NO.: 35677

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

BETWEEN:

JESUS RODRIGUEZ HERNANDEZ

APPELLANT
(Respondent in Federal Court of Appeal)

AND:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT
(Appellant in Federal Court of Appeal)

RESPONDENT'S FACTUM

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

Counsel for the Respondent

Marianne Zoric
François Joyal
Department of Justice Canada
Ontario Regional Office
Suite 3400, Box 36
130 King Street West
Toronto, Ontario M5X 1K6
Telephone: (416) 954-8046
(514) 283-5880
Fax: (416) 954-8982
(514) 496-7876
marianne.zoric@justice.gc.ca
francois.joyal@justice.gc.ca

Agent for the Respondent

Christopher Rupar
Department of Justice Canada
50 O'Connor Street,
Floor 5, Suite 557
Ottawa, Ontario
K1A 0H8
Telephone: (613) 670-6290
Fax: (613) 954-1920
christopher.rupar@justice.gc.ca

Counsel for the Appellant

Ron Poulton
596 St. Claire Ave W.
Toronto, Ontario
M6C 1A6
Telephone: (416) 653-9900 Ext: 232
Fax: (416) 653-1036
lorne@waldmanlaw.ca

Agent for the Appellant

Jean Lash
South Ottawa Community Legal Services
406 - 1355 Bank Street
Ottawa, Ontario
K1S 0X2
Telephone: (613) 733-0140
Fax: (613) 733-0401
lashj@lao.on.ca

Counsel for the Intervener
Attorney General of Ontario

Hart Schwartz
Padraic Ryan
Attorney General of Ontario
4th Floor, 720 Bay Street
Toronto, Ontario
M5G 2K1
Telephone: (416) 212-3095
Fax: (416) 326-4015
hart.schwartz@ontario.ca

Agent for the Intervener
Attorney General of Ontario

Robert E. Houston, Q.C.
Burke-Robertson
441 MacLaren Street
Suite 200
Ottawa, Ontario
K2P 2H3
Telephone: (613) 236-9665
Fax: (613) 235-4430
rhouston@burkerobertson.com

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OVERVIEW

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

2. The Appellant Hernandez was convicted of attempted alien smuggling in the United States and sentenced to a term of imprisonment. He helped organize and carry out a smuggling operation in which he and two associates attempted to bring forty-eight undocumented Cuban migrants into the United States. He does not contest that he was properly found inadmissible for serious criminality under s. 36(1)(b) of the *Immigration and Refugee Protection Act (IRPA).*[2]

3. Although Mr. Hernandez has actually been convicted in the United States for his role in that people smuggling operation, he argues that he should not be inadmissible under s. 37(1)(b) of the *IRPA* for engaging in people smuggling. The logic of interpreting s. 37(1)(b) harmoniously with s. 117 of the *IRPA* is amply illustrated in his case. His artificially narrow interpretation of s. 37(1)(b) of the *IRPA* should not be accepted. He is plainly described in s. 37(1)(b) of the *IRPA* for having engaged in people smuggling and it was reasonable to find him inadmissible on this ground.

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[1] Nos. 35688, 35685, and 35388 respectively
[2] SC 2001, c 27 [*IRPA*]

I. STATEMENT OF FACTS

A. HERNANDEZ' ACTIVE PARTICIPATION IN A PEOPLE SMUGGLING OPERATION

4. The Appellant's statement of facts understates his involvement in the human smuggling operation for which he was convicted in the US in 2004. The Respondent restates the relevant facts as follows.

5. The Appellant, a Cuban citizen, entered the United States in June 2001, where he says he was accepted as a refugee.[3] On October 14, 2003, he and two associates bought a 34-foot "go-fast" boat and left the Florida Keys for Cuba. The Appellant was one of the principal organizers of the smuggling operation.[4]

6. Once they arrived in Cuba, forty-eight would-be migrants, mostly adult males, boarded the Appellant's boat. Although the Appellant claims that the purpose of this enterprise was to pick up close family members, his evidence, as he acknowledges himself,[5] has been inconsistent on this point. In fact upon arrival at the pick-up point, none of his "close family members" were present.[6] However, the Appellant and his two associates picked up the group of 48 anyway.

7. On their way back, the Appellant's boat was intercepted by the US Coast Guard in international waters. The Appellant, who was the driver, refused to stop the boat and a chase ensued. The chase ended only after authorities succeeded in disabling his boat by entangling its propellors.[7]

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[3] Reasons of the Federal Court of Appeal [FCA Reasons], para 51; Personal Information Form, Questions 11 and 26 (Appellant's Record [AR], pp. 65, 229 and 231)
[4] Reasons of the Immigration Division [ID Reasons], para 20; FCA Reasons, para 52; Exhibit C-1, Factual Proffer, p 1 (AR, pp 9, 65 and 252)
[5] Appellant's memorandum, footnote 3
[6] ID Reasons, para 29; FCA Reasons, para 51; Transcript of ID Hearing, p 6 (referring to "my daughters, wife and my dad"); Exhibit C-1, Factual Proffer, p 1; Q&A Interview Notes - March 31, 2011, p. 4 (referring to "[m]y son, his mom, my mom, dad and brother")(AR, pp 12, 65, 197-198, 252 and 301)
[7] Exhibit C-1, Factual Proffer, p 1; Exhibit C-2, Affidavit of Ramon Cabrera, paras 4 and 8 (AR, pp 252, 307 and 308)

8. When questioned by authorities the following day, the Appellant claimed that he had been fishing with two friends and took the 48 undocumented migrants on board because their boat was taking on water. A search of his boat "revealed no fishing gear, no tackle box, no bait, and no coolers." Nor did the Appellant mention any intention to pick up family members.

9. There is no evidence that the migrants the Appellant brought on his boat were personally at risk in their home country or made refugee claims. After their interception, they were duly returned to Cuba.[8]

10. The Appellant pleaded guilty and was convicted of three counts of attempted alien smuggling.[9] On March 16, 2004, the United States District Court sentenced him to 12 months and 1 day in prison.[10] US law did not require that the offence have been committed in order to obtain a profit and the government did not submit evidence on this point.

11. As a result of his conviction, the Appellant was subject to deportation from the United States. However, the Appellant was not deported. Instead, four years later, in August 2009, Mr. Hernandez decided to go to Canada. Assisted by a Canadian citizen, the Appellant presented himself by car at the Niagara Falls port-of-entry. He was allowed into Canada after the person accompanying him falsely represented that they were both Canadian citizens.[11] Two months after that, on October 29, 2009, the Appellant made a claim for refugee protection in Canada.[12] His claim has not yet been tested by any decision-maker in Canada.

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[8] Transcript of ID hearing, p 13 (AR, p 204); Q&A Interview Notes – March 31, 2011, p. 4 ("[t]he 48 people were returned to Cuba with no repercussion."))(AR, p 301). See also: Congressional Research Service, *Cuba: Issues for 11th Congress*, 2011, p 52 (AR, p 282), indicating that Cubans who are at risk of persecution, instead of being returned to Cuba, find asylum in the US or a third country.

[9] 8 U.S.C. §1324(a)(2)(A); Exhibit C-1, Factual Proffer, p. 2 (AR, p 253); Exhibit C-1, Judgment, p. 1 (AR, p 263)

[10] Exhibit C-1, Judgment, p. 2 (AR, p 264)

[11] Q&A Interview Notes – March 31, 2011 (referring to Questions 10(a)-(g))(AR pp 298-299)

[12] FCA Reasons, para 53; Exhibit C-2, Q&A Interview Notes – March 31, 2011, pp. 1-2 (AR, pp 65 and 298-299)

12. The Appellant was reported as being inadmissible to Canada on grounds of serious criminality under s. 36(1)(b) of the *IRPA*, for having been convicted of an offence outside of Canada that, if committed in Canada, would constitute an offence punishable by a maximum term of imprisonment of at least 10 years, and under s. 37(1)(b) of the *IRPA*, for having engaged, in the context of transnational crime, in people smuggling. He was referred to the Immigration Division (ID) of the Immigration and Refugee Board (IRB) for a hearing.[13]

B. STATUTORY FRAMEWORK

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

C. DECISIONS BELOW

1. The decision of the Immigration Division

14. On January 27, 2012, the ID first determined that the Appellant is inadmissible to Canada for serious criminality in accordance with s. 36(1)(b) of the *IRPA.* It found that his US conviction on three counts of alien smuggling was equivalent to the Canadian offence of human smuggling in s. 117 of the *IRPA*, which is punishable by a maximum penalty of ten years imprisonment, when committed in respect of fewer than 10 persons.[14]

15. The ID also found the Appellant inadmissible under s. 37(1)(b) of the *IRPA* for having engaged, in a transnational criminal context, in people smuggling. The ID found that s. 117, the *IRPA* people smuggling offence, provided an appropriate interpretative guide for defining "people smuggling" and that, therefore, s. 37(1)(b) did not require evidence of a financial or other material benefit. The ID rejected the Appellant's argument

[13] Reports dated January 19, 2010 and March 31, 2011, and Referral dated June 11, 2010 (AR, pp 247-249 and 292-293)
[14] ID Reasons, paras 13, 15 and 26 (AR, pp 7 and 11)

about the need for a financial benefit that he based on the definition of "migrant smuggling" in the *Smuggling Protocol*.[15]

16. The ID also found, based on s. 117 of the *IRPA*, that "people smuggling" in s. 37(1)(b) includes the elements of "knowingly organizing, inducing, aiding or abetting the coming into a country of one or more persons who are not in possession of a visa, passport or other document required by that country." Contrary to his contention, the ID did not accept for a fact that the Appellant acted for "humanitarian" motives; rather, the ID simply took note of the Appellant's statements to that effect.[16] The ID did find that the Appellant knew the persons he attempted to smuggle did not have authorization to enter the US.[17]

17. The Appellant did not contest the constitutional validity of s. 37(1)(b) at his inadmissibility hearing before the ID or, on judicial review, before the Federal Court. He raised the issue for the first time before the Federal Court of Appeal.

2. The decision of the Federal Court

18. On December 4, 2012, the Federal Court (Zinn J.) set aside the ID's inadmissibility determination under s. 37(1)(b) of the *IRPA*. The Appellant had not contested his serious criminality inadmissibility finding under s. 36(1)(b). Zinn J. concluded that the human smuggling offence at s. 117(1) did not dictate the proper meaning of "people smuggling" in s. 37(1)(b) and that, properly construed, "people smuggling" included a profit element. Notably, he relied on the fact that these provisions use different expressions ["people smuggling" at s. 37(1)(b) and "human smuggling" at s. 117(1)] and that trafficking in persons and money laundering, which are mentioned in s. 37(1)(b), are activities which, in his view, are done for profit.[18]

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[15] ID Reasons, paras 28-29, 37-40; FCA Reasons, paras 59 and 61 (AR, pp 12, 15-16 and 66); *Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime* (2000), 2241 UNTS 507 [*Smuggling Protocol*] [RBOA tab 125]
[16] ID Reasons, para 29 (AR, p 13)
[17] ID Reasons, paras 40-42, 44; FCA Reasons, para 60 (AR, pp 16-17 and 66)
[18] FC Reasons, paras 59, 49, 70-72, 28-31 (AR, pp 42, 39, 46-47, 32-33)

3. The decision of the Federal Court of Appeal

19. The Minister appealed Zinn J.'s decision to the Federal Court of Appeal (FCA). The appeal was heard concurrently with the appeals in *JP* and *B306*. On November 12, 2013, the FCA allowed the three appeals, dismissed the judicial review applications and upheld the deportation orders that had been issued by the ID. The Respondent refers to his summary of the FCA decision in his memorandum in the *JP* appeal.

II. POINTS IN ISSUE

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

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

Answer: Yes.

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

Answer: Yes.

c) On June 9, 2014, the Chief Justice also stated the following constitutional questions: Does s. 37(1)(b) of the *IRPA* infringe s. 7 of the *Canadian Charter of Rights and Freedoms* and, if so, is the infringement a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society under s. 1 of the *Canadian Charter of Rights and Freedoms*?

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

III. ARGUMENT

A. THE APPROPRIATE STANDARD OF REVIEW IS REASONABLENESS

21. The Respondent refers to his argument on the appropriate standard of review in his memorandum in *JP* and adds the following.

22. While the Appellant points out that the Minister has a right to appeal unfavourable ID decisions to the Immigration Appeal Division, this does not demonstrate Parliament intended the ID to be accorded less deference when interpreting its home statute. This Court has already held that "even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise."[19]

23. The Appellant's concern about possible contradictory decisions by the ID on the interpretation of s. 37(1)(b) is misplaced. In fact, the ID decisions at issue in these appeals are all consistent to the effect that s. 37(1)(b) cannot be interpreted in the narrow manner suggested by the Appellant. Further, this Court has recently rejected this argument, noting that questions of law that are not of central importance to the legal system can appropriately be examined under a reasonableness standard of review.[20]

24. Finally, the Appellant erroneously argues that the ID should be accorded less deference because it may be called upon to apply the rules of interpretation of bilingual statutes, claiming that it does not have expertise in this area.[21] Since all federal statutes are enacted in both official languages, federal tribunals routinely interpret bilingual statutes. If accepted, this argument would effectively mean that it would never be possible to accord deference to the findings of federal administrative tribunals even when they interpret their home statutes.

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[19] *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557, p 591 [RBOA tab 51]
[20] *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 SCR 160, para 38 [RBOA tab 88]
[21] Appellant's factum, para 51

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

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

1. The Appellant's erroneous approach to the interpretation of s. 37(1)(b)

26. The central premise of the Appellant's argument is erroneous. For the reasons already set out in the Respondent's memorandum in *JP*, there is no ambiguity in s. 37(1)(b). There are no elements in the text or the context of this provision which show Parliament intended, expressly or by necessary implication, to require that the person engaged in people smuggling acted with a view to obtaining a profit or other material benefit.

27. The Appellant's argument that s. 37(1)(b) should not be interpreted by reference to s. 117(1) of the *IRPA* because the immediate objectives of the provisions differ – the former being concerned with inadmissibility, while the latter is concerned with criminal prosecution – does not recognize that both provisions deal with the problem of human smuggling, even though they provide a different response to it. While s. 117 is a penal provision, the purpose of s. 37(1)(b) is to identify persons whose presence in Canada is not considered desirable.

28. Other provisions in the *IRPA* are specifically concerned with inadmissibility on criminal grounds.[22] Criminality might therefore have penal consequences, as well as immigration repercussions.

29. The fact that some individuals engaged in people smuggling may also be inadmissible under other inadmissibility grounds (for example, s. 34 dealing with security grounds or s. 36(1) dealing with serious criminality) does not mean that they cannot also be described in s. 37(1)(b), the only inadmissibility provision that specifically mentions

[22] *IRPA*, s 36 (criminality and serious criminality). See also s 35 (violating human and international rights) [RBOA tab 5]

people smuggling. The inadmissibility grounds need not be mutually exclusive and there is bound to be some overlap.

30. The Appellant's interpretation of ss. 37(1)(b) and 117(1) as disconnected provisions leads to an absurd result, especially when one considers the circumstances of his own case. Had he attempted to bring the forty-eight migrants illegally into Canada, instead of the US, his activities would clearly be caught by s. 117(1) and subject to the possible imposition of a life sentence. Yet, on his interpretation, he asserts that he is not inadmissible under s 37(1)(b) for having engaged in "people smuggling." This contention is absurd.

31. For the reasons already set out in the Respondent's memorandum in *JP*, the Appellant's argument that s. 37(1)(b) seeks *only* to target those individuals who are involved in a criminal organisation who act for profit and pose a grave danger to the safety of Canadians ignores the clear text of s. 37(1)(b) and oversimplies its purposes.

32. Section 37(1)(b) does not require evidence that the person poses a danger, grave or otherwise, to the security of Canadians. When Parliament intends to render inadmissible a person on the basis of the danger that he or she constitutes to national security, public safety, or public health, for example, it is explicit about this.[23] By contrast, no such requirement is specified in s. 37(1)(b).

2. International law

33. With respect to the Appellant's arguments on the *Refugee Convention*[24] and the *Smuggling Protocol*, the Respondent refers to its memorandum in *JP* and adds the following.

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[23] See eg *IRPA*, ss 34(1)(d) ("being a danger to the security of Canada); 34(1)(e) ("engaging in acts of violence that would or might endanger the lives or safety of persons in Canada"; 38(1)(a) ("health condition [...] likely to be a danger to the public health") and 38(1)(b) ("health conditions [...] likely to be a danger to public safety") [RBOA tab 5]

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

34. The Appellant's thesis rests on a fundamental misunderstanding of the role of s. 37(1)(b) within the *IRPA*. It is not the objective of this provision to put into effect the prohibition against *refoulement* contained in Article 33 of the *Refugee Convention*. Rather, this is the function of s. 115 of the *IRPA*.[25]

35. Instead, s. 37(1)(b) renders inadmissible those who engage in the transnational criminal activity of people smuggling. The fact that an inadmissible person under s. 37(1)(b) has presented a claim for refugee protection in Canada does not alter its meaning.

36. When Parliament intended to exempt protected persons from the application of an inadmissibility provision, it made clear provision for this. For example, s. 38(2)(c) exempts protected persons from medical inadmissibility where their health condition would pose an excessive demand on health services, and s. 42 exempts such persons from inadmissibility on the grounds of an inadmissible family member.[26] Section 37(1)(b) has no similar constraint.

37. Those who present a claim for refugee protection in Canada are subject to Part II of the *IRPA*, dealing with "Refugee Protection", which sets out a detailed regime that governs the manner in which such claims are made. It is only when a claimant has been recognized as a "protected person" that s. 115 applies.

38. It would improper to import, in the context of the interpretation of s. 37(1)(b), the same requirements as are in s. 115(2). It is not necessary to require at the inadmissibility stage that the person concerned constitute a significant and present danger to the security of Canada. Section 37(1)(b) simply does not contain such a requirement.

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[25] *Németh v Canada (Justice)*, [2010] 3 SCR 281, 2010 SCC 56, paras 21-23 [RBOA tab 48]

[26] See also: *Immigration and Refugee Protection Regulations*, SOR 2002-27, ss 21, which exempts protected reasons from inadmissibility on financial grounds under s 39 of the *IRPA*, and 22, which exempts refugee claimants and protected persons from inadmissibility for misrepresentation under s 40(1)(a) of the *IRPA*. [RBOA tab 6]

3. Conclusion: The Appellant was properly found inadmissible under s. 37(1)(b) of the *IRPA*

39. The Appellant assumed a key role in an operation to smuggle forty-eight Cuban nationals into the US, knowing these individuals did not have the required documents.[27] Properly interpreted, s. 37(1)(b) does not require any further evidence of the personal motives for which he committed his actions. The ID reasonably held the Appellant is inadmissible under s. 37(1)(b) of the *IRPA*.

40. Furthermore, there is nothing in the record which indicates that the Appellant's actions were born out of duress or necessity. At the time of his offence, the Appellant already had protection in the US. Even after his conviction, he was not actually deported by US officials but chose to come to Canada.

41. As stated already, there is no evidence that the 48 persons he picked up and transported in his boat were in any imminent peril. While the Appellant now alleges he intended to assist close family members, this was not the motive he offered to authorities when intercepted.

42. In sum, the Appellant clearly engaged in people smuggling. It was reasonable for the ID to conclude that he is inadmissible under this ground.

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

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

44. The sole constitutional question in this appeal is whether s. 37(1)(b) of the *IRPA* infringes s. 7 of the *Charter* and, if so, whether such infringement is justified under s. 1. Like the other appellants, Hernandez falls into the error of attempting to challenge the validity of the refugee protection regime under the *IRPA* and, in the process of so doing, exaggerates the real scope of s. 37(1)(b).

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[27] ID Reasons, paras 40-42, 44; FCA Reasons, para 60 (AR, pp 16-17 and 66)

45. While the Appellant claims his removal would expose him personally to a risk of mistreatment, it is important to properly distinguish between a finding of inadmissibility and actual removal, which may or may not take place at a later stage. The Appellant's risk allegations will be assessed as part of that separate process, and ultimately, it will be up to another decision-maker to decide whether his allegations are well-founded. As such, his alleged prejudice at this stage can only be decribed as premature.[28]

46. As for the Appellant's argument that he is stigmatized by a finding of inadmissibility under s. 37(1)(b), it ignores that he plead guilty and was convicted in a public proceeding in the US for attempted "alien smuggling."

47. Should this Court conclude s. 37(1)(b) deprives the Appellant of any of his s. 7 rights, this provision is in accordance with the principles of fundamental justice. The application of s. 37(1)(b) to the Appellant's actual circumstances is consistent with the purposes of s. 37(1)(b). It is neither arbitrary nor overbroad and, as such, is consistent with the principles of fundamental justice.

48. The Appellant deliberately organized a smuggling operation with full knowledge of its illegal nature. His conduct is plainly covered by s. 37(1)(b), irrespective of whether he acted in order to achieve a monetary gain. The ID's interpretation flows from, and promotes, the objectives served by this provision.

49. With respect to the Appellant's argument regarding the application of s. 37(1)(b) to a "humanitarian smuggler", the Respondent refers to his memorandum in *JP*. In sum, Parliament did not intend to exclude from the ambit of "people smuggling" under s. 37(1)(b) those who voluntarily and knowingly assist the illegal entry of another person, even if they did not seek to realize a financial advantage. As such, the application to them of s. 37(1)(b) cannot be said to be arbitrary or overbroad.

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[28] *Febles v Canada (MCI)*, 2014 SCC 68, paras 67-68 [RBOA tab 35]

IV. COSTS

50. The Minister of Public Safety seeks his costs in this appeal. The Minister does not seek costs in respect of the Federal Court or Federal Court of Appeal proceedings and asks that costs not be awarded in respect of those proceedings as there are no special reasons[29] for such an order.

V. NATURE OF ORDER SOUGHT

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Toronto this 19th day of November 2014.

Marianne Zoric
Of Counsel for the Respondent

p.p.
François Joyal
Of Counsel for the Respondent

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

VI. TABLE OF AUTHORITIES

		Paras.
A. Statutes and Regulations		
Immigration and Refugee Protection Act, S.C. 2001, c. 24		2, 3, 12, 14-16, 18, 20, 23, 26-28, 30-32, 34-39, 43, 44, 46-49
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B. Jurisprudence		
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C. International Instruments		
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Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime (2000), 2241 UNTS 507		15, 33

VII. LEGISLATION AT ISSUE

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

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

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

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

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

punishable by a maximum term of imprisonment of at least 10 years.		dix ans.

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

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

Organizing entry into Canada (before Dec. 15, 2012) **117.** (1) No person shall knowingly organize, induce, aid or abet the coming into Canada of one or more persons who are not in possession of a visa, passport or other document required by this Act.		**Entrée illegale (avant le 15 décembre 2012)** **117.** (1) Commet une infraction quiconque sciemment organise l'entrée au Canada d'une ou plusieurs personnes non munies des documents — passeport, visa ou autre — requis par la présente loi ou incite, aide ou encourage une telle personne à entrer au Canada.

Canadian Charter of Rights and Freedoms

1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.		**1.** La Charte canadienne des droits et libertés garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.		**6.** (1) Tout citoyen canadien a le droit de demeurer au Canada, d'y entrer ou d'en sortir.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.		**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

NO.: 35677

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

BETWEEN:

JESUS RODRIGUEZ HERNANDEZ

APPELLANT
(Respondent in Federal Court of Appeal)

AND:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

RESPONDENT
(Appellant in Federal Court of Appeal)

RESPONDENT'S FACTUM

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

Counsel for the Respondent

Marianne Zoric
François Joyal
Department of Justice Canada
Ontario Regional Office
Suite 3400, Box 36
130 King Street West
Toronto, Ontario M5X 1K6
Telephone: (416) 954-8046
(514) 283-5880
Fax: (416) 954-8982
(514) 496-7876
marianne.zoric@justice.gc.ca
francois.joyal@justice.gc.ca