 3 of the Protocol.

[81] In *Hernandez*, the Federal Court came to a different conclusion than in *B010*, the Court concluded that “... the crime of Human Smuggling in subsection 117(1) does not dictate the proper meaning of the activity of “people smuggling” in paragraph 37(1)(b) of the Act. Properly construed, “people smuggling” includes the Profit Element.” (para. 58).

[82] The elements of human smuggling are different from those of human trafficking. With respect to the latter, s. 118 of *IRPA* states the following:

118. (1) 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) 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.

Excluded Categories of Persons

[83] It is clear that the various parties to the relevant international instruments, including Canada, take the view that certain categories of persons, and conduct, are not intended to be prosecuted for human smuggling.

[84] Those categories include:

1. those who provide support to migrants for humanitarian reasons; and

2. those who provide support to migrants on the basis of close family ties.

[85] The documents in which the foregoing sentiment is expressed include:

1. the Travaux Préparatoires;

2. Article 31 of the 1951 Refugee Convention;

3. the Training Manual, under the heading, “Conduct that is not Migrant Smuggling”, where it is noted that persons who assist migrants for altruistic or humanitarian reasons without receiving or agreeing to receive a material benefit are not intended to be covered by the UN Smuggling Protocol. However, it is also noted that such persons may be charged with other offences under States’ domestic laws but not with human smuggling according to the Protocol.

4. the Issue Paper of UNODC dealing with migrant smuggling states the following: “It is important to underline that criminalization only covers those who profit from migrant smuggling and related conduct through financial or other material gain. The Protocol does not intend to criminalize persons such as family members or non-governmental or religious groups that facilitate the illegal entry of migrants for humanitarian or non-profit reasons.”

[86] The Travaux Préparatoires states, among other things, the following with respect to the reason why “a financial or other material benefit” was included in the Protocol definition for “human smuggling”:

[...] the intention was to exclude the activities of those who provided support to migrants for humanitarian reasons 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 non governmental organizations.

[87] Despite the foregoing expressions of intent, there appears to be no international instrument, or domestic legislation, that expressly prohibits the prosecution of humanitarian aid workers or close family members.

[88] Both expert witnesses expressed the view that humanitarian aid workers and family members were not intended, under the international regime, by the international community (including Canada) to be prosecuted as human smugglers. Both witnesses initially took the view that their activities simply did not meet the definition of what a human smuggler was. However, after cross-examination, they conceded that their activities might technically fit within the definition of human smuggling but the likelihood of their being prosecuted was virtually nil. They were not permitted to offer an opinion as to whether those activities might be captured by the wording of s. 117.

[89] In its written submission, the Crown states the following:

> Importantly, humanitarian groups, religious organizations and other charitable organizations, as well as close family members, are not considered migrant smugglers for the purposes of the Protocol, in circumstances where they assist in the transportation or enable the stay of migrants for humanitarian purposes and for no financial or material gain. The provisions of s. 117 of IRPA comply with this requirement of the Protocol.

OVERBREADTH

The Law

[90] In *R. v. Heywood*, [1994] 3 S.C.R. 761 at 792-794, the Supreme Court of Canada looked at the means of determining whether or not a given piece of legislation is overbroad:

Overbreadth analysis looks at the means chosen by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the State objective? If the State, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

...

[B]efore it can be found that an enactment is so broad that it infringes s. 7 of the *Charter*, it must be clear that the legislation infringes life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

...

[T]hose situations where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal.

[91] The Court must determine what objective the government seeks to achieve by way of the legislative provision.

[92] The principles of fundamental justice under s. 7 of the *Charter* require that the means chosen by the State to achieve a legitimate state objective are not broader than is necessary to accomplish that objective.

[93] In determining whether a given piece of legislation is overly broad in its application and therefore contrary to the principles of fundamental justice, it may sometimes be helpful to consider reasonable hypothetical applications of the legislation. This is made clear by the Supreme Court of Canada in *Heywood*, where the Court says at 799:

This Court has approved the use of reasonable hypotheses in determining whether legislation violates s. 12 of the *Charter*: *R. v. Smith*, [1987] 1 S.C.R. 1045; *R. v. Goltz*, [1991] 3 S.C.R. 485. I think the same process may properly be undertaken in determining the constitutionality of s. 179(1)(b). The effect of the section is that it could be applied to a man convicted at age 18 of sexual assault of an adult woman who was known to him in a situation aggravated by his consumption of alcohol. Even if that man never committed another offence, and was not considered to be a danger to children, at the age of 65 he would still be banned from attending, for all but the shortest length of time, a public park anywhere in Canada. The limitation on liberty in s. 179(1)(b) is simply much broader than is necessary to accomplish its laudable objective of protecting children from becoming victims of sexual offences.

[94] The Supreme Court also addressed the issue of using hypothetical scenarios in a *Charter* challenge in *R. v. Sharpe*, [2001] 1 S.C.R. 45 noting at para. 112 that:

While the Canadian jurisprudence on the question is young, thus far it suggests that laws may be struck out on the basis of hypothetical situations, provided they are "reasonable".

The Defence Argument

[95] It is common ground that s. 117 of the *IRPA*, because of its potential penalties, engages s. 7 *Charter* issues.

[96] With respect to s. 117, it is clear that the objective of the government is to prevent the smuggling of persons into Canada. That this is Canada's objective can be further ascertained by looking at the Migrant Smuggling Protocol, the purpose of which is to:

... prevent and combat the smuggling of migrants, as well as to promote cooperation among State Parties to that end, while protecting the rights of smuggled migrants.

[97] The defence acknowledges the worthiness of these goals but argues that s. 117 is drafted in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective, and therefore infringes s. 7 of the *Charter*.

[98] It is overbroad because it captures the actions of persons who the government has no intention of proceeding against, and whose prosecution does not further the government's objective.

[99] Further, s. 117 is overbroad in its application by not providing an exception for genuine asylum seekers, engaging in joint efforts to escape persecution and travel to Canada. In this regard, the section runs contrary to Canada's international, and domestic commitments to protect the rights of refugees.

[100] The possibility that such unintended charges might be laid against such persons is arguably an obstacle to Canada fulfilling the *IRPA* objective of Canada's international legal obligations with respect to refugees.

[101] Rather than protecting migrants, as it is Canada's international obligation to do, the defence argues that the breadth of this provision actually increases the vulnerability of refugees by criminalizing what may be the only route open to many of them in fleeing their home countries. The defence provides scholarly authority for that proposition.

[102] The defence proposes two sets of reasonable hypotheticals for consideration:

1. the situation where friends or family members arriving in Canada as refugees, are at the same time assisting other family members to arrive as refugees together with them;

2. the situation where humanitarian or legal workers assist asylum claimants to arrive at a port of entry in order to make a refugee claim.

[103] During submissions a third hypothetical was suggested: the situation where a close family member, from within Canada, aids a refugee to travel to Canada and enter without proper documentation.

[104] With respect to the first hypothetical:

1. The arrival of a family of asylum claimants is a common scenario. Under s. 117, any member of the family who, even if a legitimate potential refugee himself, could face prosecution as a human smuggler for assisting the other family members with whom he arrived.

2. Imagine, in that hypothetical, that a mother arrived with her young child. Both would be potential refugees and not liable to prosecution as refugees as a result of s. 133. However, the mother would also be a human smuggler captured by the wording of s. 117 as a person who aided or abetted the arrival of her child.

3. Another variation would be the husband who arrives with his spouse, the husband having done all the preparatory work, and therefore aided and abetted his spouse. Both would be legitimate refugee claimants and not liable to prosecution as refugees as a result of s. 133. However, the husband would also be a human smuggler captured by the wording of s. 117.

4. The scope of the problem goes well beyond family members. Suppose two refugee claimants travelled together, each assisting the other to arrive in Canada. While each would be individually protected from prosecution under s. 133, (as refugees who arrived illegally), the act of mutual assistance would render them both liable under s. 117 (as smugglers).

[105] During the course of argument, a variation on the family member hypothetical emerged. Suppose a family member who is a citizen of Canada, sent money to a family member in another country with legitimate need to escape that country for the traditional reasons that refugees are granted asylum. The Canadian family member did so with the knowledge that the funds would be used to pay a human smuggler to assist the migrant to arrive in Canada. The Canadian has surely aided or abetted the arrival of that refugee claimant into Canada and would be captured by the words of s.117.

[106] The aider or abettor in each of the foregoing hypothetical examples has committed an offence within the meaning of s. 117. Yet, the international instruments suggest that family members, when assisting for no profit, are not persons intended to be prosecuted for human smuggling.

[107] With respect to the humanitarian worker hypothetical:

1. It is clear from the international instruments to which Canada is a signatory that humanitarian workers are not intended to be prosecuted as human smugglers. The Crown acknowledges, in its written submission, that this is clear in the Protocol and that the "provisions of s. 117 of *IRPA* comply with this requirement of the Protocol.

2. Nevertheless, the humanitarian worker would be captured by the wording of s. 117 and potentially liable for prosecution.

3. There is at least one incident where such a humanitarian aid worker was charged under s. 117, although that charge was ultimately stayed. That was the case of Janet Hinshaw-Thomas.

4. Three former Attorneys General of Canada and three former Ministers of Immigration have written a letter about the case, which included the following:

> Section 117 of the *Immigration and Refugee Protection Act*, like its predecessor provision, section 94 of the 1976 *Immigration Act*, was intended to target people-smugglers – the criminals and criminal organizations that profit from aiding or abetting people to cross the border into Canada illegally. While the language of both the current and the previous provisions has always been broad, this was understood as necessary to ensure sufficient flexibility to enable the prosecution of those who cruelly exploit the desperation of others for financial gain, no matter what methods they used. *However, as individuals who were once responsible for the application and enforcement of these provisions, we can attest to the fact that they were never designed or intended to allow for the prosecution of humanitarian aid workers*. [Emphasis added.]
>
> "Proud to aid and abet refugees, Backgrounder", (January 2008), at p. 8, online: Canadian Council for Refugees <http://ccrweb.ca/aidandabet/aidandabetbackgrounder.pdf> ["Backgrounder"].

[108] The foregoing hypotheticals are illustrative of the overbreadth of s. 117.

[109] It follows from the foregoing that the wording of s. 117 captures a broader range of conduct and a broader range of persons than is necessary to achieve the government's objective.

The Crown Argument

[110] The objectives of s. 117 are to stop human smuggling and to protect the victims of human smuggling, while meeting Canada's international obligations to protect legitimate refugees who make it to our shores, and to prosecute persons who are engaged in the smuggling of humans.

[111] Section 117 is a legitimate and appropriate response to Canada's domestic and international obligations.

[112] It is conceded that the section is broad. This was done deliberately on the part of the government in order to achieve its important objective. However, the section does not go beyond what is necessary to achieve that objective, and consequently is not overbroad.

[113] Section 117 appropriately contemplates the organization, inducement, aiding or abetting the coming into Canada of persons, who are entering illegally, as elements of human smuggling.

[114] The government has chosen a more broad definition than that provided in the Protocol. This is consistent with the Protocol, and with the approach taken by most other countries. It is also consistent with Canada's international obligations. It is necessary that the section be this broad in order to combat the evil which is human smuggling. It is not overbroad in the context of the government's objective of combating human smuggling.

[115] The Crown disagrees with the defence contention that the breadth of s. 117 increases the vulnerability of refugees. Equally valid scholarly studies have concluded that an increase in border control will decrease the incidence of exploitative smuggling.

[116] The defence expert testified that refugee claimants do not need to rely exclusively upon human smugglers as the only means of coming to Canada. They can apply, from outside of Canada, legally, under our resettlement program. She testified that Canada's resettlement program is a good program, and that Canada is one of the three leading resettlement countries in the world.

[117] Human smuggling undermines the legal process of coming to Canada under our world-leading resettlement program.

[118] The Crown agrees that the Migrant Smuggling Protocol does not have as one of its intents the criminalization of persons such as family members or non-governmental or religious groups that facilitate the illegal entry of migrants for humanitarian reasons.

[119] Canada has deliberately chosen to keep the definition (the activity described in s. 117) broad. The flexibility is necessary and desirable in order to better combat human smuggling. In order to keep the definition broad, it has not drafted wording which exempts humanitarian aid workers or family based persons. Nevertheless, it has been the practice of Canada to not charge such persons, and that practice is best fulfilled through the exercise of discretion. Such a practice is best assessed on a case by case, and fact by fact, basis. It is best fulfilled by discretion, rather than by statute.

[120] With respect to the defence proposed hypotheticals, the Crown makes three arguments:

1. the proposed defence hypotheticals are not reasonable;

2. the actions of the persons in most of the proposed defence hypotheticals do not constitute human smuggling; and

3. even if their actions do technically constitute human smuggling, in most of the hypotheticals, they would (and could) never result in a charge being laid against them, as a matter of law.

[121] The Crown argues that the proposed hypotheticals are not reasonable. In that regard, it relies upon what the Supreme Court of Canada stated in *R. v. Morrissey*, 2000 SCC 39 at para. 30:

What constitutes a reasonable hypothetical? ... reasonable hypotheticals could not be "far-fetched or marginally imaginable cases". They cannot be "remote or extreme examples" ....

The reasonableness of the hypothetical cannot be overstated, but this means that it must be reasonable in view of the crime in question.

[122] The hypothetical examples raised by the defence do not meet the test of reasonableness. They are far-fetched, marginally imaginable, remote and extreme examples. There is no possibility that the persons suggested by those hypotheticals would ever be charged with an offence under s. 117.

[123] There are no reasonably imaginable hypotheticals that would meet the test, in the circumstances of this case.

[124] The hypothetical example of the mother arriving with her child would not constitute an offence under s. 117 of *IRPA*. This is because of the concept that human smuggling involves the notion of consent on the part of the person being smuggled. A child cannot consent; therefore human smuggling has not occurred.

[125] The scenario involving the humanitarian worker would also not be human smuggling. The Crown expert, when asked about the hypothetical stated that "I doubt anyone would define that as human smuggling." After further questioning, he resiled slightly from that view conceding that it might technically be considered smuggling by definition, but expressing doubt that anyone would prosecute that.

[126] The defence expert also was of the view that the conduct of neither the human rights worker or the mother/child would constitute the offence of human smuggling.

[127] The family member examples which do not involve a child, and therefore involve a second person who is able to consent, would still not constitute the offence of human smuggling because they would fall into the category of humanitarian worker or activities. If there was another motive, such as wanting to assist a foreign relative to "jump the queue" of persons waiting for their application for entry into Canada to be processed, that *would be* human smuggling, whether or not the person was a family member.

[128] Finally, in all the proposed situations suggested by the defence, *IRPA* provides an absolute legal prohibition to their being charged. This prohibition is found in s. 117(4) of *IRPA* which prohibits prosecution in the absence of the consent of the Attorney General. The Crown argues that the Attorney General would not provide consent for any of the aforementioned persons or activities to be prosecuted under s. 117.

[129] Therefore, s. 117(4) is a complete answer to the overbreadth argument.

[130] Section 117(4) states the following:

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

[131] The Crown argues as follows:

1. Canada is a signatory to various international agreements.

2. *IRPA* s. 3 requires that Canada follow those agreements.

3. It follows that its allegiance to those agreements is binding on Canada as a matter of law.

4. Those international instruments state expressly that it is not the intention to charge humanitarian aid workers or family members with human smuggling.

5. Section 117(4) is the method by which Canada can fulfill that obligation. The Attorney General must apply s. 117(4) in compliance with international instruments and protocols.

6. It follows that the Attorney General has no discretion to charge persons involved in the legitimate work of humanitarian workers or family members. The Attorney General is bound as a matter of law to not approve such charges as surely as if that obligation were enshrined in Canadian legislation.

7. To be sure, the Attorney General will still have a discretion, but that discretion will relate to the question of whether or not the evidence satisfies him or her whether the person is indeed conducting the legitimate activities of a humanitarian worker or family member. If so satisfied, there is no discretion to consent to the charge.

8. The foregoing provides an explanation for why there may have been a charge laid in the Hinshaw-Thomas case (referred to earlier in this Judgment), which was ultimately stayed.

[132] Parliament is entitled to deference in the means that it has chosen to fulfill its objective.

[133] In *Heywood*, the Court stated the following at 793:

In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the *Charter*, legislatures must have the power to make policy choices. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective if he or she had been the legislator.

[134] Interfering with such a decision consciously made by Canada would be an unwarranted judicial intervention into an area properly within the power of Parliament, and exercised properly by that Parliament.

[135] Canada has consciously decided not to narrow the definition of “human smuggling”. Its decision in doing so has, among other things, the following characteristics:

1. It is consistent with the Protocol which permits individual countries to have a broader definition.

2. Most other countries have taken the same broader approach.

3. Canada retains the right to prosecute humanitarian aid workers and family based helpers, although its practice is currently not to do so.

4. It avoids the great difficulty that would arise in defining what is a humanitarian aid worker or a family based member, assuming those were excluded by statute. That difficulty is best addressed by discretion.

5. It retains a discretion at the highest level, through s. 117(4) which enables special cases to be assessed on a case by case basis.

6. It reflects a policy choice, or choices, made by Parliament.

[136] Determining what is necessary to achieve its objectives requires a consideration of contextual factors, including the following:

1. The legitimate and important goal of combating human smuggling.

2. Canada's international obligations.

3. The objectives of *IRPA*.

4. The existence of s. 117(4) and the need for the consent of the Attorney General.

5. The need for flexibility in combating human smuggling.

[137] It follows that s. 117 is not unnecessarily broad. It does not capture a broader range of conduct or persons than is necessary to achieve the government's objective.

ANALYSIS

[138] It is clear that Canada's objective in passing s. 117 is to stop human smuggling and to protect victims of human smuggling in accordance with her international obligations.

[139] It is common ground that because of the potential penalties under s. 117, it engages s. 7 *Charter* issues.

[140] I am satisfied that s. 117 is overbroad in that it infringes life, liberty or security of the person. I am also satisfied that it does so in a manner that is unnecessarily broad, in that it captures a broader range of conduct, and persons, than is necessary to achieve the government's objective. My reasons are as follows.

[141] Section 117 must be interpreted in light of Canada's international obligations, including the Refugee Convention, and Article 31. It must also be interpreted according to the objectives of *IRPA*, and in particular, sections 3(2)(a) and (b), concerning the objectives with respect to refugees.

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

[143] Section 117 does not expressly refer to human smuggling or to smuggling operations. This section is much broader than that, criminalizing any assistance given to persons coming to Canada who are not in possession of appropriate documentation.

[144] If the arrival of a legitimate refugee at a port of entry without the required documentation does not attract criminal liability (s. 133 of *IRPA* and Article 31 of the Refugee Convention), why is it a crime to assist such a refugee to arrive?

[145] It is clear that s. 117 makes no distinction for the persons involved or reasons behind the transport to and entrance into Canada, or whether or not the accused person has profited from the transportation of persons into Canada. This is different from the definition in the Migrant Smuggling Protocol which indicates that smuggling is an activity which occurs in order to obtain "a financial or other material benefit".

[146] It is the clear, and appropriate intention for s. 117 to be more broad than the minimum standard required for international instruments so that it can appropriately stop and prosecute those human smugglers who exploit migrants for profit, or who seek to import terrorism to Canada. However, it was never intended that it be so broad as to stop and prosecute legitimate family members and humanitarian workers. As noted earlier, in the 2011 Issue Paper entitled "Smuggling Migrants by Sea", the UNODC notes that migrant smuggling is a criminal business which is competitively run as such.

[147] As noted earlier, the position of the Crown is that the provisions of s. 117 comply with the "requirement of the Protocol" which notes that family members and humanitarian workers are not considered to be migrant smugglers.

[148] The Crown's position that the proposed hypotheticals are not reasonable, simply because there is no possibility that anyone could ever be charged under the section, is not tenable. The determination of whether or not a hypothetical is reasonable must be based upon the activity complained of, not upon the possibility of whether or not persons would ever be charged. When simply the activities are concerned, the hypotheticals are eminently reasonable. The hypothetical with respect to family members occurs frequently. The hypothetical with respect to humanitarian aid workers happens often, and in fact resulted in a charge (although ultimately stayed) against Ms. Hinshaw-Thomas.

[149] The two hypotheticals are technically within the scope of "human smuggling" under s. 117, but they are not within the objectives that Canada is trying to achieve through s. 117. To the contrary, it is the clear intention of the government not to prosecute such people.

[150] The Crown points to no valid objective for the section to be so wide that it captures such persons referred to in the hypotheticals.

[151] A proper consideration of those hypotheticals supports the defence argument that s.117 is unnecessarily broad, and goes beyond what is necessary to accomplish the government's objective, and infringes s. 7 of the *Charter*.

[152] In response to the Crown's argument that the hypothetical relating to humanitarian aid workers is marginal and remote, I note the comments of the Federal Court in *Hernandez*. While the Court was not the recipient of an argument concerning overbreadth or a "humanitarian hypothetical", it clearly assumed that a humanitarian worker could be charged under s. 117. In para. 64, the Court states:

It is true that if "people smuggling" requires the Profit Element then a humanitarian smuggler convicted under section 117 would not be inadmissible by virtue of paragraph 37(1)(b) ....

And at para. 65:

... even on the narrow interpretation of "people smuggling" humanitarian smugglers are accorded the same inadmissibility status as murderers, rapists, and others convicted of serious offences.

And at para. 66:

Parliament therefore obviously intended that the smuggling of people for profit is to be met with harsher treatment than humanitarian smuggling.

[153] The overbreadth of the section makes it impossible for persons to know if certain activities (those of humanitarian aid workers and close family members) will result in charges under s. 117, despite Canada's intention to the contrary. One of the reasons for the rule against overbroad sections is that persons are entitled to prior notice as to what are the limits of proper behaviour, and what is criminal behaviour.

[154] While s. 117 of *IRPA* is intended to target criminal groups engaging in human smuggling who often exploit vulnerable migrants (including refugees), the provision is so broad that it encompasses anyone who "organizes, induces, aids or abets" migrants coming into Canada. This is true, whether they are exploiting those migrants for profit, or saving their lives by helping them escape persecution and violence in their home countries out of humanitarian compassion. In this sense, the section is overbroad.

[155] Therefore, the section casts too wide a net and is inconsistent with the principles and purposes of the international Conventions and Protocols.

[156] All of foregoing is an infringement of those persons' s. 7 rights.

[157] Even if the Crown is correct in arguing that s. 117 is in fact in compliance with international instruments, it must still comply with the *Charter*. Canada's international obligations do not entitle it to pass and rely upon legislation which is inconsistent with the *Charter*. Section 3(3)(d) states this expressly.

[158] With respect to the Crown's argument that s. 117(4) is a complete answer to the overbreadth argument, counsel have advised me that they are unaware of any prior court decisions where this issue has been considered. However it has certainly been considered in other forums and circumstances.

[159] Concern about the overbreadth of s. 117, and the effect of s. 117 (4), in the context of humanitarian workers was expressed to senior officials before the Standing Committee on Citizenship and Immigration:

Mr. John McCallum: …we heard a fair amount of testimony in our hearings from people doing humanitarian work, reverends and saintly people, if you will, and the last people in the world we would want to prosecute. Yet, if you read that literally, it looks like some of these people who are helping refugees could be prosecuted. Or if my sister is in a bad country and I help her, it looks like I can be prosecuted. How does that work?

Mr. Daniel Therrien: The protection against such prosecutions is in subclause 117(4), which provides that no prosecution under the smuggling provision can occur without the consent of the Attorney General, who, obviously, in deciding whether to prosecute, will weigh the motives of the people who have assisted others to come illegally into Canada. This is, again, what the current act provides, and there are relatively few prosecutions on smuggling, certainly no complaints I've heard that under the current regime, which would be repeated in the new regime, people who acted on humanitarian grounds have been prosecuted for smuggling. [CIMM, 17 May 2001, see below]

"Backgrounder" at p. 3-4.

[160] In the letter referred to earlier in this judgment arising out of the case of Janet Hinshaw-Thomas, the three Attorneys General and the three former Ministers of Immigration, who authored the letter, commented upon the failure of s.117(4) as a safeguard in such cases:

The arrest of Janet Hinshaw-Thomas suggests that this safeguard has now proven inadequate. Whatever the merits of Ms. Hinshaw-Thomas' particular case, the fact of her arrest telegraphs the deeply disturbing message that it is now illegal to assist asylum seekers to ask Canada for protection from persecution. This message is inimical to the achievement of the IRPA's objectives of fulfilling "Canada's international legal obligations with respect to refugees" and granting "as a fundamental expression of Canada's humanitarian ideals, fair consideration to those who come to Canada claiming persecution". Individuals like Ms. Hinshaw-Thomas play a vital role in helping ensure that Canada does in fact comply with its international human rights obligations, including those dealing with refugee protection.

To ensure that asylum seekers continue to receive the assistance they need and which is their legal right, we urge the Government of Canada to ensure that those with humanitarian motives who assist asylum-seekers to access Canadian refugee determination procedures will not be charged with aiding, abetting, or otherwise 'smuggling' within the meaning of s. 117 of IRPA. *Appropriate regulatory and legislative changes should be adopted.* [Emphasis added.]

"Backgrounder" at p. 9.

[161] I am unable to accept the Crown's submission that the existence of s. 117(4) provides the same protection for humanitarian aid workers and family based persons as would be the case if they were protected by legislation. My reasons are as follows:

1. If, as the Crown suggests, s. 117(4) operates as a matter of law to protect humanitarian aid workers (and others who the Crown may choose not to prosecute), how does the humanitarian worker raise that issue? Is it the same as a "defence"? Does it get raised in a court of law? Is there access to the Attorney General so that it can be raised? Upon whom does the burden rest? How and when can a challenge to a decision to prosecute be made?

2. If there is such an obligation at law, how could it be reviewed? Is there a right of appeal? Is there a right to judicial review? If there is such a right in any circumstances at all, is it as broad a right as would be a right of appeal from more finely crafted legislation?

3. Even if there were a policy under s. 117(4) to guide the Attorney General, there is nothing preventing that policy being changed by administrative fiat.

4. There is no evidence at all before me with respect to when or how the Attorney General might exercise his discretion.

5. The Crown expert was not aware of what standard Canada uses in dealing with the discretion under s. 117(4).

6. There is also nothing requiring that any such standard be made public. Even if there was such a standard, and it was made public, it would not enable a lawyer to advise a client with respect to potential jeopardy for anticipated conduct with the same certainty that such advice could be given if it were based upon actual legislation. How can any person ever know whether or not the Attorney General would consent to a charge being laid?

[162] If s. 117(1) is overbroad, the existence of s. 117(4) does not change that, and does not save the section. Nevertheless, it is a contextual factor that can be considered in assessing the means which the government has chosen to address its objective.

[163] One can easily imagine a narrower definition of human smuggling than what s. 117 provides, although it would involve the weighing and choosing of priorities. For example, one might imagine a definition which allows for consideration of one or more (among others) of the following:

1 a more refined definition of "human smuggling";

2. exclusion of certain classes of persons from the definition of "human smuggling";

3. human smuggling as including one or more of the following essential elements:

    (a) clandestine or surreptitious entry;

    (b) "financial gain or material benefit" ;

    (c) association with a criminal organization;

(d) an association with a terrorist organization;

(e) exploitation or abuse of the migrant;

(f) “power or control” over the migrant;

(g) endangerment of the life or safety of, or causing bodily harm or death to, the migrant;

(h) any combination of the above.

4. any combination of the above.

[164] Some of the foregoing considerations are considered, in s. 121, to be aggravating factors to be taken into account on sentencing. However, none are factors for consideration in assessing the conduct captured by s. 117(1) itself.

[165] In all the circumstances, I am satisfied that s. 117 of *IRPA* is overbroad and thereby infringes s. 7 of the *Charter*.

[166] Despite the foregoing, it is important to note that this decision is not a negative comment on Parliament’s legitimate goal and objective of passing legislation which targets human smuggling. Rather, it is a comment on the passing of legislation which is more broad than the government’s objective requires, and which infringes s. 7 of the *Charter of Rights*.

[167] In view of all the foregoing, I am satisfied that s. 117 is drafted in a manner that is unnecessarily broad, in that it captures a broader range of conduct, and persons, than is necessary to achieve the government’s objective.

SECTION 1

[168] Once it is determined that s. 117 infringes s. 7 of the *Charter* and is overbroad, it is necessary to determine whether or not it can be saved by s. 1 of the *Charter*. In that regard, the Supreme Court of Canada in *Heywood* said the following at 793, 802-803:

Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual.... However, where an independent principle of fundamental justice is violated, such as the requirement of *mens rea* for penal liability, or of the right to natural justice, any balancing of the public interest must take place under s. 1 of the *Charter*: *Re: B.C. Motor Vehicle Act*, *supra*, at p. 517; *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977.

...

This Court has expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies: *Re: B.C. Motor Vehicle Act*, *supra*, at p. 518. In a case where the violation of the principles of fundamental justice is as a result of overbreadth, it is even more difficult to see how the limit can be

justified. Overbroad legislation which infringes s. 7 of the *Charter* would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis.

[169] No party in the case at bar has argued that, if s. 117 is overbroad and thereby infringes s. 7, it can be saved by s. 1.

[170] I am satisfied that s. 117 cannot be saved by s. 1.

REMEDY

[171] Given that the legislation on its face captures a wide range of behaviour that ought not to be sanctioned, the next question to be addressed is one of appropriate remedy. The Court can do one of the following:

1. interpret the legislation in such a way as being *Charter* compliant;

2. read down the section; or,

3. read in the necessary elements.

[172] Should none of the foregoing remedies be appropriate, then the legislation ought to be struck down and returned to Parliament to craft an offence compliant with the *Charter*.

[173] I am satisfied that the section cannot be interpreted in a way which would make it *Charter* compliant. In that regard, I have considered the approach taken by the dissent in *Heywood* which noted at para. 75 that the word "loiter" should be interpreted as meaning "... for a malevolent or ulterior purpose related to the predicate offences". It took that approach because of "the purpose and legislative history" of the section in question "as well as precedent and statutory context".

[174] In this case, it would be impossible to interpret the legislation in a way which would not smack of judicial intervention. There are a variety of different considerations and approaches that could be taken and these are decisions which must be made by Parliament.

[175] For the same reasons, it is impossible to read in or read down the section in a way which would not smack of a judicial intervention.

[176] The Supreme Court concluded in *Heywood* that the circumstance presented in that case, was not one of reading in an obvious lacuna, but one of legislating. The Supreme Court has repeatedly warned courts against engaging in a legislative exercise.

[177] Crafting a properly worded section which would address the overbroad s. 117 would include a consideration of many factors and priorities which must be weighed and chosen. This is not the Court's job, nor does it have the authority to choose what those priorities are or should be. This is the job of Parliament.

[178] It follows that the only appropriate remedy in this case is, in the words of s. 52, to declare the section of no force or effect.

CONCLUSIONS

[179] Section 117 of *IRPA* is overbroad and infringes s. 7 of the *Charter of Rights*.

[180] The section cannot be saved by s. 1 of the *Charter*.

[181] It is unnecessary to consider the applicant's argument with respect to vagueness, and I decline to do so.

[182] It follows that s. 117 of *IRPA* is inconsistent with the provisions of the Constitution and is therefore of no force or effect.

"Silverman J."

The Honourable Mr. Justice Silverman