File No.:35958

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

FRANCIS ANTHONIMUTHU APPULONAPPA
HAMALRAJ HANDASAMY
JEYACHANDRAN KANAGARAJAH
VIGNARAJAH THEVARAJAH

APPELLANTS

AND:

HER MAJESTY THE QUEEN

RESPONDENT

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APPELLANT'S FACTUM

PART I: OVERVIEW AND FACTS

A. OVERVIEW

1. This appeal concerns the constitutionality of Section 117 of the *Immigration and Refugee Protection Act*, 2001 S.C., c. 27 *(IRPA)*. Specifically, the issue is whether section 117 of *IRPA* violates section 7 of the *Canadian Charter of Rights and Freedoms* and if so, whether the violation is demonstrably justifiable in a free and democratic society pursuant to s. 1 of the *Charter*.

2. This Appellant's submission is that, in addition to adopting the submissions of the other Appellants on overbreadth, s.117 is unconstitutionally vague in so far as a proceeding cannot be initiated without the Attorney General's consent, and yet the *IRPA* does not provide any transparent criteria for determining when the Attorney General's consent will be granted or withheld.

3. The Appellants were charged with organizing the illegal entry into Canada of a group of 10 or more individuals contrary to section 117 of *IRPA*. The charge related to events leading to the arrival of 76 undocumented Sri Lankan Tamil migrants in Canada aboard the MV Ocean Lady, which was apprehended off the coast of British Columbia on October 17, 2009.[1]

4. In June, 2011, the Appellants were arrested in Ontario (where they resided) and were returned to British Columbia for a show cause hearing in the Supreme Court of British Columbia. They were released on conditions of bail.

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[1] Reasons of Trial Judge on Voir Dire ("BCSC Reasons") at para. 42, Joint Appellants' Record ("AR"), vol. I at p.8.

5. The prosecution proceeded by way of a direct indictment in the Supreme Court of British Columbia, at Vancouver.

6. In a pre-trial motion, the Appellants applied to the British Columbia Supreme Court, for a declaration that s. 117 of the *IRPA* was of no force and effect for violating s. 7 of the *Charter*, infringing liberty interests in a vague, overbroad manner, contrary to the principles of fundamental justice.

7. The trial judge found that s. 117 was enacted in order to prevent human smuggling. He found that the section engaged liberty interests but was overbroad because, in light of Canada's international obligations, it criminalized a broader range of conduct and persons than was necessary to achieve any legitimate government objective. In light of this finding, the judge declined to deal with the argument that s. 117 was vague.[2]

8. The British Columbia Court of Appeal overturned the trial judgment. On appeal, the Crown revised its position and argued that the objectives of s. 117 were broader than the prevention of human smuggling.[3] The Court of Appeal agreed and found that the section was not therefore overbroad.[4] In doing so, it is respectfully submitted that the Court of Appeal misunderstood the guidance of this Court, the process of seeking asylum in Canada as well as Canada's international law and *Charter* obligations to refugees.

9. This Appellant therefore seeks to uphold the trial judge's ruling that s.117 is unconstitutional but is seeking a determination of the allegation of vagueness which was advanced at trial but not decided. It is submitted that in the reasons for judgment of the trial judge, his findings support the contention that the law is unconstitutionally vague. Without knowing when or why the discretion will be applied, an accused does not know what conduct will risk criminal sanction

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[2] BCSC Reasons at para. 181, AR, vol. I at 39.
[3] BCCA Reasons at para. 40, AR, vol.I, at 62
[4] Reasons of the British Columbia Court of Appeal ("BCCA Reasons") at paras. 142,143, AR, vol.I, at 95

and what will not. On the one hand, s.117 appears to capture everyone but on the other, the Attorney General appears to allow exemptions from prosecution based on the public interest. The Crown has not established any objective for s. 117 that is pressing and substantial enough to warrant criminalizing humanitarians and family members of refugees who may be refugees themselves.

B. FACTS

The scheme of the IRPA

1. As it stood at the time of the BCSC proceedings, s. 117 created the offence of knowingly organizing, inducing, aiding or abetting the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by the *IRPA*.[5]

2. The very substantial penalties for the offence were set out in subsection 2 of s. 117, being, upon conviction on indictment, for a first offence, a maximum of a $500,000 fine or 10 years in prison, or both, for an offence with respect of fewer than 10 persons. Upon a subsequent offence, the penalty increased to a maximum of a fine of $1,000.000 or 14 years in prison, or both. If the offence is prosecuted summarily, the maximum penalty was $100,000 fine or 2 years in prison, or both.[6]

3. If the offence involved more than 10 persons, as it does in this case, the penalty increased to a maximum fine of $1,000.000 or life imprisonment, or both. Summary conviction was not available for an offence involving 10 or more persons.[7]

4. However, no proceedings for any offence under s. 117 may be instituted without the consent of the Attorney General of Canada. There is no other

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[5] *IRPA* s. 117, prior to 2012 amendments
[6] *ibid*
[7] *ibid*

offence in *IRPA*, including that of human trafficking in section 118, which requires the consent of the Attorney General of Canada to institute a prosecution.[8]

5. Profit motive was not a constituent element of the offence but was relevant as an aggravating factor for the purposes of sentencing pursuant to s. 121 and the amended s. 117(3.2) of *IRPA*. It is worth noting subsequent to the changes made to the *IRPA* in 2012 section 121 no longer applies to section 117.[9]

6. The consent of the Attorney General is supposed to act as a filter for reviewing potential charges before they are laid. *IRPA* itself provides no guidance or criteria as to when the Attorney General's consent will be granted or withheld and the exercise of the discretion is not reviewable by a court. [10]

7. The only guidance as to when that consent might be granted or withheld is to be found in the dual criteria which generally governs the exercise of prosecutorial discretion: whether there is a substantial likelihood of conviction and whether it is in the public interest to prosecute. It is the undefined "public interest" component which is to be applied in the exercise of the discretion which, it will be argued, renders the section unconstitutionally vague because it provides no basis for legal debate.

Proceedings before the Supreme Court of British Columbia

8. In a pre-trial motion before the Supreme Court of British Columbia, the Appellants applied under section 7 of the *Canadian Charter of Rights and Freedoms*, for an order declaring that s. 117 of *IRPA*, infringed section 7 of the *Charter*. The Appellants argued that the section was vague and overbroad and was inconsistent with the principles of fundamental justice. The Appellants also argued that section 117 of *IRPA* could not be saved by section

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[8] *IRPA* s. 117(4)
[9] *IRPA* s. 121, s. 117(3.2) as amended
[10] *R. v. Anderson*, 2014 SCC 41

1 of the *Charter*.

9. In reply, the Respondent addressed both issues in writing and in oral argument.

The Evidence of the Experts

10. Both the Appellants and Respondents led expert evidence on the *voir dire* in order to provide evidence regarding the aims of s. 117 and its place within the context of the *IRPA* and international instruments to which Canada is a signatory.

11. The Appellants led evidence from Professor Catherine Dauvergne, an expert in the area of refugee law. Professor Dauvergne testified about Canada's obligations to refugees under the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6 (the "*Refugee Convention*"). She testified that:

- There are around 10 million refugees in the world. Canada has a good international resettlement program, which is facilitated by the UNHCR, which aims to bring in about 10000 refugees a year, but often falls short of this target. The target itself is low compared to the unmet needs of 10 million refugees. [11]
- There is no resettlement queue for refugees accepted by UNHCR. [12]
- Resettlement is prioritized according to other criteria. It is possible that a refugee accepted for the program by UNHCR will never be resettled.[13]
- If one's only aim in coming to Canada is to make a refugee claim, there is no legal way to do so. There is no immigration queue between refugees and others who obtain visas to come to Canada.[14]

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[11] Testimony of Professor Dauvergne, AR vol II at 29, lines 10-47; at 30 lines 1-14; at 89 line 1
[12] Testimony of Professor Dauvergne, AR vol II at 30 lines 34-47; at 34 lines 37-47; at 35 lines 1-2; at 92 lines 13-14
[13] Testimony of Professor Dauvergne, AR vol II at 31 lines 1-22
[14] Testimony of Professor Dauvergne, AR vol II at 18, lines 41-46; at 26, line 28-34; at 89 line 46

- Refugees are persons who face hardships and often urgent, life-threatening situations. Sometimes they must escape their countries of origin quickly, and often, the only means of doing so are with the assistance of a smuggler.[15]
- Article 31 of the *Refugee Convention* does not mandate that states facilitate the arrival of refugees into the borders of the state. It is arguable, however, that Article 31 does impose an obligation on signatory states to allow asylum seekers into the territory for the purposes of making refugee claims. [16]
- Article 31 of the *Refugee Convention* prohibits signatory states from penalizing refugees for breaching immigration laws when entering the state to seek protection. It also prohibits the states from penalizing those who later fail their refugee claims, but made those claims in good faith.[17]

12. The Crown led the evidence of Yvon Dandurand, a criminologist and an expert in smuggling. Mr. Dandurand testified that:

- The *Convention against Transnational Organized Crime*, 15 November 2000, 2225 U.N.T.S. 275 ("*UNCTOC*") and the *Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime,* 15 November 2000, 2241 U.N.T.S. 507 (the "*Protocol*") set minimum standards that require signatory states to criminalize and prosecute human smuggling.[18]
- Both the *UNCTOC* and the *Protocol* expressly intend that signatory states continue to protect the human rights of the smuggled and asylum seekers.[19]
- In order to punish those who profited from smuggling, not refugees or

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[15] Testimony of Professor Dauvergne, AR vol II at 16, lines 21-42; at 19; at 37 lines 18-32; at 42 lines 1-6
[16] Testimony of Professor Dauvergne, AR vol II at 14, lines 22-29
[17] Testimony of Professor Dauvergne, AR vol II at 17, lines 17-32; at 37 line 37-47; at 66 lines 28-34
[18] Testimony of Yvon Dandurand, AR vol II at 146 lines 26-35; at 148 line 23-30; at 152 lines 1-20
[19] Testimony of Yvon Dandurand, AR vol II at 175 lines 1-4

humanitarians who worked to help refugees, the drafters of the *Protocol* consciously made "material benefit" an element of the definition of smuggling. In light of the *Protocol's* objectives to preserve the rights of smuggled migrants, the aim of the *Protocol* was the prosecution of those who exploited them, not assisted them.[20]

- It was possible for signatory states to conceive of a broader definition of smuggling than that in the *Protocol*, for example, it could be any act done by anyone to help another into the territory of a state.[21]
- The *Protocol* definition of smuggling was intended to define smuggling without preventing states from achieving other objectives, some better than others, of preventing illegal migration.[22]
- A broader definition than that contained in the *Protocol* would capture the actions of humanitarians and refugee claimants who assisted one another. That likely no one would call these actions "smuggling" even though they were technically smuggling. No one would prosecute these actions as "smuggling". That criminalizing the actions of humanitarians and refugees would be contrary to the *Protocol's* intent, but not its minimum requirements that smuggling for material benefit be criminalized.[23]
- A broader definition of smuggling may be necessary for signatory states to prosecute "domestic" as opposed to transnational smuggling. However, the difference between smuggling and trafficking in persons, besides the element of exploitation in trafficking, is that smuggling is by definition transnational. [24]
- He did not know what standard Canada actually used when prosecuting offences under s. 117.[25]

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[20] Testimony of Yvon Dandurand, AR vol II at 148 lines 5-19; at 156 lines 1-5; at 166 lines 13-17
[21] Testimony of Yvon Dandurand, AR vol II at 138 lines 4-11; at 164 lines 9-23; at 167 lines 1-7
[22] Testimony of Yvon Dandurand, AR vol II at 163 lines 21-28
[23] Testimony of Yvon Dandurand, AR vol II at 164 lines 40-47; at 165 lines 8-15; at 170 lines 9-13; at 174 lines 34-40
[24] Testimony of Yvon Dandurand, AR vol II at 140 lines 21-22
[25] Testimony of Yvon Dandurand, AR vol II at 159 lines 11-16

The Ruling of the Trial Judge

13. The trial judge decided that s. 117 was overbroad.[26] Partly based on the Respondent's position, the trial judge decided that the objectives of s. 117 were to combat human smuggling while protecting the rights of victims and refugees. However, the trial judge also found that contrary to Parliament's intent and various international instruments to which Canada is a signatory including the *Refugee Convention*, s. 117 criminalized family members and humanitarians, whom it did not intend to prosecute.

14. At para 153 of his Reasons, the trial judge found as fact that it was not possible to know what conduct was criminalized by s. 117. He stated:

> [153] The overbreadth of the section makes it impossible for persons to know if certain activities (those of humanitarian aid workers and close family members) will result in charges under s. 117, despite Canada's intention to the contrary. One of the reasons for the rule against overbroad sections is that persons are entitled to prior notice as to what are the limits of proper behaviour, and what is criminal behaviour. [27]

15. The trial judge found that the overbreadth could not be cured by the requirement for the consent of the Attorney General for prosecution in s. 117(4). He found that because s. 117(4) had no substantive content, it did not enable one to know how the discretion would exercised, nor for example, enable a lawyer to advise their client about whether or not their actions would be prosecuted. [28]

16. Having decided the section was unconstitutional in its overbreadth, the trial judge stated that it was unnecessary to decide the Appellant's argument with respect to vagueness, and he declined to do so.[29]

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[26] BCSC Reasons at paras. 138-143, 146, AR, vol. I, at 30-31
[27] BCSC Reasons at para. 153, AR, vol. I, at 33
[28] BCSC Reasons at para. 153, AR, vol. I, at 33
[29] BCSC Reasons at para. 181, AR, vol. I, at 39

17. However, given the above, it is this Appellant's submission that it is implicit in the reasons given by the trial judge for deciding s. 117 was overbroad, that the provision is unconstitutionally vague.

Proceedings before the British Columbia Court of Appeal

18. The Respondent appealed the trial judge's ruling that s. 117 was overbroad to the British Columbia Court of Appeal ("BCCA").

19. The BCCA overturned the ruling of the trial judge. Based on the revised position of the Crown, the BCCA decided that the objectives of s. 117 were to protect Canada's borders and prevent anyone from arranging the unlawful entry of others into Canada and not to prevent human smuggling.[30]

20. However, at para. 109, the BCCA found that Parliament had intended to create a broad offence to "firmly combat human smuggling"

> 109. It is evident that Parliament ultimately opted to enact a broad offence to firmly combat human smuggling. The legislators acknowledged, however, that the myriad factors at play in providing assistance to refugee claimants would produce some difficult and sensitive cases in which prosecution would be undesirable. They accordingly chose to enact s. 117(4) as the continuing policy instrument that would provide a filter in approving proceedings and precluded any charges under s. 117 without a full assessment of all relevant circumstances, including motive, in the context of the two federal criteria for charge-approval: whether there is a reasonable prospect of conviction, and whether prosecution is in the public interest.[31]

21. The BCCA agreed with the Crown that motive was not a constituent element of the offence in s. 117 but that the consent of the Attorney General would act

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[30] BCCA Reasons at paras. 72, 81, AR, vol. I, at 71, 75

[31] BCCA Reasons, at para. 109, AR, vol. I, at 84

as a filter for reviewing potential charges before they were laid.[32] The BCCA disagreed with the trial judge that the Appellants had established Parliament's clear intent to exempt humanitarian workers or family members from prosecution. Since the Respondent had in fact proceeded against both family members and humanitarians, and the provisions enabled it to do so, the offence was not overbroad in the domestic sphere.

22. Turning to international law, the BCCA found that there was nothing in international law that prevented Parliament from criminalizing humanitarians and family members. Despite the Crown expert's testimony that they were excluded from the definition of smugglers in the *Protocol*, in order to meet the *Protocol's* express commitment to protecting the rights of migrants, the BCCA found that nothing in the *Protocol* prevented Parliament from creating an offence that was broader than that in the *Protocol*. Similarly, nothing in the *Refugee Convention* that prevented the legislation of a broad offence.[33]

23. In reaching its conclusions the BCCA did not consider whether or not the *Protocol* and *Refugee Convention* prevent the criminalizing of refugee claimants who assist each other to enter Canada, which the trial judge had found as a fact to be possible.[34]

24. Furthermore, despite the *Protocol's* clear definition of humanitarians as those who do not act for material benefit, the BCCA commented that the definition of who was and was not a humanitarian was subjective. The BCCA was concerned that humanitarians may assist the arrival of those who "having jumped the queue, are routinely found to be illegal aliens rather than "genuine" refugees." [35] This finding was made despite the uncontested testimony of Professor Dauvergne that Article 31 of the *Refugee Convention*

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[32] BCCA Reasons, at para. 65, 143, AR, vol. I, at 69, 95-96
[33] BCCA Reasons at para. 120, AR vol I at 89.
[34] BCSC Reasons at para. 149, AR vol I t 32.
[35] BCCA Reasons at para 108, AR vol I at 85

prohibits the penalizing of those who make refugee claims in good faith even if they fail, that there is no queue for refugees to come to Canada, that the people who assist such people may be refugees themselves and that there are many reasons why people fail refugee claims that have nothing to do with whether or not they were *bona fide*.[36]

25. Vagueness was not raised as a distinct issue on appeal before the BCCA but submissions were made by both Appellants and Respondent about the relationship of the required prosecutorial discretion to the constitutionality of section 117. The Crown took the position that profit motive or humanitarian motives may be relevant to the Attorney General's decision to prosecute "in the public interest" but that had no effect on the constitutionality of section 117.[37]

26. With respect to some difficult scenarios raised by the Appellants (Respondents before the BCCA) about the potential criminalization of a refugee mother who brought her child to Canada, the BCCA relied on the reasoning of the Federal Court of Appeal in *B010 v. The Minister of Immigration*, 2013 FCA 87, stating that "common sense" will prevail.[38]

27. Despite citing the statement of the Assistant Deputy Minister of Citizenship and Immigration at paragraph 83, confirming that up to that point there had been "no prosecution of anyone involved in trying to help refugees come to Canada," the BCCA decided that while such discussions may be admissible in constitutional cases, the Court should exercise caution in determining how much weight they should have.[39]

28. Before the decision was rendered by the BCCA, the Court requested further submissions on two cases, *R. v. Callahan* (1 November 2012), Thunder

[36] Testimony of Professor Dauvergne, AR vol II at 37, 66, 89-90
[37] BCCA Reasons at para 109, AR vol II at 89
[38] BCCA Reasons at para 138, AR vol II at 94
[39] BCCA Reasons at paras. 83, 91, AR at 75, 79

Bay 113204 (Ont. C.J.) and *R. v. Bello*, [2004] O.J. No. 5312 (C.J.). *Callahan* was the only reported case of a prosecution for a citizen helping refugee claimants on purely humanitarian motives.

29. In its decision, the BCCA made reference to the utility of section 117(4) in *IRPA*, at para. 109. However, the Court specifically did not address the arguments raised by the *Callahan* decision about the way in which the discretion is applied, at para. 109. Even though this was a crown appeal of a successful constitutional challenge, the Court stated:

> 112. Finally, the respondents complain the shifting position of the Crown make is impossible to discern who will be charged under s. 117. They say the discretion under s.117(4) is being exercised arbitrarily on unknown criteria, and those who offer assistance to refugee claimants in illegally entering Canada are unable to assess the risk of attracting criminal sanctions under s.117, or to challenge the Crown's decision to prosecute. With respect, these complaints lie beyond the question of unconstitutional overbreadth raised on this appeal.[40]

PART II: POINTS IN ISSUE

30. On November 21, 2014, The Chief Justice granted an order stating the following constitutional questions at issue in this appeal:

1. Does s.117 of the *Immigration and Refugee Protection Act,* S.C.2001, c.27, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

2. If so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

PART III: ARGUMENT

31. This Appellant agrees with the other Appellants that s. 117 is overbroad and

[40] AR vol I at 86-87

adopts their arguments in that regard. The Appellant submits also that s. 117 is vague.

32. The trial judge found as fact that it is impossible to know what range of conduct is criminalized by s. 117 and that it is impossible to know what criteria inform a decision of the Attorney General to prosecute a person for an offence.[41] However, it is submitted that a review of all the materials in this appeal before the Court in this case reveals an inability of government officials, lawyers, experts and courts to identify or agree on the following: the constituent elements of the offence created by section 117 of *IRPA* or even whether it is human smuggling; defences to the offence; the objectives of s. 117; the content of the Attorney General's discretion to prosecute or not prosecute pursuant to s. 117; or the targets for prosecution under s. 117. This confusion exemplifies why s. 117 impermissibly vague on its face as an offence, and it cannot be said that s. 117 is a limit on liberty interests that is "prescribed by law" within the meaning of s. 1.

Vagueness as an issue on appeal

33. The constitutional question as stated above makes no distinction between vagueness and overbreadth. However, given the importance of the constitutional issue, it is submitted that to preclude a consideration of vagueness, given the history of these proceedings could undermine the legitimacy of the Court's judgment.[42]

34. The issue of vagueness was raised before, but not decided by, the trial judge in the BCSC. In the BCCA, vagueness was not raised as a ground of appeal by the Appellant but the role of the required discretion in the impugned section was clearly discussed. The BCCA made no pronouncement as it was beyond

[41] BCSC Reasons at paras. 153, 161, AR vol I at 33, 35.
[42] See BCCA Reasons at para. 46, AR vol I at 64

the scope of the appeal question. Nevertheless the role of s. 117(4) is discussed throughout.

35. The Appellants advanced the ground in their Notice of Motion to State Constitutional Question, at paragraph 13 of their Argument.

36. The Appellant's aim is to uphold the decision of the Supreme Court of British Columbia. The vagueness argument was previously advanced but not expressly decided. The Respondent is aware of the issue of the Attorney General's discretion and has addressed it to some extent in both courts below.

The law on vagueness

37. There is no dispute in this appeal that section 7 of the *Canadian Charter of Rights and Freedoms* in engaged. As summarized by Gonthier J. in *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, vagueness can be raised under section 7 of the *Charter* since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter in limine* on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". That threshold being high, nevertheless, a law that does pass this threshold test may still not qualify as a reasonable limit under section 1 of the *Charter*.

38. The content of the doctrine of vagueness rests on two theoretical foundations: fair notice to the Citizen and the limitation of enforcement discretion.

39. In *Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.)*, [1990] 1 SCR 1123 [*Prostitution Reference*], this Court gave an overview of many relevant principles regarding vagueness, including its relationship to overbreadth:

> The proper approach to adopt in understanding the relationship between vagueness and overbreadth has been stated by Marshall J., speaking for the U.S. Supreme Court in *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), at pp. 494-95:

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

The relationship between vagueness and overbreadth in Canadian law has been expressly addressed in *R. v. Zundel* (1987), 1987 CanLII 121 (ON CA), 31 C.C.C. (3d) 97 (Ont. C.A.), in a decision rendered "By the Court" at pp. 125-26:

Vagueness and overbreadth are two concepts. They can be applied separately, or they may be closely interrelated. The intended effect of a statute may be perfectly clear and thus not vague, and yet its application may be overly broad. Alternatively, as an example of the two concepts being closely interrelated, the wording of a statute may be so vague that its effect is considered to be overbroad. Vagueness or overbreadth, for the purpose of determining the permissibly regulated area of conduct, and whether freedom of expression under s. 2(*b*) of the Charter has been breached, may be different from vagueness or overbreadth for the purpose of applying the criteria in *Oakes* as to the application of s. 1 of the Charter.

... It would seem to me that since the advent of the *Charter*, the doctrine of vagueness or overbreadth has been the source of attack on laws on two grounds. First, a law that does not give fair notice to a person of the conduct that is contemplated as criminal, is subject to a s. 7 challenge to the extent that such a law may deprive a person of liberty and security of the person in a manner that does not accord with the principles of fundamental justice. Clearly, it seems to me that if a person is placed at risk of being deprived of his liberty when he has not been given fair notice that his conduct falls within the scope of the offence as defined by Parliament, then surely this would offend the principles of fundamental justice. Second, where a separate *Charter* right or freedom has been limited by legislation, the doctrine of vagueness or overbreadth may be considered in determining whether the limit is "prescribed by law" within the meaning of s. 1 of the *Charter*. In this regard I quote from the decision of Hugessen J. of the Federal Court of Appeal in *Luscher v. Deputy Minister, Revenue Canada, Customs & Excise*, [1985] 1 F.C. 85, at pp. 89-90:

In my opinion, one of the first characteristics of a reasonable limit prescribed by law is that it should be expressed in terms sufficiently clear to permit a determination of where and what the limit is. A limit which is vague, ambiguous, uncertain, or subject to discretionary determination is, by that fact alone, an unreasonable limit. If a citizen cannot know with tolerable

> certainty the extent to which the exercise of a guaranteed freedom may be restrained, he is likely to be deterred from conduct which is, in fact, lawful and not prohibited. Uncertainty and vagueness are constitutional vices when they are used to restrain constitutionally protected rights and freedoms. While there can never be absolute certainty, a limitation of a guaranteed right must be such as to allow a very high degree of predictability to the legal consequences.[43]

40. In the same case, the test for vagueness was articulated as:

> The precise standards for evaluating vagueness were further developed and enunciated in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), at pp. 108-9:
>
> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. . . . Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application....
>
> Also, as the Ontario Court of Appeal has held in *R. v. LeBeau* (1988), 1988 CanLII 3271 (ON CA), 41 C.C.C. (3d) 163, at p. 173, "the void for vagueness doctrine is not to be applied to the bare words of the statutory provision but, rather, to the provision as interpreted and applied in judicial decisions".
>
> The fact that a particular legislative term is open to varying interpretations by the courts is not fatal. As Beetz J. observed in *R. v. Morgentaler*, 1988 CanLII 90 (SCC), [1988] 1 S.C.R. 30, at p. 107, "[f]lexibility and vagueness are not synonymous". Therefore the question at hand is whether the impugned sections of the *Criminal Code* can be or have been given sensible meanings by the courts. **In other words is the statute so pervasively vague that it permits a "standardless sweep" allowing law enforcement officials to pursue their personal predilections?** (See *Smith v. Goguen*, 415 U.S. 566 (1974), at p. 575, and *Kolender v. Lawson*, 461 U.S. 352 (1983), at pp. 357-58.) [Emphasis added].[44]

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[43] *Prostitution Reference, supra* at 1154-1155

[44] *Prostitution Reference, supra* at 1153-1154.

41. In *Nova Scotia Pharmaceutical Society*, the Court held that the substantive aspect of fair notice was that "certain conduct is the subject of legal restrictions". This was elaborated further in *R. v. Levkovic*, 2013 SCC 25, [2013] 2 S.C.R. 204, in which Fish J, speaking for the majority referred with approval, at para. 3 to statement of the Chief Justice, who was speaking for the Court in *R. v. Mabior*, 2012 S.C.C. 47, [2012] S.C.R. 584 at para. 14:

> It is a fundamental requirement of the rule of law that a person should be able to predict whether a particular act constitutes a crime at the time he commits the act. The rule of law requires that laws provide in advance what can and cannot be done. ...Condemning people for conduct that they could not reasonably have known was criminal is Kafkaesque and anathema to our notions of justice. After the fact condemnation violates the concept of liberty in s. 7 of the *Canadian Charter of Rights and Freedoms* and has no place in the Canadian legal system.

42. The doctrine of vagueness applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precisions when it enacts legal dispositions.[45]

43. If the doctrine of vagueness aims to ensure that all dispositions are framed in terms which permit meaningful legal debate, then all dispositions are subject to this doctrine regardless of their form.[46]

Application to the case at bar

44. In this appeal, it is submitted that s.117 of the *IRPA*, while appearing on its face to provide fair notice to a citizen of unlawful conduct, in fact does not, because some conduct is capable of being excused and not prosecuted and other conduct is prosecuted under the same section.

45. There are numerous incurable problems in s.117, the crux of the matter being that the structure of the section does not enable any meaningful legal debate

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[45] *Nova Scotia Pharmaceutical Society, supra* at 642.
[46] *R. v. Morales*, [1992] 3 S.C.R. 711 at 729.

about the conduct criminalized. The Attorney General usurps the role of the Court in deciding what is and is not criminalized by s. 117. The true elements of the offence and potential defences are not discernible to the public. For example, motive appears to be a relevant factor but there is no statement about that in the law or for that matter, regarding any other criteria or considerations. This results in the "standardless sweep" or reliance on "common sense" impugned in the *Prostitution Reference*.

46. However, the difference between the offences of human smuggling, if there is such a thing, and that of section 117 of the *IRPA* is also not clear. What makes one different from the other? The Respondent's shift in position from the trial to the appeal, at odds at all times with the view of "smuggling" taken by its own expert is illustrative of the lack of consistent policy and inability to pin down what conduct it is that s. 117 of the *IRPA* intends to render criminal.

47. It cannot be ascertained if humanitarian principles, such as humanitarian motive or absence of material benefit are constituent elements of any offence criminalized by s. 117, if they are part of motive only or if they are considered at all by the Attorney General before a decision is made to proceed with prosecution.

48. Therefore, an accused person, or a layperson who may be in the exigent circumstance of considering whether to help a family member escape a place of danger, will not know the constituent elements of the offence, nor any potential defences. Nor will a lawyer, if they choose to consult one. Nor will the Court be able to tell whether an accused is being prosecuted for smuggling or some other offence pursuant to s. 117.

49. At paragraph 161 of his Reasons for Judgment, the trial judge detailed all the flaws that render s. 117 afoul of the words of Fish J. in *Levkovic*, *supra* and explained how it represents a quandary for humanitarian aid workers and family members of refugees:

1. If, as the Crown suggests, s. 117(4) operates as a matter of law to protect humanitarian aid workers (and others who the Crown may choose not to prosecute), how does the humanitarian worker raise that issue? Is it the same as a defence? Does it get raised in a court of law? Is there access to the Attorney General to that it can be raised? Upon whom does the burden rest? How can when can a challenge to the decision to prosecute be made?

2. If there is such an obligation at law, how could it be reviewed? Is there a right of appeal? Is there a right to judicial review? If there is such a right in any circumstances at all, is it as broad a right as would be a right of appeal from more finely crafted legislation?

3. Even if there were a policy under s. 117(4) to guide the Attorney General, there is nothing preventing that policy being changed by administrative fiat.

4. There is no evidence at all before me with respect to when or how the Attorney General might exercise his discretion.

5. The Crown expert was not aware of what standard Canada uses in dealing with the discretion under s. 117(4).

6. There is also nothing requiring that any such standard be made public. Even if there was such a standard, and it was made public, it would not enable a lawyer to advise a client with respect to potential jeopardy for anticipated conduct with the same certainty that such advice could be given if it were based upon actual legislation. How can a person ever know whether or not the Attorney General would consent to a charge being laid.[47]

50. Although the Respondent Crown changed its position before the BCCA from being that, as a matter of law, s. 117(4) operates to protect humanitarian workers and family members to that of humanitarian motive being one factor to consider in exercising discretion to prosecute, it is submitted that that change makes no difference to the vagueness argument. In fact, it strengthens it because it is even less clear who will be captured by the offence.

51. In addition to the list of shortcomings in fair notice expressed by the trial judge, once a person has been charged, as humanitarian motive is neither an element of the offence nor a defence, a judge cannot instruct a jury on that

[47] BCSC Reasons at para 161, AR vol I at 35

question. So, once the charge has been laid, entirely at the discretion of the Attorney General, assuming that the elements of the offence are proven, conviction will ensue. That is what happened in the *Callahan* case.

52. It is submitted that the unfettered discretion of the Attorney General, based only upon a consideration of whether there is a reasonable prospect of conviction or whether it is in the public interest to prosecute, is akin to the "standardless sweep" referred to by Lamer J. in the *Prostitution Reference*. It is an enormous power to confer on the Attorney General a discretion to decide who to prosecute based on unknown criteria. Regardless of the Respondent's shifting position on section 117(4), the question remains: How would a person know in advance that their conduct will attract criminal sanction or might be exempted in the public interest? Without looking at the legislative debates or previous case law, which up until *Callahan*, appeared to focus on profit schemes, it is impossible to tell who is captured by this legislation.

53. If one is chosen to be prosecuted, presumably the law will be broad enough to encompass one's activity. This means that the illegality of the action rests in the discretion of the prosecutor. This makes the Attorney General both the prosecutor and the judge, offending the rule of law.

54. The BCCA's comment that "common sense" will prevail demonstrates that as opposed to rigorous legal standards, s. 117 of the *IRPA* leaves everything to the discretion of the authorities, contrary to the guidance of this Court. The lack of a "common sense" consensus is evident from these appeals and the cases where family members, refugees and humanitarians have been charged, prosecuted or otherwise pursued, for example, by immigration authorities.[48]

55. Even the BCCA was substantially mistaken when it accepted the Crown's submission that all failed refugee claimants are queue jumping illegal aliens.

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[48] See for example *Callahan*, *supra*, the case of Ms. Hinshaw Thomas, *Canada (Public Safety and Emergency Preparedness) v. J.P.*, 2013 FCA 262; *B010 v. Canada (Citizenship and Immigration)*, *supra*; *Desmond De Hoedt v. Canada (Citizenship and Immigration)*, 2014 FC 829

This argument by the Crown has been recognized by the Federal Court as "grossly simplistic".[49] How can the Attorney General, CBSA and police, who may lack training about refugees and Canada's international obligations, be expected to discern who should and should not be prosecuted? There are many administrative regimes, particularly in the immigration context, that rely on the definitions of criminal offences, but lack the safeguard that s. 117(4) is meant to be. If s. 117(4) contains hidden elements of the offence in s. 117, these administrative authorities do not know about them and have nothing but their personal predilections to rely on when applying it. This type of entirely unfettered discretion is hardly justifiable even in the administrative, let alone criminal, context.

Previous judicial consideration of the term "public interest": R v. Morales

56. The Attorney General's exercise of discretion is to be made on the basis two-pronged test for a decision to prosecute: whether there is a reasonable prospect of conviction and whether it is in the "public interest" to prosecute.[50]

57. It is submitted that the term "public interest" is itself highly discretionary, and not knowable by a potential accused under s. 117. In the words of Chief Justice Lamer in *Morales, supra*:

> "No amount of judicial interpretation of the term "public interest" would be capable of rendering a provision which gives any guidance for legal debate."[51]

58. At issue in *Morales, supra,* was the "public interest" factor to be taken into account in a judicial decision to deny bail under section 515(10)(b) of the *Criminal Code,* R.S.C. 1985, c. C-46. The term "public interest" in section 515(10)(b) was held to be unconstitutionally vague and not capable of being saved by section 1 of the *Charter*.

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[49] *Canadian Doctors For Refugee Care v. Canada (Attorney general)*, 2014 FC 651 at paras. 840-848
[50] BCCA Reasons, para 109, AR, vol. I, at 85
[51] *Morales, supra* at 732

59. Although the decision was based on a consideration of s.11 of the *Charter*, rather than under s. 7, the Court's analysis was based partly on the "constitutional doctrine" of vagueness as a principle of fundamental justice.

60. The Court noted that all of the cases in which vagueness had been considered up to that point had involved provisions defining an offence or prohibiting certain conduct, including *Nova Scotia Pharmaceutical Society*. But in *Morales*, the Court was being asked to rule on the grounds authorizing pre-trial detention. The intervenor, the Attorney General of Ontario had argued that this difference meant that the doctrine of vagueness should not apply, but the Court did not accept that argument. Nor did it accept that the doctrine of vagueness should not apply because the section authorized judicial discretion and not that of law enforcement officials.[52]

61. The Court considered that while the concept of "fair notice" was not relevant in a provision such as s. 515(10)(b) because that section did not prohibit conduct, the limitation of law enforcement discretion was relevant. As Lamer, C.J. said at 728:

> In the *Prostitution Reference* at pa. 1157, I explained this rationale in terms of a "standardless sweep": "is the statute so pervasively vague that it permits a "standardless sweep" allowing law enforcement officials to pursue their personal predilections?" In my view the principles of fundamental justice preclude a standardless sweep in any provision which authorizes imprisonment.

62. Quoting from *Nova Scotia Pharmaceutical Society*, at 642, he said that the Court had expressly stated that the doctrine of vagueness applies to all types of enactment:

> Finally, I also wish to point out that the standard I have outlines applies to all enactments, irrespective of whether they are civil, criminal, administrative or other. The citizen is entitled to have the State abide by constitutional standards of precision whenever it enacts legal dispositions.

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[52] *Morales, supra* at 729

63. In s. 117 of the *IRPA*, the State mandates the discretion of law enforcement officials in instituting charges without providing a criteria as to when that will be exercised, aside from when they consider it to be in the public interest (or reasonable prospect of conviction, which is not at issue in this appeal). That decision can lead to arrest and, upon conviction, to a term of imprisonment. And yet, no-one appears to know exactly what conduct engages the risk of criminal sanction. Parliament's intention[53] appears to have been to exclude those with humanitarian motives or family members from the risk of prosecution but it is left to the Attorney General to decide on the basis of what is in the public interest. *IRPA* gives no indication as to how those decisions must be reached, such as factors to be considered or determinative elements.

64. In *Morales* at 732, the term "public interest" was held to be incapable of framing the legal debate or structuring discretion in any way.

> Nor would it be possible in my view to give the term public interest a constant or settled meaning. The term gives the courts unrestricted latitude to define any circumstances as sufficient to justify pre-trial detention. The term creates no criteria to define these circumstances. No amount of judicial interpretation of the term public interest would be capable of rendering it a provision which given any guidance for legal debate.

65. And further at 731-732:

> In my view, these authorities demonstrate that the term public interest has not been given a constant or settled meaning by the courts. The term provides no basis for legal debate. According to Nova Scotia Pharmaceutical Society, a p. 642, such unfettered discretion violates the doctrine of vagueness.
>
> What becomes more problematic is not so much general terms conferring broad discretion, but terms *failing to give direction as to how to exercise this discretion, so that this exercise may be controlled.* Once more, an impermissibly vague law will not provide a sufficient basis for legal debate; it will not give a sufficient indication as to how decision must be reached such as factors to be considered or determinative elements. [Emphasis added]

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[53] BCCA Reasons at paras 82-83, AR, vol. I, at 76

66. It is submitted that this is very different from those provisions in the *Criminal Code* which require the consent of the Attorney General to institute proceedings. That is because the wording of s. 117 in *IRPA* appears to include groups of people that were never intended to be caught by the legislation but the safety valve of prosecutorial discretion is so imprecisely worded that it is entirely possible that they would be.

67. The decision to prosecute is based on factors not readily available, such as motive. Therefore, assuming all constituent elements of the offence are made out, the decision as to whom to prosecute is what leads to a conviction, even if the intent of Parliament was not to prosecute such offenders. There is no way to review a prosecution that is inconsistent with Parliament's intent, neither judicially nor otherwise.[54]

68. Finally, if, as both the Respondent and the BCCA agree that humanitarian factors relate to motive, as opposed to the elements of the offence, and that is one factor to consider in whether to prosecute, it is submitted that motive is not usually a factor in the decision to initiate criminal prosecutions. It is submitted that motive has no place in the charge-approval process in other criminal offences.

69. It is submitted that motive is an irrelevant consideration in charge-approval. Motive is not a defence to a criminal charge but a factor in sentencing. Motive is not part of either the *mens rea* or the *actus reus* of a criminal offence. If motive is such a strong factor in the decision to prosecute when the penalties are so serious as in s. 117 of *IRPA,* and motive is not defined, then the discretion is completely unfettered.

Parliament cannot justify a significant infringement upon rights, absent a clearly defined pressing and substantial objective

70. As recognized by the trial judge, it is widely accepted that there is some overlap between an analysis of what is unacceptably vague or overbroad for

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[54] *Anderson, supra*

the purposes of determining what is in accordance with the principles of fundamental justice under s. 7 and the balancing conducted under s. 1 of the *Charter* with respect to whether any limit on a right or freedom is demonstrably justified. For example, in *R. v. Heywood*, [1994] 3 SCR 761 at 792-793, this Court clarified that fundamental justice requires proportionality between a state's "legitimate" objective and the infringement on rights:

> Overbreadth and vagueness are different concepts, but are sometimes related in particular cases. They are related in that both are the result of a lack of sufficient precision by a legislature in the means used to accomplish an objective. In the case of vagueness, the means are not clearly defined. In the case of overbreadth, the means are too sweeping in relation to the objective.
>
> Overbreadth analysis looks at the means chosen by the state in relation to its purpose. A court must consider whether those means are necessary to achieve the state objective. If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.
>
> Reviewing legislation for overbreadth as a principle of fundamental justice is simply a matter of balancing the state interest against that of the individual. Where an independent principle of fundamental justice is violated, however, any balancing of the public interest must take place under s. 1 of the *Charter*. In analysing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. A court should not interfere with legislation merely because a judge might have chosen a different means of accomplishing the objective.
>
> Section 7 of the *Charter* has a wide scope. An enactment, before it can be found to be so broad that it infringes s. 7 of the *Charter*, must clearly infringe life, liberty or security of the person in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective. In determining whether a provision is overly broad and not in accordance with the principles of fundamental justice, it must be determined whether the means chosen to accomplish the provision's objectives are reasonably tailored to effect its purpose. Where legislation limits the liberty of an individual in order to protect the public, that limitation should not go beyond what is necessary to accomplish that goal.[55]

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[55] See also *Re: B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 517; *R. v. Swain*, [1991] 1 S.C.R. 933, at 977.

71. The BCCA entered into error in this case by failing to appreciate the nature of this balancing. According to the BCCA, the persons criminalized by s. 117 may include humanitarians, family members of refugees and refugees themselves. Since the offence carries the potential for lengthy imprisonment, it engages an important liberty interest. Furthermore, for family members and refugees there is an important interest in preserving one's life or the life of one's family members, which engages the right to life and personal security.

72. In order for s. 117 to accord with the principles of fundamental justice, the objective of s. 117 should be sufficiently precise, pressing and substantial in order to justify these deprivations. The Appellant accepts that combatting human smuggling may be such an objective. The BCSC Reasons demonstrate that in order to combat human smuggling, it is not necessary to deprive humanitarians, family members and refugees of their rights to the extent done by s. 117.

73. However, the objective of "preventing individuals from arranging the unlawful entry of others into Canada" that the Crown advanced on appeal and the BCCA accepted,[56] is too vague and amorphous a concept to be capable of meaningful analysis. While in some forms, such as combatting for-profit human smuggling and preventing terrorism, it is no doubt pressing and substantial, in other forms, such as preventing the entry of, and criminalizing bona fide asylum claimants- it isn't, and in fact is prohibited by international law. The BCCA erred by permitting the Crown to define away the problem of vagueness and overbreadth found at trial by re-formulating the objectives of the legislation in a vague and overbroad manner.

74. As this Court said in *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 SCR 519, 2002 SCC 68 at para 23:

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[56] BCCA Reasons at paras. 67, 72, AR vol I at 70,72.

> 23 At the end of the day, people should not be left guessing about why their *Charter* rights have been infringed. Demonstrable justification requires that the objective clearly reveal the harm that the government hopes to remedy, and that this objective remain constant throughout the justification process. As this Court has stated, the objective "must be accurately and precisely defined so as to provide a clear framework for evaluating its importance, and to assess the precision with which the means have been crafted to fulfil that objective": *per* Cory J. in *U.F.C.W., Local 1518*, *supra*, at para. 59; see also *Thomson Newspapers*, *supra*, at para. 96; *RJR-MacDonald*, *supra*, at para. 144. A court faced with vague objectives may well conclude, as did Arbour J.A. (as she then was) in *Sauvé No. 1*, *supra*, at p. 487, that "the highly symbolic and abstract nature of th[e] objective . . . detracts from its importance as a justification for the violation of a constitutionally protected right".

75. If Crown chooses to advance a broad and vague objective for its legislation, it should be prepared to prove that criminalization of conduct is the only proportionate remedy in every circumstance to which that legislation could apply.

76. For example, in *R. v. Keegstra*, [1990] 3 SCR 697, this Court examined the constitutionality of provisions of the *Criminal Code* (as it stood at the time) prohibiting hate speech. These sections required the consent of the Attorney General for prosecution. All of the justices of the Court accepted that the sections engaged the right to freedom of expression. Given that overbroad and vague laws do not minimally impair rights, the Court's majority decision about minimum impairment at 785-786 is relevant:

> To summarize the above discussion, in light of the great importance of Parliament's objective and the discounted value of the expression at issue I find that the terms of s. 319(2) create a narrowly confined offence which suffers from neither overbreadth nor vagueness. This interpretation stems largely from my view that the provision possesses a stringent *mens rea* requirement, necessitating either an intent to promote hatred or knowledge of the substantial certainty of such, and is also strongly supported by the conclusion that the meaning of the word "hatred" is restricted to the most severe and deeply-felt form of opprobrium. Additionally, however, the conclusion that s. 319(2) represents a minimal impairment of the freedom of expression gains credence through the exclusion of private conversation from its scope, the need for the promotion of hatred to focus upon an

> identifiable group and the presence of the s. 319(3) defences. As for the argument that other modes of combatting hate propaganda eclipse the need for a criminal provision, it is eminently reasonable to utilize more than one type of legislative tool in working to prevent the spread of racist expression and its resultant harm. It will indeed be more difficult to justify a criminal statute under s. 1, but in my opinion the necessary justificatory arguments have been made out with respect to s. 319(2).

77. The dissenting justices disagreed that the statute was not too vague and overbroad on the basis that it had been shown that many authorities had applied it far too zealously and that it had not been demonstrated that criminal sanctions were necessary achieve Parliament's objectives.[57]

78. Like in *Keegstra*, there are examples of authorities (criminal and immigration) applying s. 117 at their predilection to humanitarians, refugees and family members of refugees. Unlike in *Keegstra*, the scope of the legislation is extremely broad, the true elements of the offence – unknowable due to s. 117(4), the conduct criminalized- not restricted to the most severe forms and its *mens rea* requirements – watered down by the most recent amendment.

79. Furthermore, it has not been demonstrated why humanitarians, family members and refugees, who pose no security threat to Canada, should be criminalized even when they act in the purest of motives, when administrative sanction would likely be sufficient to punish and deter their conduct if this is desirable. Unlike in *Keegstra*, where the interest infringed upon was hate speech and had low social value, the rights to liberty, respect for human life, and protecting one's family are of the utmost importance and are a social boon. Even absent any international law norm that prohibits criminalizing such persons, there is nothing to show that Parliament's objective of preventing individuals from arranging the unlawful entry of others into Canada is of such great importance that even these persons must be deprived of their most fundamental personal rights and face serious criminal sanctions.

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[57] *Keegstra*, *supra* at 819, 850, 852, 859-861.

The violation is not saved by section 1

80. A law that is vague will rarely be saved by section 1. In this case, it is not only because it does not minimally or proportionally impair rights in accordance with the *Oakes* test,[58] it also fails to be a reasonable limit "prescribed by law". This case is a perfect example of the decision of what is and is not criminal conduct being unacceptably left to the unfettered discretion of the Attorney General, which is not reviewable and outside the rule of law.

PART IV: SUBMISSIONS AS TO COSTS

81. The Appellant makes no submission as to costs.

PART V: ORDER REQUESTED

82. That s. 117 of the *Immigration and Refugee Protection Act,* 2001, S.C. c.27 be declared contrary to s. 52 of the *Constitution Act*, 1982 and therefore of no force and effect.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Fiona Begg

FIONA BEGG
Solicitor for the Appellant
Francis Anthonimuttu Appulonappa

[58] *R v. Oakes*, [1986] 1 S.C.R. 103

PART VI: AUTHORITIES CITED

Document	Cited at para
Legislation	
Convention against Transnational Organized Crime, 15 November 2000, 2225 U.N.T.S. 275	12
Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S. 137, Can. T.S. 1969 No. 6	11,13,22,23,24
Criminal Code, R.S.C. 1985, c. C-46	58,66,76
Immigration and Refugee Protection Act, 2001 S.C., c. 27	
Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, 2241 U.N.T.S. 507	12,22,24,33
Caselaw	
B010 v. The Minister of Immigration, 2013 FCA 87	26,54
Canada (Public Safety and Emergency Preparedness) v. J.P., 2013 FCA 262	54
Canadian Doctors For Refugee Care v. Canada (Attorney general), 2014 FC 651	55
Desmond De Hoedt v. Canada (Citizenship and Immigration), 2014 FC 829	54
Reference re ss. 193 and 195.1(1)(C) of the criminal code (Man.), [1990] 1 SCR 1123	39,40,45,52,61
Re: B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486	70
R. v. Anderson, 2014 SCC 41	6,67
R. v. Bello, [2004] O.J. No. 5312 (C.J.)	28
R. v. Callahan (1 November 2012), Thunder Bay 113204 (Ont. C.J.)	28,29,51,52,54
R. v. Heywood, [1994] 3 SCR 761	70
R. v. Keegstra, [1990] 3 SCR 697	76,77,78,79

PART VII: STATUTORY PROVISIONS

Organizing entry into Canada

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.

Marginal note: Penalties — fewer than 10 persons

(2) A person who contravenes subsection (1) with respect to fewer than 10 persons is guilty of an offence and liable

(*a*) on conviction on indictment

(i) for a first offence, to a fine of not more than $500,000 or to a term of imprisonment of not more than 10 years, or to both, or

(ii) for a subsequent offence, to a fine of not more than $1,000,000 or to a term of imprisonment of not more than 14 years, or to both; and

(*b*) on summary conviction, to a fine of not more than $100,000 or to a term of imprisonment of not more than two years, or to both.

Marginal note: Penalty — 10 persons or more

(3) A person who contravenes subsection (1) with respect to a group of 10 persons or more is guilty of an offence and liable on conviction by way of indictment to a fine of not more than $1,000,000 or to life imprisonment, or to both.

Marginal note: No proceedings without consent

(4) No proceedings for an offence under this section may be instituted except by or with the consent of the Attorney General of Canada.

Aggravating factors

121. (1) The court, in determining the penalty to be imposed under subsection 117(2) or (3) or section 120, shall take into account whether
(*a*) bodily harm or death occurred during the commission of the offence;
(*b*) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization;
(*c*) the commission of the offence was for profit, whether or not any profit was realized; and
(*d*) a person was subjected to humiliating or degrading treatment, including with respect to work or health conditions or sexual exploitation as a result of the commission of the offence.

Definition of "criminal organization"

(2) For the purposes of paragraph (1)(*b*), "criminal organization" means an organization that is believed on reasonable grounds to be or to have been engaged in activity that is

part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence.