NO.: 35388

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE FEDERAL COURT OF APPEAL)

BETWEEN:

B010

APPELLANT
(Appellant in Federal Court of Appeal)

AND

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

RESPONDENT
(Respondent in Federal Court of Appeal)

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(Rule 42 of the *Rules of Supreme Court of Canada*)

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OVERVIEW

1. This appeal and those of *JP*, *Hernandez*, and *B306*[1] share common issues. The Minister's submissions in the *JP* appeal provide the Minister's main response to the arguments common to all appeals and should be read first. This factum deals with the issues unique to B010.

2. B010 is a self-admitted member of the crew who operated the *Sun Sea* throughout its voyage from the Gulf of Thailand to Canada. The *Sun Sea* operation was a large scale, multi-national, for-profit people smuggling venture that brought almost 500 improperly documented migrants to Canada.[2] The Immigration Division (ID) of the Immigration and Refugee Board (IRB) found that B010's role in the engine room crew was "vital in ensuring that the *MV Sun Sea* and its passengers reached Canada," a finding of fact that he has not contested.[3]

3. The Appellant's conduct is plainly covered by s. 37(1)(b) of the *Immigration and Refugee Protection Act* (*IRPA)* and it was reasonable for the ID to find him inadmissible under this ground. The ID reasonably interpreted s. 37(1)(b) having regard to its text, context, and consistent with its purposes and those of the *IRPA* as a whole. Parliament intended to render inadmissible those who knowingly engage in the transnational criminal activity of people smuggling, even if they did not personally make a profit from their actions.

4. The Appellant's arguments misconstrue the pertinent text and context for the interpretation of s. 37(1)(b) and instead focus on issues which exceed the scope of this appeal. He has not demonstrated that the ID's decision was not reasonable, or that the Federal Court (FC) or Federal Court of Appeal (FCA) committed any error in rejecting his arguments.

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[1] Nos. 35688, 35677 and 35685 respectively
[2] FC Reasons, paras 2-4, 22, 29 (Appellant's Record ("AR"), Vol I, pp 20, 29, 31); CBSA *Sun Sea* Report, (AR, Vol II, pp 157-171)
[3] ID Reasons, para 45 (AR, p 10)

I. STATEMENT OF FACTS

5. The Appellant's statement of facts downplays his involvement in the *Sun Sea* people smuggling operation and includes unproven allegations of risk. The Respondent restates the relevant facts as follows, relying predominantly on the ID's unconstested findings of fact.[4]

A. B010'S ACTIVE PARTICIPATION IN THE *SUN SEA* PEOPLE SMUGGLING OPERATION

6. The Appellant is a citizen of Sri Lanka.[5] He testified that, in early 2010, he left Sri Lanka and made his way to Thailand where he retained the services of an agent, "Piraba," who, after a few months, made arrangements for him to leave Thailand for Canada via the *Sun Sea*.[6]

7. On or around April 14, 2010, the Appellant and nine other men boarded the *Sun Sea* in Thailand.[7] As the Appellant disclosed to Canada Border Services Agency ("CBSA") officers, the nine individuals in question included the other appellant "J.P.", identified by Canadian authorities as "B004."[8]

8. No other passengers were on board at the time except a Thai crew which disembarked two to three days later, at which time the Appellant and the others commenced their duties as crew members. The crew included the captain, second in command, navigation crew and engine room crew. Other crew roles included, cooks, kitchen help and food distribution, as well as carpentry, wiring, and welding.[9] Over the next three months, the ship travelled surreptitiously throughout the Gulf of Thailand picking up passengers, before setting out for Canada in July 2010.[10]

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[4] ID Reasons (AR, Vol I, pp 1-17)
[5] ID Reasons, para 2 (AR, Vol I, p 2)
[6] ID Reasons, para 28, 34 (AR, Vol I, pp 6, 8)
[7] ID Reasons, para 29 (AR, p 6); Solemn Declaration of Jannett Fagan dated November 8, 2010, p 17 (AR, Vol II, p 108)
[8] *JP v Canada (MPSEP)*, Court File No. 35688. See: Solemn Declaration of Jannett Fagan dated November 8, 2010, p 20 (AR, Vol II, p 111); Solemn Declaration of Christian Lane dated December 16, 2010, p 15 (AR, Vol II, p 144)
[9] ID Reasons, paras 29-34, (AR, pp 6-8); CBSA *Sun Sea* Report, p 5 (AR, Vol II, p 162)
[10] ID Reasons, para 41(AR, Vol I, p 9); Solemn Declaration of Joanne Jesmer dated August 23, 2010, p 33 (AR, Vol II, p 76)

9. The *Sun Sea's* engine room crew comprised eight men, including the Appellant.[11] Throughout the journey, he worked two daily three-hour shifts and his duties included monitoring and maintaining the ship's engines.[12]

10. The Appellant stated that he and other crew members received additional food and soft drinks during the voyage and that these crew privileges were not available to the passengers.[13] He also stated that, as one of the crew, he was able to claim living and sleeping space in a cabin.[14] In contrast to the Appellant and the other crew members, many *Sun Sea* passengers were not in cabins, but instead were in the ship's hold, where they sat and slept on the floor or on rope bridges that had been strung from one wall to the other.[15]

11. Following their arrival in Canada, all of the *Sun Sea* passengers and crew, including the Appellant, indicated they wished to remain permanently in Canada and made refugee protection claims.[16] While some of the migrants' claims have been accepted, many have since been determined not to have been well-founded, with the tribunal finding, *inter alia*, that they would not be at risk in Sri Lanka.[17]

12. After the Appellant's arrival, Canada Border Services Agency ("CBSA") officers interviewed the Appellant about the *Sun Sea* people smuggling venture, including seeking details about his role, the other crew members and their respective positions and roles on the ship.[18]

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[11] Solemn Declaration of Joanne Jesmer dated August 23, 2010, pp 35 and 38 (AR, Vol II, pp 79 and 81); Solemn Declaration of Jannett Fagan dated November 8, 2010, pp 17-18 (AR, Vol II, pp 108-109)
[12] ID Reasons, paras 29-34 (AR, Vol I, pp 6-8); FC Reasons, paras 7-8 (AR, pp 22-23); ID Hearing Transcript, p 25 (AR, Vol I, p 147); Solemn Declaration of Christian Lane dated December 16, 2010, p 20 (AR, Vol II, p 149)
[13] FC Reasons, paras 7-8 (AR, Vol I, pp 22-23); Solemn Declaration of Christian Lane dated December 16, 2010, pp 8, 24 (AR, Vol II, pp 137, 153)
[14] Solemn Declaration of Jannett Fagan dated November 9, 2010, pp 17, 21, (AR, Vol II, pp 108, 112); Solemn Declaration of Joanne Jesmer dated August 23, 2010, p 40 (AR, Vol II, p 83)
[15] Photographs of *Sun Sea*, Exhibit C-3 to ID Admissibility Hearing, (AR, Vol III, pp 20-22); FC Reasons, para 64 (AR, Vol I, p 50); CBSA *Sun Sea* Report, p 12 (AR, Vol II, p 169)
[16] ID Reasons, para 43 (AR, Vol I, p 9)
[17] See *eg Sivanathan v Canada (MCI)*, 2014 FC 184 [Respondents' Book of Authorities ("RBOA"), Vol 4, Tab 179]; *Balakrishnan v Canada (MCI)*, 2013 FC 944 [RBOA, Vol 4, Tab 172]; *S.K. v Canada (MCI)*, 2013 FC 78, [2013] FCJ No. 137 (QL) [RBOA, Vol 4, Tab 178]; *B223 v Canada (MCI)*, 2013 FC 511, [2013] FCJ No. 572 (QL) [RBOA, Vol 4, Tab 171]; *PM v Canada (MCI)*, 2013 FC 77, [2013] FCJ No. 136 (QL)) [RBOA, Vol 4, Tab 175]
[18] Solemn Declarations dated August 23, 2010, November 8, 2010, and December 16, 2010 (AR, Vol II, pp 47-154)

13. The Appellant was reported pursuant to s.44(1) of the *IRPA* for being inadmissible under s. 37(1)(b) for engaging, in the context of transnational crime, in people smuggling,[19] and his case was referred to the ID for an admissibility hearing.[20]

B. STATUTORY FRAMEWORK

14. The Respondent refers to his description of the applicable statutory framework set out in the Respondent's memorandum in *JP*.

C. PROCEDURAL HISTORY AND DECISIONS BELOW

1. The decision of the Immigration Division

15. On July 6, 2011, the ID determined that that the Appellant is inadmissible pursuant to s. 37(1)(b) of the *IRPA* for engaging, in the context of transnational crime, in people smuggling.

16. The ID considered the *IRPA* and Canada's international obligations and concluded that "people smuggling" in s. 37(1)(b) should be interpreted as knowingly organizing, inducing, aiding or abetting the coming into a country of one or more persons who are not in possession of a visa, passport, or other document required by that country, consistent with the elements of the human smuggling offence in s. 117(1) of the *IRPA*.[21] The ID rejected the Appellant's arguments that "people smuggling" requires proof the person concerned received a financial or other material benefit,[22] or that the persons being smuggled came into Canada "clandestinely."[23]

17. The ID determined that, on the evidence as a whole, there were reasonable grounds to believe that the Appellant had knowingly aided the unlawful and undocumented entry of the migrants into Canada by means of the *Sun Sea*.[24]

18. Based on the Appellant's testimony, interviews with CBSA officers, as well as photographic evidence, the ID concluded that the Appellant had boarded the *Sun Sea* with the intention of being a crew member and noted that the Appellant "admit[ted] that because of his

[19] Section 44(1) Report and Section 44(1) Highlights (AR, Vol II, pp 41-42 and 44-46)
[20] Section 44(2) Referral (AR, Vol II, p 43)
[21] ID Reasons, paras 12-26 (AR, Vol I, pp 3-5)
[22] ID Reasons, para 24 (AR, Vol I, p 4)
[23] ID Reasons, paras 51-59 (AR, Vol I, pp 11-13)
[24] ID Reasons, para 68 (AR, Vol I, p 17)

contribution and the contribution of the other seven people who worked in the engine room, the ship was able to cross the ocean to Canada."[25]

19. The ID did not find credible the Appellant's claims that he became a crew member "by happenstance" a few days into the voyage, after the original crew abandoned the *Sun Sea*.[26] The ID noted photographs of the Appellant socializing with members of the crew, including the captain, onshore in Thailand and taken in the days prior to boarding the ship, and found that the Appellant "was not being truthful" in his testimony.[27]

20. Likewise, the ID also did not find credible the Appellant's claims that he "had no knowledge of what documents his fellow travellers possessed" until after arriving in Canada and that, at the least, he had been willfully blind as to whether the passengers had the required documents.[28]

21. The ID also found that the Appellant did not receive a "material benefit" which the ID interpreted as receiving "free passage or financial compensation" in exchange for his work on the *Sun Sea*.[29]

2. The decision of the Federal Court

22. The Appellant sought judicial review of the ID's decision. He did not challenge the ID's findings that he had knowingly aided the migrants' undocumented entry into Canada, or that he was not truthful when he claimed to have become a crew member "by happenstance" after boarding the ship.[30]

23. On May 15, 2012, the FC dismissed the judicial review and upheld the ID's decision. Noël, J. held, *inter alia*, that:

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[25] ID Reasons, para 37 (AR, Vol I, p 8)
[26] ID Reasons, paras 30-34 (AR, Vol I, pp 6-8)
[27] ID Reasons, paras 33-34 (AR, Vol I, pp 7-8)
[28] ID Reasons, paras 46-49 (AR, Vol I, p 11)
[29] ID Reasons, para 50 (AR, Vol I, p 11)
[30] FC Reasons, paras 2-10, 29 (AR Vol 1, pp 20-23, 31)

(i) consistent with the recent jurisprudence of the Supreme Court, the standard of review of the ID's interpretation of s. 37(1)(b) of the *IRPA*, which is the ID's home statute, is reasonableness;[31]

(ii) the principles of statutory interpretation support the ID's interpretation of "people smuggling" in s. 37(1)(b) of the *IRPA*, that is, consistently with the elements of the human smuggling offence in s. 117(1) of the *IRPA*;[32]

(iii) the restrictive interpretation of s. 37(1)(b) advanced by the Appellant – as including both a "material benefit" and a "clandestine" component - is not supported by the text, context or purpose of s. 37(1)(b);[33]

(iv) in any event, the ID's finding that the Appellant did not receive a material benefit was unreasonable, as there was evidence that crew members on the *Sun Sea* were given better food and accommodations, including a room above-decks rather than sharing the hold with hundreds of others.[34]

24. Noël, J. certified the following question for appeal pursuant to s. 74(d) of the *IRPA*:

> For the purposes of para 37(1)(b) of the *IRPA*, is it appropriate to define the term "people smuggling" by relying on section 117 of the same statute rather than a definition contained in an international instrument to which Canada is a signatory?[35]

3. The decision of the Federal Court of Appeal

25. The Appellant appealed to the FCA.[36] On March 22, 2013, a unanimous panel of the FCA dismissed the Appellant's appeal. The FCA held, *inter alia*, that: (i) the reasonableness standard of review applies to the ID's interpretation of s. 37(1)(b);[37] and (ii) it is reasonable to define "people smuggling" for the purposes of s. 37(1)(b) by relying upon s. 117(1) of the *IRPA*, which does not contain a profit or material benefit element.[38]

26. The FCA found that the ID's interpretation of s. 37(1)(b) is supported by the text, context and purposes of this provision, and rejected the Appellant's argument that it would lead to "absurd results." On the latter point, the FCA noted that the Appellant's interpretation would

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[31] FC Reasons, para 33 (AR, Vol I, p 33)
[32] FC Reasons, paras 38-60 (AR, Vol I, pp 36-48)
[33] FC Reasons, paras 61-62 (AR, Vol I, pp 48-49)
[34] FC Reasons, paras 63-64, (AR, Vol I, pp 49-50)
[35] FC Judgment (AR, Vol I, p 57)
[36] The B010 appeal was heard concurrently with an appeal from the Federal Court's judgment in *B072 v Canada (MPSEP)*, 2012 FC 899 [*B072 FC Judgment*] [RBOA, Vol 4, Tab 170] which was also dismissed by the FCA. B072 did not seek leave to this Court.
[37] FCA Reasons, paras 60-72 (AR, Vol I, pp 85-89)
[38] FCA Reasons, paras 73-94 (AR, Vol I, pp 89-97)

lead to the absurd result that a foreign national convicted of human smuggling might nonetheless not be inadmissible for engaging in "people smuggling."[39]

27. The FCA rejected the Appellant's argument that the ID's interpretation of s. 37(1)(b) conflicts with Canada's international legal obligations. The Court concluded that nothing in the applicable international instruments restrains Canada from adopting a definition of "people smuggling" that encompasses a wider sphere of activity than the "smuggling of migrants" as defined in the *Smuggling Protocol*. The FCA also cited the well-established principles that a finding of immigration inadmissibility is neither tantamount to *refoulement* under Article 33 of the *Refugee Convention*, nor a "penalty" under Article 31 of the *Refugee Convention*.[40]

28. The FCA also found that although the Appellant received superior lodgings and food on board the ship, it was reasonable for the ID to conclude he did not receive a "material benefit."[41] The Court of Appeal answered the question certified by the Applications Judge as follows:

> Yes, it is reasonable to define inadmissibility under paragraph 37(1)(b) by relying upon subsection 117(1) of the Immigration and Refugee Protection Act, which makes it an offence to 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 the Act. To do so is not inconsistent with Canada's international legal obligations.[42]

4. Application for Leave to Appeal and Motion for Reconsideration

29. On October 3, 2013, a three member panel of this Court dismissed the Appellant's application for leave to appeal the FCA's judgment. Subsequently, after this Court had granted leave to appeal to *JP*, *Hernandez* and *B306*, the Appellant made a motion for reconsideration of his application for leave raising, for the first time in his proceedings, a constitutional issue. On July 17, 2014, the Court granted the Appellant's motion and leave application.

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[39] FCA Reasons, para 92 (AR, Vol I, pp 95-96)
[40] FCA Reasons, paras 81-91 (AR, Vol I, pp 92-95)
[41] FCA Reasons, paras 51-57, (AR, Vol I, pp 81-84)
[42] FCA Reasons, para 101, (AR, Vol I, pp 99-100)

II. POINTS IN ISSUE

30. The Respondent submits the appeal raises the following issues :

a) Is reasonableness the standard of review applicable to the Immigration Division's interpretation of s. 37(1)(b) of the *IRPA*?

Answer: Yes.

b) Did the Immigration Division reasonably interpret s. 37(1)(b) of the *IRPA* when it concluded that "people smuggling" does not require that the person concerned has acted in a clandestine or secret manner and in order to obtain a profit or other material benefit?

Answer: Yes.

c) On August 20, 2014, the Chief Justice also stated the following constitutional questions: Does s. 37(1)(b) of the *IRPA* infringe s. 7 of the *Canadian Charter of Rights and Freedoms* and, if so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

Answer: The first question should be answered in the negative. Should the Court feel necessary to examine the second question, it should be answered in the affirmative.

III. ARGUMENT

A. THE APPROPRIATE STANDARD OF REVIEW IS REASONABLENESS

31. The Respondent refers to his argument on the appropriate standard of review in his memorandum in *JP* and adds the following in response to the Appellant's arguments.

32. In asserting that the standard of review of the ID's interpretation of s. 37(1)(b) of the *IRPA* should be correctness, the Appellant erroneously relies on this Court's decisions in *Pushpanathan* and *Mugesera* and the fact the FC certified a "serious question of general importance" for the purposes of an appeal under s. 74(d) of the *IRPA*.

33. However, the approach to standard of review in those cases has been superseded by more recent jurisprudence of this Court, in which it has clearly affirmed the presumption that deference is owed an administrative tribunal in the interpretation of its home statute.[43]

34. The Appellant's suggestion that this Court adopt the standard of review analysis applied by the majority of the FCA in *Febles*[44] is also misplaced. *Febles* concerned the interpretation of Article 1F(b) in the *Refugee Convention*, which is explicitly incorporated by reference in s. 98 of the *IRPA*. The FCA majority concluded in that case that a standard of review of correctness was appropriate because, "Article 1F (b) is a provision of an international Convention that should be interpreted as uniformly as possible."[45] This factor is not at play in the present appeal, which concerns the interpretation of a domestic *statutory* provision.

B. THE IMMIGRATION DIVISION PROPERLY INTERPRETED AND APPLIED SECTION 37(1)(B)

35. The Respondent refers to his arguments on the proper interpretation of s. 37(1)(b) in his memorandum in *JP* and adds the following.

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[43] *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, para 34 [RBOA, Vol 4, Tab 169]; *Agraira v Canada (MPSEP)*, 2013 SCC 36, para 50 [RBOA, Vol 4, Tab 168]
[44] *Febles v Canada (MCI)*, 2012 FCA 324, [Appellant's Book of Authorities ("ABOA"), Vol II, Tab 21], aff'd 2014 SCC 68 [RBOA, Vol 1, Tab 35]
[45] *Id*. at para 24

1. The Appellant's erroneous analysis of the text and context of s. 37(1)(b)

36. For the reasons already set out in the Respondent's memorandum in *JP*, there are no elements in the text or the context of this provision which show Parliament intended to require that the person engaged in people smuggling acted with a view to obtaining a profit or other material benefit, or to restrict the applicability of s. 37(1)(b) only to persons who organize, induce, aid or abet the clandestine or covert entry of undocumented migrants into Canada.

37. With respect to the Appellant's arguments about the ordinary meaning of "smuggling", in fact, he cites a contextual factor external to the *IRPA* when he references the *Customs Act*. Further, scrutiny of the cases and provisions he cites discloses that neither a "profit motive" nor a "clandestine element" is mandated in all cases of "goods smuggling."

38. The *Customs Act* makes it an offence to smuggle a good into Canada "whether clandestinely or not,"[46] implying that "smuggling" contemplates both clandestine and overt conduct. This approach is consistent with the decision of the Quebec Court of Appeal in *R v. Riddell*,[47] a case with respect to which the Appellant cites only the dissent. In fact, in that case, a majority of judges, relied on, *inter alia*, the dictionary definitions of "smuggling" to conclude that "smuggling" was not limited to clandestine behaviour.[48]

39. Nor does the *Customs Act* smuggling offence require proof that the smuggler evaded customs duties or otherwise stood to make a personal profit from the smuggling venture. Instead, the core consideration is whether importation of the good in question is prohibited or regulated, and whether the person concerned knowingly contravened the regulatory regime.[49]

40. By analogy, in the context of "people smuggling" under s. 37(1)(b), it is undisputed that the entry of foreign nationals to Canada is regulated under the *IRPA*, including with respect to applying for and obtaining any necessary visa prior to entry.[50] It is likewise undisputed that the migrants on the *Sun Sea* did not comply with these requirements, and that the Appellant, who aided them in coming to Canada, knew or was wilfully blind to this fact.

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[46] *Customs Act*, RSC 1985, c 1, s 159 [RBOA, Vol 4, Tab 167]
[47] *R v Riddell*, (1973), 11 CCC 493 (QCCA) [RBOA, Vol 4, Tab 177]
[48] *Id.*, pp 497 and 498. [RBOA, Vol 4, Tab 177]
[49] *Johnson v HMTQ* (1994), 156 NBR (2d) 119, 1994 CanLII 6532, p 4 (NBCA) [RBOA, Vol 2, Tab 62]
[50] *IRPA*, s 20 [RBOA, Vol 1, Tab 5]

41. Nor does the French language version of s. 37(1)(b) assist the Appellant. His argument suffers from the same frailties as that of *JP* and is addressed in the Respondent's factum therein. As argued in *JP*, the phrase "le passage des clandestins," which appears in the French language text of s. 37(1)(b), is not limited to secrecy, but specifically encompasses unlawfulness or illegality.[51] Hence, "passage des clandestins" in s. 37(1)(b) is consistent with, rather than diverges from, the expression "organisation d'entrée illégale" in the French language heading of s. 117.

42. While the Appellant relies on the text of the *Smuggling Protocol* to argue that "smuggling" should be understood as comprising only deceptive behaviour, his argument fails to appreciate that there is no requirement of clandestinity in the *Smuggling Protocol*. Rather, "illegal entry" (as defined in Art. 3(b) of the *Smuggling Protocol*) is expressly made part of and informs the definition of "smuggling of migrants" (in Art. 3(a)).

43. Neither the British Columbia Court of Appeal (BCCA) judgment in *Appulonappa*,[52] nor the ID's decision in *U.O.P.*,[53] support the Appellant's position. With respect to *Appulonappa*, the Appellant erroneously asserts that the BCCA "accepted the conclusion that 'organizing illegal entry' is a distinct activity from 'people smuggling'." In fact, the BCCA's reasons disclose that the Court did not draw the distinction the Appellant asserts. Furthermore, with respect to the "human smuggling" offence, the BCCA concluded that Parliament did not intend that s. 117(1) of the *IRPA* be limited by the definition of "smuggling of migrants" under the *Smuggling Protocol*. In *U.O.P.*, the tribunal explicitly concluded that s. 37(1)(b) should be interpreted consistently with s. 117 of the *IRPA*, as did the ID here.[54]

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[51] *JP* factum, para 46
[52] *R v Appulonappa*, 2014 BCCA 163 [*Appulonappa*] [RBOA, Vol 4, Tab 176], leave to appeal granted, SCC File No. 35958, to be heard at the same time as the within appeal.
[53] *Canada (MPSEP) v UOP*, [2009] IDD No 9 (QL), [ABOA, Vol II, Tab 16]
[54] *Id*., para 15

2. The Appellant's interpretation would lead to absurd results

44. The Appellant's claim that the ID's interpretation of s. 37(1)(b), which was upheld by the FC and FCA, would lead to "absurd results" does not withstand scrutiny. In fact, as the FCA noted, it is the Appellant's interpretation which would lead to absurd results.[55]

45. The Appellant's claim is posited not on his own situation, but on a hypothetical fact scenario. However, for the reasons explained in *JP*, it should not be presumed - based on the inevitably incomplete facts in a hypothetical scenario - that the criteria for inadmissibility under s. 37(1)(b) would necessarily be met in all cases involving family members. Each case will turn on its own, highly specific facts.[56] Additionally, the Appellant's arguments on these points fail to consider the effects of Ministerial relief under s. 42.1 of the *IRPA* and discretion not to write or refer an inadmissibility report under s. 44.[57]

46. Moreover, the Appellant's proposal to read a "profit element" and "clandestine element" into s. 37(1)(b) itself leads to problematic and unintended outcomes. On the Appellant's interpretation, individuals could act as organizers, operators, or facilitators of mass human smuggling ventures, knowing full well that the people they smuggle are not in compliance with the law, possibly also endangering the lives and safety of hundreds in the process. Yet, they would remain immune from inadmissibility, so long as they did not make a profit, or they intended to disembark the undocumented migrants at a port-of-entry. It is hard to see how such absurd results could have been intended by Parliament.

47. For instance, B072 was found to be a lead organizer of the *Sun Sea* smuggling operation and was involved in purchasing the ship. Yet, he argued that he is not inadmissible because the smuggled migrants had made refugee claims upon arrival. The FCA rightly rejected this contention, holding that even if refugee claimants may be *excused* from the consequences of arriving without proper documentation, this does not mean that there is no requirement to possess

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[55] FCA Reasons, para 92 (AR, Vol I, p 96).
[56] See *JP* factum, paras 119-137; See also: *Najafi v Canada (MPSEP)*, 2014 FCA 262, para 91 [RBOA, Vol 1, Tab 46]
[57] *IRPA*, ss 42.1 and 44 [RBOA, Vol 1, Tab 5]. See also: FCA Reasons, paras 92-94 (AR, Vol I, pp 95-96)

documentation, explaining that otherwise, "no one could ever be found inadmissible for people smuggling if the persons smuggled into Canada made refugee claims."[58]

3. The Appellant's erroneous approach to international law

48. With respect to the Appellant's arguments regarding Canada's international obligations, including under the *Refugee Convention*[59] and the *Smuggling Protocol*,[60] the Respondent refers to his memorandum in *JP* and adds the following.

49. The Appellant's core premise is that Canada's obligations under the *Refugee Convention*, specifically, Article 33 (non-*refoulement*) and Article 31 (prohibition of penalties) , mandate that inadmissibility for engaging in "people smuggling" pursuant to s. 37(1)(b) be interpreted in exact accordance with the definition of the phrase "smuggling of migrants" in the *Smuggling Protocol*. This proposition is fundamentally flawed. As explained below, the Appellant misconstrues the nature of the international obligations at play and the role of s. 37(1)(b) within Canada's immigration regime.

a) Refoulement is not at issue

50. Contrary to the Appellant's suggestion otherwise, and for the same reasons as set out in in the Respondent's factum in *JP*, it is not the objective of s. 37(1)(b) of the *IRPA* to implement the prohibition against *refoulement* contained in Article 33 of the *Refugee Convention*.

51. Rather, s. 37(1)(b) concerns *immigration* inadmissibility, specifically describing as inadmissible a foreign national or permanent resident who engages in the transnational criminal activity of people smuggling. Whether a refugee protection claim has been made does not change the meaning or purpose of s. 37(1)(b).

52. A finding of inadmissibility is not the equivalent of removal or *refoulement* of a Convention refugee, and the two concepts should not be conflated. Inadmissibility concerns the

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[58] See *X (Re)*, 2011 CanLII 100695, paras 22-26 (IRB-ID) [RBOA, Vol 1, Tab 21]; *B072 FC Judgment, supra* [RBOA, Vol 4, Tab 170]; FCA Reasons, paras 12-13, 41-42, 98-99 (AR, Vol I, pp 65-66, 78, 98-99)

[59] *Convention Relating to the Status of Refugees*, Can TS 1969 6 (entered into force 22 April 1954) [*Refugee Convention*] [RBOA, Vol 3, Tab 124]

[60] *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime* (2000), 2241 UNTS 507 [*Smuggling Protocol*] [ABOA, Vol I, Tab 7]

discrete question of whether the presence in Canada of a non-citizen is in conformity with the requirements of the *IRPA*. In contrast, *refoulement* concerns the "removal of refugees to a territory where they run a risk of being subjected to human rights violations," and is engaged only "at the time of proposed removal."[61]

53. The Appellant faults the FCA for its reliance on *Németh.* However, the FCA referred to *Németh* in the context of explaining the significance of the separation of the concepts of inadmissibility and removal, which the Appellant throughout has overlooked.[62]

54. As such, consideration of whether the Appellant's removal, should it take place, would constitute *refoulement* contrary to the *Refugee Convention* is clearly premature at the stage when admissibility is being determined. As recognized by this Court in *Febles*, a pre-removal risk assessment is where questions of risk will be assessed prior to removal.[63] That the procedure in a pre-removal risk assessment may not be identical to a hearing before the RPD does not make out a violation of the principle of *non-refoulement.* As the Respondent explains in *JP*, states do not have an obligation under the *Refugee Convention* to adopt any particular risk assessment procedure.[64]

55. The Appellant asserts that Ministerial relief in s. 42.1 (formerly s. 37(2)) of the *IRPA* is inadequate and illusory, and purports to cite the FC's judgment in *Stables* in support. In fact, in that case Justice de Montigny explicitly rejected this argument.[65] Moreover, judicial oversight and the ability to seek a judicial stay of removal is a full answer to the Appellant's concerns.[66]

56. In short, the Appellant's critique of the various proceedings available to those found inadmissible under s. 37(1)(b) is unfounded, and misses the essential point, which is that inadmissibility does not automatically result in removal such that Canada's international obligations would be engaged when inadmissibility is being assessed. Accordingly, *non-refoulement* is not at issue in this appeal.

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[61] *Németh v Canada (Justice),* [2010] 3 SCR 281, 2010 SCC 56, paras 19, 50 [*Németh*] [RBOA, Vol 4, Tab 174]
[62] FCA Reasons, paras 88-91 (AB, Vol I, pp 94-95)
[63] *Febles*, 2014 SCC 68, paras 67-68 [RBOA, Vol 1, Tab 35]
[64] *JP Factum*, para 107. See also: *Németh, supra*, para 51 [RBOA, Vol 4, Tab 174]; *Maydak v United States of America*, 2004 BCCA 478, para 83 [RBOA, Vol 4, Tab 173]
[65] *Stables v Canada (MCI)*, 2011 FC 1319, paras 59-63 [RBOA, Vol 4, Tab 180]
[66] *Id.*, para 64 [RBOA, Vol 4, Tab 180]

b) Article 31 of the Refugee Convention is Not Applicable

57. For the reasons set out in the Respondent's memorandum in *JP*, Article 31 of the *Refugee Convention* is not applicable to the interpretation of s. 37(1)(b).[67] The Appellant has not been found inadmissible because of his own illegal entry into Canada, but because he actively assisted in the smuggling of others. These are two distinct notions, and it is clear that Article 31 does not prevent States from taking action against a refugee claimant on the basis that he took an active role in the smuggling of others.[68] Indeed, none of the authorities cited by the Appellant suggests otherwise.

58. Additionally, it is well-established in international law that the notion of "penalties" in Article 31 is meant to refer only to criminal punishment.[69] Similarly, Canadian jurisprudence is to the effect that the purpose of deportation proceedings is not punishment or retribution, but rather its purpose is "to remove from Canada an undesirable person."[70]

4. Conclusion: ID reasonably found the Appellant inadmissible

59. The ID reasonably held that the Appellant is inadmissible under s. 37(1)(b) of the *IRPA* because of his role in the *Sun Sea* smuggling operation. The ID had reasonable grounds to believe that he had engaged in "people smuggling" in the context of transnational crime.

60. The *Sun Sea* smuggling operation clearly had a transnational character, spanning the national boundaries of, at a minimum, Thailand and Canada.[71] The Appellant's contribution as a member of the crew was deliberate. His contribution was found by the ID to have been vital in

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[67] *JP Factum*, paras 91-93

[68] Anne T. Gallagher, Fiona David, *The International Law of Migrant Smuggling*, New York: Cambridge University Press, 2014, p 167 [RBOA Vol 3, Tab 145]; *SC v Canada (MPSEP)*, 2013 FC 491, para 41 [*SC*] [RBOA, Vol 2, Tab 83]; *Appulonnapa, supra*, paras 19 and 137 [RBOA, Vol 4, Tab 176]

[69] *The International Law of Migrant Smuggling, supra*, p 166; Zimmermann, Andreas, Dörschner, Jonas & Machts, Felix, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol — A Commentary*, New York: Oxford University Press, 2011, p 1263 (para 75) [RBOA, Vol 4, Tab 182]

[70] *Chiarelli v Canada (MEI)*, [1992] 1 SCR 711, p 735 [RBOA, Vol 1, Tab 19]; *Hurd v Canada (MEI)*, [1989] 2 FC 594, p 606 (FCA) [RBOA, Vol 1, Tab 36]

[71] *Webster's Third New International Dictionary*, Springfield: Merriam-Webster, 1981, p 2430 *sub verbo* "transnational" ("extending or going beyond national boundaries") [RBOA, Vol 3 Tab 140]; *Le Grand Robert de la langue française*, Paris: Le Robert, 1985, vol II, offers this definition: «qui dépasse le cadre national, concerne plusieurs nations […]» [RBOA, Vol 3, Tab 139]. See also: *Convention Against Transnational Organized Crime*, art. 3(2) [RBOA, Vol 3, Tab 123].

ensuring the ship would reach its intended destination. As the ID found, the Appellant must have known that the other passengers on board did not have the required documents.[72]

61. Finally, even on the Appellant's flawed approach to s. 37(1)(b), he nonetheless would be inadmissible on the facts of the case at hand. Insofar as the Appellant asserts that s. 37(1)(b) requires proof of clandestine activity, there is no doubt that the *Sun Sea* people smuggling operation, and the ship itself, operated covertly.

62. As outlined by the Respondent in its submissions in *JP*, the unofficially-named *Sun Sea*, left its port without permission, took on undocumented passengers at sea rather than at an identifiable port, made every attempt to evade authorities *en route*, and was intercepted at sea, having failed to duly announce its arrival at a Canadian port.[73] If an element of secrecy or deception is required for "people smuggling," it is easily met here.

63. Likewise, even if s. 37(1)(b) were to be interpreted as requiring a material benefit or profit element, the Appellant would still be inadmissible. The Appellant aided a smuggling operation in which passengers were charged large fees to travel to Canada on a ship not even intended for passenger travel. The obvious conclusion to be drawn was that the operation was profit-driven.

64. Further, irrespective of whether he was paid for his work, there is no question that the Appellant's position as a crew member enabled him to secure far more comfortable lodgings and superior food and drink to the passengers. These privileges were no small matters in a four month sea voyage where the vast majority endured hardships, including living with hundreds of others in the ships' hold, and limitations on food and water. As such, they surely constitute a "material benefit".[74]

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[72] ID Reasons, para 49, (AR, Vol I, p 11)
[73] *JP* factum, para 49
[74] Anne T. Gallagher, Fiona David, *The International Law of Migrant Smuggling*, *supra*, p 46 [RBOA Vol 3, Tab 145]; See also: United Nations Office on Drugs and Crime, *Model Law Against the Smuggling of Migrants*, 2010, p. 13 [RBOA, Vol 3,Tab164] (http://www.unodc.org/documents/human-trafficking/Model_Law_Smuggling_of_Migrants_10-52715_Ebook.pdf)

C. SECTION 37(1)(B) IS CONSTITUTIONALLY VALID

65. In response to the Appellant's arguments on the constitutional validity of s. 37(1)(b), the Respondent refers to his memorandum in *JP*.

IV. COSTS

66. The Minister of Public Safety seeks his costs in this appeal. The Minister does not seek costs in respect of the FC or FCA proceedings and asks that costs not be awarded in respect of those proceedings as there are no special reasons[75] for such an order.

V. NATURE OF ORDER SOUGHT

67. The Respondent respectfully requests that the Court dismiss the appeal. Further, it should answer the first constitutional question in the negative. Should the Court feel necessary to examine the second question, it should be answered in the affirmative.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 8th day of January 2015.

Marianne Zorić

for François Joyal

for Banafsheh Sokhansanj

Of Counsel for the Respondent

[75] *Federal Courts Immigration and Refugee Protection Rules,* SOR/93-22, Rule 22: No costs shall be awarded to or payable by any party in respect of an application for leave, an application for judicial review or an appeal under these Rules unless the Court, for special reasons, so orders. [RBOA, Vol 1, Tab 4]

VI. TABLE OF AUTHORITIES

Authorities		Paragraph(s)
A. Statutes and Regulations		
Customs Act, RSC 1985, c 1, s 159		37, 38, 39
Immigration and Refugee Protection Act, S.C. 2001, c. 27		40, 45
Federal Courts Immigration and Refugee Protection Rules, SOR/93-22, Rule 22		68
B. Jurisprudence		
Agraira v. Canada (MPSEP), 2013 SCC 36		33
Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 36		33
B072 v Canada (MPSEP), 2013 FC 899		25, 47
B223 v Canada (MCI), 2013 FC 511, [2013] FCJ No. 572 (QL)		11
Balakrishnan v Canada (MCI), 2013 FC 944		11
Canada (MPSEP) v UOP, [2009] IDD No 9 (QL)		43
Chiarelli v Canada (MEI), [1992] 1 SCR 711		58
Febles v Canada (MCI), 2012 FCA 324		34, 54
Hurd v Canada (MEI), [1989] 2 FC 594 (FCA)		58
Johnson v HMTQ (1994), 156 NBR (2d) 119, 1994 CanLII 6532, p 4 (NBCA)		39
Maydak v United States of America, 2004 BCCA 478		54
Najafi v Canada (MPSEP), 2014 FCA 262		45
Németh v Canada (Justice), [2010] 3 SCR 281, 2010 SCC 56		52, 53, 54

boundaries")		
Le Grand Robert de la langue française, Paris: Le Robert, 1985, vol II, offers this definition: «qui dépasse le cadre national, concerne plusieurs nations […]»		60

APPENDIX "A" – STATUTES RELIED ON

***Immigration and Refugee Protection Act*, S.C. 2001, c 27**

Rules of interpretation **33.** The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur		**Interprétation** **33.** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

Organized criminality **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.		**Activités de criminalité organisée** **37.** (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants : […] *b*) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.
Application (2) Paragraph (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.		**Application** (2) Les faits visés à l'alinéa (1)a) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

Exception — application to Minister **42.1** (1) The Minister may, on application by a foreign national, declare that the matters referred to in section 34, paragraphs 35(1)(*b*) and (*c*) and subsection 37(1) do not constitute inadmissibility in respect of the foreign national if they satisfy the Minister that it is not contrary to the national interest.		**Exception — demande au ministre** **42.1** (1) Le ministre peut, sur demande d'un étranger, déclarer que les faits visés à l'article 34, aux alinéas 35(1)*b*) ou *c*) ou au paragraphe 37(1) n'emportent pas interdiction de territoire à l'égard de l'étranger si celui-ci le convainc que cela ne serait pas contraire à l'intérêt national.

Ineligibility **101.** (1) A claim is ineligible to be referred to the Refugee Protection Division if [..] (*f*) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(*c*).		**Irrecevabilité** **101.** (1) La demande est irrecevable dans les cas suivants : *[…]* *f*) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)*c*) — , grande criminalité ou criminalité organisée.
Serious criminality (2) A claim is not ineligible by reason of serious criminality under paragraph (1)(*f*) unless (*a*) in the case of inadmissibility by reason of a conviction in Canada, the conviction is for an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years; or (*b*) in the case of inadmissibility by reason of a conviction outside Canada, the conviction is for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.		**Grande criminalité** (2) L'interdiction de territoire pour grande criminalité visée à l'alinéa (1)*f*) n'emporte irrecevabilité de la demande que si elle a pour objet : *a*) une déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans; *b*) une déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans.

Application for protection **112.** (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).		**Demande de protection** **112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

Consideration of application **113.** Consideration of an application for protection shall be as follows: […] (*d*) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (*e*)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and (i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or (ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and […]		**Examen de la demande** **113.** Il est disposé de la demande comme il suit : *d*) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa *e*)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part : (i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada, (ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

Organizing entry into Canada (before Dec. 15, 2012) **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.		**Entrée illegale (avant le 15 décembre 2012)** **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.

Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.		**1.** La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
7. 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.		**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

Court File No.: 35388

AND BETWEEN:

B010

Appellant
(Respondent in Federal Court of Appeal)

AND

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

(Appellant in Federal Court of Appeal)

AND

ATTORNEY GENERAL OF ONTARIO, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, AMNESTY INTERNATONAL (CANADIAN SECTION, ENGLISH BRANCH), DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

Court File No.: 35688

BETWEEN:

J.P. and G.J.

Appellants
(Respondents in Federal Court of Appeal)

AND

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent
(Appellant in Federal Court of Appeal)

AND

ATTORNEY GENERAL OF ONTARIO, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, AMNESTY INTERNATONAL (CANADIAN SECTION, ENGLISH BRANCH), DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

Court File No.: 35685

AND BETWEEN:

B306

Appellant
(Respondent in Federal Court of Appeal)

AND

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent
(Appellant in Federal Court of Appeal)

AND

ATTORNEY GENERAL OF ONTARIO, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, AMNESTY INTERNATONAL (CANADIAN SECTION, ENGLISH BRANCH), DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

Court File No.: 35677

AND BETWEEN:

JESUS RODRIGUEZ HERNANDEZ

Appellant
(Respondent in Federal Court of Appeal)

AND

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent
(Appellant in Federal Court of Appeal)

AND

ATTORNEY GENERAL OF ONTARIO, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, CANADIAN COUNCIL FOR REFUGEES, CANADIAN ASSOCIATION OF REFUGEE LAWYERS, AMNESTY INTERNATONAL (CANADIAN SECTION, ENGLISH BRANCH), DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS, CANADIAN CIVIL LIBERTIES ASSOCIATION

Interveners

AND BETWEEN:

Court File No.: 35677

JESUS RODRIGUEZ HERNANDEZ

Appellant

AND

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B306

Appellant

AND

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IN THE SUPREME COURT OF CANADA
(On Appeal from the Federal Court of Appeal)

BETWEEN:

Court File No.: 35388

B010

Appellant

AND

THE MINISTER OF CITIZENSHIP & IMMIGRATION

Respondent

RESPONDENT'S FACTUM
(Rule 42 of the *Rules of the Supreme Court of Canada*)

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