Federal Court  Cour fédérale

Date: 20121204

Docket: IMM-2409-12

Citation: 2012 FC 1417

Ottawa, Ontario, December 4, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JESUS RODRIGUEZ HERNANDEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Is it "people smuggling" when not done for financial or other material benefit, but for humanitarian reasons? That is the issue raised in this application.

[2] The applicant submits that the Immigration Division of the Immigration and Refugee Board [the ID] erred in its interpretation of "people smuggling" in paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] by failing to include the requirement that the smuggler obtain, "directly or indirectly, a financial or other material benefit" [the Profit Element] as

is required in the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime* [the Protocol].

[3] This very issue was recently considered by this Court in *B010 v Canada (Minister of Citizenship and Immigration*, 2012 FC 569 [*B010*] and *B072 v Canada (Minister of Citizenship and Immigration*), 2012 FC 899 [*B072*]. In those decisions, the Court found reasonable the ID's finding that "people smuggling" is to be interpreted in a manner consistent with the offence of "Human Smuggling" in subsection 117(1) of the Act which does not require the Profit Element.[1]

[4] The applicant submits that these prior judgments should not be followed because they did not consider *De Guzman v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 [*De Guzman*], on the application of paragraph 3(3)(f) of the Act and the "incorporation of international human rights instruments into Canadian immigration law." The applicant further submits that the proper standard of review of the ID's interpretation of paragraph 37(1)(b) of the Act is correctness and not reasonableness, as held in those judgments, and that the correct interpretation of "people smuggling" in paragraph 37(1)(b) includes the Profit Element.

Background

[5] The applicant is a citizen of Cuba who says that he was persecuted and imprisoned for speaking out against its government and in joining others who opposed it. In 2001, he fled Cuba for Florida where he was granted refugee status. While in Florida, he continued to speak publicly against the Cuban government.

[6] In November 2003, he and two others took a small boat from Florida to Cuba to retrieve family members they left in Cuba and transport them to the United States. It was not done for any profit motive – it was arguably a humanitarian mission. They, and the 48 members of their extended families on board, were intercepted and detained by the US Coast Guard on their return trip. The applicant was charged with three counts of Alien Smuggling pursuant to Title USC §1324(a)(2)(A) which defines that crime as follows:

> (2) Any person who, knowing or in reckless disregard of the fact that an alien has not received prior official authorization to come to, enter, or reside in the United States, brings to or attempts to bring to the United States in any manner whatsoever, such alien, regardless of any official action which may later be taken with respect to such alien shall, for each alien in respect to whom a violation of this paragraph occurs—
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> (A) be fined in accordance with title 18 or imprisoned not more than one year, or both; or
>
> (B) in the case of—
>
> > (i) an offense committed with the intent or with reason to believe that the alien unlawfully brought into the United States will commit an offense against the United States or any State punishable by imprisonment for more than 1 year,
> >
> > (ii) an offense done for the purpose of commercial advantage or private financial gain, or
> >
> > (iii) an offense in which the alien is not upon arrival immediately brought and presented to an appropriate immigration officer at a designated port of entry,
>
> be fined under title 18 and shall be imprisoned, in the case of a first or second violation of subparagraph (B)(iii), not more than 10 years, in the case of a first or second violation of subparagraph (B)(i) or (B)(ii), not less than 3 nor more than 10 years, and for any other violation, not less than 5 nor more than 15 years.

[7] The applicant pled guilty and was sentenced to a term of imprisonment of twelve months and one day. As a consequence, he lost his refugee status in the USA and was subject to deportation to Cuba. Rather than return to Cuba, where he claims he faces persecution, he came to Canada and sought Convention refugee status. His claim for protection was suspended pending a determination of his admissibility to Canada.

[8] On January 19, 2010, an immigration officer wrote a report under subsection 44(1) of the Act expressing the opinion that the applicant was inadmissible pursuant to paragraph 36(1)(b) of the Act on grounds of serious criminality for "having been convicted of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years." The officer found that the conviction for Alien Smuggling equates to the offence of Human Smuggling in subsection 117(1) of the Act which 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.	117(1) Commet une infraction quiconque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.

It is not disputed that the Profit Element is not a necessary element of the offence of Human Smuggling and there is no issue in this proceeding that Alien Smuggling equates to the offence of Human Smuggling in subsection 117(1) of the Act.

[9] On March 31, 2011, an immigration officer wrote a second report under subsection 44(1) of the Act expressing the opinion that the applicant was inadmissible pursuant to paragraph 37(1)(b) of the Act on grounds of organized criminality because "he engaged in the activity of people smuggling" given the acts to which he admitted that led to his conviction in the USA for Alien Smuggling.

[10] Paragraph 37(1)(b) of the Act provides that a foreign national who has engaged in people smuggling is inadmissible on the grounds of organized criminality unless he satisfies the Minister of Public Safety and Emergency Preparedness that his presence in Canada would not be detrimental to the national interest. The relevant provision reads as follows:

37(1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	37(1) Emportent interdiction de territoire pour criminalité organisée les faits suivants:
…	…
(b) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.	(b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.
(2) The following provisions govern subsection (1):	(2) Les dispositions suivantes régissent l'application du paragraphe (1):
(a) subsection (1) does not apply in the case of a permanent resident or a foreign national who satisfies the Minister that their presence in Canada would not be detrimental to the national interest; …	(a) les faits visés n'emportent pas interdiction de territoire pour le résident permanent ou l'étranger qui convainc le ministre que sa présence au Canada ne serait nullement préjudiciable à l'intérêt national; …

[11] The ID conducted an admissibility hearing and in its decision of January 27, 2012, it made two findings. First, the ID found that there were reasonable grounds to believe that the offence for which the applicant had been convicted in the USA (Alien Smuggling) would constitute an offence in Canada punishable by a term of imprisonment of at least 10 years, i.e. the offence of Human Smuggling set out in subsection 117(1) of the Act. Accordingly, he was found inadmissible to Canada on grounds of serious criminality pursuant to paragraph 36(1)(b) of the Act. The applicant takes no issue with that finding in this proceeding. Second, notwithstanding that the Profit Element was absent from the applicant's smuggling activity, the ID found that there were reasonable grounds to believe that he is inadmissible to Canada on grounds of organized criminality for engaging in the transnational crime of "people smuggling" pursuant to paragraph 37(1)(b) of the Act.

[12] As a consequence of these findings, a deportation order was issued against Mr. Rodriguez Hernandez pursuant to paragraph 45(d) of the Act and paragraph 229(1)(e) of the *Immigration and Refugee Protection Regulations,* SOR/2002-227.

Standard of Review

[13] Is the ID's interpretation of paragraph 37(1)(b) of the Act reviewable on the standard of reasonableness, as the respondent submits, or correctness, as the applicant submits? There are two very recent decisions of this Court on this question, and they reach different conclusions.

[14] Justice Noël in *B010* held at para 33 of his Reasons that the ID's interpretation of paragraph 37(1)(b) of the Act is reviewable on the standard of reasonableness.

> With regard to the ID's interpretation of the IRPA, the Supreme Court has consistently spoken of the need for deference when a

> tribunal is interpreting its own statute (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 at para 30, [2011] SCJ 61 [*Alberta Teachers'*]; *Smith v Alliance Pipeline Ltd*, 2011 SCC 7 at paras 37-39 [*Alliance Pipeline*], [2011] 1 SCR 160; *Khosa*, above, at para 44; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 54, [2008] 1 SCR 190 [*Dunsmuir*]). Accordingly, this Court will apply the standard of reasonableness to the ID's interpretation of para 37(1)(*b*) of the IRPA, ensuring that there was justification, transparency, and intelligibility within the decision-making process and that the ID's interpretation fell within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at para 47).

[15] Justice Snider in *Canada (Minister of Citizenship and Immigration) v Singh Dhillon*, 2012 FC 726 [*Singh Dhillon*], held at para 20 of her Reasons that the ID's interpretation of paragraph 37(1)(b) of the Act is reviewable on the standard of correctness. In reaching her conclusion, Justice Snider refers to the instructions of the Supreme Court of Canada in decisions that include those referenced by Justice Noël, but notes that mere interpretation of a tribunal's own statute does not automatically result in the standard of review being reasonableness. She cites *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2011 SCC 53 [*Mowat*], at para 24, wherein a unanimous Supreme Court wrote the following:

> In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and <u>does not raise issues of general legal importance</u>, the standard of reasonableness will <u>generally</u> apply and the Tribunal will be entitled to deference. [emphasis added]

[16] Justice Snider held that the ID's interpretation of paragraph 37(1)(b) of the Act should be interpreted on the standard of correctness because, although that provision was found in its home statute, the issue was "one of general legal importance."

[17] In light of these conflicting decisions, the applicable standard of review has not been "determined in a satisfactory manner" by prior cases and thus it is an open question in this application which standard of review should apply to the ID's interpretation of paragraph 37(1)(b) of the Act: *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 62 [*Dunsmuir*].

[18] In *Dunsmuir*, the Supreme Court held that a decision-maker's interpretation of its home statute will "usually" attract the reasonableness standard. The Supreme Court also reaffirmed in *Dunsmuir* at paras 55, and 58-61, that "a question of law of 'central importance to the legal system … and outside the … specialized area of expertise' of the administrative decision maker will always attract a correctness standard," as will constitutional questions and "true" questions of jurisdiction or *vires* [emphasis added]. These exceptions to the home statute presumption were not said to be exhaustive. Indeed, the Supreme Court went on to say at para 55 that "[o]n the other hand, a question of law that does not rise to [the level of central importance] may be compatible with a reasonableness standard where [there is a privative clause and a discrete and special administrative regime]" [emphasis added]. Accordingly, *Dunsmuir* left the door open for the correctness standard to apply to a question of law that was both inside a decision-maker's home statute and was not of "central importance" to the legal system nor truly jurisdictional in nature. However, no test as to when the home statute presumption would otherwise be rebutted was articulated.

[19] In *Khosa v Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12 [*Khosa*], the Supreme Court first considered the application of *Dunsmuir* to the *Federal Courts Act* and, regarding questions of law, it held at para 44 that they are generally reviewable by this Court on the correctness standard:

> Judicial intervention is authorized [pursuant to paragraph 18.1(4)(c) of the *Federal Courts Act*] where a federal board, commission or other tribunal
>
> > (c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;
>
> Errors of law are generally governed by a correctness standard. *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 S.C.R. 100 (S.C.C.), at para. 37, for example, held that the general questions of international law and criminal law at issue in that case had to be decided on a standard of correctness. *Dunsmuir* (at para. 54), says that if the interpretation of the home statute or a closely related statute by an expert decision maker is reasonable, there is no error of law justifying intervention. Accordingly, para. (c) provides a ground of intervention, but the common law will stay the hand of the judge(s) in certain cases if the interpretation is by an expert adjudicator interpreting his or her home statute or a closely related statute. This nuance does not appear on the face of para. (c), but it is the common law principle on which the discretion provided in s. 18.1(4) is to be exercised. Once again, the open textured language of the *Federal Courts Act* is supplemented by the common law.

[20] The issue in *Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40 [*Mugesera*], cited by the Supreme Court in *Khosa*, was whether the Appeal Division of the Immigration and Refugee Board [the IAD] had properly found Mr. Mugesera inadmissible pursuant to provisions of the since-replaced *Immigration Act*, RSC 1985, c I-2. Those provisions required the IAD to determine whether Mr. Mugesera had committed an act or omission constituting an offence in the place in which the act or omission was committed and which would constitute a criminal offence in Canada. That exercise necessarily involved the interpretation – although not the direct application – of both domestic and foreign criminal law. The correctness standard of review was applied.

[21] *Khosa* was decided after *Dunsmuir* and supports the proposition that decisions by the ID that involve the interpretation of criminal or international law, even if not in the context of applying it – are owed no deference by a reviewing court.

[22] Two years after *Khosa*, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 [*ATA*], Justice Rothstein, at para 30, was thought by some to have strengthened the home statute presumption:

> There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.), at para. 28, per Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... questions regarding the jurisdictional lines between two or more competing specialized tribunals [and] true questions of jurisdiction or *vires*" (*Canada (Attorney General) v. Mowat*, 2011 SCC 53 (S.C.C.), at para. 18, per LeBel and Cromwell JJ., citing Dunsmuir, at paras. 58, 60-61). [emphasis added]

[23] Justice Cromwell, although concurring in the result, dissented at para 99 from Justice Rothstein's reasons on the home statute presumption:

> The point is this. The proposition that provisions of a "home statute" are generally reviewable on a reasonableness standard does not trump a more thorough examination of legislative intent when a plausible argument is advanced that a tribunal must interpret a particular provision correctly. In other words, saying that such provisions in "home" statutes are "exceptional" is not an answer to a plausible argument that a particular provision falls outside the "presumption" of reasonableness review and into the "exceptional" category of correctness review. Nor does it assist in determining by what means the "presumption" may be rebutted.

[24] Six months later, in *Rogers Communications Inc v Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, Justice Rothstein for the majority clarified the holding in *ATA* at para 16, as follows:

> I must also respectfully disagree with Abella J.'s characterization, at para. 5, of the holding in *ATA* as meaning that the "exceptions to the presumption of home statute deference are ... constitutional questions and questions of law of central importance to the legal system and outside the adjudicator's specialized expertise". *Dunsmuir* had recognized that questions which fall within the categories of constitutional questions and questions of general law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise were to be reviewed on a correctness standard (*Dunsmuir*, at paras. 58 and 60). *ATA* simply reinforced the direction in *Dunsmuir* that issues that fall under the category of interpretation of the home statute or closely related statutes normally attract a deferential standard of review (*ATA*, at para. 39; Dunsmuir, at para. 54). My colleague's approach would in effect mean that the reasonableness standard applies to all interpretations of home statutes. Yet, *ATA* and *Dunsmuir* allow for the exceptional other case to rebut the presumption of reasonableness review for questions involving the interpretation of the home statute. [emphasis added]

[25] As a result, the current state of the law is this: the home statute presumption applies unless (1) it is a constitutional question, (2) a question of general law of central importance to the legal system and outside the decision-maker's specialized expertise, (3) a true question of jurisdiction or of the jurisdictional lines between two or more competing specialized tribunals, or (4) "an exceptional other case."

[26] As to what may fall into the "exceptional other case" one looks first to previous decisions "determined in a satisfactory manner" that applied the correctness standard: *Dunsmuir* at para 62.

[27] As discussed above, the Supreme Court in *Khosa* held that decisions of the ID that involve the interpretation of criminal or international law rightly attract the correctness standard. That was held to be so even where the decision-maker was directed to interpret (and not even apply) that law by its home statute, as was the case in *Mugesera*, and where, like the present case, such interpretation was necessary in order to determine an individual's inadmissibility for criminality. The Federal Court of Appeal has also recently held that the implication of international law is a factor favouring the correctness standard of review: See *Idahosa v Canada (Minister of Public Safety & Emergency Preparedness)*, 2008 FCA 418, at para 17. That approach is consistent with that the Court of Appeal took in *De Guzman* which also involved an examination of international law.

[28] In this case, the issue is whether the ID correctly interpreted the expression "people smuggling" in paragraph 37(1)(b) of the Act in order to determine whether the applicant was inadmissible for "organized criminality." In its reasons, the ID's interpretation of that expression was based, among other things, on section 117 of the Act, which is undoubtedly criminal law; on the judgment of the Ontario Superior Court of Justice in *R v Alzehrani*, [2008] OJ 4422, applying that criminal offence; and on definitions contained in the Protocol and the *United Nations Convention against Transnational Organized Crime*, UNTS vol 2225, p 209 [Organized Crime Convention], i.e. international law. Indeed, the ID by its own conclusion is effectively interpreting criminal law by concluding that "people smuggling" for the purposes of paragraph 37(1)(b) is the same as the criminal offence of Human Smuggling created by section 117 of the Act.

[29] The present case is therefore perfectly described in *Khosa* at para 44, as an example where the correctness standard applies.

[30] In addition, although it is not necessary for the conclusion I have reached, I am also of the view that the question of who is or is not admissible to Canada is a question of "central importance to the legal system." A finding on admissibility dictates the right of a non-citizen to enter into and remain in Canada, either as an immigrant or as a protected person. The right of a non-citizen to remain in Canada and the protection, if any, he or she is entitled to receive prior to removal, are fundamental to the Canadian legal system. Therefore, it is the correct interpretation, and not merely a reasonable interpretation of the relevant statutory provisions, that is required.

[31] I therefore find that correctness is the appropriate standard of review for the issue involved in this application: the interpretation of "people smuggling" in paragraph 37(1)(b) of the Act.

International Human Rights Instruments and the Interpretation of the Act

[32] I turn to consider whether the ID erred in law by interpreting the phrase "people smuggling" in paragraph 37(1)(b) of the Act synonymously with the crime of Human Smuggling in section 117 of the Act. As discussed above, what is at issue, specifically, is whether "people smuggling" for the purposes of paragraph 37(1)(b) requires the Profit Element.

[33] The applicant's argument in a nutshell is this. Paragraph 3(3)(f) of the Act requires that the other provisions of the Act "be construed and applied in a manner that … complies with international human rights instruments to which Canada is signatory." *De Guzman* is authoritative

and held at para 83 that "IRPA must be interpreted and applied consistently with an instrument to which paragraph 3(3)(f) applies, unless, on the modern approach to statutory interpretation, this is impossible [emphasis added]."

[34] More recently, the Supreme Court in *Németh v Canada (Minister of Justice)*, 2010 SCC 56, held at para 34 that "where possible, statutes should be interpreted in a way which makes their provisions consistent with Canada's international treaty obligations and principles of international law." However, "the presumption that legislation implements Canada's international obligations is rebuttable. If the provisions are unambiguous, they must be given effect:" at para 35.

[35] Importantly, *De Guzman* teaches that one must examine the "impugned provision in the context of the entire legislative scheme," and not in isolation. As a result, one cannot simply "adopt" the Protocol's definition without examining both how that definition fits into the legislative scheme as a whole and how that whole then coexists with relevant international human rights instruments.

[36] To summarize, the effect of these authorities is that the legislative scheme of the Act as a whole must be interpreted and applied consistently with international human rights instruments described in paragraph 3(3)(f) of the Act, unless, on the modern approach to statutory interpretation, this is impossible.

The Scheme of the Act as a Whole and the Applicant

[37] The applicant made an in-Canada claim for refugee protection to an officer, which he was entitled to do as he was not subject to a removal order: subsection 99(3). The officer was then required to determine whether the applicant's claim for protection was eligible to be referred to the Refugee Protection Division of the Immigration and Refugee Board [the RPD]: subsection 100(1). The officer was of the opinion that the applicant was inadmissible to Canada (first for serious criminality and latter for organized crime) and accordingly, prepared a report setting out the relevant facts and transmitted it to the Minister: subsection 44(1). The Minister, satisfied that the report was "well-founded," referred the report to the ID for an admissibility hearing: subsection 44(2). When the report was referred to the ID for determination, the officer suspended consideration of the applicant's claim for protection: subsection 100(2).

[38] The result of the applicant's admissibility hearing was a finding that he was inadmissible to Canada both on the grounds of serious criminality (paragraph 36(1)(b)) and on the grounds of organized criminality (paragraph 37(1)(b)) as a consequence of his actions and his conviction in the United States for Alien Smuggling. Mr. Hernandez was ordered deported, pursuant to paragraph 45(d) of the Act, on account of each finding.

[39] Pursuant to paragraphs 37(2)(a) and 4(2)(d) of the Act, the applicant may negate the finding of inadmissibility for organized criminality if he "satisfies the Minister [of Public Safety and Emergency Preparedness] that [his] presence in Canada would not be detrimental to the national interest." Based on the record before me, it appears Mr. Hernandez has not yet attempted to so satisfy that Minister.

[40] If the applicant is unsuccessful at satisfying the Minister that his presence is not detrimental to the national interest, or if he does not try to do so, then, pursuant to paragraph 101(1)(f) of the Act, the finding of organized criminality will bar him from making a refugee claim. The finding of serious criminality, on the other hand, which is not contested in this application, only bars the applicant from making a refugee claim if the "Minister [of Citizenship and Immigration] is of the opinion that he is a danger to the public in Canada:" paragraph 101(2)(b). There is also no evidence that such a danger opinion has been issued by that Minister.

[41] Individuals inadmissible for having engaged in either serious criminality (as described in paragraph 112(3)(b)) or organized criminality and who are subject to a deportation order, such as the applicant, may apply for a Pre-Removal Risk Assessment (PRRA) under the Act, albeit in a limited manner. In particular, paragraph 113(d) provides that those, like the applicant, who are inadmissible on grounds of organized criminality, shall have their risk assessed "on the basis of the factors set out in section 97, i.e. "a danger … of torture," or "a risk to their life or to a risk of cruel and unusual treatment or punishment." They are not entitled to have their risk assessed on the basis of the factors set out in section 96, i.e. "a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion."

[42] In summary, if the ID's finding that the applicant is inadmissible on grounds of organized criminality stands, then he has the following options available to challenge his removal to Cuba:

a. He can attempt to satisfy the Minister of Public Safety and Emergency Preparedness that his presence is not detrimental to Canada's national interest; if he succeeds, then his inadmissibility status is waived and he can advance a claim for refugee protection.

b. If he is unable to change his inadmissibility status, then he is entitled to a PRRA only as to whether he is at risk of torture, or there is a risk to his life or a risk of cruel and unusual treatment and punishment if he is removed from Canada; not whether he is at risk of persecution.

Relevant International Human Rights Instruments

[43] I turn now to consider the relevant international human rights instruments to which Canada is a signatory.

[44] As described above, the applicant submits that removing the Profit Element from "people smuggling" is inconsistent with the Protocol. In particular, he says that by including the Profit Element in the definition of the "smuggling of migrants," the Protocol focused on those criminals who, for profit, prey on the poor and disadvantaged, and made it clear that family members, friends, and non-governmental organizations that assist others to effect illegal entry were not intended to be captured. Support for the latter assertion comes from the following passage in the *UNHCR Summary Position on the Protocol against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime*:

> The Protocol against Smuggling is also clear in that it does not aim at punishing persons for the mere fact of having been smuggled or at penalizing organizations which assist such persons for purely humanitarian reasons.

[45] I cannot accept the applicant's submission that removing the Profit Element in paragraph 37(1)(b) of the Act is inconsistent with the Protocol for the following reasons.

[46] The Organized Crime Convention concerns the criminalization of certain transnational conduct. Article 3, paragraph 1 states:

> This Convention shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of:
>
> (a) The offences established in accordance with articles 5, 6, 8 and 23 of this Convention; and
>
> (b) Serious crime as defined in article 2 of this Convention;
>
> where the offence is transnational in nature and involves an organized criminal group. [emphasis added]

[47] Moreover, paragraph 1(a) of Article 6 of the Protocol, annexed to the Organized Crime Convention, is clearly intended to criminalize the specific transnational crime of "smuggling of migrants:"

> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:
>
> (a) The smuggling of migrants; …[emphasis added]

[48] Unlike the Protocol, which establishes crimes, paragraph 37(1)(b) of the Act is an inadmissibility provision with consequences to a foreign national's ability to claim protection, and a permanent resident's or foreign national's ability to remain in Canada.

[49] Canada's international commitment to criminalize the smuggling of migrants when engaged in transnationally, has no bearing on when it must permit persons to seek Convention refugee protection or when the exceptions to the principle of non-refoulement will be met. There is another international human rights instrument to which Canada is a signatory that bears more directly on these issues: The *Convention Relating to the Status of Refugees* and the *Protocol Relating to the Status of Refugees* [collectively the Refugee Convention].

[50] Article 33 of the Refugee Convention "embodies in refugee law the principle of non-refoulement which has been described as the cornerstone of the international refugee protection regime:" *Németh*, para 18. It provides as follows:

> Article 33. - Prohibition of expulsion or return ("refoulement")
>
> 1. No Contracting State shall expel or return (" refouler ") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. [emphasis added]

[51] Standing alone, paragraph 1 of Article 33 of the Refugee Convention would prevent Canada from returning the applicant to Cuba without having made an assessment of the well-foundedness of his fear of persecution or torture under both sections 96 and 97 of the Act. However, paragraph 2 provides that the non-refoulement principle does not extend to those who, by virtue of "having been

convicted by a final judgment of a particularly serious crime, [constitute] a danger to the community of that country."

[52] Paragraph 3(3)(f) of the Act dictates that these provisions of the Act, relating to persons such as this applicant, must be examined for consistency with this international human rights instrument.

[53] What are the consequences of this applicant being found inadmissible due to organized criminality? If the applicant is inadmissible under paragraph 37(1)(b) of the Act for organized criminality, he will not get a refugee hearing (paragraph 101(1)(f) of the Act) and he will be returned without any examination of his claims of persecution, because the PRRA will not capture persecution factors under section 96.

[54] However, this is not necessarily inconsistent with the Refugee Convention because of the danger-related 'safety-valve' in paragraph 37(2)(a) of the Act. That mechanism prevents the just-mentioned consequences from befalling people smugglers who satisfy the Minister that their presence in Canada is not detrimental to the "national interest." The Court of Appeal in *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103, affirmed that "Parliament has placed the consideration of national interest within the context of national security and public safety" and that, as a result, "the principal, if not the only, consideration in the processing of applications for ministerial relief [regarding the "national interest"] is national security and public safety, subject only to the Minister's obligation to act in accordance with the law and the Constitution:" at paras 39 and 50. Persons who are detrimental to the national interest of Canada are

persons who are "a danger to the community of that country" within the meaning of the Refugee Convention and thus, disentitled from protection from persecution according to the Refugee Convention.

[55] As a result, I am satisfied that the scheme of the Act as a whole, relevant to the applicant, is not truly inconsistent with either the Protocol or the Refugee Convention.

[56] However, the fact that the ID's interpretation is not truly inconsistent with international law does not end the matter. What remains to be done is to ascertain the correct legal interpretation of "people smuggling" in paragraph 37(1)(b) of the Act.

What Does "People Smuggling" in the Act Mean?

[57] Justice Noël in *B010* was examining, as he put it at para 33, whether "the ID's interpretation [of paragraph 37(1)(b)] fell within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law (*Dunsmuir*, above, at para 47)." A reasonable interpretation of a statutory provision may not be the correct one. In fact, in this case there appear to be two equally reasonable but competing interpretations of "people smuggling." On the reasonableness standard of review, Justice Noël's task was not to determine the correct interpretation. At para 36 he said: "I must stress that in applying the reasonableness standard of review, this Court's task is not to assess the applicant's proposed definition, but only to determine whether the ID's chosen interpretation falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paras 47 and 54)." Accordingly, and although I take guidance from the reasoning of Justice Noël, neither comity nor precedent requires that I follow it. My task, based on

the correctness standard of review, is to determine the one correct interpretation of paragraph 37(1)(b) of the Act.

[58] For the following reasons, I conclude 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.

[59] My first reason for concluding that "people smuggling" in paragraph 37(1)(b) includes the Profit Element is that Parliament used different terms in paragraph 37(1)(b) and in section 117 – people smuggling versus human smuggling. I agree with Justice Noël that the different words themselves hardly clarify matters; however, it remains a canon of interpretation that different words appearing in the same statute should be given a different meaning: See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5d ed (Toronto: LexisNexis Canada, 2008) [Sullivan on Construction] at 216-218. This principle was expressed by Justice Malone in *Peach Hill Management Ltd v Canada*, [2000] FCJ 894 (CA), at para 12, as follows:

> When an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning.

[60] In my view, this observation from the Court of Appeal is all the more applicable and determinative when, as here, the two phrases came into the Act at the same time with the passage of Bill C-11 in 2001, which brought the Act into existence. The possibility of an oversight or drafting error is less likely in that circumstance than when legislation is amended piece-meal over time.

[61] What we have in the Act are two different phrases that appear to relate to the same subject matter: the bringing of persons into a country contrary to that country's laws. In Ruth Sullivan, *Statutory Interpretation*, 2d ed (Toronto: Irwin Law, 2007) [Sullivan on Interpretation] at 185, the author directs what is to be done when faced with different terms relating to the same subject in the same statute:

> [t]he next step in the analysis [is] to identify a plausible reason for distinguishing between the two groups. This may be done by noting how the two groups are treated differently under the Act, and then suggesting historical or desirable reasons for this difference in treatment

[62] Justice Noël did consider, at paragraph 44 of in his Reasons, how the two separate concepts (people smuggling and Human Smuggling) would be treated under the Act, and concluded that it made no sense that someone convicted of Human Smuggling would not be inadmissible to Canada:

> This then raises a second important point. If the provisions of the IRPA are to be read in such a manner, how can we adopt an interpretation of the IRPA in which two sections hold different meanings when they employ such strikingly similar terms and appear to address the same conduct? One would be hard pressed to explain why an individual convicted of 'organizing entry into Canada' pursuant to section 117 could remain admissible to Canada despite para 37(1)(*b*). Indeed, when the offence set out in section 117 is located under the heading 'human smuggling and trafficking' and may result in both a fine of up to $1,000,000 and life imprisonment for any individual that smuggles a group of 10 or more persons, how can an individual convicted of this offence not be found to have engaged in 'people smuggling' under para 37(1)(*b*)? It strikes me as improbable that differing interpretations given to the terms 'people smuggling' and 'human smuggling' could justify such a contradiction. Hence, for the sake of coherence and consistency, unless the contrary is clearly indicated by the context, this is another indication that para 37(1)(*b*) should be interpreted in conformity with section 117 so that it may be given "a meaning that is harmonious with the Act as a whole" (*Canada Trustco*, above, at para 10). [emphasis added]

[63] The underlined passage asks why someone convicted of Human Smuggling in Canada under section 117 could remain admissible to Canada. The short answer is that such a person's inadmissibility does not solely depend on section 37 of the Act. Section 36 of the Act also provides for inadmissibility – inadmissibility for "serious criminality."

[64] 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); however, that individual would nonetheless be inadmissible for "serious criminality" through the straightforward application of subsection 36(1), and would be subjected to the attendant consequences of such a designation. In other words, notwithstanding paragraph 37(1)(b), the humanitarian people smuggler is already inadmissible in the same manner as others convicted of serious crimes.

[65] I therefore see no "contradiction" of the kind described in *B010* if the Profit Element is a requirement of "people smuggling" even though it is not a requirement for the crime of Human Smuggling. The humanitarian smuggler remains inadmissible and is grouped, for the purposes of the Act, with murderers, rapists, and other serious criminals, which entails that if the Minister believes the smuggler is a danger to the public in Canada, he will not have the benefit of a refugee determination (paragraph 101(1)(f)), and he may be refouled to persecution (subparagraph 113(d)(i)). It is simply that certain additional and exceptional drawbacks caused by a finding of "organized criminality" would not apply to the humanitarian smuggler. But, as I have said, 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. Thus, the scheme of the Act is in no way thrown into discord merely because of that interpretation.

[66] Moreover, in Sullivan's words, I find there is a "plausible reason for distinguishing between the two groups." Individuals who smuggle people for profit arguably should be afforded fewer protections than those who do not. Indeed, Parliament listed the profit motive as an aggravating factor to be considered at the sentencing stage for the offence of Human Smuggling in section 117: See paragraph 121(1)(c). Parliament therefore obviously intended that the smuggling of people for profit is to be met with harsher treatment than humanitarian smuggling. Including the Profit Element as a requirement of people smuggling in paragraph 37(1)(b) accords with that intention.

[67] My second reason for concluding that "people smuggling" in paragraph 37(1)(b) includes the Profit Element is that Parliament placed the phrase "people smuggling" in paragraph 37(1)(b) as a part of a longer phrase and these words and phrases must be interpreted in context. "This includes the immediate context, the Act as a whole and the statute book as a whole:" Sullivan on Construction at 354.

[68] In my view, the immediate context of the phrase "people smuggling" is very relevant to its proper interpretation. It is found within the following phrase "is inadmissible on grounds of organized criminality for engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering" [emphasis added].

[69] First, the paragraph renders one inadmissible not for the crimes of people smuggling, trafficking in persons or money laundering, but for engaging in those or similar activities "in the context of transnational crime." If "people smuggling" and "Human Smuggling" both referred to crimes or both referred to activities, then it might be more natural to say that they both refer to the same thing. However, where they have different referents - one a crime and the other an activity - it is less obvious that one should import the meaning of one into the other, in the absence of a clearly stated intention that they share a common meaning.

[70] Second, the associated words rule (*noscitur a sociis*) should be used to interpret the operative phrase: "activities such as people smuggling, trafficking in persons or money laundering." Under the rule "the interpreter looks for a pattern or a common theme in the words or phrases, which may be relied on to resolve ambiguity or to fix the scope of the provision:" Sullivan on Interpretation 175. As Justice Martin said in *R v Goulis* (1981), 33 OR (2d) 55 at para 61 (CA), the words "take their colour from each other."

[71] Trafficking in persons and money laundering are done for profit. They are not activities done with no expectation of profit or for humanitarian reasons. This suggests that people smuggling, as found within that phrase, has similar colour or meaning. Alone, the phrase is ambiguous as it may refer to either a profit-motivated smuggling activity (as in the Protocol) or the smuggling activity regardless of the gain the smuggler expects to realize. However, when one examines the phrase in the context of the others, and taking colour from them, their common feature must be that they are engaged in as for-profit activities. Indeed, I am otherwise hard-pressed to see any other truly common feature among these activities, other than that they occur in the context of

transnational crime. On the contrary, in *Singh Dhillon* it made sense that the offence of drug trafficking was held to be included in paragraph 37(1)(b), because "money laundering overlaps substantially with drug trafficking:" See para 64. Humanitarian people smuggling has no such overlap with trafficking in persons and money laundering or drug trafficking.

[72] Third, paragraph 37(1)(b) speaks to the activity of people smuggling "in the context of transnational crime." The ID, both here and in *B010,* looked to Article 3, paragraph 2 of the Convention, to interpret the word "transnational." In such a circumstance, unless the domestic legislation provides a definition of an activity that it lists as falling within the scope of "transnational crime" and the Act does not, why would we not also look to the same Convention and its protocols for guidance as to the meanings of these activities? Admittedly, the Convention does not use the phrase "people smuggling;" it uses the phrase "smuggling of migrants." However, the Convention does specifically use the two other phrases that are also said to be activities that fall within the concept of a transnational crime; namely, "money laundering" (Articles 6 and 7 of the Convention) and "trafficking in persons" (in the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*). In my view, the clear coincidence between the three activities listed in paragraph 37(1)(b) and those in the Convention and its protocols provides yet another reason why the Profit Element is to be included in the definition of "people smuggling."

Conclusion

[73] For the foregoing reasons, I conclude that "people smuggling" in paragraph 37(1)(b) includes the Profit Element, and the ID erred in its decision, which is set aside. A differently

constituted panel of the ID is to re-determine, in accordance with these reasons, whether the applicant is inadmissible for engaging, in the context of transnational crime, in the activity of people smuggling.

[74] Both parties asked that the Court certify a question similar to that certified in *B010* and *B072*. It is appropriate to do so. In light of these reasons, the question as framed in those decisions is amended; however, the issue remains the same.

[75] The applicant also asked that the Court certify a question relating to the appropriate standard of review. A similar request was refused in *B010* because the judge said that he had relied "on clear jurisprudence from the Supreme Court of Canada to conclude that the issue called for reasonableness." In this case, also relying on clear jurisprudence from the Supreme Court of Canada, an opposite result was reached. Accordingly, I find that the standard of review is an appropriate question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision is set aside, a differently constituted panel of the ID is to re-determine, in accordance with these reasons, whether the applicant is inadmissible for engaging, in the context of transnational crime, in the activity of people smuggling, and the following questions are certified:

a. Is the interpretation of paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and in particular of the phrase "people smuggling" therein, by the Immigration and Refugee Board, Immigration Division, reviewable on the standard of correctness or reasonableness?

b. Does the phrase "people smuggling" in paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, require that it be done by the smuggler in order to obtain, "directly or indirectly, a financial or other material benefit" as is required in the *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime*?

"Russel W. Zinn"
Judge

[1] After this application was heard, judgment issued in *B306 v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1282 [*B306*], which also involved an applicant aboard the *MV Sun Sea* alleged to have been involved in people smuggling. However, that case turned on the interpretation of "aiding and abetting" in subsection 117(1) of the Act; it is not helpful on the issue before this Court.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2409-12
STYLE OF CAUSE:	JESUS RODRIGUEZ HERNANDEZ v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 8, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	ZINN J.
DATED:	December 4, 2012

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