Publication Ban

Interdiction de publication

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

Court File No.: 35388

BETWEEN

B010

Appellant

- and -

Minister of Citizenship and Immigration

Respondent

Court File No.: 35677

AND BETWEEN

Jesus Rodriguez Hernandez

Appellant

- and -

Minister of Public Safety and Emergency Preparedness

Respondent

Court File No.: 35685

AND BETWEEN

B306

Appellant

- and-

Minister of Public Safety and Emergency Preparedness

Respondent

Court File No.: 35688

AND BETWEEN

J.P. and G.J.

Appellants

- and -

Minister of Public Safety and Emergency Preparedness

Respondent

FACTUM OF THE INTERVENER IN ALL FOUR APPEALS DAVID ASPER CENTRE FOR CONSTITUTIONAL RIGHTS

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

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Appellant
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- and -

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Attorney General of Ontario, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, Amnesty International (Canadian Section, English Branch), David Asper Centre for Constitutional Rights, United Nations High Commissioner for Refugees

Interveners

Court File No.: 35677

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PART I: OVERVIEW OF FACTS AND POSITION

1. The David Asper Center for Constitutional Rights (AC) is part of the University of Toronto, Faculty of Law. Its mission includes the realization of constitutional rights for vulnerable individuals and groups through advocacy, education and research. It intervenes pursuant to the order of Gascon J of November 27, 2014. It accepts the facts as outlined in the Appellants' and Respondent's facta.

PART II: STATEMENT OF POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

2. The AC takes no position on the ultimate disposition of the appeal. Its position in respect of the Appellants' questions in issue, however, is that a finding that the Appellants are described in s. 37(1)(b) of the *Immigration and Refugee Protection Act* ("*IRPA*") engages their s. 7 *Charter* rights and that the appropriate standard of judicial review for determinations under this provision must be correctness.

PART III: STATEMENT OF ARGUMENT

Issue 1: A finding under s. 37(1)(b) engages s. 7 of the *Charter*

3. The Appellants before this Court are under deportation orders to be removed from Canada. The basis for the removal order in all cases is the finding that they are described in s. 37(1)(b) of the *IRPA*. This finding is determinative of the Appellants' status in Canada. It engages their rights under s. 7 of the *Charter,* because its effect is to divert the Appellants away from access to substantive protection from persecution, as well as the procedural protections that would otherwise accompany a determination of the risk of persecution (including torture and cruel or inhuman treatment) if deported or *refouled* to their country of citizenship. It is as well a finding that results in a *prima facie* determination of the need to detain a non-citizen. In consequence, the finding that these Appellants are described in s. 37(1)(b) deprives them of their liberty and security of the person interests in a manner inconsistent with the principles of fundamental justice.

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(1) S. 37(1)(b) must be viewed as part of a comprehensive scheme for regulating the admission to and removal from Canada of non-citizens

4. S. 37(1)(b) of the *IRPA* cannot be viewed in isolation as it does not stand alone. It is a constituent part of the scheme for enforcing Canada's immigration laws. The section provides that a permanent resident or foreign national is inadmissible if they have participated in organized crime and as such, if present in Canada, are to be deported from it. This provision is rightly considered within its broader context in the *IRPA*.

5. The *IRPA* additionally provides for the prosecution of individuals involved in "people smuggling" and "trafficking in persons."[1] The laying of a charge for smuggling or trafficking is not dependent on the finding of an Immigration Division member that a non-citizen is described in s. 37 of the Act. The possibility of criminal charges is not what engages the s. 7 interests of the Appellants. It is the other certain and direct consequences which engage the interests: a deportation order issues; the person is excluded from access to a determination of refugee status and from a full oral hearing before the Refugee Division – there is no protection from *non-refoulement*;[2] and the person is deemed *prima facie* a danger to the public for the purpose of consideration of detention.[3]

6. This Court has traditionally taken a holistic approach to the enforcement of immigration legislation. It has recognized that Parliament created "a comprehensive scheme of review of immigration matters"[4] and that it is important to understand "these provisions [of the *Immigration Act, 1976*] in the context of the Act as a whole."[5] When examining an impugned immigration provision, this Court has considered the context of the statutory scheme as a whole, its legislative history, and the consequences.[6]

7. A holistic approach to immigration law is particularly important when a Court is considering constitutional challenges. In such *Charter* inquiries, the court must look at "the interests at

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[1] *Immigration and Refugee Protection Act,* SC 2001, c 27*,* s 117 [*IRPA*].
[2] *IRPA*, ss 112-114.
[3] *Immigration and Refugee Protection Regulations*, SOR/2002-227, ss 244(b), 246(c) [*IRP Regs*]; *Bruzzese v Canada (Minister of Public Safety and Emergency Preparedness),* 2014 FC 230 at paras 46-47. It should be noted that while deportation itself does not generally engage the human rights of a non-citizen, it can in some instances, beyond the consideration of risk. Family separation, effective exile for long term migrants, may in some instances engage s. 7 interests. See, for example, UN Human Rights Committee, *General Comments Adopted Under Article 40(4) of the ICCPR*, GC No 15, "Aliens," CCPR/C/21/Rev.1, May 1989 at paras 1, 2, 7, 9.
[4] *Reza v Canada,* [1994] 2 SCR 394 at 405.
[5] *Singh v Canada (Minister of Employment and Immigration)*, [1985] 1 SCR 177 at 188 [*Singh*].
[6] *Chieu v Canada (Minister of Citizenship and Immigration),* 2002 SCC 3 [*Chieu*].

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stake rather than the legal label attached to the impugned provision."[7] When the statutory interpretation of an immigration provision is challenged under s. 7, as is the case here, this Court has analyzed the legislation in its entire context, looking at the potential consequences that may arise from a particular interpretation. Such *Charter* inquiries require "investigating the 'treatment meted out,' i.e., what is actually done to the offender [under the provision] and how that is accomplished."[8] In *Charkaoui v Canada (Minister of Citizenship & Immigration),* this court noted that, "the fairness of the process leading to possible deportation and the loss of liberty associated with detention raise important issues of liberty and security and […as a result] s. 7 is engaged."[9] In keeping with this Court's approach, s. 37(1)(b) must not be considered in isolation, but in light of its context and the consequences of a finding that a person is so described.

(2) Determinations of inadmissibility under s. 37(1)(b) deny access to a rights protection regime

8. Individuals found to be inadmissible under s. 37(1)(b) of the *IRPA* are denied access to Canada's refugee scheme and instead are streamed into a truncated and inferior process leading, at best, to a more restricted level of substantive protection – one which does not permit a consideration of broader forms of serious harm which constitute persecution.[10]

9. If a migrant is found inadmissible under s. 37(1)(b), a deportation order is issued. The Immigration Division member has no discretion to decide otherwise.[11] The finding that the person is described under s. 37(1) has immediate consequences on the subsequent processes and outcomes available to the individual involved. Ordinary refugee claimants are entitled to a hearing before the quasi-judicial Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada to determine whether they have a well-founded fear of persecution. This Court in *Singh*[12] established, early in the life of the *Charter*, that access to a fair hearing for the determination of whether a person had a well-founded fear of persecution was required for compliance with s. 7 of the *Charter*. Migrants, like the Appellants, found inadmissible under s. 37(1)(b), do not have access to this process. They are restricted to a paper review of the likelihood of facing torture, death, or cruel treatment by way of a Pre-

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[7] *Charkaoui v Canada (Minister of Citizenship & Immigration)*, 2007 SCC 9 at para 18 [*Charkaoui*].
[8] *R v Lyons*, [1987] 2 SCR 309 at 334.
[9] *Charkaoui*, *supra* note 7 at para 18.
[10] *IRPA,* s 45.
[11] *Ibid.*
[12] *Singh*, supra note 5.

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Removal Risk Assessment (PRAA). The review is conducted by an officer of Citizenship and Immigration Canada, under the Minister's control and direction.

(3) PRAA is not an adequate substitute for a rights protecting regime

10. A PRAA is an inadequate substitute for a hearing before the RPD because of the lack of an oral hearing, the limited assessment of the kinds of risks that engage s. 7 interests, and the lack of an independent tribunal.

(a) Exclusion from the Convention refugee process

11. Refugee claimants found inadmissible under s. 37(1)(b) are denied protection from persecution as interpreted in Canadian and international refugee law jurisprudence. They are not assessed against the full, consolidated grounds used at hearings before the RPD. They can only seek protection on grounds set out in s. 97(1) of the *IRPA,* namely torture, death, or other forms of cruel treatment or punishment.[13] A PRAA does not cover the possibility of *refoulement* to persecution, which is wider in its coverage.

12. This is not an issue of process, but one of substance. This Court has determined that facing a threat of deportation to persecution engages s. 7 of the *Charter*.[14] These Appellants will not have an assessment of whether they face a well-founded fear of persecution before being removed from Canada simply because they have been found to be described in s. 37(1) of the *IRPA*.

(b) Different standard of proof

13. A refugee claimant is entitled to protection if she shows a 'reasonable chance' or 'more than a mere possibility' of persecution. Refugee law uses this relatively low standard of proof because of the inherent difficulties of future prediction of events and actions in another country, and also because of the severity of the consequence of a wrong negative decision. PRRA applicants restricted to s. 97 grounds must establish a risk of torture, death, or cruel treatment or punishment on a balance of probabilities. The burden on these applicants is considerably more onerous than on those permitted to seek refugee protection, even though the stakes are at least as high and the consequences at least as severe. A person who fears torture might well be recognized under s. 96 of the Act as a Convention refugee on the lower

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[13] *IRPA*, s 97(1).

[14] *Singh,* supra note 5.

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standard of proof – well-founded fear.[15]

(c) Denial of an oral hearing

14. A PRAA application does not guarantee a migrant's right to be heard. In contrast to the full quasi-judicial hearings held before the RPD, a PRAA is normally assessed on the basis of written submissions. Oral hearings are held only if there are clear credibility concerns that go to the heart of the determination to be made.[16] The absence of the opportunity to be heard in a PRAA is a critical detriment to the migrant's right to participate in proceedings that will determine their ability to remain here.

(d) Lack of an independent and expert tribunal

15. Immigration officers are responsible for assessing and determining PRAA applications. These officers are purely administrative decision-makers who are employees of the Minister, government officials whose independence is not guaranteed. While it is recognized that there is no particular decision-making framework mandated for the determination of serious risks such as persecution and torture,[17] the decision-making process must be a fair one which requires decisions be made by independent and impartial decision-makers where the consequences to the person are serious.[18]

16. A finding of inadmissibility under s. 37(1)(b) denies individuals the procedural and substantive rights protections ordinarily provided by a hearing before the RPD. Due to the denial of a right to be heard appropriate to the circumstances of refugee claims (as this Court articulated in *Singh*), the narrower ambit of protection provided under PRRA, and the lack of independence of PRRA decision-makers, a PRAA is an inadequate substitute for an oral hearing before an independent decision-maker.

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[15] The definitions in s. 96 and s. 97 differ in a number of ways. For example, a person might well establish that the risk of torture has a nexus to a Convention ground, even if that person would be excluded from s. 97 protection because the risk is generally faced by others. See *Salibian v Canada (Minister of Employment and Immigration,* [1990] FCJ No 454 (CA) at para 17.

[16] *Hurtado Prieto v Canada (Minister of Citizenship and Immigration, Minister of Public Safety and Emergency Preparedness*), 2010 FC 253; *Sayed v Canada (Minister of Citizenship and Immigration)*, 2010 FC 796 [*Sayed*]. In *Sayed*, the Federal Court held that the test with regards to a PRAA application of "whether to hold an oral interview is that where the testimony of the applicant, if believed, would adequately address the determinative issues raised by the Board in rejecting the applicant's refugee claim, then procedural fairness requires a PRRA officer to convoke an oral interview to determine the credibility of this evidence unless the officer is prepared to accept this evidence on its face" (*ibid* at para 35).

[17] *Németh v Canada (Minister of Justice)*, 2010 SCC 56 at para 51.

[18] *Singh,* supra note 5; *Orelien v Canada (Minister of Employment and Immigration),* [1991] FCJ No 1158 (CA); *Nguyen v Canada (Minister of Employment and Immigration)*, [1993] FC 696 (CA); *Chieu,* supra note 6 at para 70, citing *Pushpanathan v Canada (Minister of Citizenship and Immigration),* [1998] 1 SCR 982 at para 157 [*Pushpanathan*].

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(4) Denial of access to refugee protection jeopardizes the Appellants' s. 7 rights

17. Denying access to a hearing before the RPD threatens the Appellants' security of the person under s. 7 because it puts them at risk of removal to face persecution. As held by this court in *Suresh* and *Singh*, [19] it is this *threat* that engages s. 7 interests.

18. The majority of the Appellants claim a well-founded fear of persecution if deported. *Refoulement* to persecution violates s. 7 of the *Charter*. The PRRA process will result in *refoulement* if the claimant has a well-founded fear of persecution that is not torture, death, or cruel punishment. The PRRA process will also result in *refoulement* if the applicant can show a reasonable chance of torture or death, but the PRRA officer is not satisfied on a balance of probabilities. Even if the PRRA officer doubts the applicant's credibility, the PRRA officer retains unfettered discretion to decide whether to convene an oral hearing. And as noted above, the s. 37(1)(b) finding is also determinative, for detention purposes, that the person is a danger to the public such that the person's liberty interest is engaged.[20]

Issue 2: The applicable standard of review must be correctness

19. Judicial review is an historic and essential element of the rule of law in Canada.[21] As such, it must be understood as itself a process that must be measured in terms of how effectively it fulfills its task within a regime of human rights protection. The right is not just to a remedy but to an effective one, appropriate and just in the circumstances.[22]

(1) The question at issue is a question of law of central importance to the legal system

(a) A question of law that affects fundamental human rights is a question of central importance to the legal system

20. The question at issue is both a human rights question and a question of law. *Dunsmuir* reserves correctness review for, *inter alia*, questions of central importance to the legal system as a whole that are outside the specialized expertise of the decision-maker.[23] This formulation

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[19] *Singh,* supra note 5 at 207; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 5.
[20] *IRP Regs*, ss 244(b), 246(c).
[21] *Dyson v Attorney General,* [1911] 1 KB 410; *R v Mills*, [1986] 1 SCR 863 at 882.
[22] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c11, s 24(2); *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 art 8 [*Universal Declaration*]; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 2.3 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*International Covenant*]; *American Convention on Human Rights,* 22 November 1969, OAST No 36 art 25 (entered into force 18 July 1978) [*American Convention*].
[23] *Dunsmuir v New Brunswick*, (2008) SCC 9 at para 55.

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is traceable to the dictum of this Court in *Toronto (City) v CUPE, Local 79*. In that decision, the Court referred to questions of human rights and civil liberties as examples of questions of central importance to the legal system.[24] The meaning of s. 37(1)(b) is a question of law that will have a significant impact on the fundamental human rights of these Appellants and many others in the future. Further, the Immigration Division ("ID") does not have specialized expertise in human rights interpretation, statutory interpretation in general, or in respect of the meaning of smuggling in particular.[25] The question at issue is a human rights question and a question of law outside the specialized expertise of the ID.

21. Further, the impact of the decision on the human rights of these Appellants – including the denial of access to the refugee determination process with the consequent risk of *refoulement* to persecution – requires that the standard of correctness be applied. It is through the rule of law that human rights are protected.[26] This cannot be achieved without a consistent interpretation of laws which impact on the human rights of individuals. A reasonableness standard, with its range of possible 'acceptable' outcomes cannot provide the predictability required to ensure human rights protection. It is not just a matter of protecting the person, but also of ensuring that state actors know both the scope of human rights protections afforded under Canadian law and the limits on them. And in a global community, it is essential that other state and international decision-makers be able to look to Canada, which is a democracy committed to human rights protections, for consistency in such protection. Human rights are universal.[27]

(b) The question at issue was certified as a serious question of general importance

22. The fact that Federal Court certified a serious question of general importance that is also a question of law supports the application of a correctness standard. The question certified was: "For the purposes of para 37(1)(b) of the *IRPA* is it appropriate to define the term 'people smuggling' by relying on s. 117 of the same statute rather than a definition contained in an international instrument to which Canada is signatory."[28] Bastarache J in *Pushpanathan* held that a correctness standard should be applied to a questions of law certified by the Federal

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[24] *Toronto (City) v CUPE, Local 79*, 2003 SCC 63 at para 67.
[25] *Factum of JP and GJ* at para 31; *Factum of B306* at para 122; *Factum of Rodriguez Hernandez* at para 35.
[26] In *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 70, this Court emphasized the "sense of orderliness" conveyed by the rule of law, noting that "[a]t its most basic level, the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society."
[27] *Universal Declaration*, supra note 23; *International Covenant*, supra note 23; *American Convention,* supra note 23.
[28] *JP v Canada (Minister of Public Safety and Emergency Preparedness)*, (2012) 2012 FC 1466 at para 44.

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Court:

> First, s. 83(1) would be incoherent if the standard of review were anything other than correctness. The key to the legislative intention as to the standard of review is the use of the words "a serious question of general importance" (emphasis added). The general importance of the question, that is, its applicability to numerous future cases, warrants the review by a court of justice. Would that review serve any purpose if the Court of Appeal were obliged to defer to incorrect decisions of the Board? Is it possible that the legislator would have provided for an exceptional appeal to the Court of Appeal on questions of "general importance", but then required that despite the "general importance" of the question, the court accept decisions of the Board which are wrong in law, even clearly wrong in law, but not patently unreasonable? The only way in which s. 83(1) can be given its explicitly articulated scope is if the Court of Appeal – and inferentially, the Federal Court, Trial Division – is permitted to substitute its own opinion for that of the Board in respect of questions of general importance.[29]

23. While this Court in *Chieu* found that the certification of a question of general importance is not determinative of the standard of review on its own, the question at play here is closer in nature to the question certified in *Pushpanathan*: it engages human rights and the ID has no particular expertise in deciding such questions. [30] On this analysis the appropriate standard of review is correctness.

(2) The consequences of the decision should inform the standard of review

24. Judicial review must be understood as a component of the legal system's overall commitment to the rule of law and the protection of fundamental human rights. The standard of review analysis determines how carefully a court will scrutinize the legality of an administrative decision-maker's decision. Throughout the legal system, at common law and under the *Charter*, the consequences of a decision inform the procedural safeguards that must accompany decision-making, and the scrutiny and care that a decision-maker must apply to performing his or her tasks. In administrative law,[31] civil law,[32] and criminal law,[33] the

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[29] *Pushpanathan,* supra note 19 at para 43.
[30] *Chieu, supra* note 6 at paras 23-25.
[31] In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at para 25, this Court held that "the more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated."
[32] In *Continental Insurance Co v Dalton Cartage Co,* [1982] 1 SCR 164 at 170 [*Continental Insurance*], this Court held that trial judges are justified "in scrutinizing evidence with greater care if there are serious allegations to be established by the proof that is offered." In *FH v McDougall*, 2008 SCC 3 at paras 30-31, this Court applied the reasoning in *Continental Insurance*, while reaffirming, as the Court did in the *Continental Insurance* case, that the balance of probabilities was the only standard for assessing the evidence.

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higher the stakes or the more severe the consequences, the more demanding the procedures and the more exacting the scrutiny. What is at stake in these appeals is the complete denial of access to a determination of the need for refugee protection, the prospect of persecution and torture for the Appellants on return to their countries of nationality. Given the serious nature of the consequences of the decision, a court should scrutinize the ID's interpretation of s. 37(1)(1) against a standard of correctness.

(3) The Immigration Division is not a fully independent tribunal

25. Less deference should be accorded to administrative decision-makers if those decision-makers are not independent from political influence. The ID is not fully independent,[34] and this factor favours a correctness standard.

(4) The preceding considerations should apply if a reasonableness standard is applied

26. If the Court is not satisfied that a correctness standard of review applies, the Intervener submits that in the alternative, the factors that the Intervener has identified are relevant to the application of a reasonableness standard of review. Given the importance of the question to the legal system as a whole, the possibility of contradictory interpretations, the stakes of the decision, and the fact that the ID is not fully independent, the Court cannot take a deferential stance to Mainville JA's decision at the Federal Court of Appeal.

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[33] The entire criminal process is structured around the consequences of a wrong decision. For instance, whereas Crown evidence will be excluded if its probative value outweighs its prejudicial effect, defense evidence can only be excluded where the prejudicial effect of the evidence substantially outweighs its probative value because of the fear of wrongful convictions (*R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 at 610-611). Further, one of the only times solicitor-client privilege can be broken is where another person's innocence is at stake, because, "our system will not tolerate the conviction of the innocent" (*R v McClure,* 2001 SCC 14 at para 40).

[34] *Factum of JP and GJ* at para 29.

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PART IV: COSTS

27. The AC does not seek costs and respectfully requests that none be awarded against it.

PART V: ORDER REQUESTED

28. The AC takes no position on the disposition of the appeal, but requests that it be allowed ten (10) minutes to provide oral submissions to the Court.

All of which is respectfully submitted, this 30th day of January, 2015.

______________________________	______________________________
Barbara Jackman	Audrey Macklin
Counsel for the Asper Centre	

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PART VI: TABLE OF AUTHORITIES

Authority	Paragraph in factum	Location
LEGISLATION		
Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11	18	AC Factum, Part VII
Immigration and Refugee Protection Act, SC 2001, c 27	5, 7, 8, 10	AC Factum, Part VII; AC Book of Authorities, Tab 1
Immigration and Refugee Protection Regulations, SOR/2002-227	5, 17	AC Book of Authorities, Tab 2
INTERNATIONAL CONVENTIONS AND COMMENTARY		
American Convention on Human Rights, 22 November 1969, OAS Treaty Series No 36 (entered into force 18 July 1978)	18, 20	AC Book of Authorities, Tab 3
International Covenant on Civil and Political Rights, 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976, accession by Canada 19 May 1976)	18, 20	AC Book of Authorities, Tab 4
UN Human Rights Committee, *General Comments Adopted Under Article 40(4) of the ICCPR*, GC No 15, "Aliens," CCPR/C/21/Rev.1. May 1989	5	AC Book of Authorities, Tab 5
Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71	18, 20	AC Book of Authorities, Tab 6
JURISPRUDENCE		
Domestic Jurisprudence		
Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817	23	AC Book of Authorities, Tab 7
Bruzzese v Canada (Minister of Public Safety and Emergency Preparedness), 2014 FC 230	5	AC Book of Authorities, Tab 8

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Authority	**Paragraph in factum**	**Location**
Charkaoui v Canada (Minister of Citizenship and Immigration), 2007 SCC 9	6	Book of Authorities of the Appellant JP, Vol II, Tab 24
Chieu v Canada (Minister of Citizenship and Immigration), 2002 SCC 3	5, 14, 22	AC Book of Authorities, Tab 9
Continental Insurance Co v Dalton Cartage Co, [1982] 1 SCR 164	23	AC Book of Authorities, Tab 10
Dunsmuir v New Brunswick, 2008 SCC 9	19	Book of Authorities of the Appellant B010, Vol II, Tab 19
FH v McDougall, 2008 SCC 53	23	AC Book of Authorities, Tab 11
Hurtado Prieto v Canada (Minister of Citizenship and Immigration, Minister of Public Safety and Emergency Preparedness), 2010 FC 253	13	AC Book of Authorities, Tab 12
JP v Canada (Minister of Public Safety and Emergency Preparedness), 2012 FC 1466	21	AC Book of Authorities, Tab 13
Németh v Canada (Minister of Justice), 2010 SCC 56	14	Book of Authorities of the Appellant B010, Vol II, Tab 26
Nguyen v Canada (Minister of Employment and Immigration), [1993] FC 696 (CA)	14	Book of Authorities of the Appellant B306, Tab 26
Orelien v Canada (Minister of Employment and Immigration, [1991] FCJ No 1158 (CA)	14	AC Book of Authorities, Tab 14
Pushpanathan v Canada (Minister of Citizenship and Immigration), [1998] 1 SCR 982	14, 21	AC Book of Authorities, Tab 15
R v Lyons, [1987] 2 SCR 309	6	AC Book of Authorities, Tab 16
R v McClure, 2001 SCC 14	23	AC Book of Authorities, Tab 17
R v Mills, [1986] 1 SCR 863	22	AC Book of Authorities, Tab 18
R v Seaboyer; R v Gayme, [1991] 2 SCR 577	23	AC Book of Authorities, Tab 19
Reference re Secession of Quebec, [1998] 2 SCR 217	20	AC Book of Authorities, Tab 20

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Authority	**Paragraph in factum**	**Location**
Reza v Canada, [1994] 2 SCR 394	5	AC Book of Authorities, Tab 21
Salibian v Canada (Minister of Employment and Immigration), 1990 3 FC 250	12	AC Book of Authorities, Tab 22
Sayed v Canada (Minister of Citizenship and Immigration), 2010 FC 796	13	AC Book of Authorities, Tab 23
Singh v Canada (Minister of Employment and Immigration), [1985] 1 SCR 177	5, 8, 11, 14, 16	AC Book of Authorities, Tab 24
Suresh v Canada (Minister of Citizenship and Immigration), 2002 SCC 1	16	AC Book of Authorities, Tab 25
Toronto (City) v CUPE, Local 79, 2003 SCC 63	19	AC Book of Authorities, Tab 26
UK Jurisprudence		
Dyson v Attorney General, [1911] 1 KB 410	22	AC Book of Authorities, Tab 27

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PART VII: STATUTORY PROVISIONS

***Immigration and Refugee Protection Act*, SC 2001, c 27**

Organized Criminality

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for

(*a*) being a member of 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, or engaging in activity that is part of such a pattern; or

(*b*) engaging, in the context of transnational crime, in activities such as people smuggling, trafficking in persons or money laundering.

Application

(2) Paragraph (1)(*a*) does not lead to a determination of inadmissibility by reason only of the fact that the permanent resident or foreign national entered Canada with the assistance of a person who is involved in organized criminal activity.

Activités de criminalité organisée

37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :

a) être membre d'une organisation dont il y a des motifs raisonnables de croire qu'elle se livre ou s'est livrée à des activités faisant partie d'un plan d'activités criminelles organisées par plusieurs personnes agissant de concert en vue de la perpétration d'une infraction à une loi fédérale punissable par mise en accusation ou de la perpétration, hors du Canada, d'une infraction qui, commise au Canada, constituerait une telle infraction, ou se livrer à des activités faisant partie d'un tel plan;

b) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

Application

(2) Les faits visés à l'alinéa (1)*a*) n'emportent pas interdiction de territoire pour la seule raison que le résident permanent ou l'étranger est entré au Canada en ayant recours à une personne qui se livre aux activités qui y sont visées.

Organizing entry into Canada

117. (1) No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act.

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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.

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: Minimum penalty — fewer than 50 persons

(3.1) A person who is convicted on indictment of an offence under subsection (2) or (3) with respect to fewer than 50 persons is also liable to a minimum punishment of imprisonment for a term of

(*a*) three years, if either

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or

(*b*) five years, if both

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

Minimum penalty — 50 persons or more

(3.2) A person who is convicted of an offence under subsection (3) with respect to a group of 50 persons or more is also liable to a minimum punishment of imprisonment for a term of

(*a*) five years, if either

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(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, or

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group; or

(*b*) 10 years, if both

(i) the person, in committing the offence, endangered the life or safety of, or caused bodily harm or death to, any of the persons with respect to whom the offence was committed, and

(ii) the commission of the offence was for profit, or was for the benefit of, at the direction of or in association with a criminal organization or terrorist group.

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.

Entrée illégale

117. (1) Il est interdit à quiconque d'organiser l'entrée au Canada d'une ou de plusieurs personnes ou de les inciter, aider ou encourager à y entrer en sachant que leur entrée est ou serait en contravention avec la présente loi ou en ne se souciant pas de ce fait.

Peines

(2) Quiconque contrevient au paragraphe (1) relativement à moins de dix personnes commet une infraction et est passible, sur déclaration de culpabilité :

a) par mise en accusation :

(i) pour une première infraction, d'une amende maximale de cinq cent mille dollars et d'un emprisonnement maximal de dix ans, ou de l'une de ces peines,

(ii) en cas de récidive, d'une amende maximale de un million de dollars et d'un emprisonnement maximal de quatorze ans, ou de l'une de ces peines;

b) par procédure sommaire, d'une amende maximale de cent mille dollars et d'un emprisonnement maximal de deux ans, ou de l'une de ces peines.

Note marginale: Peines

(3) Quiconque contrevient au paragraphe (1) relativement à un groupe de dix personnes et plus commet une infraction et est passible, sur déclaration de culpabilité par mise en accusation, d'une amende maximale de un million de dollars et de l'emprisonnement à perpétuité, ou de l'une de ces peines.

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Peine minimale — moins de cinquante personnes

(3.1) Quiconque est déclaré coupable, par mise en accusation, de l'infraction prévue aux paragraphes (2) ou (3) visant moins de cinquante personnes est aussi passible des peines minimales suivantes :

a) trois ans si, selon le cas :

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit;

b) cinq ans si, à la fois :

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit.

Peine minimale — groupe de cinquante personnes et plus

(3.2) Quiconque est déclaré coupable de l'infraction prévue au paragraphe (3) visant un groupe de cinquante personnes et plus est aussi passible des peines minimales suivantes :

a) cinq ans si, selon le cas :

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit;

b) dix ans si, à la fois :

(i) l'auteur, en commettant l'infraction, a entraîné la mort de toute personne visée par l'infraction ou des blessures à celle-ci ou a mis en danger sa vie ou sa sécurité,

(ii) l'infraction a été commise au profit ou sous la direction d'une organisation criminelle ou d'un groupe terroriste ou en association avec l'un ou l'autre de ceux-ci ou en vue de tirer un profit.

Consentement du procureur général du Canada

(4) Il n'est engagé aucune poursuite pour une infraction prévue au présent article sans le consentement du procureur général du Canada.

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***The Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11**

s. 7 Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

s. 7 Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.