Federal Court Cour fédérale

**Date: 20161219**

**Dockets: IMM-881-14**
**IMM-3760-14**

**Citation: 2016 FC 1389**



**Ottawa, Ontario, December 19, 2016**

**PRESENT: The Honourable Mr. Justice Boswell**

**Docket: IMM-881-14**

**BETWEEN:**

**HAMALRAJ HANDASAMY**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

**Docket: IMM-3760-14**

**AND BETWEEN:**

**HAMALRAJ HANDASAMY**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

**JUDGMENT AND REASONS**



[1] The Applicant, Hamalraj Handasamy, is a 45 year old citizen of Sri Lanka. He, along with 75 other individuals, arrived off the coast of British Columbia in October 2009 aboard the Motor Vessel Ocean Lady. Mr. Handasamy and all the other individuals on the ship made claims for refugee protection. However, his claim for protection failed because, after the Immigration Division [ID] of the Immigration and Refugee Board [IRB] determined on January 22, 2014 that Mr. Handasamy was inadmissible to Canada, an immigration officer [the Officer] decided to issue a notice which terminated consideration of his claim for refugee protection.

[2] Mr. Handasamy has now applied for judicial review of these two separate, yet related, decisions. In the first decision (Court file IMM-881-14), the ID determined pursuant to paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], that Mr. Handasamy was inadmissible to Canada by reason of organized criminality. In the second decision (Court file IMM-3760-14), the Officer issued a notice dated April 7, 2014 under subsection 104(1) of the *IRPA*, notifying the Refugee Protection Division [RPD] of the IRB and Mr. Handasamy that his claim for refugee protection was ineligible because of his inadmissibility and that, consequently, consideration of his claim was terminated by virtue of subsection 104(2).

## I. Background

[3] The Applicant left Sri Lanka for Malaysia in January 2007 due to problems with para-military groups connected to the Sri Lankan Security Forces. The Applicant had no legal status while in Malaysia, which is not a signatory to the *Convention relating to the Status of Refugees*,

189 UNTS 150. In February 2009, the Applicant's employer informed him that there was a vessel travelling to Canada and that if he agreed to work as a crew member aboard the vessel he could journey to Canada. In exchange for his work, the Applicant would pay a reduced amount for his passage to Canada; he agreed to pay $20,000.



[4] In May 2009, the Applicant was transported from Malaysia to Indonesia and, on or about June 1, 2009 he boarded the Ocean Lady as the first passenger or crew member. The Applicant received instructions from two individuals with the titles of "Captain" and "First Engineer" on how to operate the ship's engine and GPS navigational system. After a few weeks on board, these individuals informed the Applicant that another individual who was to navigate the ship to Canada was no longer coming to do so; they then imposed upon him and a few other crew members the responsibility for navigation of the ship. When the Applicant declined this additional responsibility, he was threatened and kicked by the Captain. He and three others took over navigation of the ship in August 2009 after the Captain and the First Engineer left the ship.

[5] As part of their duties to ensure the success of the voyage, the navigational team or crew were to call the organizers of the voyage several times a day by way of a pre-programmed satellite phone to inform them on the status of the ship and its operations, and also to receive instructions on what to do. The crew was alerted to the fact that the vessel would likely be intercepted by Canadian authorities, and that they were to sink the ship upon being intercepted. In late August 2009, the Ocean Lady set sail to Thailand where two boatloads of passengers joined the ship, and in early September 2009 they proceeded from Thailand towards Canada where all those aboard the ship intended to make refugee claims.

[6] The Applicant assisted in navigating the ship to Canada. He was aware that none of the individuals aboard the Ocean Lady had proper documentation to enter Canada. On October 15, 2009, two days before the ship arrived in Canadian waters off the coast of Vancouver Island, a Fisheries Canada plane made radio contact with one of the individuals on board who informed the agents in the plane that the ship contained 76 individuals who intended to make refugee claims in Canada. The agents in the plane instructed the ship to maintain its course to Canada. On the following day, a Canadian naval vessel made contact with the Ocean Lady and guided it into Canadian waters.



[7] Upon arrival in Canada, the Applicant initiated a claim for refugee protection as he originally intended. After numerous interviews with Canadian officials, the Applicant was reported as being inadmissible to Canada on grounds of organized criminality pursuant to paragraphs 37(1)(a) and 37(1)(b) of the *IRPA*. The Minister of Citizenship and Immigration referred the inadmissibility reports to the ID for an admissibility hearing pursuant to subsection 44(2) of the *IRPA*.

[8] Prior to the admissibility hearing, the Applicant's legal counsel made two applications: one for the production of particulars for purposes of the paragraph 37(1)(a) allegation, and the other to exclude portions of the Minister's evidence in order to comply with Mr. Handasamy's right to natural justice and to fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms*. The ID refused the Applicant's request to exclude some of the Minister's evidence. The admissibility hearing commenced on April 29, 2013, on which date the Minister withdrew the allegation that the Applicant was inadmissible pursuant to paragraph 37(1)(a) of

the *IRPA*. The admissibility hearing therefore focused on whether the Applicant was inadmissible pursuant to paragraph 37(1)(b) of the *IRPA*.

## II. The Immigration Division's Decision



[9] In a decision dated January 22, 2014, the ID determined that the Applicant was inadmissible to Canada on grounds of criminality for engaging, in the context of transnational crime, in the activity of people smuggling pursuant to paragraph 37(1)(b) of the *IRPA*, which provides that:

| | |
|---|---|
| **37 (1)** A permanent resident or a foreign national is inadmissible on grounds of organized criminality for | **37 (1)** Emportent interdiction de territoire pour criminalité organisée les faits suivants : |
| … | … |
| **(b)** engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or laundering of money or other proceeds of crime. | **b)** se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité. |

[10] The ID began its analysis of whether the Applicant was inadmissible by noting that the standard of proof to establish an allegation under paragraph 37(l)(b) is whether there are "reasonable grounds to believe" that the facts constituting inadmissibility have occurred, are occurring or may occur, and also that the Applicant had the burden to establish that he is not inadmissible. The ID further noted that an allegation under paragraph 37(1)(b) requires the establishment, on reasonable grounds, of three essential elements: (1) that the individual in

question is a permanent resident or a foreign national; (2) that he engaged in people smuggling; and (3) that the people smuggling occurred in the context of transnational crime.

[11] As to the first element, the ID determined that the Applicant was neither a Canadian citizen nor a permanent resident and, therefore, found him to be a foreign national under subsection 2(1) of the *IRPA*. The ID then addressed the question of whether the Applicant was engaged in "people smuggling", noting that this phrase is undefined in the *IRPA* and that some court decisions rely on international instruments to interpret the phrase while others look to the offence of "organizing entry into Canada" under subsection 117(1) of the *IRPA*. To interpret the phrase "people smuggling", the ID looked to the decision of the Federal Court of Appeal in *Canada (Public Safety and Emergency Preparedness) v JP*, 2013 FCA 262, [2014] 4 FCR 371 [*JP*], where it was determined that:

> [79] The Board's decision to interpret paragraph 37(1)(b) of the *IRPA* with reference to subsection 117(1) thereof, as it then read, is not only reasonable, but in my view also the correct interpretation of that provision.
>
> [80] First, that interpretation is entirely consistent with the modern rule of statutory interpretation requiring that a statutory provision be read as a whole with the act of which it is part of, which in this case includes the closely related subsection 117(1), as it then read: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para.10; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 27.
>
> [81] Second, the *Smuggling of Migrants Protocol* does not restrict Canada's ability to take measures against persons whose conduct constitutes an offence under its own laws. As a result, the reference to "a financial or other material benefit" in that Protocol does not restrict Canada's ability to adopt a wider definition of people smuggling which does not refer to a financial or material benefit.

[12] The ID rejected the Applicant's argument that there must be a material benefit or profit element to the smuggler in order to establish the offence of people smuggling, and that he had not profited in the movement of the 75 other persons to Canada and had not received a material benefit. The ID determined, in view of the Federal Court of Appeal's decisions in *JP* (at para 78) and also in *B010 v Canada (Citizenship and Immigration)*, 2013 FCA 87 at paras 7 and 8, [2014] 4 FCR 326 [*B010 (FCA)*], that "the term 'people smuggling' does not require a profit element." As a result, the ID did not consider whether the Applicant was engaged in people smuggling for the purpose of obtaining a material benefit or profit.



[13] The ID also rejected the Applicant's argument that the phrase "people smuggling" requires clandestine, surreptitious, or fraudulent conduct, an element of secrecy or intent to fraudulently avoid border controls, and that the Applicant and the 75 other migrants openly presented themselves on arrival to Canada and were examined. It rejected this argument on the basis of the decision in *B010 v Canada (Citizenship and Immigration)*, 2012 FC 569, [2014] 1 FCR 95 [*B010 (FC)*], where this Court stated that:

> [61] ...While the applicant sought to include a "secret or clandestine" element, the panel correctly pointed out that where a person smuggled appeared at the port of entry to make a refugee claim, an individual that had aided that person to enter Canada could still be found guilty of an offence under section 117 (*Godoy*, above, at para 35 and *Mossavat*, above, at paras 1-2). The Minister also rightfully submitted to this Court that no such component can be derived from a reading of para 37(1) (b), of section 117, or even of the Protocol, and this in either French or English. The Minister also referred this Court to section 159 of the *Customs Act*, RSC 1985, c 1 (2d Supp), which defines smuggling as follows: "Every person commits an offence who smuggles or attempts to smuggle into Canada, whether clandestinely or not, any goods subject to duties, or any goods the importation of which is prohibited, controlled or regulated by or pursuant to this or any other Act of Parliament [emphasis added]." I agree with the Minister that

> subsections 37(1) and 117(1) do not require a "secret or clandestine" component, but are instead concerned only with the 'organizing of entry into Canada,' whether the person entering declares themselves at a port of entry or not, when such a person is "not in possession of a visa, passport or other document required by this Act" (subsection 117(1) of the IRPA). Evidence submitted to the ID showed that the majority of the passengers on board the MV Sun Sea were in fact not in possession of the visas and passports required by the IRPA. [Emphasis in original]



[14] The ID thus found that paragraph 37(1)(b) does not require a secret or clandestine component. It went on, however, to determine that even if a clandestine operation was a required element to establish people smuggling, the activities and operations of the crew and human cargo of the Ocean Lady were such that one could impute the presence of a clandestine operation. In this regard, the ID noted that:

> [77] The name by which the freighter arrived in Canada - the Motor Vessel Ocean Lady - and its International Maritime Organization # 7732348 were all determined to be invalid. It was further determined that the freighter was actually the MV Princess Easwary, with the IMO # 8840224.21. By virtue of this deception, one can impute the presence of a clandestine operation. As well, the Motor Vessel Ocean Lady was a cargo freighter designed to carry cargo, and was not designated a ship for transporting passengers….
>
> [78] The motive behind the masquerading of the true identity of the freighter, and the provision of false identification data, and the improper use of the vessel to transport humans instead of cargo, would have been to avoid tracking and a proper determination of the agenda of the vessel. This constitutes, in the view of the Tribunal, a surreptitious element in the whole enterprise of bringing migrants to Canada.

[15] The ID further noted that the Applicant had been instructed to sink the ship and to throw the satellite phone overboard before being intercepted. Although the Applicant did not sink the ship, the ID found that his disposal of the satellite phone further showed his efforts to foil

detection. The ID thus found the whole operation was clandestine in nature to avoid any enforcement action and potential surveillance or tracking of persons who may have masterminded, coordinated or organized the journey and assisted in the success of the venture.



[16] The ID then addressed the Applicant's argument that utilizing section 117 of the *IRPA* to define people smuggling in paragraph 37(1)(b) would lead to an overly broad interpretation and violate rights guaranteed under section 7 of the *Charter*. After reviewing the jurisprudence, the ID determined that the offence created by subsection 117(1) requires the establishment of four elements, namely that: (1) one or more persons were coming into Canada; (2) they were coming into Canada in contravention of the *IRPA*; (3) the subject of the proceedings organized, induced, aided or abetted the one or more persons in coming to Canada; and (4) he or she did so, knowing that, or being reckless as to whether the coming into Canada of the one or more persons was, or would be, in contravention of the *IRPA*.

[17] After identifying these four elements, the ID proceeded to analyze each element. As to the first element, the Applicant argued that interception of the illegal migrants before they arrived in Canadian territorial waters, and their announcement to authorities that they intended to seek refugee protection in Canada, meant that they were not truly persons coming into Canada. The ID rejected this argument, stating that: "the assistance and escort of the Canadian authorities during the last leg of the journey should not be viewed as a factual situation that should change the outcome or the definition of 'coming into Canada'." The ID therefore concluded that the first element of subsection 117(1) was satisfied, namely, that one or more persons were coming into Canada.

[18] The ID also found that the second element of subsection 117(1) was established since all those aboard the Ocean Lady were entering Canada without proper documentation. Although the Applicant was aware that he and the other passengers did not have the documents required to enter Canada legally, he only wanted to seek refugee protection in Canada and believed he could lawfully do so. The ID, however, stated that what the Applicant and the other passengers believed about their entry, and what he and the other passengers wanted to do, was irrelevant to assessing their contravention of the *IRPA*.



[19] As to whether the Applicant organized, induced, aided or abetted one or more persons in coming to Canada, the ID found he had willingly aided the people smuggling venture. The ID was not persuaded that the Applicant "acted under compulsion or force in taking up the function of transporting illegal migrants to Canada." In the ID's view, the Applicant was "motivated to accept the offer made to him to work on the ship in exchange for his passage to Canada because of his strong desire to make it to Canada;" and his actions were also influenced by the fee reduction he received for working on the ship. After reviewing how the Applicant had learned about the ship travelling to Canada and the nature and scope of his functions and duties aboard the Ocean Lady, the ID concluded that the Applicant "contributed significantly" to the operation and manoeuvring of the Ocean Lady "and facilitated the illegal movement of several migrants, thereby aiding and abetting the coming into Canada of a large group of persons."

[20] As to the fourth element of subsection 117(1), the ID found that the Applicant knew that coming into Canada with the 75 other individuals contravened the *IRPA*. In this regard, the ID relied on the Federal Court's decision in *B010 (FC)*, where the Court stated (at para 69):

"section 117 does not require that a person know they are committing an illegal act; it simply requires that they know they are engaging in that act." The ID determined there were "reasonable grounds to believe" that the Applicant knew that coming into Canada with 75 other persons aboard the Ocean Lady contravened the IRPA. Ultimately, the ID concluded:

> [182] …there are reasonable grounds to believe that Mr. Handasamy fits into all realms of the *mens rea* necessary under section 117. He aided or abetted the coming into Canada of several persons, knowing that their coming was or would be in contravention of the *Act*. Even if that analysis is not sound, he would have been wilfully blind to the fact that their coming was or would be in contravention of the *Act*, having knowledge of a need to inquire whether the persons travelling on the Motor Vessel Ocean Lady had visas and/or passports to travel to Canada, and deliberately refraining from engaging in that inquiry. He was also reckless as to whether their coming was or would be in contravention of the *Act*, persisting in travelling to Canada whilst appreciating the grave dangers and risks involved.

[21] After assessing the four elements of subsection 117(1), the ID next assessed whether the smuggling operation of the individuals aboard the Ocean Lady constituted a transnational crime. The ID observed that the phrase "transnational crime" is not defined in the *IRPA* and, accordingly, looked to the definition of a "transnational offence" in Article 3(2) of the *United Nations Convention against Transnational Organized Crime*, 2225 UNTS 209 [*UNCATOC*]; under this Article, an offence is transnational if the offence is committed in more than one country and has substantial effects in another country. The ID noted that the Ocean Lady's voyage involved "the moving of persons from one state territory into another" and would have occasioned "the accrual of significant profits to the organizers of the voyage." The ID further noted that "this people smuggling enterprise" was "one that had substantial effects in Canada." Thus, the ID concluded that the people smuggling venture by the Ocean Lady qualified as a

transnational crime, in accordance with the *UNCATOC*, and satisfied the final element required to establish the allegation under paragraph 37(1)(b) of the *IRPA*.

## III. The Officer's Decision

[22] The Applicant filed an application for leave to seek judicial review of the ID's decision on February 13, 2014. He also applied for relief under section 42.1 of the *IRPA* on February 27, 2014, seeking a declaration from the Minister that he was not inadmissible on grounds of organized criminality despite the ID's determination to the contrary. While these applications were pending, the Officer issued the following notice dated April 7, 2014 to the RPD and the Applicant:

> THE REFUGEE PROTECTION DIVISION IS HEREBY NOTIFIED THAT PURSUANT TO SECTION 104 OF THE IMMIGRATION AND REFUGEE PROTECTION ACT, IT HAS BEEN DETERMINED THAT YOUR CLAIM FOR REFUGEE PROTECTION IS INELIGIBLE TO BE CONSIDERED BY THE REFUGEE PROTECTION SECTION, FOR THE FOLLOWING REASONS:
>
> IN ACCORDANCE WITH PARAGRAPH 101.(1)(f), THE IMMIGRATION DIVISION HAS RULED THAT YOU HAVE BEEN DETERMINED TO BE INADMISSIBLE ON GROUNDS OF ORGANIZED CRIME, AS DESCRIBED IN SECTION 37 OF THE IMMIGRATION AND REFUGEE PROTECTION ACT.
>
> CONSEQUENTLY, PURSUANT TO SECTION 104, THIS NOTICE TERMINATES CONSIDERATION OF YOUR CLAIM FOR REFUGEE PROTECTION.

## IV. Issues

[23] The Applicant raises several issues with respect to the decisions of the ID and the Officer, while the Respondent advances the position that the Court has discretion to uphold the ID's decision despite any errors.

[24] In my view, the following issues require the Court's attention:

1. What is the applicable standard of review?
2. Was the ID's decision reasonable?
3. Was the Officer's decision to terminate the Applicant's refugee claim reasonable?
4. Should the Applicant be awarded costs?
5. Should a question be certified pursuant to paragraph 74(d) of the *IRPA*?



## V. Analysis

### A. *Standard of Review*

[25] The Applicant cites *Hernandez v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1417 at para 31, 422 FTR 159 [*Hernandez*], where the Court found that: "correctness is the appropriate standard of review for… the interpretation of 'people smuggling' in paragraph 37(1) (b) of the Act." However, this finding was overturned by the Federal Court of Appeal when it answered the certified question stated in *Hernandez* in the context of hearing two other appeals, one of which was *JP*. The Court of Appeal held in *JP* (at para 144) that: "The interpretation of paragraph 37(1) (b) of the *IRPA* by the Board is reviewable on a standard of reasonableness."

[26] In *B010 v Canada (Citizenship and Immigration)*, 2015 SCC 58, [2015] 3 SCR 704 [*B010 (SCC)*], the Supreme Court of Canada did not directly address the appropriate standard of review for the interpretation of paragraph 37(1)(b) of the *IRPA*. In this regard, the Supreme Court stated as follows:

> [23] There are potentially two issues to which the standard of review may be relevant: (1) the statutory interpretation of s. 37(1) (b) of the *IRPA*; and (2) the Board's application of s. 37(1) (b). This case turns on the statutory interpretation of the provision, which is determinative.
>
> [24] Recent decisions in the Federal Court of Appeal have taken different views on whether questions of statutory interpretation involving consideration of international instruments should attract review on the standard of correctness or of reasonableness. In *Hernandez Febles v Canada (Citizenship and Immigration)*, 2012 FCA 324, [2014] 2 F.C.R. 224, at paras 22-25, the court applied a correctness standard; while in B010's appeal, now before us, the court concluded that reasonableness was the appropriate standard.
>
> [25] This being the home statute of the tribunal and Ministers, there is a presumption that the standard of review is reasonableness: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para 34. The question is whether this presumption has been displaced in the appeals before us.
>
> [26] We find it unnecessary to resolve this issue on these appeals. In our view, for the reasons discussed below, the interpretation of s. 37(1) (b) of the *IRPA* taken by the Board and supported by the Ministers was not within the range of reasonable interpretations.

[27] Although the Supreme Court reversed the Court of Appeal's decisions in both *JP* and *B010 (FCA)*, it did not question the Court of Appeal's determination that interpretation of paragraph 37(1)(b) of the *IRPA* by the ID is reviewable on a standard of reasonableness. Accordingly, the ID's interpretation of paragraph 37(1)(b) in this case is to be reviewed on the reasonableness standard.

[28] In addition, the ID's decision as a whole is also to be reviewed on the reasonableness standard (see: *B010 (FCA)* at paras 58 to 72). This being so, although the Court can intervene "if the decision-maker has overlooked material evidence or taken evidence into account that is

inaccurate or not material" (*James v Canada (Attorney General)*, 2015 FC 965 at para 86, 257 ACWS (3d) 113), it should not intervene if the ID's decision is intelligible, transparent, and justifiable, and defensible in respect of the facts and the law: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16, [2011] 3 SCR 708.



[29] As to the Officer's decision, the applicable standards of review have been stated as follows in *Tjiueza v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 1247, [2010] 4 FCR 523, where the Court stated that:

> [11] It is clear from the jurisprudence that the issue raised by the applicant is reviewable on a correctness standard. Determining whether or not the officer had the discretion to issue the notice requires statutory interpretation and is therefore a question of law. If he had discretion, whether he failed to exercise it was either an issue of law or of procedural fairness, both of which are reviewable against the standard of correctness. Finally, if it is found that he had discretion and that he did exercise it, whether he exercised that discretion properly is reviewable on a standard of reasonableness.

B. *Was the ID's Decision reasonable?*

[30] The Applicant argues that the ID erred by relying on the Federal Court of Appeal's decisions in *B010 (FCA)* and in *JP* which were subsequently overturned by the Supreme Court of Canada. He contends that the ID's decision should be quashed because it does not accord with the law emanating from *B010 (SCC)*. According to the Applicant, the ID never analysed whether

the Applicant acted in order to obtain, directly or indirectly, a financial or other material benefit, and instead found that this element of the test was irrelevant. Furthermore, the Applicant says that the ID also failed to consider or analyse whether the Applicant acted in order to aid the collective flight of other refugees who were seeking protection in Canada. The Applicant also says that the Court should not uphold the ID's decision, even though it contains an error of law, and urges the Court not to follow the decision in *Appulonappar v Canada (Citizenship and Immigration)*, 2016 FC 914, [2016] FCJ No 969 [*Appulonappar*].



[31] The Respondent says that the ID's decision accords with *B010 (SCC)* because the Applicant received a fare reduction for his voyage on the ship and had better living arrangements than other individuals on the ship. According to the Respondent, the Applicant does not fit into the mutual aid exception to paragraph 37(1)(b) as articulated in *B010 (SCC)* because: his participation was not merely or solely based on mutual assistance among unrelated asylum-seekers as he was providing aid to organized transnational crime; he was not fleeing from risk to safety when he agreed to aid the smugglers; and he did not truly have a collective flight with the other individuals aboard the ship because he testified that he was unaware of the circumstances of the other migrants before boarding the ship. The Respondent says that, if the Court finds that the ID erred in law, the Court should exercise its discretion and uphold the decision because the ID would have reached the same conclusion despite any legal error.

[32] A court ruling which changes the law from what it was previously thought to be, as in the Supreme Court's decision in *B010 (SCC)*, has retrospective and prospective effect; it has a

retrospective effect insofar as the parties in this case are concerned (see: *British Columbia v Imperial Tobacco Canada Ltd*, 2005 SCC 49 at para 72, [2005] 2 SCR 473).

[33] The decision in *B010 (SCC)* effected a fundamental change in Canadian law as it pertains to people smuggling. Speaking for a unanimous Court, Chief Justice McLachlin stated:

> [5] I conclude that s. 37(1) (b) of the *IRPA* applies only to people who act to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. In coming to this conclusion, I outline the type of conduct that may render a person inadmissible to Canada and disqualify the person from the refugee determination process on grounds of organized criminality. I find, consistently with my reasons in the companion appeal in *R. v. Appulonappa*, 2015 SCC 59 (S.C.C.), that acts of humanitarian and mutual aid (including aid between family members) do not constitute people smuggling under the *IRPA*.
>
> …
>
> [72] The wording of s. 37(1) (b), its statutory and international contexts, and external indications of the intention of Parliament all lead to the conclusion that this provision targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime. To justify a finding of inadmissibility against the appellants on the grounds of people smuggling under s. 37(1) (*b*), the Ministers must establish before the Board that the appellants are people smugglers in this sense. The appellants can escape inadmissibility under s. 37(1) (*b*) if they merely aided in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety.

[34] In this case, the ID explicitly and clearly relied upon the Court of Appeal's decisions in *B010 (FCA)* and *JP* for the proposition that "the term 'people smuggling' does not require a profit element." This proposition has now been discredited by the decision in *B010 (SCC)* because paragraph 37(1)(b) of the *IRPA* applies "only to people who act to further illegal entry of

asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime."

[35] The ID's interpretation and application of paragraph 37(1)(b) in this case cannot be justified in light of the decision in *B010 (SCC)* and, consequently, its decision is unreasonable.

[36] Without the benefit of the decision in *B010 (SCC)*, the ID neither directly nor indirectly addressed the critical question of whether the Applicant acted "to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime." Although the ID found the Applicant had paid a reduced amount for his passage to Canada, it also remarked that this amount was "an exorbitant amount of money for his passage to Canada."

[37] I disagree with the Respondent that the ID's finding that the Applicant paid a reduced fee is tantamount to a finding that he acted in order to receive a material benefit. This case is distinguishable from *Appulonappar* in this regard because in that case the ID there, unlike the ID here, explicitly found that Mr. Appulonappar had "received a material benefit in exchange for his agreement to serve as a crew member aboard the Ocean Lady, namely a reduction in the fee for his passage to Canada" (para 14). It is also distinguishable from *Appulonappar* on the basis that the ID conducted an alternative analysis, finding that: "even if a material benefit were required under the definition of 'human smuggling', Mr. Appulonappar would meet the definition because he acted 'to obtain a material benefit,' and that 'the reduction in the fee charged for him to travel to Canada' qualified as a 'financial or material benefit' " (para 34). The ID in *Appulonappar* also

found that “Mr. Appulonappar had ‘no humanitarian purpose’ when he agreed to work as a crew member” (para 36).

[38] The ID in this case did not assess or consider whether the Applicant acted *in order to obtain* a material or financial benefit. The phrase “in order to obtain” suggests that an applicant’s actions must be motivated by the financial or material benefit. It also leaves open the possibility that an applicant may receive a material benefit even though his or her actions are not motivated by such benefit. Since the ID did not consider this element or make any findings of fact that shed light on how this element should be resolved, the ID’s decision must be set aside and the matter returned to the ID for redetermination anew.

[39] Unlike the Court in *Vashakidze v Canada (Citizenship and Immigration)*, 2016 FC 1144 at para 24, [2016] FCJ No 1183 (a case where an inadmissibility determination on grounds of people smuggling was returned to the ID for redetermination upon certain conditions in the wake of *B010 (SCC)*), I do not see any need to restrict or direct the manner by which the redetermination in this case is conducted. However, in view of my reasons above, the redetermination must address at a minimum two essential or critical questions: firstly, whether the Applicant acted “to further illegal entry of asylum-seekers in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime”; and secondly, whether the Applicant’s actions were “of humanitarian and mutual aid” “merely…in the illegal entry of other refugees or asylum-seekers in the course of their collective flight to safety.” The facts of this matter as disclosed in the record are such that there may also be some question of whether the Applicant was engaged in a “transnational crime” since these

words, according to the Supreme Court, “cannot be read as including non-organized individual criminality” (*B010 (SCC)* at para 35).

[40] Aside from the ID’s failure to assess the Applicant’s inadmissibility on the basis of the principles emanating from *B010 (SCC)*, it was neither justifiable nor reasonable for the ID to find that the Applicant had the burden to establish that he is not inadmissible. The burden in this regard lies with the Minister. As the Supreme Court noted in *B010 (SCC)*: “the Ministers must establish before the Board that the appellants are people smugglers” (para 72). Also see *Gechuashvili v Canada (Citizenship and Immigration)*, 2016 FC 365 at para 23, [2016] FCJ No 331.



[41] Lastly, with respect to this issue, I decline the Respondent’s request that the Court should exercise its discretion and uphold the ID’s decision despite the errors noted above. In this regard, the Respondent points to the decision in *Appulonappar*, where the Court stated that:

> [26] A judge may overlook an error of law that is not conclusive, or if the judge is satisfied that, had the tribunal applied the right test, it would have come to the same conclusion (*Cartier v Canada (Attorney General)*, 2002 FCA 384 at para 33 [*Cartier*]). It is futile to quash a tribunal’s decision due to an error of law and refer the case back for redetermination if the tribunal would “unavoidably arrive at the same conclusion, although this time for the right reasons” (*Cartier* at para 35). However, a decision that is based upon an incorrect apprehension of the law may be upheld only in “the clearest of circumstances” (*Cartier* at para 34, citing *Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31).

[42] In this case, I am not convinced that, upon redetermination, the ID would unavoidably or inevitably reach the same conclusion with respect to the Applicant’s inadmissibility. In view of the jurisprudence at the time the ID rendered its decision, the ID did not fully assess the evidence

before it with the principles emanating from *B010 (SCC)* in mind. The ID's decision is devoid of the analysis that is now required in view of *B010 (SCC)*.

C. *Was the Officer's decision to terminate the Applicant's refugee claim reasonable?*

[43] The Officer's decision to issue the notice and terminate the Applicant's refugee claim pursuant to section 104 of the *IRPA* cannot be justified and, consequently it was not reasonable because it was premised upon a faulty and unreasonable determination of inadmissibility by the ID. It is unnecessary to address the parties' arguments as to the scope of the Officer's discretion under section 104 of the *IRPA* or whether the Officer should have waited until after the applications for judicial review and for Ministerial relief were resolved before terminating the Applicant's refugee claim.

[44] The Officer's decision is therefore set aside and the Applicant's claim for refugee protection can now proceed.

D. *Should the Applicant be awarded costs?*

[45] Rule 22 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, precludes an award of costs in the absence of "special reasons".

[46] The Applicant submits that he is entitled to costs on the post-leave portion of this application because there are special reasons and points to the decision in *Ndungu v Canada (Citizenship and Immigration)*, 2011 FCA 208 at para 7, 204 ACWS (3d) 31, where the Federal

Court of Appeal stated that special reasons justifying costs against the Respondent may be found if: “the Minister unreasonably opposes an obviously meritorious application for judicial review”. The Respondent says there are no special reasons justifying costs in this case.



[47] I agree with the Respondent that the circumstances of this case are not such that an award of costs in favour of the Applicant is warranted.

E. *Should a question be certified pursuant to paragraph 74(d) of the IRPA?*

[48] Subsequent to the hearing of this matter, the Applicant and the Respondent each made written submissions as to the certification of questions, the Applicant with reference to the Officer’s decision and the Respondent with reference to the ID’s decision.

[49] In *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, [2014] 4 FCR 290, the Federal Court of Appeal stated as follows:

> [9] It is trite law that to be certified, a question must (i) be dispositive of the appeal and (ii) transcend the interests of the immediate parties to the litigation, as well as contemplate issues of broad significance or general importance. As a corollary, the question must also have been raised and dealt with by the court below and it must arise from the case, not from the Judge’s reasons… [Citations omitted]

[50] After reviewing and considering the parties’ submissions in this regard, certification of a question in IMM-3760-14 would not be appropriate because the basis of the Officer’s decision is negated by my determination that the ID’s decision as to the Applicant’s admissibility was unreasonable. Certification of a question in IMM-881-14 would also not be appropriate because

the ID has yet to apply the law emanating from *B010 (SCC)* to the facts of this case, and any open questions of law or mixed fact and law should be decided by the ID and not by this Court.

## VI. Conclusion

[51] The ID's decision (IMM-881-14) is unreasonable as it does not reflect changes in the law flowing from *B010 (SCC)*. As a result, the Officer's decision to terminate the Applicant's refugee claim (IMM-3760-14) must also be set aside because it is based on the ID's unreasonable decision.

## JUDGMENT

**THIS COURT'S JUDGMENT is that:** the application for judicial review is allowed in each of Court file IMM-881-14 and Court file IMM-3760-14; the decision of the Immigration Division of the Immigration and Refugee Board dated January 22, 2014, is set aside and the matter is returned for redetermination by a different member of the Immigration Division in accordance with the reasons for this judgment; the immigration officer's issuance of a notice terminating the Applicant's claim for refugee protection dated April 7, 2014, is set aside and the Applicant's claim for refugee protection can now proceed; no question of general importance is certified; and a copy of this judgment and reasons shall be placed in each of Court Files IMM-881-14 and IMM-3760-14.

"Keith M. Boswell"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKETS:** | IMM-881-14 AND IMM-3760-14 |
| **STYLE OF CAUSE:** | HAMALRAJ HANDASAMY v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 12, 2016 |
| **JUDGMENT AND REASONS:** | BOSWELL J. |
| **DATED:** | DECEMBER 19, 2016 |



**APPEARANCES:**

| | |
|---|---|
| Jared Will<br>Joshua Blum | FOR THE APPLICANT |
| Gregory G. George<br>Laoura Christodoulides | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Jared Will & Associates<br>Barristers and Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |