Criminalizing Refugee Assistance

by Lorne Sabsay and Angela Ruffo

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The *Immigration and Refugee Protection Act* (*IRPA*) creates a number of criminal offences related to counseling misrepresentation, document fraud, and aiding/abetting the commission of offences under the *IRPA*. In the first year of the *IRPA's* enactment, the British Columbia Provincial Court acknowledged that the legislation's purpose is to combat "the growing problem" of illegal immigration and to curtail the role of organized crime and other persons who profit from such activity. Accordingly, the Act includes a number of general offences to discourage "enabling activities" such as withholding relevant information.[1]

Over the past year, there has been much reported about the millions of people fleeing war-torn Syria. Thousands of Syrian refugees have come to Canada through the Canadian government's resettlement plan.

Notwithstanding our country's current

welcoming strategy for refugees (at least those from Syria), many former attempts to provide humanitarian assistance to those seeking refuge in Canada have led to criminal prosecution under the *IRPA* enforcement provisions.

The Supreme Court of Canada made this observation in *R. v. Appulonappa*,[2] which declared the former s. 117 of the *IRPA* unconstitutional insofar as it permitted prosecution for humanitarian aid to undocumented entrants, mutual assistance amongst asylum-seekers, or assistance to refugee claimants by family members.

... there remains little jurisprudence dealing with the application of the *IRPA* enforcement provisions dealing with assistance to would-be refugees.

In *R. v. Mahamoud*,[3] the Ontario Court of Justice was faced with these issues before the Supreme Court's ruling in *Appulonappa*. In *Mahamoud,* a dual American/Canadian citizen escorted his niece from Dubai to Toronto where she made a refugee claim. Mahamoud's niece had fled Somalia after a member of the terrorist organization, Al-Shebaab, tried to marry her. Knowing that she would be killed if she did not marry the man, the niece made her way to Dubai where she lived with the accused's wife and family for some time. When the family planned to move back to Somalia, the niece met her uncle at the airport to travel with him to Canada. When they arrived in Toronto she applied for refugee status. The accused was charged with, and ultimately acquitted of, *IRPA* charges related to fraudulent documents and aiding his niece to make misrepresentations.

Besides *Appulonappa* and *Mahamoud*, there remains little jurisprudence dealing with the application of the *IRPA* enforcement provisions dealing with assistance to would-be refugees. Focusing on the offences engaged in *Mahamoud* under ss. 122 and 126 of the *IRPA*, this article aims to provide a guide for defending these types of cases.

The Legislative Scheme

Section 122 of the *IRPA* criminalized the use of official documents for the purpose of contravening the statute:

> 122 (1) No person shall, in order to contravene this Act,
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> (a) possess a passport, visa or other document, of Canadian or foreign origin, that purports to establish or that could be used to establish a person's identity;
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> (b) use such a document, including for the purpose of entering or remaining in Canada; or
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> (c) import, export or deal in such a document.
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> (2) Proof of the matters referred to in subsection (1) in relation to a forged document or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene this Act.
>
> 123 (1) Every person who contravenes
>
> (a) paragraph 122(1)(a) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to five years; and
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> (b) paragraph 122(1)(b) or (c) is guilty of an offence and liable on conviction on indictment to a term of imprisonment of up to 14 years.
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> (2) The court, in determining the penalty to be imposed, shall take into account whether
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> (a) the commission of the offence was for the benefit of, at the direction of or in association with a criminal organization as defined in subsection 121.1(1); and
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> (b) the commission of the offence was for profit, whether or not any profit was realized.

Notwithstanding the offences above, an individual making a refugee claim cannot be charged under s. 122.

Section 126 criminalizes counselling, assisting or even attempting to assist persons making misrepresentations:

When the identity document in issue is forged, blank, incomplete, altered or not genuine, there is a presumption that the person engaging in the offending conduct is doing so with an intention to contravene the *IRPA*.

> 126 Every person who knowingly counsels, induces, aids or abets or attempts to counsel, induce, aid or abet any person to directly or indirectly misrepresent or withhold material facts relating to a relevant matter that induces or could induce an error in the administration of this Act is guilty of an offence.

Proving the Offence: s. 122

Section 122 criminalizes conduct relating to the possession and use of identity documents, when done for the purpose of contravening the *IRPA*. This includes:

(a) Possessing identity documents (passport, visa, etc.);
(b) Using an identity document to enter or stay in Canada; or
(c) Importing, exporting or otherwise dealing in such a document.

Each specified type of conduct, of course, imports its own *mens rea* component. Further, the overarching *mens rea* component of s. 122 requires that the Crown establish that the offending conduct was done with the specific purpose of contravening the *IRPA*. In other words, it is not enough that the Crown has established possession, use, or dealing of the identity document. The Crown must, in addition, prove the accused's intention to possess, use, or deal with the document *for the purpose of contravening the statute*: see *R. v. Aghani*.[4]

When the identity document in issue is forged, blank, incomplete, altered or not genuine, there is a presumption that the person engaging in the offending conduct is doing so with an intention to contravene the *IRPA*.[5] The Crown should be put to the strict proof of establishing the necessary prerequisites for the presumption to apply. As was revealed in *Mahamoud*, the application of the presumption may not always be clear.

Where the presumption does not apply, the Crown must call evidence to establish that the accused had the necessary intention ...

It was conceded by the defence in *Mahamoud* that the accused was in possession of the relevant identity document. This was a passport that had been issued in the name of the accused's daughter, but bore the photo of his niece. Despite this, the evidence from Passport Canada established that although the passport was *fraudulently obtained*, it was nonetheless *genuinely issued*. The Embassy in Dubai had issued a genuine Canadian passport with the incorrect photograph. The passport was therefore not forged, blank, incomplete, altered, or not genuine.

Accordingly, the Crown was not entitled to benefit from the statutory presumption that the accused possessed the identity document for the purpose of contravening the *IRPA*. Justice Clark commented on this particular issue:

> What makes this analysis interesting, however, is the extent to which the presumption set out in subsection (2) assists the Crown in proving the charge. This presumption provides that possession of a forged document, or a document that is blank, incomplete, altered or not genuine is, in the absence of evidence to the contrary, proof that the person intends to contravene the Act. However, the subject passport, according to the agreed statement of facts was deemed "genuine". It was not forged, blank, or incomplete. As for being "altered", this word implied that it was issued by the embassy and then something was done to it subsequently to change it. There is insufficient evidence, however, to support this.[6]

Even where the prerequisites from the presumption are met, the accused may rely on evidence to rebut it. For example, in *Mahamoud,* the evidence was that the accused had no involvement in obtaining the passport in issue. Nor had he made any attempts to use it in any way. Thus, even if the presumption had applied, it was rebutted on the facts in that case.

Where the presumption does not apply, the Crown must call evidence to establish that the accused had the necessary intention to contravene the *IRPA* in order to secure a conviction under s. 122. The Crown may call expert evidence for this purpose as was done in *Aghani*.

In *Aghani*, the Canadian Customs and Revenue Agency intercepted an envelope containing passports at the international mail centre in Vancouver. One of the passports was blank and the other passport had been altered by the removal of a photograph and by the fraudulent insertion of biographical data.[7] The accused was charged under s. 122(1)(a): possessing a Canadian passport for the purpose of contravening the *IRPA*. The Crown sought to establish *mens rea* by adducing expert evidence about the use that could be made of the document in Canada to contravene the *IRPA*. In allowing the expert evidence, the Court drew an analogy between s. 122 and the manner in which intent can be proven in drug prosecutions:

> The expert testimony proffered in this case is analogous in many ways to the expert testimony called by the Crown in prosecutions for possession of drugs for the purpose of trafficking. In both instances, the Crown, in addition to proving possession, must also prove the accused's intention with respect to a particular item—whether it be a passport or an illegal drug. Intention may be established by inference based on all of the circumstances. Expert testimony indicating the value of the prohibited item and describing the various ways in which it can be sold and used illegally provides the trier of fact with information that is both necessary and relevant in terms of assessing the circumstances and determining whether the Crown has established the requisite *mens rea* beyond a reasonable doubt.[8]

This language of inducing or even potentially inducing an error under the Act suggests that s. 126 can capture a broad range of activity.

Proving the Offence: s. 126

Section 126 of the *IRPA* criminalizes counselling, or assisting another, to make misrepresentations, or withhold material facts, that could or does induce an error in the administration of the statute. In *Mahamoud*, Justice Clark explained that, "[t]he essence of this charge is that it requires one to knowingly misrepresent or withhold material facts relating to a

relevant matter that could have induced an error in the administration of the Act."[9] This language of inducing or even potentially inducing an error under the Act suggests that s. 126 can capture a broad range of activity. As was demonstrated in *Dinten*,[10] it includes compromising a potential future investigation.

In *Dinten,* the Court concluded that taking possession, and subsequently disposing, of passports compromised any investigation which could have been done. Such disposition of passports was held to warrant charges under s. 122. The Court in *Dinten* concluded that such an action, "could induce an error in the administration of this Act." Similarly, such action compromised any investigation to determine whether the airline had complied with its obligation to ensure that persons have proper documentation under s. 148 and therefore did induce an error in the administration of the *IRPA*.

Even where it is established that the misrepresentation or withholding of a material fact could induce an error in the *IRPA*, the Crown must still prove that the accused (1) had knowledge that the misrepresentations were being made to induce the error and (2) did actually counsel, induce, aid or abet the person in making those misrepresentations.

Clearly, if the accused does not have knowledge of the misrepresentations, s/he cannot be found guilty. This was the successful defence in *R. v. Aderbigbe*. The accused was charged under s. 128(a) of the *IRPA* with knowingly misrepresenting or withholding material facts relating to a relevant matter that could have induced an error in the administration of the Act. He was also charged under s. 131 of the *IRPA* with attempting to aid and abet a person in contravening the statute.

It was agreed that the accused had driven his companion to the border where he presented his own valid identification to a CBSA agent. His companion presented a U.S. permanent resident card belonging to a different person. The accused testified in his own defence that he was not aware that his companion was using someone else's permanent resident card. Considering all of the evidence, the Court was left with "a very real doubt"[11] as to whether the accused knowingly misrepresented or withheld material facts, or that he knowingly attempted to aid and abet his companion in contravention of the *IRPA*.

In *Mahamoud,* the accused, and his niece, arrived at Pearson Airport from Dubai, via Amsterdam. The accused presented his declaration card and his U.S. passport to the primary border services officer (BSO) and then, when he was sent to secondary examination he presented his Canadian passport. He also had in his possession a Canadian passport issued in Dubai for a young adult in the name of his daughter but with a photo of his niece in it, as well as a photocopy of a Somali passport in the name of his daughter. Mahamoud also had boarding passes and baggage stickers with his own name and with the name of his daughter.

Mahamoud's niece presented herself in a separate inspection line, provided her name, advised she had no documents, and made a claim for refugee status. The thrust of her evidence was that other than his travelling with her, her uncle did nothing. He did not participate in the issuance of the passport with her photo on it, he did not tell her what to say to the BSOs, nor did he advise her to do anything particular when she got to the border.

First, it was not established that the niece's actions could induce an error in the *IRPA*. She never used a passport to try to enter Canada. The only evidence was that she came to make a refugee claim (without any travel documents in her possession at all), which is not contrary to the statute. Further, even if inferences were available about the niece making misrepresentations, Justice Clark held that these inferences, "do not serve as proof that [the accused] either encouraged, directed, or otherwise aided and abetted her in so doing. The threshold of finding [the accused] to have had either actual knowledge or that he was willfully blind to [his niece's] actions has not been made out beyond a reasonable doubt."

Writing specifically about the knowledge that is required on the part of an aider to ground a conviction under s. 126, Justice Clark concluded:

> The Court is mindful of the statement made by associate Chief Justice O'Connor in *R. v. Helsdon* [2007 CarswellOnt 336 (Ont. C.A.)] that a higher level of mens rea must be proven against one who aids or abets than on the principal. The word "knowingly" in section 126 requires proof that one must subjectively advert to a specific objective and must have knowledge of the facts that constitute that objective. On that basis, the Court finds that AM did not know beyond a reasonable doubt that he was doing something to cause [his niece] to misrepresent herself for the purpose of contravening the Act.[12]

Additional Considerations Following *R. v. Appulonappa*

Although *Mahamoud* was won on the basis that the Crown had not proven the elements of the offence beyond a reasonable doubt, his conduct was precisely that which the Supreme Court of Canada read out of the provision in *Appulonappa* as a remedy for the constitutional overbreadth of s. 117: providing humanitarian aid to asylum-seekers. Section 117 (as it was at the time of the alleged offences in *Appulonappa*) read as follows: "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."[13]

The Supreme Court determined that the purpose of s. 117, "is to criminalize the smuggling of people into Canada in the context of organized crime, and does not extend to permitting prosecution for simply assisting family or providing humanitarian or mutual aid to undocumented entrants to Canada." Insofar as it captured such conduct, s. 117 was held to be overbroad as bearing no relation to its objective. To be clear, on a statutory interpretation analysis of the text, the purpose of ss. 122 and 126 appears to be broader than s. 117. While s. 117 appears

directly under the heading "Human Smuggling and Trafficking" in the *IRPA*, ss. 122-123 appear under the heading "Offences Related to Documents" and ss. 124-131 appear under the heading "General Offences". Nonetheless, the Court's comments about Canada's international obligations invite the argument that even these broader enforcement provisions must not capture humanitarian aid to asylum seekers.

The following passages from *Appulonappa* are instructive:

... the Court's comments about Canada's international obligations invite the argument that even these broader enforcement provisions must not capture humanitarian aid to asylum seekers.

> [40] As a matter of statutory interpretation, legislation is presumed to comply with Canada's international obligations, and courts should avoid interpretations that would violate those obligations. . .
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> [41] The provisions of the *IRPA* relating to the fight against the assisting of unauthorized entry of persons to Canada respond to Canada's international commitments related to these matters in the *Convention relating to the Status of Refugees*, 189 U.N.T.S. 150 ("*Refugee Convention*"), [etc.]
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> [42] The *Refugee Convention* reflects humanitarian concerns. It provides that states must not impose penalties for illegal entry on refugees who come directly from territories in which their lives or freedom are threatened and who are present on the territory of the foreign state without authorization, "provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence": art. 31(1).
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> [43] Consistent with this, s. 133 of the *IRPA* provides that foreign nationals who enter Canada without documents cannot be charged with illegal entry or presence while their refugee claims are pending. As I explain in *B010*, art. 31(1) of the *Refugee Convention* seeks to provide immunity for genuine refugees who enter illegally in order to seek refuge. For that protection to be effective, the law must recognize that persons often seek refuge in groups and work together to enter a country illegally. To comply with art. 31(1), a state cannot impose a criminal sanction on refugees solely because they have aided others to enter illegally in their collective flight to safety.[14]

Thus, to the extent that ss. 122 and 126 allow for the prosecution of persons making legitimate humanitarian efforts to assist refugee claimants, it would appear that these provisions run afoul of the spirit of the international treaties to which Canada is a party. It can therefore be argued that ss. 122 and 126 do not pass constitutional scrutiny. This should be kept in mind when considering the defences available where the evidence establishes that a person charged under the *IRPA* enforcement laws was engaged in legitimate humanitarian assistance to a refugee.

CONCLUSION

In dealing with any criminal offences under the *IRPA* defence counsel should be mindful of the intentions of the client in carrying out the allegedly proscribed action. Proving the possession of the impugned documents, or the fact of misrepresentation does not end the matter.

The *reasons* why the client *may* have contravened the *IRPA* are exceedingly important. Even where the Crown has *prima facie* proof of a technical violation, an accused may escape conviction where the *motives* for engaging in the impugned behaviour are humanitarian in nature.

Indeed, after the Supreme Court's decision in *Appulonappa*, the prosecution of those who seek to assist refugees for real humanitarian reasons may result in a finding of constitutional overbreadth.

Lorne Sabsay practises criminal law at Cohen, Sabsay LLP. Angela Ruffo practises criminal law at Doucette Santoro Furgiuele.

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NOTES:

[1] *R. v. Tongo*, 2002 CarswellBC 2657, 2002 BCPC 463 (B.C. Prov. Ct.).

[2] 2015 SCC 59, 2015 CarswellBC 3427, 24 C.R. (7th) 385, 35 Imm. L.R. (4th) 171 (S.C.C.).

[3] 2015 CarswellOnt 12265, 37 Imm. L.R. (4th) 79 (Ont. C.J.).

[4] 2008 CarswellOnt 4989 (Ont. S.C.J.).

[5] *IRPA*, s. 122(2).

[6] *R. v. Mahamoud, supra* note 3 (Ont. C.J.) at para. 89.

[7] It is not clear why the presumption in s. 122(2) did not apply in this case as it is apparent that the passports in issue attracted the presumption.

[8] *R. v. Aghani, supra* note 4 at para. 38.

[9] *R. v. Mahamoud, supra* note 3 (Ont. C.J.) at para. 85.

[10] *R. v. Dinten*, 2007 CarswellOnt 1870, 61 Imm. L.R. (3d) 210, 2007 ONCJ 132 (Ont. C.J.).

[11] *R. v. Aderbigbe*, 2012 CarswellOnt 17423, 2012 ONCJ 858 (Ont. C.J.) at para. 24.

[12] *R. v. Mahamoud, supra* note 3 (Ont. C.J.) at para. 87.

[13] Section 117 of *IRPA* now reads: "No person shall organize, induce, aid or abet the coming into Canada of one or more persons knowing that, or being reckless as to whether, their coming into Canada is or would be in contravention of this Act."

[14] *R. v. Appulonappa, supra* note 2 at paras. 40-43.