# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Rajaratnam,*
2019 BCCA 209

Date: 20190618
Dockets: CA44256; CA44257; CA44258

Docket: CA44256

Between:

**Regina**

Appellant

And

**Thampeernayagam Rajaratnam**

Respondent

- and -

Docket: CA44257

Between:

**Regina**

Appellant

And

**Lesly Jana Emmanuel**

Respondent

- and -

Docket: CA44258

Between:

**Regina**

Appellant

And

**Nadarajah Mahendran**

Respondent

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett
The Honourable Madam Justice Garson

On appeal from: Acquittals entered by the Supreme Court of British Columbia, dated January 25, 2017 (*R. v. Rajaratnam*, *Emmanuel, and Mahendran,*
Vancouver Docket No. 26117).

| | |
|---|---|
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| Place and Date of Hearing: | Vancouver, British Columbia<br>June 13, 14 and 15, 2018 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 18, 2019 |

**Written Reasons of the Court**

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***Summary:***

*The respondents were acquitted of human smuggling charges laid under s. 117 of the Immigration and Refugee Protection Act, S.C. 2001, c. 27. In the summer of 2010, the MV Sun Sea sailed across the Pacific Ocean and arrived in Canadian territorial waters. It carried 492 Tamil migrants fleeing the aftermath of war, all of whom claimed refugee status upon arrival. The Crown's theory was that the respondents were part of a human smuggling operation linked to organized crime. E was the captain of the ship. He testified that he boarded the ship as a passenger, then reluctantly took charge of the ship to avert disaster for all those aboard. R and M were not aboard the ship. The Crown's theory was that they were involved in provisioning the vessel and organizing the transfer of the migrants. R and M's defences focused on identification. On appeal, the Crown submits that the judge erred in charging the jury that the accused were entitled to acquittals if it concluded that they were involved in humanitarian aid or mutual aid, because humanitarian and mutual aid were defences without an air of reality. The Crown also submits that the judge erred in finding s. 36 of the Mutual Legal Assistance in Criminal Matters Act, R.S.C. 1985, c. 30 (4th Supp.) [MLACMA], to be unconstitutional.*

*Held: appeals dismissed; MLACMA, s. 36, declared unconstitutional with respect to Crown evidence tendered in criminal trials.*

*The constitutional exceptions to s. 117 are defences rather than elements of the offence of human smuggling. The humanitarian aid defence has four elements: (i) the accused must act for the purpose of providing humanitarian aid, and not for the purpose of obtaining a financial or other material benefit in the context of transnational organized crime; (ii) the accused must provide aid in order to save the life or alleviate the suffering of an asylum seeker, which is a person from another state who intends to seek refuge in Canada from persecution or physical harm; (iii) the aid must be humanitarian, a question to be determined by the trier of fact in accordance with the principles of impartiality, neutrality, and independence; and (iv) the accused must reasonably believe that the person assisted is an asylum seeker. The mutual aid defence also has four elements: (i) the accused must act for the purpose of providing aid to a fellow asylum seeker, and not for the purpose of obtaining a financial or other material benefit in the context of transnational organized crime; (ii) the accused must be an asylum seeker; (iii) the accused must reasonably believe that the person assisted is an asylum seeker; (iv) the accused and the person they are assisting must have the common purpose of seeking refuge. There is no requirement of mutuality of effort. The family member aid defence is not a subset of mutual aid and can be raised by an accused who is not an asylum seeker.*

*Section 36 of the MLACMA fundamentally alters the rules governing the admissibility of hearsay and is inconsistent with an accused's right to a fair trial. The declaration of unconstitutionality should be limited to Crown evidence in criminal proceedings.*

*The Crown has not demonstrated that there is a reasonable possibility that errors committed by the trial judge affected the verdicts. E was likely acquitted because his testimony raised a reasonable doubt about the mutual aid defence. R and M were likely acquitted because of the frailties in the Crown's identification evidence.*

**Reasons for Judgment of the Court:**

## A. Overview

[1] The MV *Sun Sea*, a cargo vessel designed to accommodate a small crew during short coastal voyages, sailed across the Pacific Ocean for just over a month in the summer of 2010. It left the Gulf of Thailand on July 5, 2010, and entered Canadian territorial waters on August 12. Canadian authorities boarded the ship the same day. They found 492 Sri Lankan nationals on board, all of Tamil ethnicity. They were fleeing the aftermath of Sri Lanka's civil war, which had caused many of them to fear for their lives and safety.

[2] The three respondents in these related appeals were charged along with a fourth accused under s. 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*], with organizing, inducing, aiding, or abetting people to come into Canada, colloquially known as "human smuggling", in contravention of the *IRPA*. At trial, three of the accused, Thampeernayagam Rajaratnam, Lesly Jana Emmanuel and Nadarajah Mahendran, were acquitted by the jury. The Crown appeals those three acquittals. In respect of the fourth accused, Kunarobinson Christhurajah, the trial judge, Justice Ehrcke, declared a mistrial, as the jury could not reach a verdict. He was retried by Justice Wedge and a new jury and convicted. His appeal from that conviction is addressed in separate reasons: *R. v. Christhurajah*, 2019 BCCA 210.

[3] A fifth person, Sathyapavan Aseervatham, was also charged, but he died before trial and the charges were abated.

[4] The first issue is whether s. 36 of the *Mutual Legal Assistance in Criminal Matters Act*, R.S.C. 1985, c. 30 (4th Supp.) [*MLACMA*], violates s. 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*], for allowing the Crown to adduce hearsay evidence in a manner that is inconsistent with an accused's right to a fair trial. We conclude that s. 36 is unconstitutional and should be declared of no force or effect in respect of evidence tendered by the Crown in a criminal trial.

[5] The second issue is whether the remedy granted by the Supreme Court of Canada in *R. v. Appulonappa*, 2015 SCC 59, the creation of exceptions for humanitarian, mutual, and family aid, created true defences to s. 117 of the *IRPA*, or whether it created new elements of the offence. Justice Ehrcke did not conclusively decide the issue because, in his view, there was an air of reality to the exceptions and, thus, regardless of whether they were characterized as defences or offences, the Crown would bear the burden of disproving the exceptions beyond a reasonable doubt (reasons indexed as 2017 BCSC 60). He did, however, charge the jury on the basis that the exceptions were essential elements of the offence. In Mr. Christhurajah's retrial, Justice Wedge concluded that they were defences (reasons indexed as 2017 BCSC 1211). In our view, the exceptions operate as defences, and are not essential elements of the offence.

[6] The third issue relates to defining the elements of the *Appulonappa* exceptions. Justice Wedge ruled that the exceptions are available only where they are the sole purpose or motivation in acting. Our view is that there is no sole purpose requirement and that the other elements should not be defined as narrowly as the Crown submits.

[7] These general answers must be applied to each respondent. There are also other legal issues relating to the exceptions that are particular to each respondent.

[8] Mr. Emmanuel is the only accused who testified at trial. For him, the issue is whether a new trial is inappropriate because the way the trial was conducted indicates that he was acquitted because the jury accepted his evidence. In our view, Mr. Emmanuel's acquittal should stand because the Crown has not demonstrated that any legal errors were material to the verdict.

[9] For both Mr. Rajaratnam and Mr. Mahendran, the issues are whether Ehrcke J. erred in leaving the humanitarian aid exception with the jury and whether the acquittals should stand in any case because each respondent was likely acquitted due to poor identification evidence. In our view, both acquittals should stand for that reason.

[10] These appeals were heard together with the appeal in *Christhurajah*. Although these appeals and *Christhurajah* arise from different trials, the legal issues and evidence called in each trial were similar in a number of ways. For that reason, we describe the factual background that all four appeals share at paras. 11−35 of these reasons and signal where the evidence recounted relates to any of the appeals in particular. Furthermore, although the three respondents in these appeals and the appellant in *Christhurajah* made different submissions, they each adopted the submissions of the others wherever relevant. We therefore consider Mr. Christhurajah's submissions along with those of the three respondents in these reasons.

## B. Factual background

[11] In this judgment, we first summarize the evidence given by witnesses who testified at both trials. This summary is equally applicable to the companion case of *Christhurajah.* We then summarize the evidence unique to each respondent. Evidence unique to Mr. Christhurajah is summarized in the judgment that pertains to him.

### The Sri Lankan civil war

[12] Sri Lanka is an island country that lies southeast of the Indian subcontinent. For over 25 years, ending in 2009, the Sinhalese majority and Tamil minority in Sri Lanka were engaged in a brutal war. One of many reasons the war began was that some Tamils, spearheaded by the Liberation Tigers of Tamil Eelam ("LTTE"), wanted to establish their own state in the northern and eastern regions of the island. In May 2009, the Sinhalese troops declared victory over the LTTE.

[13] Many Tamil witnesses testified to the carnage and terror they experienced living in Sri Lanka during and after the war. Witnesses described aerial bombing and artillery shelling that destroyed buildings and killed or injured many. Some had to leave their homes and move to refugee camps with many other Tamils for the sake of their safety. One witness described a "white van encounter", in which his brother was kidnapped by the Sri Lankan army in an unmarked van and feared dead. Tamils were harassed, detained, and beaten by members of the army because of their ethnicity.

[14] Many Tamils feared for their lives. To escape the conditions with which they were faced, some decided to flee the country in search of safety. The Tamil witnesses all fled in the same way. They communicated with someone who promised them safe passage across the Pacific Ocean to

Canada in exchange for tens of thousands of U.S. dollars. They travelled to Bangkok, Thailand, where they stayed in apartments with other Tamils, then travelled to the southern Thai shore, where they would stay for one or two nights, eventually finding themselves on a small cargo ship located some distance offshore: the MV *Sun Sea*.

**Arrival of the MV *Sun Sea* in Canada**

[15] The circumstances surrounding the arrival of the MV *Sun Sea* in Canada were not in dispute in any material way. The MV *Sun Sea* left the Gulf of Thailand on July 5, 2010, with 492 Sri Lankan nationals on board: 380 men, 63 women and 49 children. None of them possessed the required travel documents to enter Canada. All of them claimed refugee status upon their arrival.

[16] The MV *Sun Sea* entered Canadian territorial waters on August 12, 2010, and was boarded by Canadian authorities on the same day. The authorities who boarded the vessel included an RCMP Emergency Response Team, a Navy prize crew capable of operating the vessel, and a Canadian Border Services Agency ("CBSA") officer. They took control of the vessel and brought it to Canadian Forces Base Esquimalt on Vancouver Island.

[17] RCMP Sergeant Robert Tan testified that he found four men on the bridge operating the vessel. One of them, Mr. Emmanuel, identified himself as the captain. Eight men were found in the engine room. Apart from them and the four men on the bridge, no other passengers were identified as being part of the crew.

[18] The living conditions on board the vessel were poor. Although some migrants (mainly women and children) lived in sheltered areas on the deck, many of the migrants stayed in the cargo hold. The hold was very full and the migrants had established their sleeping areas wherever they could find space. The CBSA officer, Scott Abrahamson, testified that there was a bridge made of rope suspended in the air from one side of the cargo hold to the other to create additional sleeping space for the migrants.

[19] In both trials, the Crown called RCMP Staff Sergeant Robert Pikola and Captain Phillip Nelson as expert witnesses to give evidence regarding seaworthiness and the safety requirements applicable to vessels such as the MV *Sun Sea*, among other subjects.

[20] The safety conditions aboard the MV *Sun Sea* were deplorable. Sergeant Pikola testified that the vessel had insufficient life jackets and no immersion suits for prolonging survival in cold water. He testified that a vessel carrying 492 passengers should have had the capacity for 500 people in lifeboats and life-rafts on each side of the vessel, but the one lifeboat and two life-rafts aboard the MV *Sun Sea* could together hold a maximum of 60.

[21] In the first trial, Captain Nelson testified that, based on the evidence he saw, conditions on the MV *Sun Sea* were "abysmal". In Mr. Christhurajah's retrial, he testified that conditions on the ship were the worst of any vessel he had ever seen. He testified that it was a cargo vessel designed for short coastal voyages and was not seaworthy to cross the Pacific Ocean. It had inadequate life-saving and firefighting equipment. Captain Nelson testified that a cargo hold is not suitable for accommodating passengers because the facilities are inadequate and the hold

provides no protection from the motion of the ship. In Mr. Christhurajah's retrial, he elaborated that there is inadequate ventilation in a cargo hold and no means of egress.

[22] The Crown's theory was that the voyage of the MV *Sun Sea* was a human smuggling operation for financial or material gain linked to transnational organized crime. The Crown alleged that Mr. Christhurajah was the managing director of the company that owned the MV *Sun Sea*, Mr. Emmanuel was the captain, and Mr. Mahendran and Mr. Rajaratnam were involved in the logistics of getting the migrants to the vessel.

**The migrant witnesses' evidence**

[23] With some variation, the migrants' common experience with respect to the voyage fell into three stages: (1) securing passage on the vessel through an agent and gathering with other migrants in Bangkok; (2) traveling from Bangkok to the coast, then traveling by boat to the MV *Sun Sea*; and (3) traveling to Canada on board the MV *Sun Sea*.

[24] Eleven migrants gave evidence at the first trial, and five of those migrants again gave evidence at the retrial. The migrants who testified for the Crown at both trials were Uthayakumar Thavasi, Sasikumar Kanthappillai, Ragu Gnanasountharanayakam, Kulathisan Kulavirasuntharam, and Ragavan Sithirasegaram. The migrants who testified only at the first trial were Sathiyaraj Thurairajah, Pirakas Karunenthiran, Dhushandh Gandhi, Gopinath Pathmanathan, Surenthiran Raththinam, and Umakanthan Selathurai. Their evidence was tendered for the purpose of establishing the accused's roles in gathering the migrants in Thailand, paying money to the organizers, provisioning the vessel, and transferring the migrants to the vessel.

***Securing passage on the vessel and gathering in Bangkok***

[25] All of the migrant witnesses secured passage on the MV *Sun Sea* through agents. Most of the migrants made contact with their agents while still in Sri Lanka. Some of the migrants instead made contact with their agents from Malaysia, where they had been living. Some contacted their agents while already in Thailand. The migrants then traveled, by air, foot, or vehicle, to Bangkok.

[26] Once in Bangkok, each migrant was met by other Tamils who brought them to an apartment. Many of them lived with other Tamils, though some stayed by themselves for at least part of their time in the city.

[27] Each of the migrants who testified at the retrial and nearly all of the migrants who testified at the first trial agreed to pay, or asked a relative to pay, a deposit equivalent to a few thousand dollars on the understanding that the equivalent of about $25,000 to $30,000 would eventually be paid for the voyage. Two of the migrants, Mr. Kulavirasuntharam and Mr. Kanthappillai, entered into written contracts. Both contained a default clause that provided that if the balance was not paid, the migrant agreed "to abide by any action that will be initiated by Mr. T. Chandrasegaram who arranges the voyage."

[28] Each of the migrants lived in Bangkok for some time—from one week to several months—before being told, usually by their agent, that it was time to leave.

***The journey from Bangkok to the MV Sun Sea***

[29] The experiences of Mr. Thavasi and Mr. Kulavirasuntharam were representative of the migrant witnesses. Mr. Thavasi testified that on May 16, 2010, following his agent's instructions, he went to a bus station, where he met Mr. Christhurajah. Mr. Christhurajah gave him a bus ticket to the coastal city of Songkhla, Thailand, and the name of a hotel where he was to stay. The next day, he went to the seashore, where he met Mr. Mahendran. He gave Mr. Mahendran his passport, then boarded a trawler with a number of other Tamils and traveled to the MV *Sun Sea*. Mr. Christhurajah boarded the vessel some time after him.

[30] Mr. Kulavirasuntharam testified that on May 12, 2010, his agent told him it was time to leave for the MV *Sun Sea*. He boarded a van along with other Tamils that took them to the seashore. Once there, he gave his passport, cell phone, $2,000 USD, and some Thai Baht to his agent. He and the other Tamils then boarded a small boat that took them to the MV *Sun Sea*.

[31] Each of the other migrants gave similar testimony. In May or June 2010, they traveled by bus or van from Bangkok to the coast with other Tamils. There they met their agents, handed over their passports (unless they had already done so or no longer had a passport), and boarded small boats that took them to the MV *Sun Sea*. Each migrant testified that the voyage to the MV *Sun Sea* from shore took between one and two days.

***On board the MV Sun Sea***

[32] The migrant witnesses gave similar testimony regarding their experiences on the MV *Sun Sea*.

[33] In some cases, the migrants had to wait a considerable period for the vessel to depart after they boarded. Mr. Thavasi had to wait one and a half months; Mr. Sithirasegaram waited two months. In the interim, the vessel took on more passengers and supplies.

[34] All the migrants who testified slept in the cargo hold. Mr. Sithirasegaram testified that the migrants in the cargo hold were not permitted to come out. Some of the migrant witnesses testified that they did not have enough to eat during the voyage. Some testified that the conditions aboard the MV *Sun Sea* were worse than expected. Multiple migrant witnesses testified that they had expected to be aboard a passenger vessel, not a cargo ship.

[35] Although not all of the migrants worked during the voyage, some did various jobs aboard the vessel. Some used tarps to collect rainwater, some worked on the bridge, some worked in the engine room, and one kept a ledger to ensure all the passengers got their meals.

**Additional evidence relevant to Mr. Emmanuel**

[36] The Crown's theory was that Mr. Emmanuel was the captain of the ship. Mr. Emmanuel admitted to having been the captain. He relied upon the exceptions created by the Supreme Court of Canada in *Appulonappa*.

[37] Mr. Emmanuel testified at trial. He testified that he was Tamil and was born in Sri Lanka. He said he left the country because he feared for his life. While he was in Sri Lanka, his village was

destroyed by the army, who then used the villagers as human shields. Mr. Emmanuel and his girlfriend were shot while they escaped with 50 other individuals. His girlfriend died of her wounds in hospital.

[38] Mr. Emmanuel went to Malaysia, where he studied Nautical Sciences at the Malaysian Maritime Academy. He then worked as a crew member on an Eritrean cargo ship called the MV *DenDen*, which sank in June 2007. At that time, he did not believe he could safely return to Sri Lanka.

[39] At some time after the MV *DenDen* sank, Mr. Emmanuel attempted to apply to the United Nations in Malaysia to relocate to Canada. He abandoned the process when he was told it would take five to six years without a sponsor. In November 2009, he travelled from Sri Lanka to Thailand on a six-month tourist visa. He lived with Thai students in Bangkok until April 2010. He visited the United Nations again, where he was again told it would take years to relocate to Canada without a sponsor.

[40] Mr. Emmanuel, with his brother's assistance, paid a $15,000 deposit to an agent who agreed to arrange his passage to Canada. He received a call from his mother, who told him she was in a camp controlled by the army. His mother and sister had been interrogated. The interrogators, having elicited information that Mr. Emmanuel was a sailor, said he must be a member of the Sea Tigers, a branch of the LTTE. Mr. Emmanuel testified that this news affirmed his intention to go to a place where he would be safe.

[41] When Mr. Emmanuel boarded the MV *Sun Sea*, it was operated by a Thai crew. The ship travelled for two days and met with another ship, when diesel fuel was loaded onto the MV *Sun Sea*. Mr. Emmanuel testified that the Thai crew then tried to leave the MV *Sun Sea*. The Tamil migrants tried to leave the ship with them, but the crew refused to take them. Mr. Emmanuel testified that they gave him a satellite phone and that he spoke to someone named "Praba", who told them that the Thai crew would return and that they would go to Canada on another ship that was better suited to travelling across the Pacific Ocean.

[42] The Thai crew left and did not return. Ten days after they left, another person on the ship repaired the engine, which had not been functional. A week later, 50 more Tamil migrants boarded the MV *Sun Sea*. Mr. Emmanuel testified that the other migrants begged him to be the ship's captain. He took on that role, which included training others to work on the ship. He stayed on the bridge deck twenty-four hours a day, providing advice and guidance to the other migrants and resting whenever he found the space to do so. He testified that he did not expect any payment for his work. He was not cross-examined on this point. He said he took on the role of captain only because of the dire consequences that would have resulted had he not agreed to do so. The Crown disputes Mr. Emmanuel's motives and whether his actions qualify as humanitarian.

[43] Other Tamil migrants also testified to Mr. Emmanuel's presence and involvement on the MV *Sun Sea*. Mr. Thavasi, Mr. Gandhi, Mr. Gnanasountharanayakam, and Mr. Sithirasegaram confirmed that Mr. Emmanuel was the captain of the ship. Mr. Raththinam said he had been described as the ship's operator. Mr. Selathurai testified that during a confrontation with the Thai

Navy, Mr. Emmanuel said he would speak to the Navy. Although he did not observe Mr. Emmanuel speaking with them, they left shortly afterward.

**Additional evidence relevant to Mr. Rajaratnam**

[44] Mr. Rajaratnam and Mr. Mahendran were not aboard the MV *Sun Sea* when it was apprehended. Government records showed that they entered Canada at Pearson International Airport in Toronto within minutes of each other on July 7, 2010. The Crown alleged that they were involved in provisioning the vessel and organizing the transfer of the migrants. Their defences at trial focused largely on the issues of identity and credibility of the migrant witnesses.

[45] The Crown called two migrant witnesses who purportedly dealt with Mr. Rajaratnam in Thailand: Pirakas Karunenthiran and Dhushandh Gandhi.

***Mr. Karunenthiran's testimony***

[46] Although he conceded that it was difficult to remember things that had occurred six years prior to his testimony, Mr. Karunenthiran testified that he had had two encounters with an individual he identified as "Sokan". In his October 2, 2010 interview with the RCMP, Mr. Karunenthiran had identified a photograph of Mr. Rajaratnam as "Sokan". At trial, he did not mention Sokan until after the Crown had asked to stand down and spoke to him through an interpreter. Before that discussion, he said he could not remember Sokan's name. In cross-examination, Mr. Karunenthiran agreed that Crown counsel had directed him to use the name "Sokan". Mr. Karunenthiran was unable to make an in-dock identification of Mr. Rajaratnam at trial.

[47] Mr. Karunenthiran testified that he first met Sokan in a vehicle parked beneath an apartment building on May 5, 2010. He gave him $2,000, which had been provided to him by his agent "Johnson" with instructions to give it to Sokan. He agreed that the meeting was a "quick in and out" and could have been less than a minute. Mr. Karunenthiran then stayed in the apartment building for one week, along with other Tamil migrants who became passengers on the MV *Sun Sea*.

[48] Mr. Karunenthiran testified to one other encounter with Mr. Rajaratnam, when he and other migrants were picked up from an apartment building by white vans on May 12, 2010. He said he saw Sokan seated in a vehicle as he was walking to the van that he rode in. He did not initially testify to seeing anyone he knew during that walk apart from a Thai man he recognized. He only testified that he saw Sokan after speaking with Crown counsel over the lunch break. In cross-examination, he agreed that he had only seen Sokan in the vehicle for a matter of seconds.

***Mr. Gandhi's testimony***

[49] Mr. Rajaratnam was also identified by Mr. Gandhi. Unlike Mr. Karunenthiran, Mr. Gandhi identified Mr. Rajaratnam in court.

[50] Mr. Gandhi's credibility and the reliability of his testimony were impugned by Mr. Rajaratnam in several ways. He gave evidence that was inconsistent with multiple statements given to the CBSA and the RCMP, as well as with other portions of his evidence. He testified to his prior employment, which included working as a caller at a company in Sri Lanka. He would deceive

those he called into thinking he was in Britain and would use a fake name, fake accent, and downloaded weather reports to give them the false impression that he was a local British person. Mr. Gandhi testified that he did not leave the apartment in Thailand out of fear that he would be arrested and sent back to Sri Lanka, but his testimony was directly contradicted by his diary and receipts he retained which confirmed that he left the apartment on many occasions.

[51] Mr. Gandhi agreed with his agent that he would pay between $25,000 and $30,000 for passage on the MV *Sun Sea*. He paid a $5,000 deposit and agreed to pay the balance upon arrival in Canada, although it was clear from cross-examination that he did not intend to pay the balance.

[52] Mr. Gandhi flew to Bangkok from Sri Lanka in April 2010. He testified that he was taken to an apartment building where “Sokan” and a family were present. He said that he paid his agent the $5,000 in the presence of Sokan and spoke with Sokan during this first interaction. Mr. Gandhi testified that when he arrived at the apartment building, Sokan gave him food and a place to sleep.

[53] In the September 3, 2010 statement to the RCMP, however, he had identified another migrant, B165, as the person who gave him food when he arrived in Thailand. In the same statement, he said twice that he had not spoken to Sokan.

#### *Other evidence*

[54] The Crown also called Sanpetch Kamma, an assistant manager of a car rental dealership in Bangkok, to testify that he had rented a car to Mr. Rajaratnam on June 3, 2010, and that the car had not been returned. The Crown also entered evidence showing that Mr. Rajaratnam and Mr. Mahendran entered Canada on July 7, 2010, at Pearson International Airport in Toronto.

### Additional evidence relevant to Mr. Mahendran

[55] At trial, Mr. Mahendran’s defence focused on identity. The Crown attempted to establish his identity using eyewitness evidence and evidence obtained from the Kingdom of Thailand pursuant to a treaty request for mutual legal assistance. The latter evidence was ultimately found inadmissible.

[56] Mr. Mahendran was identified by three witnesses who were aboard the MV *Sun Sea*: Sathiyaraj Thurairajah, Uthayakumar Thavasi, and Sasikumar Kanthappillai.

#### *Mr. Thurairajah’s testimony*

[57] Mr. Thurairajah testified that he had dealt with a man named “Chandran”, who made arrangements for his travel from Malaysia to Thailand and from Thailand to Canada. He had three short in-person meetings with Chandran in Thailand and several short phone conversations. Over four months after the last in-person interaction, Mr. Thurairajah selected a photograph of Mr. Mahendran during an RCMP interview and identified him as Chandran. After the interview, he was repeatedly shown a picture of Mr. Mahendran by Canadian authorities: four or five times by the RCMP, at least once by the CBSA, and once by the Crown. Mr. Thurairajah made an in-dock identification of Mr. Mahendran as Chandran.

[58] Mr. Thurairajah testified to having significant memory problems. He fell while aboard the MV *Sun Sea*, became unconscious, and thereafter had no memory for about three days. After arriving in Canada, he saw a psychologist and medical doctor for treatment for his memory problems.

[59] Mr. Thurairajah told the RCMP that although he was trying to be careful with his statements, he could not remember everything and may make mistakes due to his memory issues. During his testimony, he initially forgot that the Crown had shown him a photograph of Mr. Mahendran a week and a half before he was asked about the photograph in cross-examination. He agreed to a number of propositions put to him by defence counsel relating to his poor memory, including that he was confused about what he was saying, that the court had to be careful with his evidence because of his confusion, and that his in-dock identification of Mr. Mahendran was influenced by the pictures he was shown by the authorities.

[60] The photo lineup procedure used for Mr. Thurairajah's identification of Mr. Mahendran failed to conform to multiple RCMP policies for the composition of photopacks.

***Mr. Thavasi's testimony***

[61] Mr. Thavasi testified that he had two in-person interactions with someone he called "Mahendran". Five months after meeting him, Mr. Thavasi selected a photograph of Mr. Mahendran during an RCMP interview and identified him as Mahendran. After the interview, he was repeatedly shown a picture of Mr. Mahendran by Canadian authorities. Mr. Thavasi made an in-dock identification of Mr. Mahendran as Mahendran.

[62] The photo lineup procedure used for Mr. Thavasi's identification of Mr. Mahendran also failed to conform to RCMP policies.

***Mr. Kanthappillai's testimony***

[63] Mr. Kanthappillai testified that he observed Mr. Mahendran standing at the seashore as he was transported from the shore to the MV *Sun Sea* on a fishing boat. Six months after this observation, Mr. Kanthappillai selected a photograph of Mr. Mahendran, whom he identified as the man on the shore. Mr. Kanthappillai was not asked to make an in-dock identification of Mr. Mahendran.

[64] Mr. Kanthappillai testified to serious memory problems resulting from exposure to chemicals between 1996 and 2000. Mr. Kanthappillai's memory loss hindered his ability to eat, sleep and work. At some point, he could not remember where or who he was.

[65] The photo lineup procedure used for Mr. Kanthappillai's identification of Mr. Mahendran also failed to conform to RCMP policies.

**MLAT evidence**

[66] In the first trial, the Crown made a number of attempts to secure the admission of documents obtained from the Kingdom of Thailand. These attempts culminated in a ruling by Ehrcke J. that s. 36 of the *MLACMA* is unconstitutional.

## C. Proceedings and decisions in the court below

[67] All four accused were tried by Ehrcke J., sitting with a jury, beginning October 18, 2016. Mr. Rajaratnam, Mr. Emmanuel, and Mr. Mahendran were all acquitted on January 25, 2017. The jury was unable to reach a verdict with respect to Mr. Christhurajah, and a mistrial was ordered.

[68] Mr. Christhurajah's second trial began on May 1, 2017, before Wedge J., sitting with a jury. The jury convicted Mr. Christhurajah on May 27, 2017.

### (1) The first trial (before Ehrcke J.)

#### *a. Attempts to tender evidence obtained from the Kingdom of Thailand*

##### *(i) First attempt (withdrawn)*

[69] In January and February of 2016, before empanelling the jury, Ehrcke J. conducted several *voir dires*, one of which concerned the Crown's application to tender documents obtained from Thailand. The documents were attached to four affidavits sworn by Lieutenant Colonel Jedsada Chomcherngpat of the Royal Thai Police (the "RTP") before a Canadian consular official in Bangkok in April of 2013. The documents are not identified in any way in the bodies of the affidavits. The majority of the documents are in the Thai language. The Crown provided English translations of some of them.

[70] All of the affidavits are entitled:

> AFFIDAVIT with respect to COMPUTER PRINT-OUTS and/or COPIES of ORIGINAL RECORDS

[71] Two of the affidavits read:

> I, Pol. Lt. Col. Jedsada Chomcherngpat, knowing that I may be prosecuted under the laws of Thailand for intentionally making a false statement or affidavit, MAKE OATH AND SAY AS FOLLOW:
>
> 1. I am employed by Royal Thai Police (hereinafter RTP). I am employed as Inspector, and by virtue of that employment have knowledge of the matters hereinafter set out. In this document, "copies of original records" includes the output of data from a computer system or other similar device.
>
> 2. Attached to this Affidavit are copies of original records maintained by the RTP in the usual and ordinary course of business.
>
> 3. The original records were created in the usual and ordinary course of the business of the RTP by persons who at the time of the making of the entry or record had knowledge of the circumstances or events set out therein.
>
> 4. The original records were made or the data was recorded at or near the time of the circumstances or events set out therein by persons who were under a duty to accurately record the circumstances or events.
>
> 5. Where the attached documents are photocopies of original records, it was not possible or reasonably practicable to produce the original records because they are government's properties [or, in the case of computer print-outs retrieved directly from an electronic system, the original version of the information is in the electronic documents system which cannot be provided.]

All the documents attached to one of these affidavits are marked with a "Certified True Copy" stamp signed by Lt. Col. Chomcherngpat. Some of the documents attached to the other affidavit are marked in the same way.

[72] The other two affidavits read:

> I, Pol. Lt. Col. Jedsada Chomcherngpat, knowing that I may be prosecuted under the laws of Thailand for intentionally making a false statement or affidavit, MAKE OATH AND SAY AS FOLLOW:
>
> 1. I am employed by Royal Thai Police (hereinafter, RTP). I am employed as Inspector, and by virtue of that employment have knowledge of the matters hereinafter set out.
>
> 2. Where the documents attached to this affidavit are copies of original records, I made these copies from the original of the records and attest that the copies are true and accurate copies of the original records.
>
> 3. Where the attached documents are the output of an electronic documents system or other similar system ("the system"), I caused the documents to be generated by the system. I attest that the documents are a true and accurate representation of data stored in the system.

All the documents attached to these affidavits are marked with a "Certified True Copy" stamp signed by Lt. Col. Chomcherngpat.

[73] Collectively, the four affidavits have several hundred pages of documents attached to them. Those documents pertain to Operation Hydra, a human-smuggling investigation the RTP conducted. For the most part, the documents consist of RTP reports, photographs taken by RTP officers, copies of documents seized by RTP officers, copies of documents the RTP obtained from the RTP Immigration Bureau and the Thailand Department of Business Development. Letters the RTP received from the Australian Federal Police are also included.

[74] Lt. Col. Chomcherngpat was the only witness on the *voir dire*. He provided a narrative account of Operation Hydra and testified with respect to the documents attached to his affidavits.

[75] During closing submissions on the *voir dire*, the Crown withdrew its application, indicating it might reapply later to have some of the documents admitted as evidence.

***(ii) Second attempt (2016 BCSC 2399, per Ehrcke J.)***

[76] On September 12, 2016, Lt. Col. Chomcherngpat swore two further affidavits before a Canadian consular official in Bangkok. Those affidavits and the documents attached to them as exhibits constitute the evidence the Crown later sought to tender as evidence pursuant to s. 36 of the *MLACMA*. This time, the documents were identified and described in the bodies of the affidavits. As before, the Crown provided English translations of some of the documents written in Thai.

[77] After the trial commenced before the jury, the Crown applied pursuant to s. 714.2 of the *Criminal Code*, R.S.C. 1985, c. C-46, to have Lt. Col. Chomcherngpat testify with respect to his personal involvement in Operation Hydra by means of an audio-video link from Thailand. In addition, defence counsel wished to cross-examine the officer on his September 12, 2016 affidavits. Lt. Col. Chomcherngpat's testimony was recorded on the understanding counsel would have an opportunity to seek rulings from Ehrcke J. on evidentiary objections before any portion of the recording was played to the jury. Due to the poor quality of the recording, Ehrcke J. refused to allow any portion of it to be played to the jury.

***(iii) Third attempt (2016 BCSC 2452, per Ehrcke J.)***

[78] Next, the Crown applied to tender the transcript of the testimony Lt. Col. Chomcherngpat gave during the January/February 2016 *voir dire*, together with the exhibits marked on that *voir dire*, which included the four affidavits the officer swore in 2013. The Crown relied on s. 715(1) of the *Criminal Code* and the principled approach to hearsay. Section 715(1) permits testimony previously given to be admitted in certain circumstances. In this case, the Crown relied on the fact that Lt. Col. Chomcherngpat was "absent from Canada" (subs. (1)(d)).

[79] Justice Ehrcke dismissed the Crown's application. In doing so, he noted Lt. Col. Chomcherngpat had expressed frustration with being requested to testify a third time and was unwilling to come to Canada to testify or testify by audio-video link from Thailand.

***(iv) MLACMA, s. 36 ruling (2016 BCSC 2400, per Ehrcke J.) [MLACMA ruling]***

[80] Later in the trial, the Crown sought to have the affidavits Lt. Col. Chomcherngpat swore on September 12, 2016, admitted as evidence pursuant to s. 36 of the *MLACMA*. That provision reads:

> 36 (1) In a proceeding with respect to which Parliament has jurisdiction, a record or a copy of the record and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record, sent to the Minister by a state or entity in accordance with a Canadian request, is not inadmissible in evidence by reason only that a statement contained in the record, copy, affidavit, certificate or other statement is hearsay or a statement of opinion.
>
> (2) For the purpose of determining the probative value of a record or a copy of a record admitted in evidence under this Act, the trier of fact may examine the record or copy, receive evidence orally or by affidavit, or by a certificate or other statement pertaining to the record in which a person attests that the certificate or statement is made in conformity with the laws that apply to a state or entity, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the state or entity, including evidence as to the circumstances in which the data contained in the record or copy was written, stored or reproduced, and draw any reasonable inference from the form or content of the record or copy.

[81] Also relevant are the definitions of "record" in s. 2(1) of the *MLACMA* and s. 38(1):

> 2(1) *record* means a medium on which data is registered or marked;
>
> *...*
>
> 38(1) An affidavit, certificate or other statement mentioned in section 36 or 37 is, in the absence of evidence to the contrary, proof of the statements contained therein without proof of the signature or official character of the person appearing to have signed the affidavit, certificate or other statement.

[82] The accused responded by filing an application challenging the constitutional validity of those provisions on the basis they infringed ss. 7 and 11(d) of the *Charter*, which reads:

> 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.
>
> …
>
> 11. Any person charged with an offence has the right
>
> …
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

[83] The accused sought a declaration of invalidity pursuant to s. 52(1) of the *Constitution Act, 1982*, which reads:

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

**The evidence the Crown sought to tender**

[84] Lt. Col. Chomcherngpat's September 12, 2016 affidavits were filed as exhibits on the application. In them, Lt. Col. Chomcherngpat deposes not only to his personal involvement in Operation Hydra but to the involvement of the RTP in general. For the most part, he sets out what the RTP did or learned without specifying who within the RTP did what.

[85] Both affidavits contain the following statements:

> This affidavit and the exhibits attached to it are being made and provided to the Minister of Justice of Canada pursuant to a request made by Canada under the *Treaty Between the Government of Canada and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters*. All the documents attached to my affidavit were created or obtained by the RTP in the course of our Operation Hydra investigation.
>
> …
>
> This affidavit is sworn in accordance with a Canadian request made under the *Treaty Between the Government of Canada and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters*, pertaining to records in the possession of the Thai authorities sent to the Canadian Minister of Justice pursuant to that request. Attached as Exhibit [letter omitted] is a copy of the request sent to the Attorney General, the Central Authority of the Kingdom of Thailand from the Minister of Justice of Canada.

[86] The exhibit referred to in the second paragraph quoted above is a one-page document from the Minister of Justice of Canada to the Central Authority of the Kingdom of Thailand dated November 18, 2011, captioned "Letter of Transmittal and Official Request". The text of that document refers to the "attached Request for Assistance", but no such request is attached to either affidavit.

[87] In the first affidavit, Lt. Col. Chomcherngpat deposes that:

(a) he was personally involved in Operation Hydra, an investigation that concerned the use of Thailand as a transit country to smuggle Tamil migrants from Sri Lanka to Canada; and

(b) Kunarobinson Christhurajah (a Sri Lankan national and resident of Thailand), Nadarajah Mahendran (a Canadian national), Thampeernayagam Rajaratnam (a Canadian national), and Thayakaran Markandu (a Sri Lankan national and resident of France) were arrested by the RTP on June 3, 2010, in the parking lot of the Alis Apartments in Bangkok.

[88] Numerous documents are attached to this affidavit as exhibits; all are marked with a "Certified True Copy" stamp signed by Lt. Col. Chomcherngpat. The documents are described as:

(a) a Canadian passport obtained from Mr. Rajaratnam following his arrest;

(b) a Canadian passport obtained from Mr. Mahendran following his arrest;

(c) a French Travel Document obtained from Mr. Markandu following his arrest;

(d) a receipt from the Thai Embassy in Paris obtained from Mr. Markandu following his arrest;

(e) a Thai passport obtained from Mr. Christhurajah following his detention;

(f) a "Memo Record" from the RTP's Tourist Division Command concerning a van seized during the investigation (original in Thai);

(g) a "travel history" printout provided by the RTP's Immigration Bureau with respect to Mr. Rajaratnam's arrivals and departures from Thailand, together with photographs of Mr. Rajaratnam and a copy of two pages of his passport;

(h) a "travel history" printout provided by the RTP's Immigration Bureau with respect to Mr. Mahendran's arrivals and departures from Thailand.

[89] In the second affidavit, Lt. Col. Chomcherngpat states that:

(a) when Mr. Christhurajah, Mr. Mahendran, Mr. Rajaratnam, and Mr. Markandu were arrested on June 3, 2010, they were loading jugs of low-flammability petroleum into a van, an offence under the Thai *Petroleum Control Act*;

(b) the RTP transported Mr. Christhurajah, Mr. Mahendran, Mr. Rajaratnam, and Mr. Markandu to the OS Apartments in Bangkok;

(c) Mr. Christhurajah rented two rooms at the OS Apartments;

(d) he attended at the OS Apartments and dealt with Mr. Christhurajah, Mr. Mahendran, Mr. Rajaratnam, and Mr. Markandu;

(e) the RTP searched the rooms rented by Mr. Christhurajah and a van belonging to Mr. Christhurajah parked outside the building;

(f) documents (unspecified) seized from Mr. Christhurajah's rooms at the OS Apartments linked him to the Sun and Rshiya Company Limited;

(g) the Thai Immigration Bureau advised the RTP that Mr. Christhurajah applied for a non-immigrant visa in November 2008 for the purpose of working with the Sun and Rshiya Company Limited;

(h) on May 10, 2010, the RTP received information about a vessel named the MV *Sun Sea* off the coast of Thailand. The RTP learned the MV *Sun Sea* previously had been known as the MV *Harin Panich 19*. Vessel registration information obtained by the RTP disclosed the Sun and Rshiya Company Limited purchased the MV *Harin Panich 19* on March 30, 2010;

(i) on May 19, 2010, the RTP Marine Police Division requested assistance from the Royal Thai Navy in tracking the MV *Sun Sea*;

(j) on June 21, 2010, the Marine Police Division confirmed the MV *Sun Sea* was anchored in international waters in the Gulf of Thailand and that it had been met by fishing boats;

(k) the RTP determined the van located outside the OS Apartments had been purchased by Mr. Christhurajah on February 23, 2010; and

(l) on July 2, 2010, Mr. Christhurajah failed to attend court in Bangkok on charges under the *Petroleum Control Act* and a warrant was issued for his arrest.

[90] Numerous documents are attached to the second affidavit as exhibits; all are marked with a "Certified True Copy" stamp signed by Lt. Col. Chomcherngpat. The documents are described as:

(a) a post-arrest photograph of Mr. Christhurajah, Mr. Mahendran, Mr. Rajaratnam, and Mr. Markandu taken in the parking lot of the Alis Apartments;

(b) a document entitled "Record of Investigation and Seizure" which describes the collective actions of the officers who took part in the investigation at the Alis Apartments and the OS Apartments and lists what was seized (original in Thai);

(c) photographs of Mr. Christhurajah standing next to a van at the OS Apartments and of the items found in the van;

(d) photographs of items found in the van and Mr. Christhurajah's rooms;

(e) a document entitled "Record of Arrests" relating to Mr. Christhurajah, Mr. Mahendran, Mr. Rajaratnam, and Mr. Markandu which describes the collective actions of a number of RTP officers (original in Thai);

(f) a document entitled "Daily Report on cases" which describes the collective actions of a number of RTP officers (original in Thai);

(g) a document entitled "Inspection Record" which describes the collective actions of a number of RTP officers and contains a list of seized items (original in Thai);

(h) a printout of a travel itinerary for Mr. Mahendran seized during the investigation;

(i) a corporate search printout for the Sun and Rshiya Company Limited obtained from the website of the Thai Department of Business Development (original in Thai);

(j) documents from the Thai Immigration Bureau concerning Mr. Christhurajah's immigration status (originals in Thai);

(k) a document obtained by the RTP with respect to the location of the MV *Sun Sea* on May 10, 13, and 17, 2010, together with documents relating to the registration of the MV *Harin Panich 19* (originals in Thai);

(l) the request the RTP Marine Police Division sent to the Royal Thai Navy for assistance in tracking the MV *Sun Sea* (original in Thai);

(m) a memorandum dated June 21, 2010, signed by an officer with the Marine Police Division, stating the MV *Sun Sea* was anchored in international waters and giving its position (original in Thai);

(n) a note dated July 30, 2010, signed by an officer with the Marine Police Division, stating officers had determined the MV *Sun Sea* had been met by fishing boats (photos of boats attached) (original in Thai);

(o) RTP notes of interviews with several persons regarding the ownership of the van located outside the OS Apartments on June 3, 2010 (originals in Thai);

(p) a written request the RTP sent to the Thai Ministry of Commerce for business registration and corporate information concerning the Sun and Rshiya Company Limited (original in Thai);

(q) a document entitled “Recorded testimony of plaintiff, accused or witnesses” containing a statement the RTP obtained from a civil servant in the Harbour Department of Thailand with respect to the transfer of ownership of the MV *Harin Panich 19* to the Sun and Rshiya Company Limited (original in Thai);

(r) a document entitled “Recorded testimony of plaintiff, accused or witness” containing a statement the RTP obtained from a civilian with respect to the Sun and Rshiya Company Limited’s purchase of the MV *Harin Panich 19* (original in Thai);

(s) a note dated July 30, 2010, signed by an officer with the Marine Police Division stating officers had determined the MV *Sun Sea* had already sailed (original in Thai); and

(t) a warrant for Mr. Christhurajah’s arrest for failing to appear in court (original in Thai).

**Ruling on constitutionality of s. 36**

[91] Justice Ehrcke granted the defence application. He found s. 36 of the *MLACMA* infringes an accused’s right to a fair trial and to make full answer and defence and, therefore, violates ss. 7 and 11(d) of the *Charter*. As a result, the Crown was not permitted to tender Lt. Col. Chomcherngpat’s affidavits and the documents attached to them.

[92] Justice Ehrcke began by noting the Crown was seeking to tender documents which summarized, in narrative form, the fruits of an investigation conducted by the RTP. He further noted the documents contained not only hearsay evidence but also opinion evidence.

[93] Justice Ehrcke held that, as a matter of statutory interpretation, s. 36(1) removes a judge’s ability to exclude foreign records solely because they contain hearsay or opinion. He held the provision eliminates a judge’s gatekeeper role under the principled approach to hearsay because it removes the need for the tendering party to meet the requirements of necessity and reliability. He further held that s. 36(2), which provides that a trier of fact can assess the probative value of evidence admitted under s. 36(1), does not justify the elimination of a judge’s role in assessing threshold reliability.

[94] Justice Ehrcke declared ss. 36(1) and (2) to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*.

### *b. Directed verdict ruling (2017 BCSC 60, per Ehrcke J.) [Christhurajah 1 directed verdict ruling]*

[95] After the Crown closed its case, the four accused brought a motion seeking a directed verdict of acquittal on the basis that there was no evidence upon which a properly instructed jury could reasonably find they were not subject to the exceptions created in *Appulonappa*.

Mr. Mahendran sought the directed verdict on the additional basis that the identification evidence against him was so flawed that his case should not be submitted to the jury.

[96] Justice Ehrcke dismissed the motion for a directed verdict with respect to all four of the accused. His reasoning included a determination that the *Appulonappa* exceptions should be treated as elements of the offence on the basis that there was an air of reality to each of the defences, and so the Crown would be obliged to disprove the defences beyond a reasonable doubt regardless of his conclusion on this point. The Crown alleges that this was an error.

[97] In that ruling, at para. 18, Ehrcke J. noted that a credible argument could be advanced that the *Appulonappa* exceptions should be considered defences since the motives of an accused person who organizes, induces, aids, or abets undocumented migrants to come to Canada will usually be best known by that accused. He further noted, at paras. 19−20, that the wording of the exception at para. 86 of *Appulonappa* is apt for creating defences rather than for adding additional elements to the offence, and is similar to the wording used by Parliament in drafting some defences in the *Criminal Code*.

[98] However, Ehrcke J. concluded that even if the *Appulonappa* exceptions were treated as defences, the accused had established an air of reality. Thus, the distinction was of no moment in this case, as the Crown would bear the burden of proof regardless of the characterization of the exceptions. As the Supreme Court of Canada did not “express its intention unequivocally”, Ehrcke J. concluded that he would treat the *Appulonappa* exceptions as additional elements of the offence.

#### *c. Jury instructions (Ehrcke J.)*

[99] Consistent with his reasoning in the directed verdict ruling, Ehrcke J. told the jury the *Appulonappa* exceptions were, together, an element of the offence. He instructed them that the Crown was required to prove beyond a reasonable doubt that the four accused were not providing humanitarian aid to asylum-seekers and were not themselves asylum-seekers who were providing mutual aid (including to family members). As the evidence was that neither Mr. Mahendran nor Mr. Rajaratnam were passengers on the MV *Sun Sea*, Ehrcke J. instructed the jury that the mutual aid exception could not apply to either of them, but it was up to the jury to determine whether the humanitarian aid or family aid exceptions did apply.

[100] The jury returned not guilty verdicts for Mr. Rajaratnam, Mr. Emmanuel, and Mr. Mahendran. It did not return a verdict for Mr. Christhurajah. Justice Ehrcke declared a mistrial with respect to Mr. Christhurajah. Mr. Christhurajah’s second trial began before Wedge J., sitting with a jury, on May 1, 2017.

### (2) Mr. Christhurajah’s retrial (before Wedge J.)

[101] Although the appeal from the conviction entered after Mr. Christhurajah’s retrial is dealt with in separate reasons, the decisions rendered in the course of that trial are relevant to the legal issues in this case. We summarize them below.

### *a. Appulonappa exception ruling (2017 BCSC 1211, per Wedge J.) [Christhurajah 2 exception ruling]*

[102] After the Crown closed its case in Mr. Christhurajah's second trial, the parties sought a ruling with respect to whether the exceptions to s. 117 of the *IRPA* set out in *Appulonappa* should be characterized as defences or as additional elements of the offence.

[103] Justice Wedge noted the prior ruling made by Ehrcke J., in which he determined that the exceptions should be treated as elements of the offence. She concluded, however, that she was not bound to follow that approach by the principle of judicial comity expressed in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.). She noted that Ehrcke J. had made it clear that he considered the distinction between the two paths to be of little moment as the Crown would bear the persuasive burden in any event. As a result, Wedge J. considered afresh the proper characterization of the *Appulonappa* exceptions and concluded they should be treated as defences.

[104] Noting para. 45 of *Appulonappa*, Wedge J. also held that the Supreme Court of Canada intended to limit the exceptions to conduct amounting solely to humanitarian or mutual aid (which she noted included family members), and that a profit motive for procuring illegal entry of a person into Canada would render that conduct incompatible with the exception. She noted that interpreting the exceptions any other way would provide a complete defence to organized profit-driven smugglers who had both financial and humanitarian motives, undermining Canada's ability to combat large-scale human smuggling, and putting the safety of migrants at risk.

### *b. Humanitarian aid and mutual aid air of reality ruling (2017 BCSC 1212, per Wedge J.) [Christhurajah 2 air of reality ruling]*

[105] Having concluded that the *Appulonappa* exceptions should be treated as defences, Wedge J. proceeded to consider whether each of those defences had an air of reality. She concluded that Mr. Christhurajah had only established an air of reality for the mutual aid exception, and that the humanitarian aid exception should not be put before the jury.

[106] In reaching her conclusion, Wedge J. considered the most important factor to be the fact that Mr. Christhurajah was himself a refugee, whose motive was, at least in part, to get himself and his wife to Canada. As a result, his motive could not be said to be purely humanitarian. In addition, Wedge J. noted the evidence of migrants on the vessel that they were expected to pay large sums of money to board the MV *Sun Sea*, small portions of which were paid before boarding and the rest expected upon arrival. She also noted the highly organized scheme involving multiple stages of preparation and travel, the Crown's allegation that Mr. Christhurajah played an integral role in that scheme as the owner of the ship, and the unsafe and overcrowded nature of the ship.

### *c. Jury instructions in Mr. Christhurajah's second trial (Wedge J.)*

[107] Justice Wedge delivered her charge to the jury on May 25, 2017.

[108] As a result of her ruling that the humanitarian aid exception could not be left with the jury, she instructed the jury only on the mutual aid exception. Consistent with her reasoning in the

*Christhurajah* 2 exception ruling, she instructed the jury that for the defence to apply, the jury had to find that Mr. Christhurajah's sole motivation was to engage in mutual or reciprocal assistance with other asylum-seekers fleeing Sri Lanka. She instructed the jury that mutual aid required "reciprocity of assistance among the accused and the other asylum seekers". She instructed the jury that the fact that Mr. Christhurajah's wife was also on the MV *Sun Sea* was not determinative of the issue, as the jury could still find the Crown had proven its case regarding other migrants on the ship, effectively instructing the jury that "family aid" was not a separate exception but instead a possible form of mutual aid.

[109] On the second day of its deliberations, the jury asked Wedge J. to "provide further guidance in 'The defence of mutual aid among asylum-seekers'". Her response emphasized three times that it was required that Mr. Christhurajah's sole motivation be to provide mutual aid. She also emphasized the "giving and receiving" of assistance three times.

[110] The jury convicted Mr. Christhurajah.

## D. Issues

[111] This appeal raises two broad issues. The first is the constitutionality of s. 36 of the *MLACMA*. As we explain below, we conclude that Ehrcke J. did not err in finding that s. 36 violates ss. 7 and 11(d) of the *Charter* and declaring it to be of no force and effect. However, s. 36 should be declared of no force or effect only with respect to Crown evidence in the criminal trial context.

[112] The two remaining issues relate to the interpretation of the *Appulonappa* exceptions. The first of these is whether the exceptions are properly characterized as elements of the offence, as Ehrcke J. charged the jury in the first trial, or as defences, as Wedge J. charged the jury in Mr. Christhurajah's retrial. The Crown says the exceptions are true defences. The respondents and Mr. Christhurajah say they are elements of the offence. As we explain below, we conclude that the exceptions are properly characterized as true defences.

[113] The second related issue is how to define the defences. In particular, the parties join issue on whether family member aid is a subset of mutual aid, whether providing aid to the group identified in the exception must be the accused's sole motivation, and whether the accused must give and receive aid. As we explain below, we conclude that family member aid is not a subset of mutual aid, it is not necessary that providing aid is the accused's sole motivation, and mutuality of effort is not required. We conclude that the humanitarian aid and mutual aid defences each have four elements, which we discuss in some detail.

[114] We begin by considering the constitutionality of s. 36 of *MLACMA*. We then turn to the *Appulonappa* exceptions. In that section, we first set out the international and domestic legal contexts relevant to s. 117. We then discuss the characterization of the exceptions as defences, the characterization of family member aid as a separate defence, and the elements of humanitarian and mutual aid. Finally, we apply the law to the cases of the three respondents. The application of the law to Mr. Christhurajah's case is addressed in the companion judgment.

## E. Analysis

**(1) Constitutionality of *MLACMA*, s. 36**

[115] The Crown accepts that, by reason of s. 36 of the *MLACMA*, the principled approach does not govern the admissibility of hearsay evidence obtained from a foreign state pursuant to a mutual legal treaty assistance request. The Crown says that if the evidence is relevant and not barred for some non-hearsay reason, then it does not have to meet the necessity and reliability requirements to be admitted for its truth. The Crown submits this abrogation of the principled approach does not infringe an accused's *Charter* rights because a trial judge has the residual discretion to exclude evidence when its prejudicial effect is out of proportion to its probative value.

[116] In its factum, the Crown takes the position the trial judge erred by not permitting it to tender all the documents attached to Lt. Col. Chomcherngpat's affidavits. However, at the hearing of this appeal, the Crown stated it recognizes many of those documents are "problematic" because of the hearsay and opinions contained in them. Accordingly, the Crown no longer seeks to secure the admission of the majority of those documents. Rather, the Crown now contests only the exclusion of the travel history printouts for Mr. Rajaratnam and Mr. Mahendran.

[117] The Crown concedes if the trial judge is found to have erred in excluding the travel histories, then that error, standing alone, would not support an order for a new trial. The Crown accepts that to succeed on this appeal it must succeed on at least one of its other grounds, therefore, the question of the validity of s. 36 is technically "moot" or, as Justice Southin would say, "academic": see *Island Tug & Barge Ltd. v. Communication, Energy and Paperworkers Union, Local 601*, 2002 BCCA 201 at para. 2. It is, however, well-established that a court has the discretion to determine a moot appeal or a moot issue when it is in the interests of justice to do so: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at 353; *R. v. Duguay*, 2019 BCCA 53 at paras. 57−59.

[118] In our view, the question of the validity of s. 36 of the *MLACMA* should be decided. What is in issue is a statutory provision that has been declared unconstitutional by a judge of the Supreme Court of British Columbia in a considered judgment. As a matter of *stare decisis*, that decision is binding on the Provincial Court of British Columbia. As a matter of judicial comity, it will likely be followed by other judges of the Supreme Court: see *Re Hansard Spruce Mills Ltd*.

[119] Whether the Crown can rely on s. 36, particularly in the prosecution of transnational organized crime, is a matter of general importance. It is, therefore, in the public interest for this Court to decide the issue.

[120] Last, and of significance, is that the issue has been fully and vigorously argued in a true adversarial context.

***a. Discussion***

[121] We agree with Ehrcke J. that s. 36 of the *MLACMA* infringes ss. 7 and 11(d) of the *Charter* and is, therefore, unconstitutional. However, s. 36 should be declared of no force or effect only in the criminal trial context.

[122] What is known today as the principled approach to hearsay did not exist when the *MLACMA* became law in 1988. At that time hearsay evidence—an out-of-court-statement tendered for the

truth of its contents—was inadmissible at common law unless the evidence fell within a recognized common law exception (e.g., declarations of mental or emotional state and spontaneous exclamations (*res gestae*)) or unless a statute provided for admissibility (e.g., *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 30, dealing with business records, and the former *Narcotic Control Act*, R.S.C. 1985, c. N-1, s. 9 (now the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 51), dealing with certificates of analysts). It is apparent s. 36 was enacted to provide a statutory basis for admitting foreign documents containing hearsay. A similar provision was added to the *Competition Act*, R.S.C. 1985, c. C-34, in 2002 (s. 30.26).

[123] We agree with the Crown that s. 36 precludes a successful objection to the admissibility of a document solely on the basis that it contains hearsay or an opinion, which is a form of hearsay. We also agree with the Crown that, by reason of s. 36, a document containing hearsay can be tendered for the truth of its contents without the need to establish the evidence either falls within a recognized common law exception to the hearsay rule or meets the requirements of the principled approach to hearsay. To use the travel histories as an example, the Crown says because those documents were provided in response to a mutual legal assistance request they can, without more, be used to prove: (a) when the person whose name appears on the document entered or departed from Thailand; (b) the passport the person used; (c) the visa used (if any); (d) where the entry or departure occurred (e.g., airport or checkpoint); and (e) in the case of air travel, the flight on which the person arrived or departed.

[124] The principled approach to hearsay was developed by the Supreme Court of Canada in a series of cases beginning in the 1990s: *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740; *R. v. Starr*, 2000 SCC 40. It applies to both oral statements and documents: *R. v. Lemay*, 2004 BCCA 604 at paras. 44−53.

[125] In *R. v. Mapara*, 2005 SCC 23 at para. 15, Chief Justice McLachlin described the framework the Court had established for considering the admissibility of hearsay as follows:

> (a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.
>
> (b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.
>
> (c) In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.
>
> (d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a *voir dire*.

The onus is on the party tendering hearsay evidence that does not fall within one of the traditional exceptions to establish the necessity and reliability criteria on a balance of probabilities: *R. v. Khelawon*, 2006 SCC 57 at para. 47; *R. v. Bradshaw*, 2017 SCC 35 at para. 23.

[126] Most importantly, in *Khelawon* the Court stated the principled approach has a “constitutional dimension” in the criminal context because a trial judge’s gatekeeper role serves to protect an accused’s *Charter*-guaranteed right to a fair trial. In that regard, Justice Charron stated:

> [3] …In determining the question of threshold reliability, the trial judge must be mindful that hearsay evidence is presumptively *inadmissible*. The trial judge's function is to guard against the admission of hearsay evidence which is unnecessary in the context of the issue to be decided, or the reliability of which is neither readily apparent from the trustworthiness of its contents, nor capable of being meaningfully tested by the ultimate trier of fact. In the context of a criminal case, the accused's inability to test the evidence may impact on the fairness of the trial, thereby giving the rule a constitutional dimension. Concerns over trial fairness not only permeate the decision on admissibility, but also inform the residual discretion of the trial judge to exclude the evidence even if necessity and reliability can be shown. As in all cases, the trial judge has the discretion to exclude admissible evidence where its prejudicial effect is out of proportion to its probative value.
>
> [Italics in original; underlining added.]

[127] Later, under the heading "Constitutional Dimension: Trial Fairness", Charron J. said this:

> [47] Prior to admitting hearsay statements under the principled exception to the hearsay rule, the trial judge must determine on a *voir dire* that necessity and reliability have been established. The onus is on the person who seeks to adduce the evidence to establish these criteria on a balance of probabilities. In a criminal context, the inquiry may take on a constitutional dimension, because difficulties in testing the evidence, or conversely the inability to present reliable evidence, may impact on an accused's ability to make full answer and defence, a right protected by s. 7 of the *Canadian Charter of Rights and Freedoms*: *Dersch v. Canada (Attorney General)*, [1990] 2 S.C.R. 1505. The right to make full answer and defence in turn is linked to another principle of fundamental justice, the right to a fair trial: *R. v. Rose*, [1998] 3 S.C.R. 262. The concern over trial fairness is one of the paramount reasons for rationalizing the traditional hearsay exceptions in accordance with the principled approach. As stated by Iacobucci J. in *Starr*, at para. 200, in respect of Crown evidence: "It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception."
>
> …
>
> [49] The broader spectrum of interests encompassed in trial fairness is reflected in the twin principles of necessity and reliability. The criterion of necessity is founded on society's interest in getting at the truth. Because it is not always possible to meet the optimal test of contemporaneous cross-examination, rather than simply losing the value of the evidence, it becomes necessary in the interests of justice to consider whether it should nonetheless be admitted in its hearsay form. The criterion of reliability is about ensuring the integrity of the trial process. The evidence, although needed, is not admissible unless it is sufficiently reliable to overcome the dangers arising from the difficulty of testing it. As we shall see, the reliability requirement will generally be met on the basis of two different grounds, neither of which excludes consideration of the other. In some cases, because of the circumstances in which it came about, the contents of the hearsay statement may be so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process. In other cases, the evidence may not be so cogent but the circumstances will allow for sufficient testing of evidence by means other than contemporaneous cross-examination. In these circumstances, the admission of the evidence will rarely undermine trial fairness. However, because trial fairness may encompass factors beyond the strict inquiry into necessity and reliability, even if the two criteria are met, the trial judge has the discretion to exclude hearsay evidence where its probative value is outweighed by its prejudicial effect.
>
> [Emphasis added.]

[128] It is, therefore, clear the Crown cannot tender hearsay evidence at a criminal trial under a common law exception unless that exception is consonant with the principled approach. By parity of reasoning, the Crown cannot rely on a statutory provision to secure the admission of hearsay evidence at a criminal trial unless: (a) the provision is consonant with the principled approach; or (b) when not consonant with that approach, the provision can be justified under s. 1 of the *Charter*.

[129] In this case, the Crown does not seek to justify s. 36 of the *MLACMA* under s. 1 of the *Charter*. Rather, the Crown argues s. 36 does not infringe the *Charter* because trial judges have the residual discretion to exclude admissible hearsay when its prejudicial effects exceeds its probative value.

[130] This argument ignores the fact that the issue of whether to exclude hearsay evidence under the residual discretion only arises after the evidence has been found to be otherwise admissible: *Khelawon* at para. 49; *Bradshaw* at para. 24. Necessity and reliability are the touchstones of any application by the Crown to tender hearsay evidence at a criminal trial; the Crown bears the burden of establishing those criteria are met. However, under s. 36, those criteria have no application. To defeat an accused's objection to the admission of a foreign document containing hearsay tendered under s. 36 the Crown need only establish the document was obtained in response to a mutual legal assistance request. The burden then shifts to the accused to establish the prejudicial effects of the evidence exceeds its probative value.

[131] We disagree with the Crown that s. 36 does no more than "relax… the rigid grip of Canada's hearsay law on the admissibility of foreign evidence." To the contrary, s. 36 fundamentally alters the rules governing the admissibility of hearsay in a manner that is inconsistent with an accused's right to a fair trial.

[132] As this appeal is concerned only with whether the Crown can rely on s. 36 of the *MLACMA* at a criminal trial, the declaration of invalidity under s. 52(1) of the *Constitution Act, 1982*, should be limited to that context. Accordingly, we declare s. 36 of the *MLACMA* to be of no force or effect with respect to evidence tendered by the Crown in a criminal trial. We make no comment as to the application of s. 36 in other contexts.

[133] We now turn to the second group of issues which pertain to the interpretation of the *Appulonappa* exceptions. We begin by setting out the international and domestic legal contexts relevant to s. 117 of the *IRPA*, including the Supreme Court of Canada's decision in *Appulonappa*.

**(2) International legal context**

[134] The issues in this case arise at the complex intersection of two critical aspects of international agreement on the treatment of people: the prevention of human smuggling and the rights of refugees. Both are addressed in United Nations conventions: the *Convention against Transnational Organized Crime*, 12 December 2000, 2225 U.N.T.S. 209, and the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137 [*Refugee Convention*].

[135] They are also addressed in associated protocols: the *Protocol against the Smuggling of Migrants by Land, Sea and Air*, 15 November 2000, 2241 U.N.T.S. 480 [*Migrant Smuggling Protocol*]; *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children*, 12 December 2010, 2237 U.N.T.S. 319; *Protocol against the Illicit Manufacturing of and Trafficking in Firearms*, 11 July 2001, 2326 U.N.T.S. 208 (collectively, the "*Palermo Protocols*"); and the *Protocol Relating to the Status of Refugees*, 31 January 1967, 606 U.N.T.S. 267.

[136] Canada signed the *Migrant Smuggling Protocol* in 2002. Although the *Protocol* requires State Parties to establish "[t]he smuggling of migrants"—"when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit"—as a criminal offence (art. 6), it specifies that the *Protocol* only applies to offences that "are transnational in nature and involve an organized criminal group" (art. 4). The Protocol specifies that migrants should not be liable to criminal prosecution as a result of being the subject of such an offence (art. 5). The "smuggling of migrants" is defined as "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (art. 3).

[137] International law forms part of the context in which legislation is interpreted for a number of reasons, including that the legislature is presumed to act in accordance with Canada's international obligations: *R. v. Hape*, 2007 SCC 26 at para. 53. Similarly, Canada's international obligations can play an important role in other inquiries in which the legislature's intention is a central consideration. Of particular relevance to these appeals, whether to grant a constitutional remedy relating to legislation, and what remedy to grant, is such an inquiry.

[138] Canada's international obligations with respect to the protection of refugees and the criminalization of human smuggling are addressed in detail in the companion case to *Appulonappa*, *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 at paras. 49–56. *B010* addressed refugee claims made by some of the migrants aboard the MV *Sun Sea*.

**(3) Section 117 of the *IRPA***

[139] At the relevant time, s. 117(1) of the *IRPA* read:

> 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.

[140] Many of the issues in this case flow directly from the Supreme Court's decision in *Appulonappa*, which addressed the constitutionality of s. 117(1) of the *IRPA*. This case engages that section, although it has since been amended by *Protecting Canada's Immigration System*, S.C. 2012, c. 17, ss. 41(1), (4). The new provision was not before the Supreme Court of Canada (*Appulonappa* at para. 9), and it is not before this Court.

[141] *Appulonappa* involved a ship called the MV *Ocean Lady*. It arrived in Canadian waters in 2009, carrying 76 Tamil people from Sri Lanka, who claimed refugee status. Mr. Appulonappa and others were charged with human smuggling under s. 117(1).

[142] The issue was whether the legislation was overbroad, as it captured everyone who assisted an illegal migrant. The Court concluded, at para. 70, that the purpose of the legislation is to criminalize the smuggling of people into Canada in the context of transnational organized crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada.

[143] The Court read down the section and carved out exceptions so that the legislation would not apply to humanitarian, mutual, or family aid.

[144] The Court did not define any of these terms, nor did it discuss how the exceptions apply in a criminal prosecution. In *B010* at para. 60, the Court, in the context of eligibility for refugee status, discussed migrant smuggling as it is defined in the *Migrant Smuggling Protocol*, which requires that the accused directly or indirectly obtain a financial or material benefit. The Court explained that the intention of the legislation was to include transnational organized crime, but to exclude those who provided support to migrants for humanitarian reasons or on the basis of close family ties, and it was not the intention to criminalize the activities of family members or support groups such as religious or non-governmental organizations. The Court opined that certain benefits that may accrue from being involved in migrant smuggling, such as family reunification and safety, do not constitute "material benefits."

[145] The Court also found, at para. 60, that the law recognized the reality that refugees often flee in groups and work together to enter a country illegally. The Court interpreted art. 31 of the *Refugee Convention* as not permitting a state to deny someone refugee protection solely because they have aided others to enter illegally in unremunerated, collective flights to safety.

[146] Against this background, we turn to consider *Appulonappa* and whether the exceptions the Court created in that decision are elements of the offence or true defences.

**(4) Are the exceptions to s. 117 of the *IRPA* elements of the offence or true defences?**

[147] The first issue is whether the effect of the decision and order in *Appulonappa* was to create new definitional elements of the offence, which the Crown has to prove beyond a reasonable doubt. The alternative is that the Supreme Court instead created true defences for which the defence has to raise an air of reality before the Crown is required to disprove them.
Mr. Christhurajah argues that Wedge J. erred in interpreting the exceptions as defences, and the Crown argues she did so correctly. The Crown argues that Ehrcke J. erred in interpreting the exceptions as elements of the offence, and Mr. Christhurajah and the three respondents argue he was correct to do so.

[148] In *Appulonappa,* after finding that the provision was not a reasonable limit under s. 1 of the *Charter* (at paras. 79–82), McLachlin C.J.C. considered what remedy would be appropriate. She concluded the appropriate remedy was to read down s. 117 so that it did not apply to persons who give humanitarian, mutual, or family aid to asylum-seekers. The following is the entirety of that portion of her reasons:

> VI. Remedy
>
> [83] Section 52(1) of the *Constitution Act, 1982* provides:
>
> > 52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> It follows that s. 117 is of no force or effect to the extent of its inconsistency with the *Charter*.
>
> [84] The extent of the inconsistency that has been proven is the overbreadth of s. 117 in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2)

> mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents.
>
> [85] The appellants ask the Court to strike s. 117 down in its entirety. Section 117, as it was at the time of the alleged offences, has been replaced. In the particular circumstances of this case, I conclude that the preferable remedy is to read down s. 117 as not applicable to persons who give humanitarian, mutual or family assistance. This remedy reconciles the former s. 117 with the requirements of the *Charter* while leaving the prohibition on human smuggling for the relevant period in place. This remedy is consistent with the guidance this Court gave in *Schachter v. Canada*, [1992] 2 S.C.R. 679.
>
> [Emphasis in original.]

[149] The order entered by the Supreme Court (Docket No. 35958, pronounced November 27, 2015) reads as follows:

> The appeals from the judgment of the Court of Appeal for British Columbia (Vancouver), Numbers CA040592, CA040593, CA040594 and CA040595, 2014 BCCA 163, dated April 30, 2014, heard on February 17, 2015, are allowed.
>
> Section 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as it was at the time of the alleged offences, should be read down, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the *Canadian Charter of Rights and Freedoms*. The charges are remitted for trial on this basis.

### *a. Positions of the parties*

[150] The Crown makes two submissions on this point. Its first submission is that in other contexts, true defences have been found to arise from the definition of an offence. The Crown provides two examples: the “private use” exception to child pornography laws created in *R. v. Sharpe*, 2001 SCC 2, and interpreted in *R. v. Barabash*, 2015 SCC 29, as well as the “armed conflict” exception to terrorism offences contained in s. 83.01 of the *Criminal Code* and interpreted in *R. v. Khawaja*, 2012 SCC 69.

[151] Its second submission is that there are sound policy reasons for placing an evidentiary burden on the accused to show that there is an air of reality that their conduct engages one of the exceptions. The Crown says that such a burden protects against inconsistent verdicts and jury confusion and that the accused is in the best position to assess their own purpose.

[152] Amongst them, Mr. Christhurajah and the three respondents make five submissions.

[153] In *Appulonappa* at para. 70, McLachlin C.J.C. wrote that s. 117 is not intended to “permit prosecution” of those who fall within the exceptions. Mr. Rajaratnam submits that this suggests the exceptions are meant to function as a bar to prosecution.

[154] Mr. Christhurajah makes four submissions, which the respondents adopt. First, Mr. Christhurajah says that since the exceptions concern motive or purpose, they are questions for the trier of fact to decide. Second, he submits that since Ehrcke J. applied the exceptions as elements of the offence in the *Christhurajah* 1 directed verdict ruling, Wedge J. should have followed that decision as a matter of horizontal judicial comity. Third, he submits that the Supreme Court’s decision should be read through the lens of the remedy granted. He says reading down and severance are different names for the same remedy, and the Supreme Court’s order should be understood to have caused the unconstitutional aspects of s. 117 to be “removed from the statute

books" in the same way that severing a provision from an otherwise constitutional scheme removes it from the books. Fourth, and finally, he submits that if there is any ambiguity in respect of what it means for the provision to "not apply" to individuals who fall into the exception, then that ambiguity should inure to the benefit of the accused.

***b. Discussion***

[155] It is helpful to begin with the order, because it is the source of the exceptions. The ultimate task is to interpret the order according to the principles set out by Justice D. Smith in *Yu v. Jordan*, 2012 BCCA 367:

> [53] In my view, the interpretation of a court order is not governed by the subjective views of one or more of the parties as to its meaning after the order is made. Rather an order, whether by consent or awarded in an adjudicated disposition, is a decision of the court. As such, it is the court, not the parties, that determines the meaning of its order. In my view, the correct approach to interpreting the provisions of a court order is to examine the pleadings of the action in which it is made, the language of the order itself, and the circumstances in which the order was granted.
>
> [Emphasis added.]

[156] We would add the court's reasons to this list of relevant interpretive sources. Indeed, the court's reasons, where they exist, will often be the strongest indicator of the objective meaning of the order.

[157] For ease of reference, we reproduce the relevant part of the order:

> Section 117 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as it was at the time of the alleged offences, should be read down, as not applying to persons providing humanitarian aid to asylum-seekers or to asylum-seekers who provide each other mutual aid (including aid to family members), to bring it in conformity with the *Canadian Charter of Rights and Freedoms*…

[158] The first three arguments made by Mr. Christhurajah and the respondents can be dismissed summarily.

[159] Mr. Rajaratnam's submission that the *Appulonappa* decision's single reference to "permitting prosecution" means the exceptions are elements of the offence cannot be sustained. This language is used in the context of describing the purpose of the legislation, and McLachlin C.J.C. concludes that the purpose does not include criminally capturing individuals who come within the exceptions. That does not assist in determining the nature of the exceptions.

[160] Mr. Christhurajah's argument that the fact that the exception has a motive requirement means it is an element of the offence also makes little sense. It is true that some offences, like participation in the activities of a terrorist group for the purpose of enhancing its ability to carry out a terrorist activity (see *Criminal Code*, s. 83.18(1); *Khawaja* at paras. 41–47), have purpose requirements that the trier of fact must assess as elements of the offence. We also agree that the purpose for which a person acts is a question to be determined by the trier of fact. However, the trier of fact will have to consider that question regardless of whether it forms part of the offence or part of a defence.

[161] Mr. Christhurajah's comity argument can also be easily disposed of. Justice Ehrcke did not render a decision about whether the exceptions were defences or elements of the offence in the *Christhurajah* 1 directed verdict ruling. He simply said that, in his view, it would make no practical difference in the circumstances of that case because he thought the defences had an air of reality. He concluded:

> [21] In the particular circumstances of this case, the difference between treating the exemption as a defence rather than as an element of the offence, is of little moment, because, having heard the evidence in the Crown's case, I am satisfied that even if it were a defence, it is one for which there is an air of reality. Thus, in the circumstances of this case, the Crown would have the persuasive burden in relation to the exemption, regardless of whether it is characterized as a defence or as an element.
>
> [22] Since the Supreme Court of Canada did not express its intention unequivocally in this regard, I have decided that, for the purposes of this trial, I will treat the exemption created by para. 86 of *Appulonappa* as adding a new element to the offence in s. 117. That is, the jury will be told that in addition to all the elements set out in s. 117, the Crown has the onus of proving, beyond a reasonable doubt, that the accused was not providing humanitarian aid to asylum-seekers and was not himself an asylum-seeker providing mutual aid to another (including family members).

[162] The other arguments require that we consider the Supreme Court's order more fully. The order does not explicitly refer to the exceptions as defences or elements of the offence. It alters the reach of a criminal offence by narrowing its ambit. As the Crown says, the armed conflict exception to the definition of terrorist activity, as interpreted in *Khawaja* at para. 98, demonstrates that a limitation on the ambit of an offence can function as a true defence. So too do the private use and expressive material exceptions to production and possession of child pornography, created as part of a constitutional remedy in *Sharpe*. Justice Karakatsanis, writing for a unanimous Supreme Court, confirmed as much in *Barabash* at paras. 16, 19.

[163] Mr. Christhurajah responds by pointing to the specific remedy granted in *Appulonappa*. Unlike *Sharpe*, in which the Court read in two exceptions to the offences, in *Appulonappa*, the Court read down s. 117. Mr. Christhurajah's first submission is essentially that these remedies function differently. He says reading down a provision severs that portion of the provision and renders it inoperative. As explained in *Schachter v. Canada*, [1992] 2 S.C.R. 679 at 699–700, the extent of an inconsistency is defined conceptually rather than based on the specific words of the statute. The effect of the Supreme Court's remedy, in his submission, was to sever the aspects of the provision that applied to the named categories of asylum seekers.

[164] In our view, "reading down" is not a term with such a precise meaning. It is true that in *Schachter*, the remedies of reading down and severance were discussed as though interchangeable (e.g., at 696). But, for example, "reading down" is also used to describe the technique by which courts interpret potentially unconstitutional legislation as though it were constitutional: Kent Roach, *Constitutional Remedies in Canada*, loose-leaf (updated to October 2018), (Toronto: Thomson Reuters, 2017) at 14-15ff.; Peter Hogg, *Constitutional Law in Canada*, vol. 2, loose-leaf (updated to December 2018), (Toronto: Thomson Reuters, 2016) at 40-22ff. The latter is not a remedy at all—it serves to prevent a finding of unconstitutionality, rather than to remediate one.

[165] In our view, “reading down”, in this context, should be understood based on its wording and the principles that inform McLachlin C.J.C.’s reasons for judgment. In those reasons, she wrote that reading down the provision was consistent with the principles set out in *Schachter*. Understood in this way, “reading down” the provision simply meant limiting its reach in the most general sense, and is a broad enough term to encompass the creation of defences.

[166] In *Schachter*, Chief Justice Lamer, writing for the majority, explained that remedies other than declarations of invalidity can be appropriate when they “minimize the interference of the court with the parts of legislation that do not themselves violate the *Charter*”: at 702. The purpose of having multiple remedial options is to allow courts “to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the Legislature”: at 700. Chief Justice Lamer wrote that legislative objective is of “primary importance” in determining what remedy is appropriate and that “the means chosen to pursue that objective” are a “second level of legislative intention”: at 707–08.

[167] The principles in *Schachter* go beyond looking at Parliament’s intended purpose. They require that a court consider the legislature’s intention generally when determining whether to impose a remedy and require that the court ensure that the remedy granted is consistent with that intention. Parliament’s intention, as evinced by the means by which it chose to pursue its objective, included concerns about “loopholes” and the Crown’s ability to meet onuses of proof. This is clear from then-Minister Benoît Bouchard’s summary of Parliament’s purpose in a 1987 committee meeting (*Appulonappa* at para. 79, quoting House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-84*, No. 9, 2nd Sess., 33rd Parl. at 24):

> We are going to put a stop to the large-scale trafficking of illegal migrants by smugglers. There has been much discussion about amending these sections of the bill. We have all pressed lawyers and legislative drafters to consider alternatives to the current wording. We looked at phrases such as religious group, profit, reward, smuggle and clandestine entry, but every possibility creates loopholes and undermines our ability to prosecute the unscrupulous. We cannot let such individuals escape sanction by adding phrases which create insurmountable problems of proof and create gaps through which the unscrupulous would march.

[168] It would not have accorded with the principles in *Schachter* for the Supreme Court to create new elements of the offence, thereby placing an additional onus on the Crown to disprove something of which, as a general rule, it will have no special knowledge. As Ehrcke J. explained in the *Christhurajah* 1 directed verdict ruling:

> [18] … For one thing, the motive, intention, or purpose of someone in organizing, inducing, aiding or abetting undocumented migrants to come to Canada, will usually be a matter more within the knowledge of the accused than of anyone else. Typically, no one would know the accused’s circumstances in this regard better than the accused himself. If the accused seeks to be acquitted on the basis that he was providing humanitarian aid to asylum seekers or was himself an asylum seeker providing mutual aid to another (including family members), then it does not seem unreasonable to require him at least to put that issue in play at his trial, by satisfying an evidentiary burden of showing that the defence has an air of reality.

[169] Chief Justice McLachlin recognized that this was an important part of the legislature’s intention. She concluded, at para. 82, that Parliament intentionally created an overbroad provision

because of its concerns that exempting the conduct would create unacceptable loopholes in the legislation. This comports with Minister Bouchard's comments, quoted above.

[170] This is strengthened when one considers what the Crown would have to do to prove (as opposed to disprove) that an accused was not engaged in mutual aid. In this case, it might be required to call all 491 of the other migrants to prove that the accused was not engaged in mutual aid, unless it had clear evidence of a financial or material benefit, with a connection to transnational organized crime. In other words, such an interpretation would be absurd.

[171] Adding the exceptions as elements of the offence, thereby requiring the Crown to disprove them before an air of reality is established, would essentially give human smugglers the opportunity to act with impunity. It would be next to impossible for the Crown to prove the exceptions as elements of the offence.

[172] Finally, the respondents and Mr. Christhurajah argue that the phrase "does not apply", used by the Supreme Court of Canada to articulate the exceptions, is ambiguous and that the ambiguity should inure to their benefit. The phrase may mean different things in different contexts but that does not make it ambiguous. The following comments of Ehrcke J. in the *Christhurajah* 1 directed verdict ruling demonstrate how the phrase can be used to create a defence:

> [19] Moreover, the wording of the exemption is reminiscent of the way Parliament has drafted certain other defences or exemptions in the *Criminal Code*. For example, s. 94(1) of the *Criminal Code* creates the offence of being an occupant of a motor vehicle knowing that the vehicle contains a firearm. Subsections (3) and (4) of the section provide that s-s (1) does not apply in certain circumstances. Those subsections are worded in this way:
>
> > 94 (3) Subsection (1) does not apply to an occupant of a motor vehicle who, on becoming aware of the presence of the firearm, weapon, device or ammunition in the motor vehicle, attempted to leave the motor vehicle, to the extent that it was feasible to do so, or actually left the motor vehicle.
> >
> > (4) Subsection (1) does not apply to an occupant of a motor vehicle when the occupant or any other occupant of the motor vehicle is a person who came into possession of the firearm, weapon, device or ammunition by the operation of law.
> >
> > [Emphasis added.]
>
> [20] The authors of *Martin's Criminal Code* describe those subsections as creating a "defence" to a charge under s. 94(1). It may be seen, therefore, that the use of the words "does not apply" is apt for creating a defence, as opposed to adding an element to an offence. As these are the words used by the Supreme Court of Canada at para. 86 of *Appulonappa*, it may be argued that the Court intended their "reading down" to be construed as a defence, rather than as an additional element to the offence in s. 117 of the *IRPA*.

[173] In our view, the constitutional remedy in *Appulonappa* created true defences to a charge of human smuggling under s. 117 of the *IRPA*. It did not create new elements.

[174] Having concluded that the *Appulonappa* exceptions are true defences, we turn to the issue of what those defences require.

### (5) Elements of *Appulonappa* defences

[175] The Crown, the respondents, and Mr. Christhurajah raise a number of issues relating to the *Appulonappa* defences. Interpreting the elements of the defences should also begin with the order. Throughout, certain principles must be borne in mind. Canada's international obligations require

both the humane treatment of refugees and the punishment of transnational organized crime. The defences ensure that s. 117 of the *IRPA* does not capture the laudable and necessary conduct of humanitarians, family members, and fellow asylum seekers. Even so, they must not prevent s. 117 from criminalizing the conduct of those involved in transnational organized crime.

***a. Should the defences be legally interpreted?***

[176] Before considering the defences themselves, we must consider whether Wedge J.'s approach of interpreting the defences was correct, or whether Ehrcke J.'s approach of simply mirroring the language of *Appulonappa* in his jury charge was correct. In our view, the defences should be interpreted and given meaning. The defences have a complex legal history. Without definition, a trier of fact may not understand their intended sense.

[177] The Crown submits that the jury could not have been expected to understand how to relate the evidence to the legal issues based on Ehrcke J.'s "skeletal" instruction. The Crown says that Ehrcke J. simply told the jurors that the exception existed and left it to them to define as they saw fit. The Crown says that this error went to the core of the jury's assessment of guilt or innocence and that the failure to properly instruct the jury warrants a new trial regardless of whether there was an air of reality to the defence.

[178] The respondents' and Mr. Christhurajah's position, generally, is that the Crown is seeking to create new restrictions on the scope and application of the defences that are not found in the Supreme Court's decision. Mr. Rajaratnam characterizes this as "read[ing] in further conditions of applicability which are not found in the statute or in *Appulonappa*."

[179] Mr. Rajaratnam submits that Ehrcke J. provided the correct instructions to the jury by mirroring the language of the Supreme Court. Mr. Rajaratnam says that "[i]f s. 117 requires clarification and the creation of criteria, then it falls to Parliament to implement such criteria, not the Crown or the courts." Mr. Rajaratnam says Parliament did not intend to define exempted conduct into watertight compartments, but instead to leave the determination of whether conduct warranted prosecution to the Attorney General on the basis of the individual circumstances of each case.

[180] Mr. Christhurajah, like Mr. Rajaratnam, submits that it is Parliament's role to amend s. 117 if it determines that the Supreme Court's remedy needs to be limited, expanded, or amended.

[181] Similarly, Mr. Mahendran says the Supreme Court of Canada's decision in *Barabash* at paras. 50–53 shows that once a court has read in a defence, requirements cannot be added to that defence in subsequent cases. In *Barabash*, the Supreme Court rejected the Crown's argument that the private use exception to making or possessing of child pornography created in *Sharpe* had a "mutuality of benefit" requirement on the grounds that the reasons in *Sharpe* did not refer to it as a requirement.

[182] In respect of the humanitarian aid defence in particular, Mr. Emmanuel says the word "humanitarian" should simply be given its plain and ordinary meaning, and that the Supreme Court did not elaborate on its meaning because it is plain and obvious. He cites *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, in support of this argument. In that case, the Court

found that immigration officers had unduly fettered their own discretion by following a precise definition of “humanitarian and compassionate grounds” when they should have instead interpreted the phrase in accordance with the flexible and equitable test of what would “excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another” based on the specific facts and context of the case before them: at paras. 21, 25. Mr. Emmanuel submits that juries should apply a similarly flexible test to the humanitarian aid defence based on their assessment of the equities of the situation.

[183] In respect of mutual aid, Mr. Emmanuel similarly submits that whether mutual aid was provided is a question of fact to be determined by the jury in light of all the circumstances.

***(i) Discussion***

[184] In our view, the defences should be given legal meaning. As the ensuing discussion demonstrates, the defences are extremely complex. Interpreting them would require that jurors undertake a task that they are unlikely to discharge with consistency, simultaneously considering and weighing a myriad of policy considerations, and legal arguments, in addition to complex factual particularities. Significantly, although it is the respondents and Mr. Christhurajah who argue that the defences have been exhaustively defined, the principal danger in inadequately charging juries on the defences is that they may improperly or inconsistently restrict the ambit of those defences and convict accused who should be acquitted.

[185] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court unanimously agreed that the phrase “reasonable doubt” must be defined for the jury in a criminal trial. As Justice Cory explained, “The phrase ‘beyond a reasonable doubt’, is composed of words which are commonly used in everyday speech. Yet, these words have a specific meaning in the legal context”: at para. 22 (emphasis added). Justice Cory went on to emphasize that “the liberty of the subject is at stake” in ensuring that the jury properly understands the nature of the reasonable doubt standard.

[186] In our view, the same holds true for these defences. They are phrases that are used in everyday life, as the respondents and Mr. Christhurajah correctly identify, but they are also defences with a complex legal history, and therefore a specific meaning. The defences stem from a constitutional remedy granted by the Supreme Court in an appeal from a criminal prosecution in which submissions were made by four accused, six interveners, and the federal Crown. Interpreting the order is a contextual exercise that takes all of the legal background into account. Finally, there is no doubt that the liberty of the accused is at stake in these prosecutions and that there is a real danger that the trier of fact will apply the defences too narrowly and convict an accused when a proper reading of *Appulonappa* would have seen them acquitted.

[187] We disagree that the courts are prohibited from interpreting an order of the Supreme Court of Canada once it is made. Indeed, courts are frequently required to do so in order to apply the Supreme Court’s reasoning in other cases. For example, in *Barabash* at paras. 50–53, although Karakatsanis J. disagreed with the lower court’s interpretation of the private use exception to child pornography offences, she did not question the authority of the lower courts to interpret that exception so that it could be applied.

[188] Finally, we also disagree with Mr. Emmanuel that "humanitarian aid" is a term that can be considered by the jury without guidance based on the Supreme Court's decision in *Kanthasamy*. There are two differences between *Kanthasamy* and this case. First, *Kanthasamy* concerned immigration officers with particular expertise discharging a quasi-judicial role with which the expertise and duties of jurors do not align. Second, in *Kanthasamy*, the Supreme Court interpreted a provision of the *IRPA* based on its particular purpose and legislative history. Neither that purpose nor that history apply in this context.

### *b. Is the family member aid defence a subset of mutual aid?*

[189] How many defences there actually are is another preliminary question. The Supreme Court's order clearly states that s. 117 of the *IRPA* does not apply "to asylum-seekers who provide each other mutual aid (including aid to family members)" (emphasis added). However, in our view, when the reasons are read as a whole, they are clear that aid to family members is not a subset of mutual aid.

#### *(i) Positions of the parties*

[190] The Crown says aid to family members is simply a subset of the mutual assistance defence and that the same elements apply. The Crown relies on the wording in para. 84 and the order in *Appulonappa*. The Crown says there is no principled basis or necessity for a third defence.

[191] The Crown says that, in any case, the presence of the respondents' and Mr. Christhurajah's family members should have no impact on the outcome of these appeals, as the defence only applies to those family members themselves. Mr. Rajaratnam and Mr. Emmanuel only had a limited number of family members on the MV *Sun Sea* and would not have access to the defence for the majority of migrants on the ship. Mr. Christhurajah had only his wife.

[192] Mr. Rajaratnam argues that there is a principled basis for separating the family member aid defence from the mutual aid defence and that the *Appulonappa* decision itself supports a distinct category for each.

[193] He points to s. 3(2)(f) of the *IRPA*, which states:

> 3 … (2) The objectives of this Act with respect to refugees are
>
> …
>
> (f) to support the self-sufficiency and the social and economic well-being of refugees by facilitating reunification with their family members in Canada;

[194] Mr. Rajaratnam says this objective of the *IRPA* provides a rationale for a third defence, separate from humanitarian or mutual aid.

[195] Mr. Rajaratnam argues that para. 84 of *Appulonappa* clearly sets out three categories:

> [84] The extent of the inconsistency that has been proven is the overbreadth of s. 117 in relation to three categories of conduct: (1) humanitarian aid to undocumented entrants, (2) mutual aid amongst asylum-seekers, and (3) assistance to family entering without the required documents.

[196] Mr. Rajaratnam points to almost a dozen other places in which McLachlin C.J.C.'s decision refers to the mutual aid and family member aid defences separately.

[197] Finally, Mr. Rajaratnam also says that s. 117 was not intended to capture individuals providing assistance to refugee family members who were not migrants themselves. He points to legislative debates, quoted in *Appulonappa*:

> [67] … members of Parliament expressed concerns that s. 117 might criminalize people who assist family members to come to Canada or people who provide humanitarian aid to asylum-seekers. …The following excerpts from the parliamentary debates summarize those discussions:
>
> > Mr. John McCallum: . . . we heard a fair amount of testimony in our hearings from people doing humanitarian work, reverends and saintly people, if you will, and the last people in the world we would want to prosecute. Yet, if you read that literally, it looks like some of these people who are helping refugees could be prosecuted. Or if my sister is in a bad country and I help her, it looks like I can be prosecuted. How does that work?
>
> [Emphasis added.]

***(ii) Discussion***

[198] The order appears to suggest that family member aid is a species of mutual aid. That said, the decision suggests the opposite, as there are multiple mentions of "family assistance" that suggest that a person is permitted to assist a family member in seeking asylum even if they are not themselves an asylum seeker.

[199] The Supreme Court appears to refer to aid to family members as one variety of mutual aid. Chief Justice McLachlin considered family members at para. 29 of *Appulonappa*:

> [29] The first scenario the appellants ask us to consider is the situation of a person assisting a close family member to flee to Canada. The appellants cite as examples a mother carrying her small child, or the father of a household taking his family dependants with him aboard a boat. This scenario could also encompass cases of mutual assistance among unrelated asylum-seekers. Indeed, refugees mutually assisting one another in their collective flight to safety is not meaningfully different from family members assisting one another and, as showed by the companion case *B010*, is a reasonably foreseeable situation.

[200] In *B010* at paras. 60–69, however, McLachlin C.J.C. discussed protecting family member aid and mutual aid as two distinct, albeit related, policy concerns motivating the drafting of the relevant international instruments that inform interpretation of the *IRPA*. The *Human Smuggling Protocol* was intended to exclude family reunification and safety from the "material benefit[s]" that criminal smugglers reap: *B010* at para. 60, citing United Nations Office on Drugs and Crime, *Travaux préparatoires of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto* (New York: United Nations, 2006) at 489. Chief Justice McLachlin pointed to the *Refugee Convention*, art. 31(1), and related academic commentary to show that engaging in mutual aid should not leave refugees liable to penalties: *B010* at para. 63.

[201] In *Appulonappa*, the appellants had argued this hypothetical on the basis of family members in particular, perhaps because the *IRPA* contained special recognition of family reunification as an objective in s. 3(2)(f) (as it stood at the time of the offence) and because the interpretive notes of

*Human Smuggling Protocol*, art. 6, which Canada has ratified, specifically excludes supporting migrants on the basis of close family ties from its definition of migrant smuggling.

[202] Regardless, McLachlin C.J.C. specifically broadened their hypothetical to include non-family members, saying that "refugees mutually assisting one another in their collective flight to safety is not meaningfully different from family members assisting one another…": at para. 29. In doing so, she did not allow mutual aid to subsume the entirety of family member aid. She simply expanded the defence where it applied to individuals engaged in a "collective flight to safety", as in the appellants' hypothetical.

[203] As noted above, international instruments are relevant to interpreting legislation, in part because the legislature is presumed to intend to follow Canada's international obligations: *B010* at paras. 49–50; *Hape* at para. 53. Although this case concerns the interpretation of a constitutional remedy, that remedy was fashioned to ensure that s. 117 complies with the *Charter* while still according with legislative intent. In our view, ensuring that the legislation accorded with Canada's international obligations was therefore an important part of crafting that remedy. The Supreme Court could not simply ignore the international instruments to which s. 117, and the *IRPA* generally, were intended to respond.

[204] The decision in *Appulonappa* repeatedly refers to assistance to family members separately from mutual aid. Furthermore, there is a principled basis upon which to distinguish between circumstances in which a family member (who is not an asylum seeker) aids another family member in coming to Canada from a country in which they are in danger, and circumstances in which an asylum seeker helps another asylum seeker who they have happened to encounter in the course of their voyage to Canada. The Supreme Court's remedy included non-asylum-seeker family members in order to cure the overbreadth of s. 117 in accordance with Canada's international obligations. Family member aid, therefore, is not a subset of mutual aid.

### *c. Elements of humanitarian aid*

[205] In our view, the humanitarian aid defence should apply where the accused's purpose was to save the lives or alleviate the suffering of asylum seekers and the accused's actions sufficiently conformed to the principles of neutrality, impartiality and independence.

[206] As considered above, the Crown submits that Ehrcke J. erred in leaving the humanitarian aid defence to the jury "to interpret in any manner it [saw] fit". Mr. Christhurajah, on the other hand, submits that Wedge J. erred in "re-writing and restricting the applicability" of the defences.

[207] The Crown submits that if Ehrcke J. had identified the elements of the offence and evaluated the evidence against them, he would have found that the defence had no air of reality for any of the respondents. The Crown says the humanitarian aid defence has four elements:

(i) The accused's sole motivation must be to provide humanitarian aid to asylum seekers. This means that the accused will not be entitled to rely on the defence if they participate in acts knowingly connected to and furthering transnational organized crimes or criminal aims, to obtain, directly or indirectly, a financial or other material benefit.

(ii) The purpose for providing humanitarian aid to asylum seekers must be to save their lives or alleviate their suffering.

(iii) The aid must be provided in accordance with humanitarian principles such as humanity, impartiality, neutrality, and independence.

(iv) The accused must reasonably believe that the people he assisted are asylum seekers, defined as persons from another state who intend to apply for refugee protection in Canada from some form of persecution or physical harm.

[208] We would instead recognize that the humanitarian aid defence has the following four elements:

(i) The accused's purpose must be to provide humanitarian aid. The accused cannot act for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime.

(ii) The accused must provide aid in order to save the life or alleviate the suffering of an asylum seeker, defined as "a person from another state who intends to seek refuge in Canada from some form of persecution or physical harm".

(iii) The aid must have been humanitarian. This is a matter of assessing how well the accused's actions conformed to the principles of impartiality, neutrality, and independence. How well the accused's conduct conforms to these principles must be determined by the trier of fact with regard to all the circumstances.

(iv) The accused must have a reasonable belief that the person they assisted is an asylum seeker.

[209] We discuss each of these elements in turn.

***(i) Purpose of providing humanitarian aid***

[210] This proposed element requires that we address three related issues: (1) whether the accused's sole motive must be to provide humanitarian aid; (2) whether any profit motive disqualifies the accused from access to the defence; and (3) whether some other criminal motive disqualifies the accused from access to the defence.

[211] The Crown quotes the last sentence of para. 45 of *Appulonappa*, which says that s. 117 must exclude "criminalizing conduct that amounts solely to humanitarian or family aid" (emphasis added). The Crown says that this requirement means that an accused cannot have mixed purposes, including a motive such as seeking asylum for themselves, or a motive to participate (directly or indirectly) in acts connected to international organized crime or criminal aims. It quotes Wedge J. in the *Christhurajah* 2 exception ruling:

> [31] Second, the humanitarian aid exemption applies to those who are acting solely for humanitarian aid purposes. Were the exception interpreted any other way, it would provide a complete defence to organized profit-driven smugglers who have both a financial and a humanitarian motive. It would undermine Canada's ability to combat large-scale human smuggling. The most likely target for those motivated by profit are those who are the most desperate and most easily exploited for profit.

[212] The Crown says that a dual motive would be inconsistent with its proposed definition of humanitarian aid, as well as the humanitarian principles it cites (both considered below). It also says it would be contrary to public policy to allow an accused to avail themselves of the defence if they have other motivations.

[213] Mr. Rajaratnam says that the Crown has "latched on" to a single sentence in para. 45 of *Appulonappa* which has the word "solely" in it, but there is no reference to sole motivation in any of the conclusory paragraphs that state the Court's final decision. Mr. Rajaratnam says the requirement leads to counterintuitive results. An adult asylum seeker who provides assistance to a young orphan but receives no assistance in return would not be able to claim humanitarian aid because of their additional motive to reach Canada themselves, would not be able to claim mutual aid because they did not receive any assistance themselves, and would not be able to claim family member aid because they are not related to the orphan. Mr. Rajaratnam says that adding this requirement amounts to defining a new offence and that the appropriate resolution would be to mirror the language used in *Appulonappa*.

[214] Mr. Emmanuel agrees that the Crown has unduly focused on particular uses of the word "solely" in *Appulonappa*. The Supreme Court used the word "solely" in only two of its many formulations throughout the judgment: at paras. 43, 45. In particular, it did not use the word when talking about the remedy itself: at paras. 84, 85, 86.

[215] Substantively, Mr. Emmanuel submits that humans simply do not ever have a single motivation for complex behaviour and that no humanitarian would ever be able to meet the strict test of sole motivation set out by the Crown. Drawing on Justice Silverman's decision in the second *Appulonappa* trial (*R. v. Appulonappa*, 2017 BCSC 1316 at paras. 107–10 [*Appulonappa* 2]), he provides the example of volunteer professionals with Doctors Without Borders. If they had secondary personal motivations to improve their skills or see the world, they would not have access to the defence. Mr. Emmanuel also says the defence cannot be so narrow that it excludes asylum seekers who also seek to save their own lives, or who rely on smugglers to seek safety, furthering organized crime by the very fact that the payments are made to those who have organized their passage without the required documents. Mr. Christhurajah makes a similar submission.

[216] In oral argument, Mr. Emmanuel submitted that the captain of the MS *St. Louis*, who attempted to bring over 900 Jewish refugees to Canada from Germany shortly before World War II, would have been convicted as a human smuggler under the "sole" motive analysis, as many of the refugees paid for their passage.

**Discussion**

[217] In our view, the Supreme Court's use of the word "solely" in two instances is not determinative of this issue. To have access to the humanitarian aid defence, the accused's purpose must be to provide humanitarian aid, but that does not have to be the "sole" purpose. However, if the trier of fact finds that if any purpose is for financial or other material benefit in the context of transnational organized crime, as defined in the *Palermo Protocols*, then the

humanitarian defence does not apply. This addresses Wedge J.'s concern that the exceptions should not provide a complete defence to the human smuggler.

[218] In respect of the sole motivation issue, in our view, it is unrealistic to expect someone to have a sole motivation in respect of an action as complex and demanding as transporting asylum seekers to the Canadian border. Mr. Emmanuel is correct that no one would expect a volunteer professional with Doctors Without Borders or another aid group to ignore their professional development or be completely altruistic in their motivation.

[219] We agree with the Crown that as a matter of public policy, providing humanitarian aid must be a purpose of the accused. However, in our opinion, those policy considerations are satisfied by simply requiring that the accused's purpose be humanitarian, and by further specifying that the defence would not be available if the accused's purpose, in whole or in part, related to human smuggling for profit in the context of transnational organized crime.

[220] Significantly, art. 6 of the *Human Smuggling Protocol* requires that each state establish human smuggling as a criminal offence when committed "in order to obtain…a financial or other material benefit". This makes clear the importance of the Crown's submission that there be a purpose requirement. The associated *Travaux preparatoires* emphasize, however, that the purpose of this requirement is to ensure that the article captures those involved in organized criminality. Article 4 of the *Human Smuggling Protocol* itself also provides that the *Protocol* only applies to offences that "involve an organized criminal group". In our view, this aids in ensuring that the requirement is properly calibrated. A sole purpose requirement would take s. 117 beyond the organized criminality at which it is aimed, whereas a general purpose requirement would ensure that those who engage in transnational organized crime do not have access to the humanitarian aid defence, without the collateral effect of denying the defence to those with ancillary financial motives.

[221] In respect of the financial motive issue, we do not think every ancillary financial motive should disqualify an accused from access to the defence, but that evidence of a financial motive should instead be considered as a relevant factor in determining whether aid was humanitarian. In our view, a paid employee of a humanitarian organization who has a limited financial motive in exchange for their humanitarian work should not be deprived of a defence.

[222] Finally, in respect of the "other criminal motive" issue, we do not think most other criminal purposes should bar an accused from accessing the defence in respect of a charge under s. 117. The Crown gives the example of someone who transports both illicit drugs and asylum seekers at the same time. Although the accused's other criminal purpose could help establish that their purpose was not humanitarian, we do not see why they could not have access to the humanitarian aid defence for their charges under s. 117, yet be separately convicted of drug offences. The criminal motive depriving an accused of the defence is confined to human smuggling.

[223] To summarize, a humanitarian purpose is an element of the humanitarian aid defence. The trier of fact should be instructed that the humanitarian aid defence requires that the accused have the purpose of providing humanitarian aid, and that the defence is not available if the accused's

purpose, in whole or in part, relates to human smuggling in the context of transnational organized crime, keeping in mind that the burden rests with the Crown to disprove the defence once it is left with the jury.

***(ii) Purpose to save lives or alleviate suffering of asylum seekers***

[224] The issues to be determined are (1) the definition of "asylum seeker" and (2) the purpose of "humanitarian aid". The respondents and Mr. Christhurajah do not make specific submissions on this point.

[225] The Crown begins by submitting that "asylum seeker" should be understood as "a person from another state who intends to apply for refugee protection in Canada from some form of persecution or physical harm" (emphasis added). This definition is nearly the same as the definition used by Wedge J. in the *Christhurajah* 2 exception ruling and by Silverman J. in *Appulonappa* 2. Those definitions referred to a person "who is seeking refuge" (emphasis added) in Canada: *Christhurajah* 2 exception ruling at para. 30; *Appulonappa* 2 at para. 61. The Crown says it makes this "minor modification" to conform to the language in the *IRPA*.

[226] The Crown, drawing on a number of sources, says "humanitarian aid" has the purpose of saving lives or alleviating suffering and that it must be delivered in accordance with the "humanitarian principles" considered under the next subheading.

**Discussion**

[227] The Crown's suggested definition of asylum seeker, "a person from another state who intends to apply for refugee protection in Canada from some form of persecution or physical harm", accords with the wording used throughout the *IRPA* (see, for example, s. 99).

[228] However, in our view, the Crown's refinement introduces needless complexity to the element. The wording used by Silverman and Wedge JJ., that an asylum seeker is "a person from another state who intends to seek refuge in Canada from some form of persecution or physical harm", is preferable. It makes no practical difference, and the more straightforward wording is particularly preferable for a jury instruction, as "refuge" has an ordinary meaning, whereas "refugee protection" would have to be defined in the context of the legislation.

***(iii) Aid provided in accordance with humanitarian principles***

[229] The Crown lists four principles with which it submits humanitarian aid must accord: humanity, impartiality, neutrality, and independence. It cites:

- the definition of "humanitarian aid" used by the Good Humanitarian Donorship Initiative ("GHD"), online: <www.ghdinitiative.org/ghd/gns/principles-good-practice-of-ghd/principles-good-practice-ghd.html>;
- the definition of "humanitarian assistance" used by the United Nations Office for the Coordination of Humanitarian Affairs's ("OCHA") *Glossary of Humanitarian Terms in relation to the Protection of Civilians in Armed Conflict* (New York: United Nations, 2004);

- the objective of the European Union's "humanitarian aid" (E.C., *Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Commission*, [2008] O.J. C. 25/1 at para. 8) [*The European Consensus on Humanitarian Aid*]; and
- comments made by the International Court of Justice in *Military and Paramilitary Activities in and against Nicaragua (merits)*, [1986] I.C.J. Rep. 14 at para. 242, in a description of the Red Cross.

[230] Albeit with some variation, all four sources describe humanitarian aid substantially in the way the Crown does.

[231] The GHD describes humanitarian action in the following way:

> … Humanitarian action should be guided by the humanitarian principles of humanity, meaning the centrality of saving human lives and alleviating suffering wherever it is found; impartiality, meaning the implementation of actions solely on the basis of need, without discrimination between or within affected populations; neutrality, meaning that humanitarian action must not favour any side in an armed conflict or other dispute where such action is carried out; and independence, meaning the autonomy of humanitarian objectives from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented.
>
> [Emphasis added.]

[232] The OCHA defines "humanitarian assistance" as:

> Aid that seeks to save lives and alleviate suffering of a crisis-affected population. Humanitarian assistance must be provided in accordance with the basic humanitarian principles of humanity, impartiality and neutrality, as stated in General Assembly Resolution 46/182 (19 December 1991). In addition, the UN seeks to provide humanitarian assistance with full respect for the sovereignty of States. Assistance may be divided into three categories - direct assistance, indirect assistance and infrastructure support - which have diminishing degrees of contact with the affected population. [See 'Humanitarian Principles']

[233] It goes on to define the "humanitarian principles":

> As per UN General Assembly Resolution 46/182 (19 December 1991), humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality. Adherence to these principles reflects a measure of accountability of the humanitarian community.
>
> - Humanity: Human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly. The dignity and rights of all victims must be respected and protected.
> - Neutrality: Humanitarian assistance must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature.
> - Impartiality: Humanitarian assistance must be provided without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion. Relief of the suffering must be guided solely by needs and priority must be given to the most urgent cases of distress.

[234] The European Union explains the objective of its humanitarian aid in *The European Consensus on Humanitarian Aid* at para. 8:

> The objective of EU humanitarian aid is to provide a needs-based emergency response aimed at preserving life, preventing and alleviating human suffering and maintaining human dignity wherever the need arises if governments and local actors are overwhelmed, unable or

> unwilling to act. EU humanitarian aid encompasses assistance, relief and protection operations to save and preserve life in humanitarian crises or their immediate aftermath, but also actions aimed at facilitating or obtaining access to people in need and the free flow of assistance. …

[235] Finally, the International Court of Justice explained in *Military and Paramilitary Activities in and against Nicaragua (merits)*:

> 242. … The Court has however taken note that, with effect from the beginning of the United States governmental financial year 1985, namely 1 October 1984, the United States Congress has restricted the use of the funds appropriated for assistance to the contras to "humanitarian assistance" … There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. The characteristics of such aid were indicated in the first and second of the fundamental principles declared by the Twentieth International Conference of the Red Cross, that
>
> > "The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples"
>
> and that
>
> > "It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress."
>
> [Emphasis added.]

[236] Mr. Emmanuel submits that these four principles are not inherent in the common definition of humanitarian, but are instead principles and best practices of the international donor community. He says “humanitarian” has a specific meaning in the international development and international humanitarian law contexts and that the Supreme Court cannot have intended to import those specific meanings.

[237] The Crown says the deplorable conditions on the MV *Sun Sea* were inherently incompatible with these humanitarian principles. The Crown makes this argument in respect of Mr. Rajaratnam and Mr. Mahendran alone, as there is evidence that they were involved in the smuggling scheme as agents.

[238] Mr. Emmanuel nevertheless replies to this argument, saying that although the conditions were relevant to the jury’s assessment of the context of the respondents’ actions, they could not be determinative of the humanitarian nature of those actions. He submits that humanitarian workers overwhelmingly work in deplorable conditions and that it is in such conditions that humanitarian work is most beneficial. Further, he says the jury was given ample evidence to assess the conditions of the ship and was properly invited to draw its own conclusions.

**Discussion**

[239] In our view, this element cannot require that the accused raise an air of reality for each and every one of these principles as the Crown proposes, but the principles are indeed relevant to the fact-finding process of determining whether the purpose was to provide humanitarian aid. The trier of fact should consider that actions can be classified as humanitarian based on how closely they

align with the principles of impartiality, neutrality, and independence, considered in all the circumstances. We omit "humanity" because it is covered by the requirement that the purpose of humanitarian aid be to save lives or alleviate suffering.

[240] We do not agree with the respondents that the trier of fact should simply consider the common sense meaning of "humanitarian" without guidance. To us, the real question is whether imposing the requirement that the accused have the purpose of alleviating suffering or saving lives provides the humanitarian aid defence with sufficient definition. That is, would aid caught by this defence be sufficiently "humanitarian" without recourse to the three additional principles? In our view, it would not be. The principles cited by the Crown should therefore be considered, but are best characterized as relevant factors for the trier of fact to consider in determining whether the accused's aid was humanitarian. The analysis will look different in different contexts, but ultimately, this is a question of fact. Although the humanitarian aid and mutual aid defences are not hermetically sealed from one another, this requirement in particular means it will be rare for an asylum seeker to have access to the humanitarian aid defence.

[241] The three principles should also be defined. The OCHA provides useful definitions that are echoed by the other organizations. It defines "neutrality" as the principle that "[h]umanitarian actors must not take sides in hostilities or engage in controversies of a political, racial, religious or ideological nature." It defines "impartiality" as the principle that "[h]umanitarian action must be carried out on the basis of need alone, giving priority to the most urgent cases of distress and making no distinctions on the basis of nationality, race, gender, religious belief, class or political opinions." Finally, it defines "independence" as "[h]umanitarian action must be autonomous from the political, economic, military or other objectives that any actor may hold with regard to areas where humanitarian action is being implemented."

[242] We think the principles should not be considered strict requirements for access to the defence of humanitarian aid because (1) they are cited by international associations as aspirational goals and general guidance rather than as necessary criteria for aid to qualify as humanitarian, (2) strict application of the principles would lose sight of the ultimate goal of targeting transnational organized crime, and (3) there are foreseeable circumstances in which an actor partially sacrifices one or more principles but should have access to the defence nonetheless.

[243] To the first point, in the OCHA's explanation of humanitarian principles, it says, "All OCHA activities are guided by the four humanitarian principles …" (emphasis added). The GHD also says that humanitarian action "should be guided by the humanitarian principles" (emphasis added).

[244] Furthermore, it is important to bear in mind that s. 117 is targeted at human smuggling connected to transnational organized crime. As McLachlin C.J.C. explained in *B010*:

> [68] … the record supports the view that Parliament understood "people smuggling" in the sense that "migrant smuggling" is used in the [*Migrant*] *Smuggling Protocol*. There is nothing in the parliamentary record suggesting that Parliament sought to adopt a broader definition of people smuggling. Indeed, the Minister of the day expressly referred to the *Palermo Convention* and the [*Migrant*] *Smuggling Protocol* in her evidence on the new *IRPA* provisions before the Standing Committee on Citizenship and Immigration … (see *Evidence*, No. 2, 1st Sess., 37th Parl., March 1, 2001 (online), at 9:30 to 9:35).

[245] Individuals involved in transnational organized crime would be easily precluded from accessing the defence on the basis of a contextual consideration of the principles. Conversely, as foreseeable situations demonstrate, a strict application of each of the principles as a necessary requirement would criminalize a broad swath of laudable conduct with no connection to transnational organized crime.

[246] Finally, we do not think the principles should be applied as necessary requirements, because those engaged in humanitarian work will sometimes be complicit in corruption, such as the payment of bribes, which violates the principles of neutrality, independence and impartiality, despite their best intentions. In circumstances in which some amount of aid will be inevitably lost to corruption, the trier of fact should consider how well the accused's actions conform to the principles while bearing in mind the difficult circumstances in which they found themselves.

[247] We agree with Mr. Emmanuel that the conditions on the ship were relevant to assessing the context of the respondents' actions, but could not be determinative of whether their actions were humanitarian. The jury would have been entitled to make a number of inferences from the conditions on the ship, including that the asylum seekers decided to make this journey because they preferred it to the alternative, or that the conditions were bad but the respondents were not to be held responsible for them.

[248] In this respect, Ehrcke J. did not err. He allowed the jury to hear detailed evidence on the conditions of the ship from Captain Nelson, Staff Sergeant Pikola, and CBSA Officer Abrahamson and told the jury to consider the conditions on the ship:

> Consider also such things as the conditions on the MV Sun Sea, including the sleeping arrangements, the sanitary facilities, the number of lifeboats and life rafts, and the types of navigation equipment.
>
> Consider the evidence that the MV Sun Sea was designed for coastal use, whereas this voyage was across the Pacific Ocean. Consider the number of people that the MV Sun Sea was designed to carry compared with the actual number of persons on board for this voyage. Consider the payments that passengers made and any contracts that they entered into.

#### *(iv) Reasonable belief that people assisted were asylum seekers*

[249] The Crown accepts that this requirement was met by the respondents. The Crown submits that an objective standard of belief is necessary because the defence of humanitarian aid is a justification rather than an excuse. The Crown also says the objective test for the Minister's exercise of discretion under s. 25.1(1) of the *IRPA* to act on "humanitarian and compassionate considerations" provides support for an objective standard here.

[250] Neither the respondents nor Mr. Christhurajah specifically comments on this requirement.

#### Discussion

[251] In our view, regardless of whether the defence is a justification or an excuse, an objective standard of belief that the people assisted were asylum seekers is necessary.

[252] In Glanville Williams's *Textbook of Criminal Law*, 2nd ed. (London: Stevens & Sons, 1978) at 38–39, he discusses defences as follows:

> That a person does a forbidden act, even intentionally, does not mean that he is necessarily guilty of the offence. Various defences are recognized, quite apart from the defence of absence of the requisite mental element or degree of fault. Among the circumstances of justification or excuse are self-defence, duress, and (in some cases) the consent of the person affected. A verdict of "not guilty" does not necessarily mean that the defendant did not do the forbidden act. It may mean that he did not have the requisite mental state, or other fault element, or else had some justification or excuse.
>
> …the term "justification" was formerly used for cases where the aim of the law was not frustrated, while "excuse" was used for cases where it was not thought proper to punish. Killing a dangerous criminal who tried to avoid arrest was *justified*, since the law (if one may personify) wished this to happen, whereas killing in self-defence was merely *excused*. The distinction was important, because justification was a defence to the criminal charge while an excuse was not, being merely the occasion for a royal pardon. By the end of the middle ages (it is difficult to assign a fixed date) even excuses were recognized by the courts, since when there has been no reason to distinguish between justification and excuse.
>
> Some defences (such as insanity) refer to the defendant's state of mind; others refer to external facts, while others are mixed.
>
> Although it is linguistically convenient to distinguish between what may be called the definitional elements of an offence (the ingredients mentioned in defining it) and matters of defence, the distinction is often difficult to draw and seems to have no importance in respect of the substantive law.
>
> [Italics in original; notes omitted.]

[253] While the defence of humanitarian aid is a justification, that is not a standalone reason to import an objective standard of belief. Many defences—both justifications and excuses—require that an objective element be satisfied. For example, duress is an excuse, but both statutory and common-law duress are available only where the accused reasonably believed that there was no safe avenue of escape: *R. v. Ruzic*, 2001 SCC 24 at paras. 87–88; *R. v. Hibbert*, [1995] 2 S.C.R. 973 at paras. 57, 61. Provocation, similarly, is an excuse that is available only where an objective element is satisfied: *R. v. Tran*, 2010 SCC 58 at paras. 16, 25–35. Generally speaking, excuses are less likely to be available than justifications: *R. v. Ryan*, 2013 SCC 3 at para. 26. It would be counterintuitive for more frequently available defences to require the demonstration of more stringent mental elements.

[254] Defences often include objective mental elements "to ensure that the criminal law encourages reasonable and responsible behaviour": *R. v. Thibert*, [1996] 1 S.C.R. 37 at para. 14 (provocation); *R. v. Ryan*, 2011 NLCA 9 at para. 17 (self-defence); David M. Paciocco, "Subjective and Objective Standards of Fault for Offences and Defences" (1995) 59 Sask. L. Rev. 271 at 295–96 (defences generally). In our view, requiring that the accused reasonably believe that they are assisting asylum seekers helps to ensure that their behaviour is reasonable and responsible. Failing to include this requirement could encourage reckless behaviour that endangers the effectiveness of s. 117 of the *IRPA*.

### *d. Elements of mutual aid*

[255] The Crown submits that the mutual aid defence has four elements:

(i) The accused's sole motive must be to provide aid to a fellow asylum seeker. The accused is not entitled to rely on the defence if they participated in acts knowingly connected to and furthering transnational organized crimes or criminal aims, to obtain, directly or indirectly, a financial or other material benefit.

(ii) The accused must be an asylum seeker, defined as a person from another state who intends to apply for refugee protection in Canada from some form of persecution or physical harm.

(iii) The accused must reasonably believe that the person they are assisting is also an asylum seeker.

(iv) The accused and the other asylum seeker must have provided aid to each other for the sole purpose of seeking refuge.

[256] The Crown says that, generally, the mutual aid to asylum seekers defence excludes asylum seekers from liability who smuggle one another into Canada through acts of mutual aid. The Crown submits that the defence was crafted to exclude asylum seekers who work together from criminal liability, as that would be contrary to Canada's international obligations under the *Human Smuggling Protocol*.

[257] We would instead recognize that the mutual aid defence has the following four elements:

(i) The accused's purpose must be to provide aid to a fellow asylum seeker. The accused cannot act for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime.

(ii) The accused must be an asylum seeker.

(iii) The accused must have a reasonable belief that the person they are assisting is an asylum seeker.

(iv) The accused and the asylum seeker they are aiding must have the common purpose of seeking refuge.

[258] We discuss each element in turn.

***(i) Purpose of providing aid***

[259] The Crown submits that the sole motive of the accused must have been to provide aid. It says that an accused who knowingly pursued criminal aims to pursue a financial or other material benefit cannot rely on the defence. It relies on the definition of "financial or other material benefit" in art. 3 of the United Nations Office on Drugs and Crime's *Model Law against the Smuggling of Migrants* (Vienna: United Nations, 2010), which says the phrase includes "any type of financial or non-financial inducement, payment, bribe, reward, advantage, privilege or service (including sexual or other services)". The Crown quotes Silverman J.'s discussion of the requirement in *Appulonappa* 2:

> [110] Considering all the foregoing, "solely" is capable of being interpreted as follows. The primary motivation must be mutual aid; if there are secondary motivations, they must not involve any aspect of criminality such as, but not restricted to, a profit motive, transporting slaves or illegal drugs.

[260] The Crown says the sole motive requirement stems in part from the public policy importance of securing Canada's borders.

[261] Mr. Christhurajah submits that Wedge J. erred in instructing the jury that he had to have had the sole motive of engaging in mutual aid to have had access to the defence and that the requirement rendered the defence "so meaningless as to be inoperative".

[262] Mr. Emmanuel says the Crown did not take this position in the court below. It instead took the position that the children did not aid anyone, such that the aid was not truly "mutual", and that Mr. Emmanuel was not an asylum seeker.

[263] In any case, Mr. Emmanuel says the financial or material benefit that an accused may have received is a question of fact to be considered as part of all of the circumstances rather than as automatically disqualifying the accused from accessing the defence. The Crown led evidence from multiple asylum seekers that they paid significant sums of money and the jury would have been able to assess that evidence themselves.

**Discussion**

[264] In our opinion, this issue should be resolved the same way as the humanitarian purpose issue above. The trier of fact should be instructed that the accused's purpose must have been to provide aid to other asylum seekers in seeking refuge in Canada and that where the accused acts, in whole or in part, for the purpose of financial or material benefit in the context of transnational organized crime, they cannot rely on the defence. Human beings are rarely solely motivated by anything. Financial or material benefits should, again, be considered as part of all of the circumstances in which aid was given, bearing in mind Canada's international obligations under the *Palermo Protocols*.

***(ii) Accused is asylum seeker***

[265] The Crown defines asylum seeker in the same way that it did above, under humanitarian aid. The respondents and Mr. Christhurajah again take no position.

**Discussion**

[266] Our view is the same as above. Asylum seeker should be defined as "a person from another state who intends to seek refuge in Canada from some form of persecution or physical harm".

***(iii) Reasonable belief that people assisted were asylum seekers***

[267] The Crown says Silverman J. correctly recognized that an element of knowledge and intent is imported by this defence when he wrote, in *Appulonappa* 2:

> [90] Whether or not there is mutual aid is a question of fact. It has mental aspects and physical aspects. The intent must be to give and receive aid in their mutual endeavours as asylum seekers. That determination will vary and depend upon the circumstances. "Mutual aid" should maintain its plain and ordinary meaning as described in [*Appulonappa*] without the restrictions imposed by the Crown.

[268] The Crown says the objective nature of this belief is the same as set out above for the humanitarian aid defence.

**Discussion**

[269] We agree that the mutual aid defence should have the same objective requirement as the humanitarian defence. We emphasize, however, that what constitutes a reasonable belief for an asylum seeker trying to survive in difficult circumstances will likely differ from what constitutes a reasonable belief for an aid worker with a humanitarian agency. Whereas a humanitarian agency may be expected to carry out short interviews with asylum seekers to ensure they are in danger and intend to seek refuge in Canada, another asylum seeker will likely be unable to make the same kind of inquiries. The trier of fact must assess this element contextually.

#### *(iv) Aid provided by accused to other asylum seeker with mutual purpose of seeking refuge*

[270] The Crown's proposed mutuality requirement would be that the accused and asylum seekers work together for the common purpose of seeking refuge in Canada. It contemplates that the accused and asylum seekers are members of a group defined by unity of purpose and teamwork to achieve that purpose.

[271] The Crown recognizes that not all individuals can provide the same level of effort. Some individuals can make larger contributions than others. But the Crown says that whether the division of labour satisfies the mutuality requirement depends on the facts of each case. Differences in the significance of the aid provided by the accused relative to the other asylum seekers is a factor to consider in determining the issue, and the greater the difference, the less likely the element will be satisfied. The Crown quotes Wedge J.'s air of reality ruling in the *Christhurajah* 2 air of reality ruling:

> [15] Most importantly, however, is that all of the persons on the ship were migrants seeking asylum sharing a common goal -- which was to get to Canada. With a vessel the size of the *Sun Sea*, and given the scale and experience required to navigate such a ship and keep the engine room in running order, it would be unrealistic to expect that every migrant would have a specific role to play in the operation or functioning of the vessel. This was an overcrowded vessel with nearly 500 people on board. The reciprocity here was, on the evidence, 'that at least some of the migrants paid to take the voyage. There is no evidence as to whether any of the crew, all refugees as well, were required to provide anything other than their skills and labour.

**Discussion**

[272] In our view, the Crown is correct that some mutuality requirement is necessary.

[273] In particular, we are of the view that asylum seekers who wish to avail themselves of the defence must have the mutual purpose of seeking refuge in Canada. However, we do not think that requirement need extend to mutuality of effort, except that mutual effort will be valuable evidence of whether mutuality of purpose is satisfied. Babies, for example, need not expend any effort for adults aiding them to satisfy the defence. A person tasked with looking after small children, the elderly or disabled, should still be entitled to the benefit of the defence even though those individuals are not "aiding back".

[274] This requirement must be understood in light of the international instruments considered in *Appulonappa* and *B010*, which recognize the reality that migrants often engage in a "collective flight to safety": *B010* at para. 63. The mutual aid defence was recognized by the Supreme Court in order to ensure that s. 117 properly applies to those who further transnational criminal aims, but

does not extend beyond those persons. It is because refugees' flight is frequently collective that the mutual aid defence must exist, as penalizing a refugee for assisting another refugee would violate art. 31(1) of the *Refugee Convention*. But at the same time, a human smuggler should not have access to the defence. Mutuality of purpose ensures that the accused truly shared a goal with the other asylum seeker they aided.

#### *e. Summary of conclusions about the Appulonappa defences*

[275] We have reached the following conclusions in respect of the *Appulonappa* defences:

- The constitutional remedy in *Appulonappa* created true defences to a charge of human smuggling under s. 117 of the *IRPA*.
- The remedy created three defences: humanitarian aid, mutual aid, and family member aid.
- The defences do not have sole purpose requirements.
- The humanitarian aid defence has four elements: (i) the accused must act for the purpose of providing humanitarian aid, and not for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime; (ii) the accused must provide aid in order to save the life or alleviate the suffering of an asylum seeker, which is a person from another state who intends to seek refuge in Canada from persecution or physical harm; (iii) the aid must be humanitarian, a question to be determined by the trier of fact in accordance with the principles of impartiality, neutrality, and independence; and (iv) the accused must reasonably believe that the person assisted is an asylum seeker.
- The mutual aid defence has four elements: (i) the accused must act for the purpose of providing aid to a fellow asylum seeker, and not for the purpose of obtaining, directly or indirectly, a financial or other material benefit in the context of transnational organized crime; (ii) the accused must be an asylum seeker, as defined above; (iii) the accused must reasonably believe that the person assisted is an asylum seeker; (iv) the accused and the person they are assisting must have the common purpose of seeking refuge. There is no requirement of mutuality of effort.
- Family member aid is not a subset of mutual aid. An accused who is not an asylum seeker can raise the family member aid defence.

### (6) Application to these cases

#### *a. Mr. Emmanuel*

[276] Mr. Emmanuel submits that his acquittal reflects that the jury accepted his evidence. The Crown submits that without proper instructions on the sole motivation requirement, the jury would not have been able to relate Mr. Emmanuel's testimony to the legal issues for the mutual aid defence. The Crown says that the humanitarian aid defence should not have been put to the jury at all.

[277] Mr. Emmanuel says that the standard of review for a jury charge—whether the instructions allowed the jury to understand how to relate the evidence to the legal issues—does not allow this Court to interfere with Ehrcke J.'s instruction: *R. v. Jacquard*, [1997] 1 S.C.R. 314 at para. 32. In any case, Mr. Emmanuel says, like the other respondents, that the Crown has not met its onus to demonstrate that there was a reasonable possibility the verdict would have been different if the errors it alleges were not made.

[278] The Crown concedes that the mutual aid defence was properly put to the jury in Mr. Emmanuel's case. Mr. Emmanuel points to his testimony to show that this concession is proper.

[279] Mr. Emmanuel says that the Crown took the position at trial that the mutual aid defence should not have been available because Mr. Emmanuel was not an asylum seeker and because the children on the ship did not assist him, and the jury clearly rejected those arguments.

[280] We agree with Mr. Emmanuel that the Crown has not demonstrated a reasonable possibility that the result would have been different if Ehrcke J. had not made any errors.

***(i) Humanitarian aid***

[281] The Crown says there was no air of reality to the humanitarian aid defence for Mr. Emmanuel because to the extent that he had a humanitarian motive, it was mixed with a self-serving motive of travelling to Canada himself. Even if he took command of the ship for the well-being of other migrants, he did so for his own benefit as well. The Crown says Mr. Emmanuel was in the same position as Mr. Christhurajah, who was not permitted to rely on the defence in his retrial, and as the accused in *Appulonappa* 2, who were also not permitted to rely on the defence.

[282] Mr. Emmanuel says his testimony gave an air of reality to the humanitarian defence, as he directly testified to his concern for the welfare of children and pregnant women on the ship. He says that he testified to his lack of financial or other material motivation and explicitly denied suggestions of ulterior motivations in cross-examination. Finally, he says whether his motivation was humanitarian or not was a question of fact for the jury to decide.

[283] He says the Crown seeks to artificially separate humanitarian and mutual aid motivations, and that his testimony demonstrates that he was motivated by both.

[284] Given that we have rejected the Crown's sole-motive submission, we agree with Mr. Emmanuel that his testimony gave the humanitarian aid defence an air of reality. Although the more usual defence for an asylum seeker will generally be mutual aid, in Mr. Emmanuel's rare circumstances, we do not see why the humanitarian aid defence should be foreclosed. In particular, there was evidence that Mr. Emmanuel provided aid impartially, neutrally and independently in order to alleviate the suffering of the other asylum seekers on the MV *Sun Sea*. He was unexpectedly put in a situation in which he decided to indiscriminately provide aid to everyone around him. If his evidence was believed (or if it raised a reasonable doubt), it would have established the defence and would have resulted in an acquittal.

***(ii) Crown onus to demonstrate that error affected verdict***

[285] Mr. Emmanuel submits that even if the humanitarian aid defence was improperly put to the jury, there is no reason to think that the outcome would have been different. He says that the Crown's argument is essentially that Ehrcke J. treated the humanitarian aid defence as though it was the same as the mutual aid defence. Given that the mutual aid defence was properly put to the jury, this would have caused no prejudice to the Crown's case. Similarly, he says instructing the jury on both defences actually remedied an error made by the Crown at trial (from which it has resiled on appeal) that since the babies did not provide aid to Mr. Emmanuel, he could not have "mutually" aided them. Finally, he says that if the jury had misunderstood the instructions on mutual aid, it would have also acquitted Mr. Christhurajah, because they were in the same position.

[286] The Crown says that although Mr. Emmanuel testified and gave an explanation of how he came to be the captain of the ship, the jury would not have been able to relate the evidence to the legal issues without instructions on the sole motivation requirement—a requirement we have rejected. The Crown says it is possible that the jury would have concluded that Mr. Emmanuel knowingly participated in the criminal aspects of the scheme and that his conduct was therefore not solely motivated by a desire to mutually aid the other migrants. The Crown says a new trial is necessary because some jurors may have acquitted Mr. Emmanuel on an erroneous understanding of the mutual aid defence.

[287] In our view, Mr. Emmanuel's argument that Mr. Christhurajah's mistrial demonstrates that the jury did not misunderstand the instructions on mutual aid is incorrect. Mr. Emmanuel and Mr. Christhurajah were not in the same position, as there was evidence that Mr. Christhurajah owned the ship.

[288] However, we also think that Ehrcke J.'s failure to define the elements of the defences did not have any effect on the outcome. If it did, the Crown certainly has not demonstrated what effect it had. In the particular circumstances of this case, the error likely did nothing but prejudice Mr. Emmanuel. The jury was instructed on the humanitarian aid and mutual aid defences without explanations of what distinguished them from one another. The jury heard the Crown's submission that the babies did not contribute to the asylum seekers' mutual effort and Mr. Emmanuel therefore could not rely on the mutual aid defence, an argument which was incorrect in law.

[289] The most likely explanation for Mr. Emmanuel's acquittal is that the jury simply believed him, or his evidence raised a reasonable doubt. If Mr. Emmanuel's evidence was accepted (or not disbelieved), he would certainly have had access to the mutual aid defence. The outcome therefore would not have been different. In a Crown appeal, it bears the heavy burden of showing that "the error might reasonably be thought…to have a material bearing on the acquittal": *R. v. Barton*, 2019 SCC 33 at para. 160, quoting *R. v. Graveline*, 2006 SCC 16 at para. 14; *Cullen v. The King*, [1949] S.C.R. 658 at 665. It has not discharged that burden.

#### *(iii) Conclusion*

[290] In our view, Mr. Emmanuel's acquittal must be upheld.

### *b. Mr. Rajaratnam*

[291] Mr. Rajaratnam's primary submission is that no matter the deficiencies in Ehrcke J.'s charge on the *Appulonappa* defences, the identification evidence was so flawed that the Crown's appeal should be dismissed in any event. We agree.

***(i) Humanitarian aid***

[292] The Crown says there was no evidence that Mr. Rajaratnam had a humanitarian motive at all, and therefore no air of reality to the humanitarian aid defence. The Crown says the evidence actually showed that he was involved in a human-smuggling operation for financial gain. The Crown says there was no evidence that Mr. Rajaratnam was linked to a humanitarian agency, and that the operation was carefully staged over several months rather than being characterized by a "sense of urgency or crisis that one might reasonably expect in a situation that necessitates humanitarian aid". The Crown says there was no urgency or crisis.

[293] The Crown says that, in any case, Mr. Rajaratnam's motive was not solely humanitarian. The Crown says there was evidence that Mr. Rajaratnam was paid $2,000 by a migrant, was present when Mr. Gandhi paid his agent a $5,000 deposit and gave Mr. Gandhi a place to sleep and food in Bangkok.

[294] Mr. Rajaratnam submits that, assuming that the jury was satisfied with the identification evidence, if the evidence showed that he was engaged in a criminal human smuggling operation, the jury would have convicted him. Mr. Rajaratnam says that although the Crown points to facts that it says support the inference that Mr. Rajaratnam was part of a human smuggling operation, those facts could also support other inferences. As Silverman J. wrote in *Appulonappa 2*:

> [263] It is noteworthy that many of the specific acts attributed to each of the accused, while arguably being evidence of knowledge of a connection to organized crime, are arguably also acts of aiding and abetting, and also arguably acts of mutual aid. This is consistent with the approach in [*Appulonappa*] at noted in paragraph 48.

[295] Mr. Rajaratnam says he can only be found liable for the actions he was involved in, as Ehrcke J. addressed in his instructions. He says his liability can therefore be associated only with Mr. Gandhi and Mr. Karunenthiran, because they were the only migrants who purported to have had dealings with Mr. Rajaratnam. Mr. Rajaratnam quotes Silverman J. in *Appulonappa* 2:

> [111] Further, "solely" must be analyzed in the context of the individual conduct and intent of each migrant, not the collective conduct and intent of a group. Therefore, if the owner of a vessel is involved in the crime of human smuggling, that does not automatically disentitle every migrant on the vessel to the defence of mutual aid.

[296] We agree with the Crown that the humanitarian aid defence had no air of reality in respect of Mr. Rajaratnam and should not have been left with the jury. In particular, there was no reason to think Mr. Rajaratnam had a humanitarian purpose.

[297] We disagree with the defence that Mr. Rajaratnam can be found liable only in respect of the individuals who identified him. That identification could have had the effect of implicating him in a much larger category of conduct that related to every migrant on the MV *Sun Sea*.

***(ii) Crown onus to demonstrate that error affected verdict***

[298] Mr. Rajaratnam says even if s. 36 of the *MLACMA* was constitutional and Ehrcke J. erred in his explanation of the applicability or availability of the *Appulonappa* defences, the error does not materially affect Mr. Rajaratnam's acquittal because the identification evidence was so manifestly deficient that no reasonably instructed jury could convict.

[299] Mr. Rajaratnam says the Crown did not lead instances of prior photo viewings and identifications for either Mr. Gandhi or Mr. Karunenthiran. Mr. Rajaratnam says the law is clear that the entirety of the pretrial identification process must be led for that evidence to have any probative value: *R. v. Tat* (1997), 117 C.C.C. (3d) 481 at para. 36 (Ont. C.A.). Mr. Rajaratnam says the pretrial identification process was so flawed and prejudicial that the evidence itself was virtually useless. Mr. Rajaratnam describes the photo line-ups as follows:

> The RCMP adopted a process which sacrificed the integrity of the pre-trial identification process for expediency. The photo books shown were the equivalent of 29 single photo line-ups. The photographs themselves were labelled; the respondent was always photograph #24. The photographs were shown to the migrants in the same order. The photo books used during the interview of a migrant where identifications were made was not preserved in the form that was shown to the witness. Only generic photo books were entered as exhibits at trial. Further, the RCMP were aware that CBSA had also conducted interviews of the migrants and shown photographs, yet they took no steps to determine what had been shown to the witnesses.

[300] When improper pretrial identification operates unfairly to the accused, the identification evidence that results may be entitled to no weight: *R. v. Miaponoose* (1996), 30 O.R. (3d) 419 (C.A.).

[301] Mr. Rajaratnam submits that both Mr. Karunenthiran's and Mr. Gandhi's identification evidence was irreparably tainted by repeatedly being shown a single photograph by the RCMP, CBSA, and Crown counsel. Mr. Rajaratnam cites *R. v. Thorne*, 2007 BCSC 784, in which the mother of the victim of an assault showed witnesses the accused's yearbook photo immediately prior to their being interviewed by the RCMP. Justice Chamberlist equated this to a "one person line-up". Mr. Rajaratnam says that in showing migrants a series of 29 single photographs of individuals who were identified as suspects or persons of interest, the RCMP effectively identified those individuals as targets of the investigation and negated any probative value the evidence would otherwise have had.

[302] Mr. Rajaratnam submits that Mr. Karunenthiran's evidence was unreliable and deserving of no weight. Mr. Karunenthiran did not make an in-dock identification of Mr. Rajaratnam. Mr. Karunenthiran had only observed "Sokan" two times, the first occurring over one to three minutes and the second over a matter of seconds. He testified that he selected photograph #24 when interviewed by the RCMP. Crown counsel had shown him the photograph he selected, bearing the number 24, during his pretrial interview.

[303] Mr. Rajaratnam submits that Mr. Karunenthiran's RCMP identification was tainted by the previous CBSA interview. The Crown did not lead any evidence of the prior identification at trial. Mr. Karunenthiran's ability to recall photographs and events clearly was challenged and undermined in cross-examination. He tailored his evidence to accord with what the Crown brought to his attention during breaks and meetings during his examination-in-chief, even when it

contradicted his prior testimony. Mr. Rajaratnam submits that the reliability and credibility of Mr. Karunenthiran's evidence is undermined by Exhibit 46, an agreed statement of facts the authenticity of which Mr. Karunenthiran later denied.

[304] Mr. Rajaratnam submits that Mr. Gandhi's identification evidence is incomplete and faulty. Mr. Gandhi made an in-dock identification of Mr. Rajaratnam, but prior to testifying in court, he was shown a picture of Mr. Rajaratnam by the Crown. Mr. Gandhi did not testify about making any pretrial identification of the respondent to either the RCMP or the CBSA. Mr. Gandhi had previously identified another migrant as "Sokan" to the police and he agreed in cross-examination that he had been telling the truth when he made that identification.

[305] The Crown called Officer Sean Murphy of the CBSA to provide evidence of Mr. Gandhi's pretrial identification of "Sokan". Mr. Rajaratnam submits that his evidence did not add any probative value to Mr. Gandhi's in-dock identification. The interview was not recorded and the notes from the interview were missing. Officer Murphy did not have the original colour photographs shown to Mr. Gandhi. He referred to copies provided to him by the Crown in court. His report and the photographs he referred to in court were inconsistent. One of the inconsistencies was that the report did not indicate that Mr. Gandhi identified a photograph as being "Sokan".

#### *(iii) Conclusion*

[306] In our view, the appeal from Mr. Rajaratnam's acquittal should be dismissed.

[307] Although the humanitarian aid defence should not have been left with the jury, Mr. Rajaratnam's defence focused on identification. On a Crown appeal, the Crown bears the onus of showing there is a reasonable degree of certainty that but for the error, the result would not necessarily have been the same. The identification evidence led by the Crown had significant frailties, and the jury was far more likely to have acquitted on that basis than on the basis of the humanitarian aid defence. The RCMP did not conduct the photo lineups in accordance with best practices. The jury would likely have paid close attention to the shortcomings of those lineups.

[308] This situation is very closely akin to the Supreme Court of Canada's decision in *Graveline*, in which the trial judge had left two defences with the jury: non-mental disorder automatism and self-defence. On appeal, the accused conceded that self-defence should not have been left with the jury. His defence had primarily focused on the automatism defence. A majority of the Court found that the Crown had not discharged its burden, as the jury was much more likely to have acquitted the accused on the basis of a reasonable defence than on the basis of a defence that did not have an air of reality in the first place.

### *c. Mr. Mahendran*

[309] Mr. Mahendran submits that even if the *Appulonappa* exceptions are defences, the identification evidence against him was "so manifestly deficient that no reasonably instructed jury could convict". Again, we agree.

#### *(i) Humanitarian aid*

[310] The Crown says that for Mr. Mahendran, like for Mr. Rajaratnam, there was no evidence of a humanitarian motive, and there was therefore no air of reality to the humanitarian aid defence. The Crown's arguments summarized above are also applicable to Mr. Mahendran.

[311] The Crown also says the evidence could not support the conclusion that Mr. Mahendran had a sole motive that was humanitarian, as the evidence of two migrants on the ship showed that he was part of the human-smuggling operation. The Crown says Mr. Mahendran was "deeply involved in all stages of the multi-step process of getting Mr. Thurairajah passage on the MV *Sun Sea*".

[312] We would resolve this question the same way as for Mr. Rajaratnam. We do not think there was an air of reality to the humanitarian aid defence, as there was no evidence upon which a reasonable jury, properly instructed, could conclude that Mr. Mahendran had a humanitarian purpose.

***(ii) Crown onus to demonstrate that error affected verdict***

[313] Mr. Mahendran, like the other two respondents, points to the Crown's onus to demonstrate that there was a reasonable possibility that an error at trial affected the verdict. He says that even if the humanitarian aid defence was improperly put to the jury, it would not have affected the result, because the identification issue was the focus of Mr. Mahendran's defence. He cites *Graveline* for the analysis set out above.

***(iii) Conclusion***

[314] We agree that the error does not appear to have affected the verdict for the same reasons as given above with respect to Mr. Rajaratnam. The appeal should be dismissed.

## F. Disposition

[315] For the reasons above, we would dismiss the Crown appeals and declare s. 36 of the *MLACMA* to be of no force and effect with respect to Crown evidence tendered in a criminal trial.

"The Honourable Mr. Justice Frankel"

"The Honourable Madam Justice Bennett"

"The Honourable Madam Justice Garson"