Immigration and Refugee Board of Canada
Immigration Division

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

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Reasons and Decision – Motifs et décision

PRIVATE PROCEEDING
MEDIA ACCESS ORDER

Between	The Minister of Public Safety and Emergency Preparedness	**Entre**
and		**et**
Person(s) Concerned	**XXXXX XXXXX**	**Intéressé(e)(s)**
Date(s) of Hearing	14 September 2011	**Date(s) de l'audience**
Place of Hearing	Vancouver, British Columbia	**Lieu de l'audience**
Date of Decision	20 October 2011	**Date de la décision**
Panel	Geoff Rempel	**Tribunal**
Counsel for the Person(s) Concerned	Gabriel Chand, Barrister & Solicitor	**Conseil(s) pour l'intéressé(e)/les intéressés**
Designated Representative(s)	N/A	**Représentant(e)(s) désigné(e)(s)**
Counsel for the Minister	Kamal Gill	**Conseil du (de la) ministre**

PRIVATE PROCEEDING

MEDIA ACCESS ORDER

REASONS FOR DECISION

INTRODUCTION

[1] This admissibility hearing was held with respect to Mr. **XXXXX XXXXX**. The Minister of Public Safety and Emergency Preparedness ("the Minister") alleges that Mr. **XXXXX XXXXX** is a foreign national who is inadmissible to Canada on grounds of organized criminality, pursuant to paragraph 37(1)(b) of the *Immigration and Refugee Protection Act* ("IRPA" or "the Act"), which reads as follows:

> **37. (1) 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.**

The Minister clarified at the admissibility hearing that in this case the alleged activity is people smuggling, not trafficking in persons or money laundering.

BACKGROUND

[2] Mr. **XXXXX XXXXX**came to Canada with almost five hundred other Tamil Sri Lankans in August 2010 on the MV *Sun Sea*, and made a refugee claim. His refugee claim was suspended when the Minister issued a report under subsection 44(1) of IRPA and referred the matter to this Division for an admissibility hearing. The Minister provided documentary evidence consisting of Exhibits C1 through C6; upon Mr. **XXXXX XXXXX** objection, the Minister withdrew pages 44-68 of Exhibit C2. Mr. **XXXXX XXXXX** provided no documentary evidence, but testified at the admissibility hearing.

STANDARD OF PROOF

[3] Pursuant to section 33 of the Act, the standard of proof in this case is "reasonable grounds to believe". The "reasonable grounds to believe" standard has been confirmed by the Supreme Court of Canada[1] as requiring something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities. Reasonable grounds to believe exist where there is an objective basis for the belief which is based on compelling and credible information. This standard applies to questions of fact.

ANALYSIS

[4] Mr. **XXXXX XXXXX** does not dispute his status as a foreign national; he is a citizen of Sri Lanka and concedes he is not a Canadian citizen or permanent resident of Canada.[2] He also conceded that his activities on the *Sun Sea* would constitute **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**, and that the *Sun Sea* operation took place in the context of transnational crime.

Mr. XXXXX activities

[5] In testimony at the admissibility hearing, and in previous interviews with CBSA,[3] Mr. **XXXXX** acknowledged working **XXXXX** in the *Sun Sea* **XXXXX**, under the direction of other persons. Mr. **XXXXX** said he had been asked before boarding the ship if he would be willing to help once on board, though at the time no duties were specified. He said he agreed to help, even though he was also paying a total of **XXXXX** for passage, because he was afraid of being left behind if he refused. Soon after boarding the ship he began to assist in the **XXXXX**, under the direction of three other persons.

[6] In his testimony, Mr. **XXXXX** described his duties on board as comprising **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX** during which he **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**

[1] *Mugesera v. Canada* (Minister of Citizenship and Immigration), 2005 SCC 40.
[2] Also Exh. C1, pp. 1, 5, 7.
[3] Exh. C1, pp. 7-88.

XXXXX XXXXX.

Definition of "people smuggling"

[7] As IRPA does not explicitly define "people smuggling," the parties dispute the correct definition of the phrase, and advocate different approaches to its interpretation. The Minister argues that IRPA's section 117 provides an appropriate definition, while Mr. **XXXXX** argues that, in the absence of an explicit definition in the Act, it is wrong to import the section 117 definition into a 37(1)(b) analysis.

[8] Section 117(1) of IRPA, under the heading "Human Smuggling and Trafficking", 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.**

Subsections (2) and (3) establish that contravention of subsection (1) is an offence that, depending on the circumstances, may be punished by a fine of up to $1,000,000 and/or life imprisonment.

[9] Mr. **XXXXX** argues that, in applying paragraph 37(1)(b) of the Act, the Immigration Division is not bound by the definition in section 117 of the Act, nor, for that matter, by the definition of people smuggling in the United Nations' *Protocol Against the Smuggling of Migrants by Land, Sea and Air* ("the Protocol"), which supplements the *United Nations Convention Against Transnational Organized Crime* ("the Convention"). Mr. **XXXXX** argues that, since Parliament neither defined "people smuggling" in paragraph 37(1)(b) nor referred to section 117, other sections of IRPA, or the Convention (unlike other sections in IRPA that make explicit references to definitions found within IRPA or other laws), the Immigration Division has discretion to construct its own definition in applying paragraph 37(1)(b). Mr. **XXXXX** argues that it is wrong to

use, for the purposes of deciding inadmissibility pursuant to paragraph 37(1)(b), a definition of human smuggling imported from a section of the Act pertaining to a criminal offence, since the subject of inadmissibility proceedings does not benefit from all the legal and procedural protections available to an accused in criminal proceedings, including a higher standard of proof, stricter rules of evidence, the right to silence, and, for proceedings under section 117, a requirement for the consent of the Attorney General of Canada. Mr. **XXXXX** cites a UK case[4] to emphasize that, as a refugee claimant, Mr. **XXXXX** should not be punished for illegal entry into Canada. Mr. **XXXXX** argues that the essential question is whether he was a people smuggler or was himself a smuggled person.

[10] In my view, though the section 117 definition is not binding in an analysis under section 37, it provides highly relevant interpretive assistance, since paragraph 37(1)(b) of the Act does not define people smuggling. Given the absence of more explicit interpretive guidance, it would be inappropriate simply to ignore section 117 of the very same Act, which provides a clear definition of human smuggling.[5]

[11] The same action may make a person both inadmissible and guilty of a criminal offence offence, but contrary to Mr. **XXXXX** argument this is not an instance of punishing an asylum seeker for illegal entry. The UK court judgment cited relates to criminal prosecution, not inadmissibility. Unlike the subjects of the UK case cited, Mr. **XXXXX** has not been criminally prosecuted for his actions. The legal and procedural safeguards in criminal matters are necessary since criminal prosecution pursuant to section 117 entails the possibility of criminal sanctions including fines of up to $1,000,000, up to life imprisonment, and a permanent criminal record. Mr. **XXXXX** does not face such consequences if he is found inadmissible.

[12] Finding an asylum seeker inadmissible is not punishment. As described in *Godoy*,[6] and still true under the current Act, refugee claimants in Canada are routinely

[4] *R v. Uxbridge Magistrates Court and Another, Ex parte Adimi*, [1999] EWHC Admin 765; [2001] Q.B. 667.
[5] I see no significant distinction in this context between the phrases “human smuggling” and “people smuggling”; neither party argued this point.
[6] *R. v. Godoy*, [1996] O.J. No. 2437 (O.C.J.)

found inadmissible for failing to establish that they hold the visa or other document as required under the Act; however, if their refugee claims are eligible the resulting removal order is a conditional departure order. Refugee claimants in Canada, including, as discussed below, the majority of the *Sun Sea* migrants, have entered Canada without complying with the necessary legal requirements, and are therefore inadmissible. Making a refugee claim does not absolve claimants of this inadmissibility; however, the consequences of this inadmissibility are in most cases suspended and conditional on the outcome of their claims for protection.

[13] In this case, although being found inadmissible pursuant to paragraph 37(1)(b) of the Act may make Mr. **XXXXX** ineligible pursuant to paragraph 101(1)(f) of the Act for refugee determination by the Refugee Protection Division of the IRB, it will not preclude his application for a Pre-Removal Risk Assessment through which he may receive equivalent protection, nor will it prevent him from applying to the Minister for relief pursuant to paragraph 37(2)(a). Thus, there is no conflict between a finding of inadmissibility pursuant to paragraph 37(1)(b) and the objectives of the Act listed in paragraphs 3(2)(a-d), as Mr. **XXXXX** argued.

[14] In a number of recent *Sun Sea* decisions, the Immigration Division has found that section 117 provides an appropriate interpretive guide for defining people smuggling for the purposes of paragraph 37(1)(b).[7] I share my colleagues' reasoning in those cases that people smuggling pursuant to paragraph 37(1)(b) does not require the element of "financial or other material benefit" in the Protocol's definition of smuggling of migrants. Canada has criminalized people smuggling, consistent with its obligation as a signatory to the Protocol; the fact that Canada's definition of human smuggling in section 117 is broader than the Protocol's means that the Canadian definition meets or exceeds the minimum standard the Protocol requires.

[7] e.g., B0-00988, B0-01079, B0-01083, B0-01107.

[15] For the above reasons, I am satisfied that the language of section 117 of the Act provides an appropriate definition of people smuggling into Canada for the purposes of paragraph 37(1)(b) of the Act[8].

[16] The Minister argues that, as articulated in the *Alzehrani* decision of the Ontario Superior Court of Justice [9] and accepted in recent decisions of the Immigration Division, four elements in section 117 are required for people smuggling. These four elements are as follows:

> (a) the person(s) being smuggled did not have the required documents to enter Canada;
>
> (b) the person(s) was (were) coming into Canada;
>
> (c) Mr. **XXXXX** was **XXXXX XXXXX XXXXX XXXXX XXXXX XXXXX**.
>
> (d) Mr. **XXXXX** had knowledge of the lack of required documents.

[17] With respect to (a), the Minister has provided documentary evidence that the vast majority of the *Sun Sea* migrants came to Canada without passports, and were issued departure orders for non-compliance with the Act, for not having a visa or other document required in order to establish permanent residence in Canada.[10] Mr. **XXXXX** does not dispute this issue. In the absence of evidence to the contrary, I find that the Minister's evidence provides reasonable grounds to believe that the majority of the *Sun Sea* migrants did not have the documents required to enter Canada legally.

[18] With respect to (b), Mr. **XXXXX** argues that Canadian officials boarded the *Sun Sea* in international waters and directed it into Canadian waters, so the smuggling operation did not bring the migrants into Canada. However, he has not produced evidence, either oral or documentary, to substantiate this assertion. Although he claims that at most, the *Sun Sea* operation was an *attempt* to enter Canada, it appears that that

[8] Although paragraph 37(1)(b) could also apply to people smuggling not involving Canada.
[9] *R. v. Alzehrani*, [2008] O.J. No. 848 (S.C.J.)
[10] Exh. C5, p. 1.

attempt succeeded. Mr. **XXXXX** does not dispute that the *Sun Sea*'s destination was Canada; he testified that his agent told him before boarding that the *Sun Sea* was going to Canada. There is little if any indication in the evidence before me that the *Sun Sea* was ever destined elsewhere. In *Godoy*, although the accused's clients presented themselves at a Canadian port of entry to make refugee claims, she was still found guilty of conspiring to commit the offence that, under the previous *Immigration Act*, is equivalent to section 117 of IRPA.[11] The Court found that since the accused aided her clients in traveling to and arriving at the port of entry, she did assist them to come into Canada. Even if I were to accept the unsupported allegation that the *Sun Sea* was brought into Canadian waters by Canadian officials, its passengers were coming into Canada, and - like Ms. Godoy - Mr. **XXXXX** aided them to do so, as shown below.

[19] With respect to (c), Mr. **XXXXX** concedes that his activities on the Sun Sea constituted aiding and abetting within the meaning of section 117 of the Act. Mr. **XXXXX** was directly involved, albeit at a low level of responsibility, in the physical operation of the *Sun Sea*, which enabled it to travel from Thailand to Canada. I am satisfied that Mr. **XXXXX** activities aided the smuggled migrants to come into Canada.

[20] With respect to (d), there are reasonable grounds to believe that Mr. **XXXXX** knew that the persons smuggled on the *Sun Sea* were not in possession of a visa, passport or other document required by IRPA. Mr. **XXXXX** is reasonably well-travelled and according to his testimony had experienced that a passport and appropriate visa allowed him to travel legally to other countries. He testified that he would have required a visa to travel to Canada by plane. However, he did not have a visa for Canada, and therefore resorted to the onerous process of coming by boat. He testified that his agent told him such documents were not required if he came by boat to make a refugee claim. Mr. **XXXXX** testified that he had met some of the other *Sun Sea* migrants in Thailand, about two weeks before boarding the ship. Although he testified that he did not know whether the other *Sun Sea* passengers had passports or visas for Canada, the lack of such documents is the only logical reason they would have been on the *Sun Sea* rather than a plane, just like Mr. **XXXXX**. Lack of appropriate documentation was the only reason he

[11] *R. v. Godoy*, [1996] O.J. No. 2437 (O.C.J)

and others would have paid enormous sums (tens of thousands of dollars, if Mr. **XXXXX** statements and other sources are to be believed) for unorthodox sea transport, far higher sums than airfare likely would have required.[12]

[21] Furthermore, Mr. **XXXXX** made statements in an interview with CBSA on 20 October 2010[13] that suggest he knew his fellow passengers lacked visas:

> Q. Were you aware that you were not legally travelling to Canada?
>
> A. It's not only me. It's all the 492 people on the ship that were aware or knew that it was a journey against the law. If a person is not allowed to get a visa and travel, then this is the only option.
>
> ...
>
> Q. Just to make it crystal clear. You knew you were coming to Canada through fraudulent means?
>
> A. Not before getting into the ship, but after getting into the ship I knew that with all these other people we were going to another place in a way that was against the law.

Although Mr. **XXXXX** raised concerns about the propriety of CBSA's questioning techniques in this and other interviews, he did not go so far as to repudiate the above statements. I am satisfied that Mr. **XXXXX** knew that other *Sun Sea* passengers, just like himself, lacked the required documents for legal entry to Canada.

[22] Mr. **XXXXX** may not have known precisely which documents were necessary to legally enter Canada, but his knowledge or ignorance of Canadian law is not the issue. It is his knowledge of the other Tamils' lack of adequate documents that is relevant, not his knowledge or ignorance of which specific documents Canada deems necessary. I am satisfied there are reasonable grounds to believe that Mr. **XXXXX** knew that the migrants lacked appropriate documentation for legal entry to Canada, whether or not he understood which specific documents were necessary for such entry.

[12] Exh. C2, pp. 11-12, 20-29, 35
[13] Exh. C1, pp. 52, 53

[23] Accordingly, by knowingly aiding the coming into Canada of persons who were not in possession of a visa, passport or other document required the Act, Mr. **XXXXX** engaged in people smuggling.

Transnational crime

[24] Section 37 of IRPA requires that the proscribed activity (in this case, people smuggling) must occur "in the context of transnational crime." IRPA does not explicitly define "transnational crime." Paragraph 3(3)(f) of IRPA stipulates that the Act is to be construed and applied in a manner that complies with international human rights instruments to which Canada is signatory. The Minister advocates adoption of the definition of "transnational crime" in the *United Nations Convention Against Transnational Organized Crime* ("UNCATOC" or "the Convention).

[25] According to Article 3(2) of the Convention,

> **...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.**

[26] Mr. **XXXXX** does not dispute the applicability of this definition, and concedes that the operation that brought the *Sun Sea* from Thailand into international waters was a transnational criminal operation. However, he argues that it was Canadian officials, not the Sun Sea migrants, who brought the *Sun Sea* into Canadian waters. I have not been provided with evidence to substantiate that claim, and do not find it relevant. There is no dispute in this case that the *Sun Sea*'s intended destination was always Canada, and that it deliberately sailed from Thailand to Canada with the intention of reaching Canada. Even

if it is the case that Canadian officials brought the ship into Canadian waters, since the *Sun Sea* operation involved the illegal transport of migrants from one state (Thailand) to another (Canada), and since a substantial part of its preparation, planning, direction or control took place in another state (Thailand) than the one entered (Canada), I am satisfied that the *Sun Sea* people smuggling operation took place in the context of transnational crime.

CONCLUSION

[27] Mr. **XXXXX** knowingly aided the coming into Canada of persons who were not in possession of a visa, passport or other document required by IRPA. In so doing, he engaged, in the context of transnational crime, in people smuggling. He is therefore inadmissible pursuant to paragraph 37(1)(b) of IRPA.

ORDER

[35] I am required, pursuant to paragraphs 45(d) of IRPA and 229(1)(e) of the Immigration and Refugee Protection Regulations, to issue a deportation order against Mr. **XXXXX**. The order is attached to this decision.

(signed)

Geoff Rempel

20 October 2011

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