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Application of paragraph 37(1)(b) of the IRPA following the decision of the Supreme Court of Canada in *B010* as it relates to people smuggling

Effective date	Expiry date, if any
Immediately	n/a

Summary

The decision of the Supreme Court of Canada (SCC) has changed the legal test under paragraph 37(1)(b) of the *Immigration and Refugee Protection Act* (IRPA). The following elements are now required:

- Procuring or furthering illegal entry;
- Obtaining a financial or material benefit **(new)**; and
- Transnational crime means transnational organized crime **(new)**.

The entire definition of "criminal organization" in the *Criminal Code* of Canada does not apply to paragraph 37(1)(a) or (b) of the IRPA (the SCC only incorporated the element of financial or other material benefit into 37(1)(b)).

A migrant who aids in his own illegal entry or the illegal entry of other refugees or asylum-seekers in their collective flight to safety, and humanitarian workers or family members assisting them are not inadmissible for people smuggling under paragraph 37(1)(b).

Issue

This Operational Bulletin (OB) provides guidance to officers with respect to the SCC decision in the matter of *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58 (https://www.canlii.org/en/ca/scc/doc/2015/2015scc58/2015scc58.html). This decision has an impact on the application of paragraph 37(1)(b) as it relates to people smuggling.

Background

The SCC ruling focuses on the interpretation of people smuggling under paragraph 37(1)(b). Officers are thereby required to follow instructions in this OB when evaluating inadmissibility for people smuggling and when arguing cases before the Immigration and Refugee Board under paragraph 37(1)(b).

In *Saif*, a post-*B010* decision, the Federal Court concluded that the SCC decision in *B010* had the effect of importing the definition of "criminal organization" from the *Criminal Code* of Canada into paragraphs 37(1)(a) and (b).

Despite *Saif*, [1] the Canada Border Services Agency (CBSA) takes the position that the application of paragraph 37(1)(a) has not been modified by *B010* or *Saif*; therefore the definition of "criminal organization" in the *Criminal Code* of Canada does not apply to paragraph 37(1)(a). Thus, Federal Court and Federal Court of Appeal jurisprudence on paragraph 37(1)(a) preceding the *Saif* decision may continue to be relied upon (see Appendix A for the existing interpretation of paragraph 37(1)(a)).

In *B010*, the SCC considered several determinations of inadmissibility under paragraph 37(1)(b). The SCC raised concerns about a finding of inadmissibility under paragraph 37(1)(b) rendering a person ineligible to claim refugee protection in Canada. It concluded that a migrant who aids in his own illegal entry or the illegal entry of other refugees or asylum-seekers in their collective flight to safety, and humanitarian workers or family members assisting them are not inadmissible for people smuggling under paragraph 37(1)(b).

The SCC concluded that paragraph 37(1)(b) "targets procuring illegal entry in order to obtain, directly or indirectly, a financial or other material benefit in the context of transnational organized crime." [2]

Impact

Prior to *B010*, inadmissibility under paragraph 37(1)(b) covered all acts of assistance to human smuggling and did not include the element of a benefit.

The SCC decision has changed the legal test under paragraph 37(1)(b). Based on *B010*, the following elements are now required for the Minister to establish reasonable grounds to believe that individuals have engaged in people smuggling in the context of transnational crime under paragraph 37(1)(b):

- Procuring or furthering illegal entry;
- Obtaining a financial or material benefit **(new)**; and
- Transnational crime means transnational organized crime **(new)**

Applying the test

Procuring/furthering illegal entry

Procuring/furthering illegal entry should be interpreted broadly so as to include facilitating, enabling, causing, inducing, organizing, abetting, counselling or persuading persons to cross borders without complying with the necessary requirements for legal entry. It includes acts or omissions. While adducing evidence that shows procuring or furthering illegal entry will greatly depend on the facts of each case, the lack of proper entry documents will often establish that element.

"Illegal entry" constitutes crossing the border without complying with the necessary requirements for legal entry in a country. [*Article 3(b) of the Smuggling Protocol* (PDF, 400 KB) (http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf)] [3]

Financial or material benefit

It is not relevant whether a financial or material benefit was actually received. Intent to receive is sufficient. For instance, this element can be met if an individual or organization engaged in people smuggling in the context of "transnational organized crime" with the intent or expectation of obtaining a financial or material benefit. As such, it is important that officers gather as much information as possible as to the reasons an individual or organization engaged in people smuggling.

Financial benefit is to be interpreted on its face: a monetary or pecuniary consideration that includes a transfer of currency or other similarly liquid financial instrument. It is not limited to actual currency as it could include stocks, bonds, etc.

Material benefit is a broad concept and cannot be attributed to any specific definition as it may vary depending on the facts of each case. Each case must be assessed considering the totality of the circumstances. However, the Federal Court has described material benefit as being "something that provides a person a concrete benefit over others." [4]

Material benefit does not include family reunification or safety. [5]

In assessing whether the purpose of the smuggling was for "family reunification," family members should be understood as having the same meaning as the definition of "family members" in section 1 of the *Immigration and Refugee Protection Regulations* (IRPR). As such, it is the CBSA's position that individuals should only be exempted from the application of paragraph 37(1)(b) if they were smuggling family members referred to in section 1 of the IRPR. Officers should request evidence to substantiate the family relationship between the alleged smugglers and the persons being smuggled.

Safety is a broad term which includes protection against both physical and psychological harm.

Material benefit could include, for example:

- being given a free plane or train ticket, free passage on a smuggling vessel, and can include organized crime acts for non-pecuniary motives, such as terrorism or sexual exploitation; [6]
- establishing and perpetuating a reputation for violence in order to facilitate the obtention of a profit or using existing territory to expand into new territory to protect a criminal enterprise; [7]
- providing a gang with an increased presence in a particular territory in order to deal in narcotics; [8]
- receiving a reduced fare/fee; [9]
- depending on the circumstances of the case, it may also include benefits such as better food or accommodation during the smuggling operation.

As noted above, the SCC found that three classes of sympathetic individuals are not captured by paragraph 37(1)(b) for people smuggling:

1. asylum-seekers assisting one another;
2. humanitarians assisting asylum-seekers; and
3. those assisting family members to seek asylum.

Officers may face scenarios in which an individual falls under one of the sympathetic classes described above, but at the same time there is evidence that he/she has received a financial or material benefit and is linked to an organization. For example, an alleged smuggler receives a "financial or other material benefit" but is himself part of the collective flight to safety. Another example is the alleged smuggler who receives a "financial or other material benefit" but claims his actions were for humanitarian reasons. In those cases, the CBSA's position is that evidence of benefit outweighs membership in a sympathetic class or, more specifically, evidence of benefit negates the claim that the person falls within the sympathetic class. Therefore, individuals may be captured by paragraph 37(1)(b) if there is evidence of financial or other material benefits in conjunction with a link to an organization. In other words, even if the person falls within a sympathetic class and argues that he is consequently excluded from paragraph 37(1)(b), the CBSA's position is that evidence of financial or material benefit outweighs or negates membership in the sympathetic class and therefore brings the person back into paragraph 37(1)(b).

Transnational organized crime

The SCC explicitly added "financial or other material benefit" as an essential element to the definition of people smuggling under paragraph 37(1)(b), and indicated that the activities specified in that paragraph—people smuggling, money laundering and human trafficking—must be generated in the context of "transnational organized crime."

The CBSA's position is that the term "organization" is to be given a broad and unrestricted interpretation and is to include organizations that are informally and loosely formed, as defined in the jurisprudence under paragraph 37(1)(a). The term "organization" does not include other elements found in the *Criminal Code* definition of "criminal organization." For example, people smuggling planned and organized by more than one individual could constitute an organization. [10] The CBSA recognizes that this position is contrary to the recent decision in *Saif,* [11] in which the Federal Court concluded

that *B010* had the effect of importing the *Criminal Code* definition of "criminal organization" into both paragraphs 37(1)(a) and (b). This means that three or more people would always be required to establish that an organization existed for the purpose of inadmissibility under section 37. Despite *Saif*, the CBSA continues to rely on Federal Court and Federal Court of Appeal decisions that existed prior to *B010* and *Saif*, and it is of the opinion that neither *B010* nor *Saif* supersede previous jurisprudence.

An offence is considered transnational in nature if:

- It is committed in more than one State;
- It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- It is committed in one state but has substantial effects in another State. [12]

The SCC [13] relied on the *Palermo Convention* to state that the phrase "in the context of transnational crime" captures the acts of:

- participating in the group's actual criminal activities with knowledge the group has a criminal aim; or
- participating in non-criminal acts of the group, with knowledge that the acts will further the group's criminal aim; or
- organizing, abetting or counselling a serious crime (people smuggling is a serious crime) involving the organized criminal group.

The SCC [14] then concluded that the following categories of people fall within paragraph 37(1)(b):

- members of criminal organizations; or
- those who knowingly further the criminal aim of a criminal organization; or
- those who organize, abet or counsel serious crimes involving a criminal organization.

Therefore, evidence should also support that the person is captured by one of the above categories.

> **Note:** Knowledge can be established through "willful blindness." Willful blindness refers to a situation where a person's suspicion "is aroused to the point where he or she sees the need for further inquiries, but deliberately chooses not to make those inquiries." (*R v Briscoe,* 2010 SCC 13, at para. 21)

Where there is evidence of membership in a criminal organization, officers should carefully consider whether it is sufficient to also support an inadmissibility report under paragraph 37(1)(a).

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Appendix A

Paragraph 37(1)(a) of the *Immigration and Refugee Protection Act*.

Elements - first part of paragraph 37(1)(a): a person is a member of an organization that is believed on reasonable grounds to be or to have been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment (or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence).

(1) The existence of reasonable grounds to believe that the organization falls under the definition set out in paragraph 37(1)(a).

The term "organization" is not defined in IRPA, but is to be given a broad and unrestricted interpretation. The courts have held that the following factors may assist in determining the existence of an organization under paragraph 37(1)(a), but not one of them is essential:

- Identity
- Leadership
- A loose hierarchy
- A basic organizational structure
- Occupied territory
- Regular meeting
- Other factors relevant to the circumstances of the case at hand

[*Amaya*, para 22-23; *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 326, paras 38-40 and 55; *Canada (Minister of Citizenship and Immigration), Thanarathnam*, 2005 FCA 1222)]

> **Note:** In *Sittampalam*, the FCA explicitly stated that the Criminal Code definition of "criminal organization" does not directly apply to the immigration setting and that "organization" under paragraph 37(1)(a) is to be given an unrestricted and broad interpretation in that "looseness and informality" in the structure of a group should not thwart the purpose of IRPA.

> The CBSA takes the position that this interpretation remains applicable and is not superseded by the Federal Court decision in *Saif v. CIC* 2016 FC 437, which interpreted the SCC decision in *B010* as incorporating the *Criminal Code* definition of criminal organization into paragraphs 37(1)(a) and (b).

(2) That the person in question be a member of that organization.

It is unnecessary to establish that the person in question is a member of an organization but there must be reasonable grounds to believe that he or she is or was a member. [*Moreno v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 298, [1993] FCJ No 912 (QL); *Amaya v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 549, at para 22]

The word "member" is given a broad and unrestricted interpretation, and therefore simply means belonging to an organization. To be a member of an organization, it is not necessary for the individual to have a membership card or to be a member in good standing. [*Chiau v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 297, [2000] FCJ No 2043 (QL), at para. 57; and *Poshteh v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 para. 27 and 29]

Elements - second part of 37(1)(a): that a person engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert in furtherance of the commission of an offence punishable under an Act of Parliament by way of indictment (or in furtherance of the commission of an offence outside Canada that, if committed in Canada, would constitute such an offence).

The second part of paragraph 37(1)(a) provides that a person can be found to be inadmissible for having been engaged in activity that is part of a pattern of criminal activity planned and organized by a number of persons acting in concert. This second part is separate from the first part. Membership is not required for the second part of paragraph 37(1)(a). However, the first and second parts of paragraph 37(1)(a) are overlapping grounds and, as such, a person may be inadmissible for organized criminality under either or both [*Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 122; *Mendoza v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 934]

Footnotes

1 *Saif v. CIC*, 2016 FC 437. No question was certified so there is no possibility to appeal this decision to the FCA. However, an attempt to certify a question will be sought in future cases.

2 SCC *B010*, para. 72.

3 Protocol against the Smuggling of Migrants by Land, Sea and Air. (PDF, KB) (http://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf)

4 *B010 v. Canada (Citizenship and Immigration),* 2012 FC 269 at para. 62).

5 SCC *B010*, para. 60.

6 *B010*, para. 34.

7 *R. v. Lindsay*, [2004] OJ No 845 (ON SCJ).

8 *R. v. Leclerc*, [2001] JQ No 426 (CSQ).

9 *S. C. v MPSEP*, 2013 FC 491.

10 In *Sidhu v. CIC*, 2012 FC 1533, the FC confirmed that the activities that make a person inadmissible under paragraph 37(1)(b) must have been generated in the context of organized criminality, that is involving more than a single individual in an organized criminal activity.

11 *Saif v. CIC*, 2016 FC 437.

12 Article 3(2) of the United Nations Convention Against Transnational Organized Crime (http://www.unodc.org/unodc/treaties/CTOC/index.html) (*Palermo Convention*).

13 SCC *B010*, para. 65.

14 SCC *B010*, para. 66.

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