Federal Court  Cour fédérale

Date: 20131011

Docket: IMM-7523-12

Citation: 2013 FC 1033

Ottawa, Ontario, October 11, 2013

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

B006

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, known as B006, seeks judicial review of two decisions of the Immigration Division of the Immigration and Refugee Board of Canada [the Board]. In its decision dated July 5, 2012, the Board issued a deportation order after determining that the applicant was inadmissible for engaging in people smuggling contrary to paragraph 37(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*]. In an earlier decision on three preliminary applications, dated November 30, 2011 the Board determined that the conduct of the Minister of Public Safety

[the Minister] did not amount to an abuse of process and refused to stay the admissibility proceedings, and, alternatively, refused to exclude interview notes of a Canadian Border Services Agency [CBSA] officer from the admissibility hearing.

[2] The applicant filed an application for leave and judicial review of the preliminary decision of the Board and leave was granted. The applicant then brought a motion to stay the admissibility hearing until a decision was rendered on the judicial review of the preliminary decision. The Court refused to stay the admissibility hearing and it proceeded in April 2012.

Background

[3] B006 is a Tamil from Sri Lanka who arrived in Canada with his seven-year-old son on August 13, 2010 on the *MV Sun Sea*. The *MV Sun Sea* was an unregistered ship with 492 migrants on board, all of whom sought refugee protection upon arrival. Their journey from Thailand lasted approximately three months in deplorable conditions on the ship, which was barely sea worthy, dangerously over-crowded and inadequately stocked with food and water.

[4] The applicant was one of the first passengers to board the ship and, because of his past experience working on commercial vessels, was asked to work in the engine room until the Thai crew returned. The Thai crew did not return and the applicant continued to work in the engine room. Upon his arrival in Canada, he applied for refugee status alleging a fear of persecution by Sri Lankan authorities based on years of abuse, including extortion, arbitrary detention and torture.

[5] The applicant was held in detention for approximately 10 months and was interviewed and interrogated on several occasions by CBSA officers.

[6] The Minister initially alleged that the applicant was inadmissible to Canada for security reasons pursuant to paragraph 34(1)(f) of the *Act*. The CBSA officers repeatedly asserted that confidential informants had provided information about the applicant, including that he had worked on board the *Omiros* in the 1990s, a vessel owned by the Liberation Tigers of Tamil Eelam [LTTE], and that he was a member of the Sea Tigers, the naval wing of the LTTE.

[7] At each 30 day detention review hearing, the Minister alleged that the applicant was a member of the LTTE. At the June 2011 detention review hearing, the Minister abandoned the allegations of LTTE membership and focused on the applicant's inadmissibility due to people smuggling. Given the absence of any evidence to support the section 34 criteria, the Board scheduled a detention review hearing and released the applicant.

[8] The Minister also alleged that the applicant had engaged in people smuggling due to his role as a crew member on the *MV Sun Sea* and was inadmissible on grounds of organized criminality under paragraph 37(1)(b) of the *Act*, which provides:

37. (1) A permanent resident or a foreign national is inadmissible on grounds of organized criminality for	37. (1) Emportent interdiction de territoire pour criminalité organisée les faits suivants :
[…]	[…]
b) engaging, in the context of transnational crime, in activities such as people smuggling,	*b*) se livrer, dans le cadre de la criminalité transnationale, à des activités telles le passage de

trafficking in persons or money laundering.	clandestins, le trafic de personnes ou le recyclage des produits de la criminalité.

The Board's decision regarding the abuse of process allegations

[9] The applicant alleged that his rights had been breached by the Minister for three reasons: the Minister relied on interviews from unnamed people; the Minister did not provide full disclosure of the interviews; and the Minister's representative, CBSA Officer Lane, engaged in abusive interview tactics.

[10] The applicant brought three applications: (1) to exclude the declarations of two CBSA officers (Officers Puzeris and Gross) which included interview notes regarding the applicant's role on the ship and interview notes with a confidential informant; (2) an Order to require the Minister to disclose the complete transcripts of all the interviews with the applicant, his wife and family members; and, (3) to exclude the interview notes between CBSA Officer Lane and the applicant and/or to grant a stay of proceedings.

[11] On June 17, 2011, before the hearing on the three applications commenced, the Minister provided the interview notes and audio recordings.

[12] On the second day of the hearing, June 23, 2011, the Minister advised the Board that he would not be pursuing the section 34 allegation that the applicant was inadmissible due to membership in the LTTE because there was insufficient information to support the allegation.

[13] The Board noted that this was a surprise given that the Minister had asserted that multiple confidential informants had said that B006 had been a member of the Sea Tigers and that the CBSA officers had repeatedly accused the applicant of lying about such membership, although he had consistently denied it. As noted above, following receipt of this information, the Board scheduled a detention review hearing and the applicant was released from detention on June 27, 2011.

[14] The Board also granted the application to exclude the declarations of Officer Puzeris and Gross which provided confidential informant evidence.

[15] The only issue remaining to be addressed by the Board was the allegation that Officer Lane's interview tactics amounted to an abuse of process warranting a stay of proceedings or alternatively, that the interview notes should be excluded. The Board noted, however, that the applicant's allegation remained that the Minister's overall conduct constituted an abuse of process.

[16] The Board found that it had the jurisdiction to stay an admissibility hearing in rare cases but that a stay was not justified in this case.

[17] The Board referred to and considered the criteria established in *Canada (Minister of Citizenship and Immigration) v Parekh*, 2010 FC 692 at para 60, [2010] FCJ No 856 [*Parekh*], that: (1) prejudice caused by the abuse will be manifested, perpetuated or aggravated through the conduct of the trial (or proceeding) or its outcome, and (2) no other remedy is reasonably capable of removing that prejudice.

[18] With respect to the applicant's request to have the evidence of the interviews excluded, the Board acknowledged that Officer Lane had overstated the strength of the information the CBSA had against the applicant, accused the applicant of lying 14-15 times during the interviews, and aggressively questioned the applicant. The Board also expressed concerns about omissions from the notes.

[19] The Board denied the application for exclusion on the basis that the notes would not prejudice the applicant at his admissibility hearing given that he remained consistent in his testimony and denied having been a member of the LTTE.

[20] The Board also noted that the applicant was represented by counsel at the time of Officer Lane's interviews and that he never advised the Board that he felt threatened or intimidated by the Officer.

The Board's decision regarding Admissibility

[21] The Board found reasonable grounds to believe that the applicant is a foreign national who engaged in people smuggling and was therefore inadmissible to Canada pursuant to paragraph 37(1)(b) of the *Act*.

[22] The Board considered the submissions of the parties regarding the appropriate definition of people smuggling. The applicant submitted that the definition should be guided by the definition of human smuggling in Article 3(a) of the *UN Convention Against Transnational Organized Crime* and the *Protocol Against the Smuggling of Migrants by Land, Sea and Air* [the Protocol] whereby

an element of material or financial gain is required. The Minister argued that there was no element of material benefit or financial gain and that the definition should be guided by subsection 117(1) of the *Act*, which at that time provided:

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.	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.

[23] The applicant also submitted that he did not meet the definition in subsection 117(1) of the *Act* because he did not know that the passengers on board the *MV Sun Sea* were traveling without proper documentation and alternatively, his work on the ship, to the extent that it would be considered aiding persons to come into Canada, was performed under duress.

[24] The Board relied on the jurisprudence and concluded that the definition of people smuggling under paragraph 37(1)(b) of the *Act* is guided by section 117, which requires four elements to be met:

i) the person being smuggled did not have the required documentation to enter Canada;

ii) the person was coming into Canada;

iii) the person concerned (i.e., the applicant) was organizing, inducing, aiding or abetting the person to enter Canada; and

iv) the person concerned (i.e., the applicant) had knowledge of the lack of required documents.

[25] The Board found that at least 451 of the passengers did not have proper documentation. The Board also found that the route chosen by the *MV Sun Sea* was clearly intended for Canada and that the applicant himself testified that he knew the ship was destined for Canada.

[26] The Board acknowledged that there was no evidence that the applicant was involved in organizing the *MV Sun Sea* operation. The Board found, however, that whether or not he knew he would be a crew member before he boarded, by agreeing to work in the engine room, he aided the other passengers on the ship to come to Canada.

[27] The Board noted the applicant's testimony that he did not think there was any way he could leave the ship because he had no passport and no authorization to be in Thailand and he feared what would happen to him and his son there and also feared that if he returned to Sri Lanka he would be tortured.

[28] The Board rejected the applicant's submission that he acted under duress. The Board referred to and relied on the three elements of the defence of necessity or duress established in *R v Perka*, [1984] 2 SCR 232, 13 DLR (4th) 1 [*Perka*]: (1) a threat of immediate peril or danger; (2) no legal alternative to the course of action taken; and (3) proportionality between the harm inflicted and the harm avoided.

[29] The Board found that there was no evidence of threats of immediate harm. The Board also found that the ship had remained close to shore in Thailand for three months and while the applicant

may have speculated what would happen to him if he returned to Thailand without a passport, this does not constitute evidence of imminent danger. The applicant still owed $30,000 to his agent and the Board found the applicant's evidence that he could not get in touch with his agent in Thailand, who had his passport, to not be credible.

[30] The Board rejected the applicant's assertion that he did not know that the passengers did not have valid travel documents. The Board found that the applicant's own experience working on a commercial ship would have caused him to know that a passport was needed to enter a country legally. The applicant had given his passport to his agent. The Board did not accept his excuse that his agent told him that he did not need a passport to make a refugee claim in Canada. The Board further found that it would have been obvious to the applicant when he promised to pay his agent $30,000 and when he saw the condition of the *MV Sun Sea* that he was not coming to Canada by legal means. He knew he could not travel to Canada commercially without a passport or visa whether to claim refugee status or not. The Board, therefore, found it implausible that he was not aware that other passengers were in the same situation without documentation.

[31] The Board found that all four elements of the definition of people smuggling had been met, and concluded that there were reasonable grounds to believe that the applicant is a foreign national who engaged, in the context of transnational crime, in people smuggling.

The issues

[32] The two broad issues are whether the Board erred in finding that a stay of proceedings is not justified and whether the Board's finding that the applicant is inadmissible pursuant to paragraph 37(1)(b) is reasonable. The applicant raised several specific issues which will be addressed in responding to the broader issues.

Standard of review

[33] The applicant submits that the standard of correctness applies to the articulation of the test for abuse of process and that the Board did not apply the correct test because it found that actual prejudice was a precondition for a finding of abuse of process.

[34] The applicant agrees that questions of mixed fact and law would be reviewable on the reasonableness standard and the Board's application of the correct test to the facts would be reviewed accordingly.

[35] I agree that the standard of correctness applies to the articulation of the legal test for abuse of process. However, I do not agree that the Board misstated the test. The Board acknowledged the case law that has established the test and how that test had been applied to different fact situations. The Board captured the key aspects of the correct test and adapted it to the circumstances before it and applied it appropriately.

[36] The standard of review for both the Board's determination that there was no abuse of process and the Board's determination that the applicant was inadmissible pursuant to paragraph 37(1)(b) is that of reasonableness.

[37] The Federal Court of Appeal, in *B010 v Canada (Minister of Citizenship and Immigration)*, 2013 FCA 87 at paras 60-72, [2013] FCJ No 322 [*B010*],confirmed that the standard of review to be applied to the Board's interpretation of people smuggling in paragraph 37(1)(b) is that of reasonableness and that deference is owed.

[38] The role of the Court is, therefore, to determine whether the decision under review "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). Several outcomes may be reasonable and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

Abuse of Process

Did the Board err in law by failing to consider the misconduct complained of on a cumulative basis?

Did the Board err in ignoring specific egregious conduct by the Minister?

[39] The applicant submits that the conduct of the Minister, through his representatives, CBSA Officers, must be considered cumulatively to determine whether a stay of proceedings is justified.

[40] The applicant alleged the following misconduct by the Minister's representatives: reliance on confidential informant information; failure to disclose all the relevant material to the applicant and to the Board; reliance on an altered (i.e., incomplete) transcript of interviews; misleading submissions on the strength of the case against the applicant which contributed to his prolonged detention; abusive interrogations by Officer Lane, which included threats, lies, and trickery; breach of the applicant's right to counsel by Officer Lane; and, offering false inducements, for example, that if the applicant told the truth it would be helpful to any Ministerial relief application.

[41] The applicant submits that in addition to ignoring some of the specific misconduct, in particular the breach of the applicant's right to counsel and the offer of false inducements to the applicant and the applicant's wife, the Board failed to consider the totality of the other misconduct, including that which it provided remedies for.

[42] The applicant argues that in the course of an interview, Officer Lane told the applicant that he would be writing a section 44 report, but continued to question the applicant after the applicant indicated he wanted to consult counsel.

[43] The respondent submits that the Board considered all the misconduct alleged individually and cumulatively.

[44] The respondent submits that the Minister was entitled to attempt to introduce confidential informant testimony and any deficiencies in that evidence would have been taken into account in

attributing the appropriate weight. Moreover, the applicant suffered no prejudice since the Board excluded the evidence.

[45] The respondent notes that it disclosed what it considered to be relevant in accordance with the *Act*. Moreover, the Minister later agreed to provide the requested material. Therefore this can not be considered abusive or misconduct.

[46] The respondent appears to agree that the interview notes should have indicated that they were a summary, but regardless, the omissions do not amount to abuse, nor does the error with respect to the duration of the interview with the applicant's wife.

[47] The respondent notes that information was evolving in the investigation regarding the *MV Sun Sea* and the fact that the information from the informants was later found not to be reliable does not mean that relying on it at the earlier detention reviews was abusive. The Officers had reason to believe the applicant was linked to the LTTE and/or Sea Tigers given that his brother was a member of the LTTE, the applicant had worked on the LTTE ship, the *Omiros*, in the 1990s and the applicant had lied about both of these facts in early interviews.

[48] The respondent submits that Officer Lane's interviewing techniques were not abusive. Given the scope and complexity of the *MV Sun Sea* investigation, the belief that the applicant was linked to the LTTE and his earlier misrepresentations, the style of accusatory questioning was not excessive. The respondent also submits that the Officer did not offer any inducement by advising

the applicant and his wife that telling the truth would serve the applicant well in any Ministerial relief application.

[49] In looking at the conduct individually and cumulatively, the respondent submits that it does not come close to being one of the "clearest of cases" to justify a stay of proceedings.

The Board considered the conduct individually and cumulatively

[50] Reading the reasons as a whole I find that the Board did consider all the allegations of misconduct individually and cumulatively. Although the only issue that remained to be addressed by the Board was the abusive interrogation tactics of Officer Lane, the Board was aware of and considered the broader circumstances, including the late disclosure and the section 34 allegations. The Board specifically addressed the allegations that the applicant had been denied his right to counsel, but as noted by the respondent, the applicant had indicated that he would speak with his counsel the next day and did not assert that he could not continue with the questioning.

[51] The Board made several critical comments about the interrogation or interview tactics as a whole but did not conclude that these tactics amounted to an abuse of process.

[52] For example, the Board observed that Officer Lane's methods of questioning were "unlike anything" it had "previously observed from a CBSA officer" and that he had "proceeded in a far more aggressive manner than I have so far observed being taken in interviews of refugee claimants".

Did the Board err in law in its articulation of the test for abuse of process?

Did the Board reasonably conclude that the test for abuse of process warranting a stay of proceedings was not met?

[53] The applicant submits that the Board erred in law in finding that actual prejudice was a precondition for a finding of abuse of process.

[54] The respondent submits that the Board applied the correct test; it considered whether the administration of justice would be brought into disrepute and whether the community's sense of fair play would be offended by continuing with the proceedings. However, the applicant simply did not establish that the misconduct alleged would prejudice the integrity of the justice system. To rise to the level of abuse of process, the conduct must cause actual prejudice to the fairness of the proceedings or to the public's confidence in the integrity of the justice system and this conduct did not reach that threshold.

The Board applied the correct test and reached a reasonable conclusion

[55] As noted above, I do not agree that the Board erred in articulating the test for abuse of process nor do I agree that the Board found that prejudice was a precondition to a determination that an abuse of process had occurred.

[56] The case law, including *R v Nixon*, 2011 SCC 34, [2011] 2 SCR 566 [*Nixon*], establishes that prejudice to the accused (in a criminal prosecution) is not determinative of abuse of process, but is relevant.

[57] In *Nixon*, the Supreme Court of Canada noted at para 41:

> Under the residual category of cases, prejudice to the accused's interests, although relevant, is not determinative. Of course, in most cases the accused will need to demonstrate that he or she was prejudiced by the prosecutorial conduct in some significant way to successfully make out an abuse of process claim. But prejudice under the residual category of cases, is better conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice….

[58] The Court went on to note that a balancing was required.

[59] And at para 42, the Court noted:

> The test for granting a stay of proceedings for abuse of process, regardless of whether the abuse causes prejudice to the accused's fair trial interests or to the integrity of the justice system, is that set out in *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297. A stay of proceedings will only be appropriate when: "(1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice" (*Regan*, at para. 54, citing *O'Connor*, at para. 75). [My emphasis]

[60] In *Parekh*, Justice Tremblay-Lamer considered whether an abuse of process resulted from a lengthy delay in processing of a citizenship application, and characterized the test for abuse of process, at para 24:

> 24 Generally speaking, a court will find that an attempt to apply or enforce legislation has become an abuse of process when the public interest in the enforcement of legislation is outweighed by the public interest in the fairness of administrative or legal proceedings; see *Blencoe v. British Columbia (Human Rights Commission), 2000 SCC 44, [2000] 2 S.C.R. 307*, at paragraph 120, where the test is set out as follows:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" [Donald JM Brown & John M Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf (Toronto: Canvasback, 1998 (loose-leaf) at p 9-68]. According to L'Heureux-Dubé J. in [*R v Power*, [1994] 1 SCR 601, 89 CCC (3d) 1 [*Power*]], at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, *supra*, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.

[61] The Board did not find that actual prejudice to the applicant was a condition precedent to abuse of process, but the Board did consider whether he would suffer prejudice, as prejudice is a relevant factor which would inform the fairness of the admissibility hearing and would inform whether remedies short of a stay are appropriate. As noted in *Power* (cited by Justice Tremblay-Lamer in *Parekh*), a stay of proceedings is a last resort to be relied on only in the clearest of cases.

[62] The Board referred to the case law that establishes the test for abuse of process in the administrative law context. The Board noted specifically the cases that dealt with delay, including *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44, [2000] 2 SCR 307 [*Blencoe*], *Beltran v Canada (Minister of Citizenship and Immigration),* 2011 FC 516, [2011] FCJ No 633, and *Parekh*, which noted the need to consider whether the Minister's actions would bring

the "administration of justice into disrepute'' or " offend the community's sense of fair play" if the proceedings continued.

[63] The Board stated that it applied the test which was set out in *Blencoe* and the criteria set out in *Parekh*: (1) the prejudice caused by the abuse in question will be manifested, perpetuated, or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice.

[64] The Board considered both criteria and determined that although B006 may have suffered distress in the interview process, that distress would not be manifested, perpetuated or aggravated by proceeding with the admissibility hearing. In addition, the interview notes would not prejudice B006 because he consistently denied his involvement with the LTTE.

[65] The applicant argues that the Board only assessed prejudice from the perspective of the applicant and did not analyze the harm that would result to the integrity of the justice system or to the community's notion of decency.

[66] The Board addressed the conduct which it found to be bordering on abusive and provided specific remedies. The Board then addressed the remaining allegations within the broader context of what the applicant had experienced, including his detention and the abandonment of the allegations pursuant to section 34.

[67] The tests for abuse of process considered by the Board were developed to address different scenarios, primarily in criminal proceedings. None of the tests that the applicant submitted to the Board were the perfect fit for the applicant's allegations of abuse. However, the Board considered the legal tests, adapted them and applied them to the allegations of misconduct in the admissibility proceedings. In concluding that the remedy of a stay was not warranted, it is apparent that the Board considered the bigger picture including the integrity of the justice system.

[68] The Board applied the correct test and reasonably concluded that the remedy of a stay of proceedings was not justified. Similarly, the Board reasonably concluded that the notes of the four interviews in question should not be excluded. The Board noted the interview tactics were aggressive and intimidating but did not produce any evidence that would be prejudicial to the applicant.

[69] It must be kept in mind that 492 persons arrived on the *MV Sun Sea*. The applicant was a member of the crew. The Minister had reasonable grounds to believe that the applicant was a member of the LTTE. The lengthy, repetitive and badgering questioning was clearly stressful and emotionally draining for the applicant, but this cannot, on its own, meet the test for abuse of process in an investigation as complex and large as this one.

Should the Court Find Abuse of Process and direct the Board to Stay the Proceedings?

[70] I have found that the Board did not err in its application of the test for abuse of process and reasonably found that a stay of proceedings was not justified. Therefore, it is not necessary to address this issue.

Did the Board err in finding that section 7 is not engaged?

[71] The applicant submits that the Board erred in finding that section 7 of the *Charter* was not engaged. Although the applicant agrees that section 7 would not be dispositive of the abuse of process issues, he submits that section 7 applies to the breach of the applicant's right to counsel during one interview and to the issue of the overbreadth of section 37, which, in the applicant's submission, would capture the conduct of aid workers and others who assist refugees to flee.

[72] The respondent submits that section 7 is simply not engaged on an admissibility hearing and that the time to assess risk would be at the time of removal.

[73] The issue of overbreadth is addressed below. As noted above, the Board considered the applicant's allegation that he was denied his right to counsel and reasonably concluded that he was not.

Admissibility

Did the Board err in interpreting paragraph 37(1)(b) of the Act by relying on section 117 of the Act, an overbroad provision which has been found to be unconstitutional?

[74] The Board did not err in relying on section 117 to guide the interpretation of people smuggling in paragraph 37(1)(*b*).

[75] In *B010*, the Federal Court of Appeal confirmed that people smuggling as contemplated in paragraph 37(1)(*b*), which provides that a person is inadmissible on grounds of organized criminality for "engaging, in the context of transnational crime, in activities such as people

smuggling, trafficking in persons or money laundering" does not require that there be any financial or material benefit for the smuggler. The Court of Appeal answered a certified question as follows, at para 8:

> Yes, it is reasonable to define inadmissibility under paragraph 37(1)*(b)* by relying upon subsection 117(1) of the *Immigration and Refugee Protection Act*, which makes it an offence to 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 the Act. To do so is not inconsistent with Canada's international legal obligations.

[76] When relying on the elements of the section 117 offence as the conduct that will form the basis of a finding of inadmissibility under section 37, it is important to keep in mind that different standards of proof apply.

[77] The criminal standard of proof applies to section 117, which sets out the elements of a criminal offence, each of which would have to be proved beyond a reasonable doubt for a conviction. Section 37 sets out grounds upon which a person is inadmissible to Canada, which includes engaging in people smuggling in the context of transnational crime. The standard of proof is set out in section 33; the facts that constitute inadmissibility include facts for which there are reasonable grounds to believe have occurred, are occurring, or may occur. This standard of proof is greater than a mere suspicion but less than the civil standard of proof on a balance of probabilities and far less than the criminal standard of proof.

[78] Therefore, a person could be found inadmissible based on reasonable grounds to believe they have engaged in people smuggling, but not charged, or if charged, not convicted of the offence under section 117, due to the inability to prove each element beyond a reasonable doubt.

[79] With respect to the applicant's submission that section 117 should not be relied on because it has been found unconstitutional due to overbreadth by the British Columbia Supreme Court in *R v Appulonappa*, 2013 BCSC 31, [2013] BCJ No 35 [*Appulonappa*], I remain guided by the Federal Court of Appeal in *B010*.

[80] The Court of Appeal noted at paras 88 and 90-91 that defining inadmissibility due to people smuggling with reference to section 117 would not place Canada in breach of the Refugee Convention because a finding of inadmissibility is not the same as removal from Canada. There are protections available for a person found inadmissible and, at the time of removal, any risk would be assessed. Therefore, concerns about overbreadth and, in particular, the applicant's allegations that section 117 could capture aid workers or other family members who assist refugees, which do not apply in the present case, were addressed by the Federal Court of Appeal.

[81] The Court of Appeal also noted at para 93 that inadmissibility proceedings are initiated pursuant to section 44, which provides that an officer *may* prepare a report:

> [93] The preparation of a report is permissive, that is, an officer "may" prepare a report. As well, the Minister's delegate "may" refer the report to the Immigration Division. It is to be expected that common sense will prevail in situations such as when family members simply assist other family members in their flight to Canada, or when a person acting for humanitarian purposes advises a refugee claimant to come to Canada without documents. [My emphasis]

[82] In addition, as noted by the respondent, the Court of Appeal was aware of the decision of the British Columbia Supreme Court in *Appulonappa* and chose not to specifically refer to it. This may

indicate that the Court did not consider it to be relevant to the issues before it. Regardless, the Court addressed the argument that section 117 cast the net too wide.

Did the Board err in finding the applicant inadmissible under paragraph 37(1)(b) of the Act because the Board erred in finding that he was aware that the other passengers did not have the required documents?

[83] The applicant submits that there was no reason to doubt his credibility and his evidence that he knew that one passenger held his own passport but he did not know whether other passengers had passports. The applicant's evidence was that he did not believe that a passport or visa was required to enter Canada as a refugee. This belief was based on what he had heard from his agent and his experience while he worked on a commercial ship and observed two crew members jumping overboard to seek refugee status in Italy.

[84] The applicant submits that the Board erred by asking itself the wrong question when assessing whether the applicant had knowledge that the passengers lacked documents to enter Canada legally rather than as refugees. The applicant argues that there is no requirement in the *Act* for a refugee to have a valid travel document or visa in order to claim refugee status and be admitted to Canada.

The Board did not err in finding that the applicant had the requisite knowledge

[85] Section 117 sets out the elements of the offence of aiding or abetting persons to enter Canada illegally, or as the marginal note describes "organizing entry into Canada". That offence is to be distinguished from the offence of trafficking in persons in section 118, which addresses the conduct of those who bring persons into Canada against their will. As noted, where a person is

charged with the offence under section 117 or 118, the Crown would have to prove each element of the offence beyond a reasonable doubt. The use of different terms in the same legislation with different standards of proof – "people smuggling" in section 37 and the heading of "human smuggling and trafficking" in Part 3 and the offence of "organizing entry into Canada" in section 117 and of "trafficking in persons" in section 118 – has resulted in countless legal arguments about how the provisions are to be interpreted and reconciled.

[86] The Federal Court of Appeal clarified a significant part of the debate in *B010*. To determine if a person is inadmissible under section 37 for engaging in people smuggling, the elements set out in section 117 will guide the determination of whether the person has been so engaged. However, as noted above, the standard of proof for a finding of inadmissibility is reasonable grounds to believe, which is far lower than the criminal standard of proof.

[87] The Board considered the four elements and found that there were reasonable grounds to believe that each element was satisfied: the vast majority of the passengers did not have documents; the ship was destined for Canada; the applicant worked in the engine room and in doing so, aided the passengers to come to Canada; and, the applicant knew the passengers did not have the required documents.

[88] The Board acknowledged that there was no evidence that the applicant was involved in organizing the *MV Sun Sea* operation, but by agreeing to continue to work in the engine room when the Thai crew did not return, he aided the ship coming into Canada.

[89] Although the applicant's evidence overall may have been credible, the Board did not find the applicant's evidence with respect to his awareness of the status of the other passengers to be credible.

[90] The Board reasonably found that the applicant's own experience working on a commercial ship would have caused him to know that a passport was needed to enter a country legally. In addition, I agree with the Board that it should have been apparent to the applicant that the ship was not traveling to Canada legally.

[91] The applicant knew that, like him, other passengers had paid significant amounts of money to travel on the dilapidated boat which was obviously a poor alternative to commercial transportation; he knew a passport was needed to enter a country legally; he had handed over his own passport to his agent; and, he claimed that he could not get off the ship in Thailand because he had no passport. The applicant cannot, on the one hand, claim he feared what would happen to him without a passport and, on the other, claim that he did not know a passport was needed to travel to Canada.

[92] The Board reasonably found it implausible that the applicant would not be aware that other passengers were in the same situation as he was – without a passport.

[93] With respect to the applicant's argument that no passport is needed to claim refugee status, the Federal Court of Appeal addressed this issue in *B010* at para 98, finding that the clear wording

of subsection 20(1) requires foreign nationals who seek to enter Canada to possess a visa or other document.

[94] The Court of Appeal noted, at para 99:

> [99] While, pursuant principles of refugee law, refugee claimants may be excused from the consequences of arriving without proper documentation, this does not mean that there is no requirement to possess documentation. If the appellant's submission on this point were accepted, no one could ever be found inadmissible for people smuggling if the persons smuggled into Canada made refugee claims.

[95] Contrary to the applicant's submission, the Board did not ask itself the wrong question. The question is whether the applicant knew others did not have travel documents to legally enter Canada. The Board reasonably found that there were reasonable grounds to believe that the applicant had the requisite knowledge that the passengers were traveling without documents; whether he asked the passengers or not, he would or should have known.

[96] The Board, therefore, had reasonable grounds to believe that the applicant had engaged in people smuggling as all the elements were established on the same standard of reasonable grounds to believe.

Did the Board err in law in finding that the applicant did not act under duress?

[97] The applicant submits that duress and necessity are recognized defences in criminal law to excuse conduct and that the defences are applicable to admissibility findings in the immigration context. The applicant submits that the Board erred in its assessment of whether he acted under duress.

[98] The respondent submits that the defence of duress is not available to the applicant and relies on a passage from *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FCA 103 at para 64, [2011] FCJ No 407 [*Agraira*], which referred to section 34 of the *Act* regarding inadmissibility on security grounds, for this position:

> [64] As I read the Supreme Court's decision, it concluded that the saving provision of section 19 of the *Immigration Act* would apply to protect persons who innocently joined or contributed to organizations that, unbeknownst to them, were terrorist organizations. There may be other cases in which persons who would otherwise be caught by subsection 34(1) of the *IRPA* may justify their conduct in such a way as to escape the consequence of inadmissibility. For example, those who could persuade the Minister that their participation in a terrorist organization was coerced might well benefit from ministerial relief. [My emphasis]

[99] The respondent takes the position that duress is a factor to be considered under subsection 37(2) and cannot, therefore, be considered under subsection 37(1).

[100] I do not agree that the statement of the Federal Court of Appeal supports the respondent's position. The Court of Appeal was simply providing an example of circumstances that could be considered in an application for Ministerial relief. It was not ruling out that coercion, or duress, could be raised in determining admissibility.

[101] I note that the Supreme Court of Canada upheld the decision of the Federal Court of Appeal in *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] SCJ No 36, albeit with different reasons regarding the meaning of "national interest" in section 34, which is not an issue in the present case. With respect to the circumstances that could be raised on an

application for Ministerial relief pursuant to subsection 34(2), the Supreme Court of Canada noted, at para 87, that the relevant factors will depend on the particulars of the application before the Minister. The Court also noted that the Guidelines provide a wide range of factors which may be validly considered in an application for Ministerial relief.

[102] I agree with the respondent that, by analogy, in an application for Ministerial relief pursuant to subsection 37(2), an applicant could raise the fact that he acted under duress. Such applications provide an opportunity to set out the relevant circumstances of the conduct that led to an applicant's inadmissibility. However, the circumstances set out in an application for Ministerial relief should be distinguished from a "defence" of duress. Many factors could be considered, including those which relate to conduct similar to duress, but the specific elements of the "defence" of duress would not be required in an application for Ministerial relief.

[103] Therefore, contrary to the submissions of the respondent, the ability to raise relevant factors, including those related to duress, in an application for Ministerial relief does not prevent the applicant from raising duress in the determination of inadmissibility.

[104] Moreover, the defences of duress and necessity have been raised at admissibility determinations and have been considered by this Court in many cases.

[105] In *Thiyagarajah v Canada (Minister of Citizenship and Immigration*), 2011 FC 339 at paras 16-17, [2011] FCJ No 450, Justice Rennie found that the Board's assessment of the defence of duress raised by the applicant, who was found inadmissible on security grounds, was reasonable:

> [16] The application of a legal standard (the defence of duress) against a given set of facts is a question of mixed fact and law, and as such, is assessed on a standard of reasonableness: *Poshteh* above. In reviewing a decision against the reasonableness standard, the Court must consider the justification, transparency and intelligibility of the decision making process and whether the decision falls within a range of possible outcomes that are defensible in light of the facts and law.
>
> [17] In this context the Board examined the pressure and coercion the applicant felt and assessed it against the harm done by his continued active participation and support of the LTTE. This assessment is one which could reasonably give rise to different interpretation. The existence of another view on the evidence however, does not mean that the interpretation reached by the Board on these facts, is unreasonable. There is no reviewable error.

[106] In *Ghaffari v Canada (Minister of Citizenship and Immigration)*, 2013 FC 674, [2013] FCJ No 704 [*Ghaffari*], Justice Phelan allowed the judicial review of a finding of inadmissibility under section 34 for inadmissibility on security grounds. The Officer had rejected the applicant's submission that his actions in the Iranian intelligence unit were committed under duress. Justice Phelan applied the recent decision of the Supreme Court of Canada in *R v Ryan*, 2013 SCC 3, 353 DLR (4th) 387 [*Ryan*], which clarifies the statutory and common law defence of duress. While noting that the Supreme Court of Canada's pronouncement came after the Officer's decision, Justice Phelan found that the Officer had erred in rejecting the defence of duress.

[107] There are many other cases where this Court has considered whether the Board's assessment of duress is reasonable. The Court has not held that the defence may not be raised at an admissibility hearing. The issue, as in this case, is whether the Board's assessment of duress and its determination is reasonable.

[108] The applicant submits that the factors set out in *Ryan* should be considered in determining whether he acted under duress. He submits that there was an implicit threat from both the organizer of the smuggling operation and the passengers and crew on board that, if he did not assist in the engine room, he and his son would suffer harm and that he reasonably believed that the threat would be carried out. The applicant argues that the Board erred in finding that there was no direct threat of imminent harm and failed to consider the other elements of the test for duress.

[109] From the applicant's perspective, based on his past experience of torture in Sri Lanka, he felt he had no other choice except to assist in the engine room and remain on the ship after the Thai crew left.

[110] He also submits that while he may have aided the passengers to come to Canada illegally and, therefore, been a small part of a smuggling operation, he was not an organizer, nor did he benefit in any way from his role.

[111] The respondent submits that if the defence of duress is available, the applicant failed to meet the requirements: there was no explicit or implicit threat of death or bodily harm made to compel the applicant to work in the engine room; and, any fear that the applicant had that he or his son would be harmed was speculative and not objectively reasonable. The respondent submits that the Board's finding that there was no duress is within the range of possible acceptable outcomes and is justified by the facts and the law.

The Board's assessment of duress was not reasonable

[112] As in *Ghaffari*, the Board's decision predates *Ryan*. However, the law of duress had already evolved beyond the 1984 case law cited by the Board and was further modernized by *Ryan*.

[113] The Board referred to the three elements of the defence of duress or necessity in *Perka*: (1) a threat of immediate peril or danger; (2) no legal alternative to the course of action taken; and (3) proportionality between the harm inflicted and the harm avoided.

[114] The Board found that there was no evidence of immediate harm since the applicant never actually tried to leave the ship and there was no evidence of any threats by others on the ship. The Board noted that the applicant could have left the ship in Thailand while it remained close to shore, despite that he did not have a passport, and that consequently, "[h]e was not working in the engine room of the MV Sun Sea because of duress or necessity". The Board found that the applicant was only speculating about what might happen to him if he left the ship.

[115] The case law focuses on duress in the criminal law context. For parties to an offence, the common law of duress applies. The applicant is not accused of a criminal offence. His conduct – that of aiding persons to enter Canada – is the basis for his inadmissibility to Canada. Again, reliance on the case law that focuses on the *Criminal Code* statutory defence of duress, which applies to principals, or the common law defence, which applies to parties to a criminal offence (e.g. those who aid and abet), is not a perfect fit, but these principles can be adapted and applied to the applicant's role in people smuggling as the basis for the finding of inadmissibility.

[116] In *Perka,* the Supreme Court of Canada established the common law defence of necessity (and duress) which excuses criminal conduct. The Court held that the defence of necessity applies only in circumstances of imminent risk where the action was taken to avoid a direct and imminent harm or peril. There must be no reasonable opportunity for an alternative course of action and the harm inflicted by the violation of the law must be less than the harm the accused sought to avoid.

[117] In *R v Hibbert,* [1995] 2 SCR 973 at paras 60-61, [*Hibbert*], the Supreme Court noted that the defences of necessity and duress are so similar that the same principles should apply. The Court emphasized that a purely objective assessment of what is reasonable is not the test.

> 60 The defences of self defence, necessity and duress are essentially similar, so much so that consistency demands that each defence's "reasonableness" requirement be assessed on the same basis. Accordingly, I am of the view that while the question of whether a safe avenue of escape was open to an accused who pleads duress should be assessed on an objective basis, the appropriate objective standard to be employed is one that takes into account the particular circumstances and human frailties of the accused.

[118] And at para 61:

> ….In contrast, excuse based defences, such as duress, are predicated precisely on the view that the conduct of the accused is involuntary in a normative sense- that is, that he or she had no realistic alternative course of action available. In my view, in determining whether an accused person was operating under such constrained options, <u>his or her perception of the surrounding facts can be highly relevant to the determination of whether his or her conduct was reasonable under the circumstances, and thus whether his or her conduct is properly excusable.</u> [My emphasis]

[119] In *R v Ruzic,* 2001 SCC 24, [2001] 1 SCR 687 [*Ruzic*], the Supreme Court considered whether the statutory defence of duress in the *Criminal Code* infringed the *Charter*. In its analysis,

the Court considered the criteria for the defence noting, *inter alia*, that the threat of harm need not be immediate but there must be a close temporal link. The Court also confirmed that the threat could be directed at a third party. The Court held that a modified objective standard applies to both the assessment of the threat and the existence of a safe avenue of escape. At paras 61-62:

> 61 This particular excuse focuses on the search for a safe avenue of escape (see *Hibbert*, *supra*, at paras. 55 and 62), but rejects a purely subjective standard, in the assessment of the threats. The courts have to use an objective-subjective standard when appreciating the gravity of the threats and the existence of an avenue of escape. The test requires that the situation be examined from the point of view of a reasonable person, but similarly situated. The courts will take into consideration the particular circumstances where the accused found himself and his ability to perceive a reasonable alternative to committing a crime, with an awareness of his background and essential characteristics. The process involves a pragmatic assessment of the position of the accused, tempered by the need to avoid negating criminal liability on the basis of a purely subjective and unverifiable excuse. A similar approach is also to be used in the application of the defence of necessity (see *Latimer*, *supra*, at paras. 26 ff.).
>
> 62 The common law of duress, as restated by this Court in *Hibbert* recognizes that an accused in a situation of duress does not only enjoy rights, but also has obligations towards others and society. As a fellow human being, the accused remains subject to a basic duty to adjust his or her conduct to the importance and nature of the threat. The law includes a requirement of proportionality between the threat and the criminal act to be executed, measured on the objective-subjective standard of the reasonable person similarly situated. The accused should be expected to demonstrate some fortitude and to put up a normal resistance to the threat. The threat must be to the personal integrity of the person. In addition, it must deprive the accused of any safe avenue of escape in the eyes of a reasonable person, similarly situated. [My emphasis]

[120] In *Ryan*, the Supreme Court of Canada considered the differences between the concepts of self-defence, necessity and duress and provided guidance on the elements of the modern defence of

duress, which excuses wrongful acts. The Court summarised the elements of duress as follows, at para 81:

> [81] The defence of duress, in its statutory and common law forms, is largely the same. The two forms share the following common elements:
>
> - There must be an explicit or implicit threat of present or future death or bodily harm. This threat can be directed at the accused or a third party.
> - The accused must reasonably believe that the threat will be carried out.
> - There is no safe avenue of escape. This element is evaluated on a modified objective standard.
> - A close temporal connection between the threat and the harm threatened.
> - Proportionality between the harm threatened and the harm inflicted by the accused. The harm caused by the accused must be equal to or no greater than the harm threatened. This is also evaluated on a modified objective standard.
> - The accused is not a party to a conspiracy or association whereby the accused is subject to compulsion and actually knew that threats and coercion to commit an offence were a possible result of this criminal activity, conspiracy or association.

[121] Even though the Board did not have the benefit of the *Ryan* decision when assessing the applicant's assertion of duress, I find that the Board erred in its rigid adherence to the principles articulated in *Perka*, which had been refined in *Hibbert*, *Ruzic* and other more recent cases. The Board focused only on the first element of *Perka* and looked for a direct threat of imminent peril from a purely objective perspective. The Board concluded there was no threat and did not go on to consider the other elements of the test.

[122] As noted in *Ruzic*, the elements of the test must be considered from the perspective of a reasonable person similarly situated to the applicant.

[123] The applicant believed that the implicit threats of harm to him and/or his son would be carried out. The Board failed to consider the applicant's circumstances in assessing the reasonableness of his belief of the threat of harm. The applicant was obviously desperate to flee Sri Lanka. He was traveling with his young son. The window of opportunity for him to leave the ship was only during the time it was off the coast of Thailand. The applicant's evidence was that he feared what would happen to him without a passport in Thailand and he also indicated that his agent told him if he was caught in Thailand, it would put all the passengers on the *MV Sun Sea* at risk. Although the Board found some of this testimony to lack credibility, it did not consider the mindset of the applicant in assessing what was reasonable. His options were very limited. Once the ship set sail, there was no way to extricate himself from the situation he was in. Although the applicant did indicate that no direct threats of harm were made to him while the ship was at sea, none were needed given that there was no alternative but to continue to work in the engine room. The harm the applicant avoided may have been greater than the harm he caused in aiding the people smuggling operation for a group of passengers who wanted to flee Sri Lanka and paid significant sums to do so, and who would have arrived in Canada with or without the applicant's contribution to the engine room. The proportionality element should be considered.

Conclusion

Abuse of Process

[124] For the reasons noted above, the application for judicial review of the decision finding that there was no abuse of process is dismissed. The Board considered all the allegations of misconduct both individually and cumulatively. The Board did not err in articulating the test for abuse of process. The Board applied the key elements of the test from the case law and adapted them to the circumstances of this case. The Board was critical of the interview tactics but reasonably found that this did not justify a stay of proceedings. Quite simply, this was not the clearest of cases justifying the remedy of a stay.

Admissibility

[125] For the reasons noted above, the judicial review of the Board's determination of admissibility is allowed.

[126] Although the Board reasonably found that the elements of people smuggling, including the knowledge element, were established on the standard of proof of reasonable grounds to believe, the Board erred in its assessment of the defence of duress.

[127] The defence of duress may be raised with respect to a finding of inadmissibility in appropriate circumstances. The Board erred in assessing the applicant's conduct on a purely objective basis and in rigidly applying the principles for the defence of duress from *Perka*. The Board should consider the test for duress as refined by the case law up to and including *Ryan*, which

requires that the elements of the test must be considered from the perspective of a reasonable person, but similarly situated to the applicant.

Proposed certified questions

[128] The applicant proposes the following questions for certification:

> *Does the fact that the Applicant was compellable when questioned by CBSA place restrictions on the nature and character of the questioning that can be used during the interview process?*
>
> *Is s 117 inconsistent with s 7 because it is overbroad? If so, is it appropriate to make reference to a provision that is of no force and affect when determining inadmissibility under s 37(1)(b)?*

[129] The respondent submits that the questions do not meet the test for certification as they are not "determinative of the appeal" and are not of "broad significance or general application" (*Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, 176 NR 4 (FCA)).

[130] With respect to the first question, the respondent submits that the Board considered the interview tactics of the CBSA officers and determined that the tactics were not inappropriate to warrant a stay. The issue for the Court is whether that determination was reasonable. The respondent further submits that the fact that the applicant was required to answer the questions put to him does not change the nature of the questions the CBSA may ask. If such elevated restrictions applied, then foreign nationals would have more rights during interviews than persons questioned by the police in the criminal context.

[131] In my view, the Board was aware that the applicant was compelled to answer the questions yet reasonably found that the interview tactics were not abusive. The question proposed would not be dispositive of the judicial review.

[132] The respondent submits that the second question should not be certified because it is not a question of general importance. The decision of the BC Supreme Court *Appulonappa* does not assist the applicant. Whether section 117 is overbroad and whether it may capture the work of aid workers does not have an impact on whether the Board can rely on section 117 to interpret people smuggling under section 37(1)(*b*). The respondent also notes that the Federal Court of Appeal did not mention *Appulonapa* in *B010* and this suggests that the Federal Court of Appeal was of the view that that case had no bearing on the issues it addressed.

[133] As noted above, in my view the Federal Court of Appeal did address the issue of overbreadth and found that there are protections available for a person found inadmissible and at the time of removal any risk would be assessed. Therefore, concerns about overbreadth, and, in particular, the applicant's allegations that section 117 could capture aid workers or other family members who assist refugees, which do not apply in the present case, were addressed.

[134] The respondent proposes that if this Court's decision regarding the Board's refusal to stay the proceedings (i.e., the admissibility determination) due to abuse of process hinges on the standard of review of that decision, the following question should be certified in order to clarify the standard of review applicable to a Board's application of the doctrine of abuse of process:

What is the standard of review for a decision by the Immigration Division, Immigration and Refugee Board, applying the doctrine of abuse of process to a particular set of facts?

[135] I have found that the Board applied the correct test adapted to the circumstances and reasonably found that there was no abuse of process. Therefore, this question would not be dispositive.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review of the decision dated November 30, 2011, which found that there was no abuse of process, is dismissed.

2. The application for judicial review of the decision dated July 5, 2012 which found the applicant to be inadmissible to Canada pursuant to paragraph 37(1)(*b*) of the *Act* is allowed.

3. There is no question for certification.

"Catherine M. Kane"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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