



Sun Sea: Five years later

August 2015

1. Introduction

In August 2010, a rickety ship, the MV Sun Sea, arrived in Canadian waters off Vancouver Island, carrying 492 people to Canada. Ten months earlier, in October 2009, the MV Ocean Lady had arrived on the west coast, carrying 76 people. The passengers, all from Sri Lanka, made refugee claims.

The response to the two boats, especially the Sun Sea, was massive.¹ The passengers were subjected by the government to prolonged detention, intensive interrogation and energetic efforts to exclude them from the refugee process, or to contest their claim if they succeeded in entering the refugee process. Canada's immigration legislation was amended to give the government extraordinary new powers, many apparently unconstitutional, to detain people and deny them a wide range of rights. The Canadian government launched new initiatives to stop people smuggling in the Pacific Region. There was loud and strident public messaging about the alleged dangers presented by the arrival of the passengers. Yet, few have been found to represent any kind of security concern and almost two-thirds of the passengers whose claims have been heard have been found to be refugees in need of Canada's protection.

The treatment of the passengers and the new measures adopted raise many serious rights issues: refugee refoulement, fundamental right to liberty, equality before the law, privacy and arbitrary ministerial powers, and access to asylum.

Five years later, it is useful to review the many facets of Canada's response to the arrival of the Sun Sea. This response coincided with, and contributed to, a profound shift in Canada's attitude to refugees. In the five years since the Sun Sea arrived, Canada has dramatically closed its doors on refugees, breached its international human rights obligations, and lost its reputation as a world leader in refugee protection.

¹ The passengers in the two boats represented just one per cent of the refugee claims made in Canada in those two years (there were 33,246 claims in 2009, 23,157 in 2010 for a total of 56,403).

2. Reception

In mid-July 2010, Canadian media reported that a boat with migrants aboard was believed to be heading for Canada's west coast.² The Canadian Council for Refugees, Amnesty International Canada and the Canadian Tamil Congress called for the rights of the passengers to be respected, expressing concern about public comments "labelling Tamil asylum seekers as 'terrorists' before they have even had a chance to tell their story". Some of the allegations characterizing the passengers as members of the Liberation Tigers of Tamil Eelam (LTTE or Tamil Tigers) appeared to be coming directly or indirectly from the Sri Lankan government, which has a long history of labelling Tamil civilians as Tigers.³

After a long and bloody civil war, the Tamil Tigers had been defeated in May 2009. Although the conflict had ended, the Sri Lankan military had perpetrated massive human rights violations in defeating the Tigers, and any Tamils who were suspected (even falsely) of being Tigers were at risk.

In August, before the boat had arrived, Public Safety Minister Vic Toews labeled some of the passengers "suspected human smugglers and terrorists."⁴ Many in the media picked up these themes. For example, a Globe and Mail editorial asserted that "[t]he expected arrival of a second cargo ship ferrying Sri Lankan Tamils to Canada exposes a gap in our country's ability to deter terrorists and people-smugglers."⁵ The CCR urged that each refugee claim be examined without bias and that Canada not take sides with the potential persecutor.⁶

On August 13, 2010, the Sun Sea was boarded by the Canadian Navy and escorted to a naval base near Victoria, BC. 492 people disembarked (380 men, 63 women and 49 children). A 493rd passenger did not make it to the destination: a 37-year-old Tamil man died of an illness while the boat was in international waters and was buried at sea.⁷

"We couldn't even turn around when we were sleeping, there were so many people." When one passenger died: "Hardly anybody cried. We were immune to death and we were prepared to die too, all of us." – Sun Sea passenger.⁸

² For example, National Post, "Suspected Thai 'people-smuggling' ship reported heading for Canada", Stewart Bell, 15 July 2010.

³ Media release, "Rights of Tamils on boat need to be respected", 28 July 2010, <http://ccrweb.ca/en/bulletin/10/07/28>

⁴ Winnipeg Free Press, "Terrorists or civilians? MV Sun Sea passengers face scrutiny in days ahead", Tamsyn Burgmann, The Canadian Press, 13 August 2010.

⁵ Globe and Mail, "Keeping a lookout for Tigers", editorial, 11 August 2010. Others in the media challenged the xenophobic response to the Sun Sea, calling for the rights of migrants to be respected and drawing comparisons to boats of refugees seeking safety in the past, such as the St Louis. For example, Nanaimo Daily News, Editorial: "Migrant ship raises human rights issue", 16 August 2010; La Presse, "Il y a une limite à tout...", Agnès Gruda, 16 August 2010.

⁶ CCR, Statement regarding arrival of Tamil refugee claimants by boat on West Coast, 17 August 2010, <http://ccrweb.ca/en/bulletin/10/08/18>

⁷ Toronto Star, "Tamil asylum-seekers spark Canadian vitriol, anger", Raveena Aulakh and Brian Adeb, 16 Aug 2010.

⁸ CTV News, "Migrant deaths worth the risk, says man who boarded MV Sun Sea for Canada", 21 April 2015, <http://www.ctvnews.ca/canada/migrant-deaths-worth-the-risk-says-man-who-boarded-mv-sun-sea-for-canada-1.2338565>

The conditions on the boat had been extremely difficult: passengers were crammed together and there was not enough food and water. Passengers reported that crew members withheld provisions as punishment. Several passengers were hospitalized upon arrival in BC.⁹

“We would like to ask the Canadian people and the Canadian Government to have faith in us to believe that we are innocent civilians who have been affected by the conflict. We are not terrorists.” Extract from a letter said to have been written by Sun Sea passengers shortly after arrival.¹⁰

3. Detention

The adult Sun Sea passengers were all detained on arrival; the children, although technically not detained, accompanied their mothers in detention.¹¹ Men were detained in separate correctional facilities from their families on BC’s mainland. The passengers were assigned numbers (preceded by B - e.g. B120) for the entire process, rather than being identified by name. The correctional facilities were some distance from Vancouver, making it particularly difficult for NGO workers, lawyers, translators and others to assist them.

Before the boat had even arrived, Canada Border Services Agency (CBSA) sent its officers in BC a memo entitled “Marine Migrants: Program Strategy for the Next Arrival”, directing them to use all legal means to detain the passengers as long as possible, to try to have them declared inadmissible on grounds of criminality or security, and to argue against them being recognized as refugees. This instruction was given even though, as the memo itself recognizes, many were likely to be refugees and there might be women and children on board. The rationale given was to “ensure that a deterrent for future arrivals is created.”¹²

The memo stated that the passengers would be detained initially on identity grounds, but noted that maintaining them in detention on this ground might not be sustainable “as experience shows that most Sri Lankans are able to establish their identity in a timely manner”.

Another memo from CBSA National Headquarters gave more detailed instructions on detention reviews for Sun Sea passengers. CBSA officers were to argue for detention on identity grounds if migrants had no documents, and if they did have documents, officers should argue the documents might be fraudulent. If the Immigration Division (of the Immigration and Refugee Board) ordered release, they should look into seeking a stay of the order (meaning to ask the Federal Court to delay the release of the person while the CBSA challenged the decision). If identity arguments were exhausted, they should seek detention on some other

⁹ National Post, “From port to port: Newly declassified document shows the ‘horrible’ voyage of the MV Sun Sea”, 25 March 2013, Stewart Bell, <http://news.nationalpost.com/news/canada/from-port-to-port-newly-declassified-document-shows-the-horrible-voyage-of-the-mv-sun-sea>. The CBSA document describing the journey was dated January 2011.

¹⁰ Vancouver Sun, Migrants claim mass murders forced them to flee Sri Lanka, Guiseppe Valiante and Darah Hansen, Winnipeg Free Press, 17 August 2010.

¹¹ CBSA, Statement by the Canada Border Services Agency regarding the MV Sun Sea, 16 August 2010.

¹² The memo (undated) was obtained by the Canadian Council for Refugees through Access to Information and is available at <http://ccrweb.ca/en/sun-sea-cbsa-strategy>

ground. The memo concludes by assuring officers that, in making the arguments for continued detention, they have the support of senior management within the CBSA and partner agencies.¹³

The CBSA did indeed succeed in keeping the passengers in detention on identity grounds for months, even after their identity was confirmed. They could do this because the *Immigration and Refugee Protection Act* leaves it up to the Minister (or his delegate) to decide when identity is satisfactorily established.¹⁴ In the case of the Sun Sea passengers, CBSA continued to declare that the Minister was not satisfied of the identity of the passengers of the Sun Sea even after secure identity documents had been obtained and verified.¹⁵ In one detention review hearing, the Immigration Division member stated:

“I have about 14 years of experience as an immigration adjudicator and I would say that in this case – in these cases – the Minister has raised the bar on what will satisfy him with respect to the identity of persons on the MV *Sun Sea* ... The method of arrival, that is by ship, seems to have struck a nerve and led to the Minister requiring or setting this higher standard.”¹⁶

In the case of the Sun Sea passengers, CBSA instituted an additional verification procedure that involved an officer in Sri Lanka determining if the identity documents were properly issued by Sri Lankan officers. The procedure used was not disclosed, raising concerns that the identities of the Sun Sea passengers might be revealed to the Sri Lankan authorities.

In the case of several passengers on the *Ocean Lady*, the CBSA used a provision in the Act that allows detention while the Minister inquires “into a reasonable suspicion that they are inadmissible on grounds of security or for violating human or international rights” (s.58(1)(c)). As with the identity detention provision, the wording of the Act gives broad discretion to the Minister to decide that detention is necessary, and little opportunity for the detained person to argue for release. The Federal Court ruled, in an *Ocean Lady* case, that the Immigration Division must defer to the Minister with respect to the suspicion. In other words, it is not for the Immigration Division to decide whether the Minister’s suspicion is reasonable.¹⁷

¹³ NHQ Direction to the Pacific Region concerning the detention reviews in the case of the Sun Sea migrants, undated but apparently shortly after the arrival of the Sun Sea, available at Vancouver Sun, “CBSA directive on Tamil migrants: Detain, detain, detain”, Chad Skelton, 4 August 2011, <http://blogs.vancouversun.com/2011/08/04/cbsa-directive-on-tamil-migrants-detain-detain-detain/>

¹⁴ CCR, Submission to WGAD - challenging the legality of detention, Jan, 2014, <http://ccrweb.ca/sites/ccrweb.ca/files/wgad-submission-jan-2014.pdf>

¹⁵ For example, the Sri Lankan National Identity Card or Sri Lankan Passports, both with security features. In cases of Sri Lankans who did not arrive by boat, these documents were recognized as sufficient to establish identity.

¹⁶ Canada (Citizenship and Immigration) v. B046, 2011 FC 877 (CanLII), <http://canlii.ca/t/fmf67>. The Federal Court criticized the Member for even commenting on the Minister’s evaluation of identity. With regard to consideration of identity, the Court found that “it is not the opinion of the ID [Immigration Division] that is determinative; rather the focus is on the Minister’s opinion. To continue detention under this provision, the ID need only be “satisfied” that the Minister’s “opinion” meets the requirements of s. 58(1)(d) of *IRPA*.”

¹⁷ Canada (Citizenship and Immigration) v. X, 2010 FC 112 (CanLII), <http://canlii.ca/t/27szx>. The decision was appealed but the Federal Court of Appeal ruled it was moot. X v. Canada (Citizenship and Immigration), 2011 FCA 27 (CanLII), <http://canlii.ca/t/2fksb>. The CBSA also used the “secret hearing” provisions of the Act (s. 86) for some *Ocean Lady* passengers. National Post, “Ottawa tries to keep Sri Lankan migrants behind bars”, Darah Hansen, 6 January 2010.

In fact, it later became clear that in many cases the CBSA had little or no evidence of possible inadmissibility. In response to a question from the Vancouver Sun, a CBSA spokesperson wrote in July 2010: “After a number of weeks of continued detention it became clear that unless CBSA was able to provide further specific information concerning inadmissibility with respect to each individual case, the IRB [Immigration and Refugee Board] would order release. With no such information available, CBSA was not in a position to substantiate arguments for continued detention and the IRB began ordering release.”¹⁸

As directed by CBSA NHQ, even after the Immigration Division began to order passengers released, the government moved to prevent the release by challenging the order in the Federal Court.¹⁹ They did so in cases involving children. In September Mr. Justice Yves de Montigny upheld the order to release four women (three of them mothers) over the government’s protestations, stating: “Deprivation of liberty ranks no doubt as one of the harshest measures that may be visited upon an individual in a democratic state.” He noted that the government had presented no “direct, indirect or even circumstantial evidence” that the women posed a security threat or a flight risk.²⁰ The Court highlighted the impact of detention on the children affected:

“Five young children are currently being detained and incarcerated with their mothers. They have already gone through a gruelling journey, which could leave them with severe emotional and psychological scars. Moreover, some of them are of an education age and have had no schooling for almost a year. Their prolonged detention could only aggravate their misery.”²¹

While these women and children were released, most of the Sun Sea passengers remained in detention for months.²² CBSA vigorously opposed release by the IRB, and had significant success contesting orders of release in the Federal Court.

Because detention reviews are held every 30 days, and it takes the Federal Court several months to hear a judicial review, CBSA was able to keep people in detention by launching a new stay application after each order to release. Thus, even if the Federal Court confirmed one release order, another order was already being challenged.²³ Finally, in February 2011, the Federal Court ruled that this cycle could potentially be unending and would be “contrary to the interests of justice and result in an abuse of process.”²⁴

¹⁸ Vancouver Sun, “Border Services has no proof migrants were terrorists”, Chad Skelton, 10 July 2010.

¹⁹ See CBSA memo, NHQ Direction to the Pacific Region, above, footnote 13.

²⁰ Toronto Star, editorial, “Justice for boat people”, 21 September 2010, http://www.thestar.com/opinion/editorials/2010/09/21/justice_for_boat_people.html.

²¹ CCR, blog post, “Opening our eyes to the children”, 24 Sept. 2010, <http://ccrweb.ca/en/opening-our-eyes-children>

²² 107 Sun Sea passengers were still in detention six months after arrival. Hill Times, “Mass detention of 300 Tamil migrants cost \$18-million, says Canada Border Services Agency”, Tim Naumetz, 14 February 2011.

²³ BCCLA, release, BCCLA calls on federal government to stop abuse of process in immigration cases, 22 February 2011, <https://bccla.org/news/2011/02/bccla-calls-on-federal-government-to-stop-abuse-of-process-in-immigration-cases/>

²⁴ Canada (Citizenship and Immigration) v. B386, 2011 FC 175 (CanLII), <http://canlii.ca/t/2fwx0>

B386 was ordered released three times but still remained in jail

19 Nov 2010: Immigration Division ordered B386 released. The Minister challenged the release order in the Federal Court and won a stay, meaning that B386 remained in jail pending the judicial review.

23 Dec 2010: Immigration Division again ordered B386 released.

25 January 2011: Immigration Division ordered B386 released for a third time. Shortly afterwards, the Federal Court ruled that the first release order was valid. However, B386 remained in jail: the Minister argued that the first release order was moot as the Immigration Division had since issued other release orders.

17 February 2011: The Federal Court rejected the Minister arguments as an “abuse of process”. B386 was finally free to go, **three months** after he had first been ordered released.

Canada acting as collection agency for smugglers

In some cases, CBSA argued that passengers who owed money to the smugglers for their passage to Canada were a flight risk. This meant that detainees felt compelled to pay the smugglers (and submit proof of payment to the Canadian government) in the hopes of getting released. Some of the affected people complained that the voyage was so substandard that they did not intend to pay the smugglers the balance of the agreed fare. But given CBSA’s position, they had to encourage their family to raise the money to pay the smugglers. Thus the Canadian government was actually helping the smugglers maximize their profits.²⁵

On being told about the issue, then Immigration Minister Jason Kenney responded: “I think that’s ridiculous. Paying a smuggler is an illegal activity. The government of Canada wouldn’t countenance facilitating someone paying their debt.” Shortly after, however, he changed his position and said: “It’s quite legitimate for our lawyers to take that position. We make no apology for ensuring that the law is enforced.”²⁶

Costs of detention

The cost of mass detention was huge. In February 2011, the CBSA reported that they had spent \$22 million for the arrival, processing and detention of the passengers. Of that amount, 80% – \$18 million – was spent on detention (at \$190 per day per person).²⁷ This does not include the costs of detention reviews at the Immigration and Refugee Board (their costs were \$900,000 by February 2011), judicial reviews at the Federal Court, legal aid for the detainees, or the CBSA representatives arguing for detention to be maintained.²⁸

²⁵ Globe and Mail, “Perversion of the law’ forces migrants to pay smugglers, lawyer argues”, Sunny Dhillon, 30 March 2011.

²⁶ CTV News, “Gov’t to Tamils: pay smugglers or stay in jail”, Jon Woodward, 30 March 2011, <http://bc.ctvnews.ca/gov-t-to-tamils-pay-smugglers-or-stay-in-jail-1.625138>. CTV had reviewed 15 transcripts of detention reviews where money owed the smugglers was a factor. The issue is also mentioned in several Federal Court cases: 2010 FC 1339, 2010 FC 1314, 2011 FC 140 and 2011 FC 94 (the man’s brother in France would pay the smugglers \$5,000).

²⁷ Hill Times, “Mass detention of 300 Tamil migrants cost \$18-million, says Canada Border Services Agency”, Tim Naumetz, 14 February 2011.

²⁸ CCR et al, media release, “Rights advocates decry detention of refugee claimants from MV Sun Sea”, 10 February 2011.

4. Investigations and privacy

Already with the passengers of the Ocean Lady, who arrived in October 2009, there were grave concerns about possible breaches of privacy. For refugees, privacy breaches are particularly damaging if personal information is shared with the persecuting government.

In October 2009, a National Post article, quoting “sources”, identified one of the Ocean Lady passengers by name, alleging he was wanted for a terrorism offence.²⁹ (The Immigration and Refugee Board subsequently found this passenger to be a refugee, a conclusion upheld by the Federal Court. The contention that he was involved with the LTTE was deemed not supported by sufficient trustworthy evidence). In addition, media reports stated that Canadian government authorities had been collaborating with Sri Lankan authorities in establishing the identity of the 76 passengers.³⁰

The CCR complained to the Privacy Commissioner about these concerns, as well as other indications that personal information from some or all of the men was being disclosed without regard to the potential risk to the life, liberty or security of a person:

- Government officials confirmed in hearings that they had been in communication with the Sri Lankan government about the man whose name was published.
- In other cases, government officials stated in hearings that they had not been in communication with the Sri Lankan government, but had communicated with other governments.
- The government extracted telephone numbers from the SIM cards of the men’s cell phones. The numbers were compared with telephone numbers known already to CSIS or RCMP. CBSA officials then called the telephone numbers “cleared” by CSIS and RCMP (meaning apparently not already of interest to those agencies) and asked questions about the person from whose telephone the number was extracted.
- The government relied on Rohan Gunaratna as an expert witness. Mr Gunaratna is known to be close to the Sri Lankan government. He was given at least the names of the individuals in whose hearings he testified, and potentially the names of all 76 individuals.
- The government had reportedly approached members of the Liberation Tamil Tigers of Eelam (LTTE) in the USA and Canada requesting them to testify against individuals from the boat as to their supposed membership in the LTTE. This would presumably require that individuals’ names were disclosed. If the individuals are fleeing persecution at the hands of the LTTE, such disclosure could endanger them or their families.

The Privacy Commissioner limited its investigation to the naming of the individual in the National Post article. The Commissioner’s office was unable to determine the source of the information published and therefore concluded the complaint was not founded.

²⁹ National Post, “Passenger wanted in Sri Lanka” , Stewart Bell, 22 October 2009.

³⁰On 22 October 2009, the Canadian Council for Refugees and Amnesty International Canada sent a letter to the Minister for Citizenship, Immigration and Multiculturalism and the Minister of Public Safety about these concerns and asking for an investigation.

In at least one Sun Sea case, the passenger's fingerprints were sent to Sri Lankan authorities for verification. The RCMP acknowledged they had been sent in error, given that policy prohibited sending fingerprints for verification to protect persons from being identified as a refugee claimant.

In 2013, following the death of Sathyapavan "Sathi" Aseervatham in Sri Lanka, information emerged that raised even more troubling questions about the relationship of the Canadian government to the Sri Lankan authorities. Sathi was one of the passengers on the Sun Sea who had returned to Sri Lanka. He had alleged in an affidavit that, on arrival in Sri Lanka, he was tortured by the Terrorist Investigations Division (TID), who knew that he had been on the Sun Sea. This raises the question of whether the Canadian government shared the names of the Sun Sea passengers with the Sri Lankan authorities.

Sathi's Canadian lawyer used the affidavit produced by Sathi in other Sun Sea refugee hearings, on the condition that it remain confidential. Sathi was willing to be cross-examined on his affidavit by Canadian immigration authorities. However, the CBSA instead took the affidavit to Sri Lanka. Sathi was called to the TID office, where he found himself met by two CBSA officers, in addition to the TID officials. The obvious inference is that CBSA asked the TID to call Sathi into their office. The CBSA officers questioned Sathi about the contents of his affidavit alleging torture, **in the presence of officers of TID**, the agency named in his affidavit as the torturers.³¹

The CCR wrote to the President of CBSA in October 2013 calling for an investigation into this matter. No answer was ever received. Since there is no external complaint mechanism for the CBSA, this matter could not be pursued further.³²

5. Refugee determination

Before the Sun Sea had even arrived in Canada, CBSA's strategy for dealing with the passengers included a plan to deal "aggressively" with the refugee determination hearings. They intended to intervene in every hearing and to build standard evidence packages designed to show why the person was not a refugee³³. This undermined Canada's commitment to individualized refugee determination and flouted jurisprudence directing that claimants' testimony is presumed to be true.³⁴ It was also inconsistent with the treatment of Sri Lankan refugee claimants who did not arrive by boat: their claims were not systematically attacked.

The directive also ignored the evidence that many Sri Lankans continued to be at risk of persecution. Guidelines issued by the UN High Commissioner for Refugees (UNHCR) just one month before the Sun Sea arrived in Canada identified a series of profiles of Sri Lankans potentially at risk and therefore deserving of

³¹ <http://ccrweb.ca/en/public-statement/2013-10-11>

³² CCR, media release, Seven Years of Inaction: Rights organizations call for oversight mechanism in response to CBSA abuses, 5 March 2014, <http://ccrweb.ca/en/oversight-mechanism-cbsa>

³³ CBSA memo, see above footnote 12.

³⁴ See, notably, *Maldonado v Canada (Minister of Employment & Immigration)*, [1980] 2 FC 302, (1979).

particular attention, including people suspected of having links with LTTE, journalists, human rights activists, and LGBT individuals.³⁵

Despite CBSA's opposition to these claims, many have been accepted as refugees. As of July 22, 2015, 228 Sun Sea passengers had been accepted as refugees, 116 had their claims rejected, while twenty claims were withdrawn or otherwise terminated. This represents an acceptance rate of 63% of claims finalized.³⁶

Some of those accepted were found to be “sur place” refugees. These claims were accepted on the grounds that as passengers on the Sun Sea, they were at risk of human rights abuses by the government of Sri Lanka. The Canadian government's public pronouncements associating the boat with terrorism led the government of Sri Lanka to believe that the Sun Sea passengers were Tamil Tigers.³⁷ Although the Minister challenged the “sur place” risk that has arisen for Sun Sea passengers, the Federal Court has on numerous occasions rejected the Minister's arguments.³⁸

The Federal Court also stepped in when the government submitted evidence in refugee hearings that suggested Sun Sea passengers returned to Sri Lanka were not at risk, while failing to disclose other evidence in the government's possession that pointed to the opposite conclusion. The Court concluded that “[a]t a bare minimum, if the Minister chooses to disclose evidence, that disclosure must be complete.”³⁹

The federal government's consistent opposition to the refugee claims made by Sri Lankan Tamils conflicts with its outspoken criticism of the Sri Lankan government's rights record.⁴⁰ Notably, in 2013, the Prime Minister declined to attend the Commonwealth summit in Colombo and issued a strongly worded statement about the “serious violations of human rights” in Sri Lanka.⁴¹

³⁵ UNHCR Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka, 5 July 2010, HRC/EG/SLK/10/03, <http://www.refworld.org/docid/4c31a5b82.html>

³⁶ Statistics provided by the Immigration and Refugee Board.

³⁷ Amnesty International concluded that refused refugee claimants face a serious risk of detention, torture and mistreatment if the Sri Lankan government suspects that they travelled on the MV *Sun Sea*. Their position is laid out in a document used in many of the claims: “Amnesty International Concerns with respect to forced returns to Sri Lanka for passengers of the Ocean Lady and MV Sun Sea”.

³⁸ B472, 2013 FC 151; B323, 2013 FC 190; B380, 2012 FC 1334; B420, 2013 FC 321; Pathmanathan, 2015 FC 640; Pillay, 2014 FC 160, Y.S., 2014 FC 234; Thanabalasingam, 2015 FC 397.

³⁹ B135 v. Canada (Citizenship and Immigration), 2013 FC 871 (CanLII), <http://canlii.ca/t/g0p86>. See also canada.com, “Immigration lawyers call for review of all failed MV Sun Sea refugee claims”, Douglas Quan, 11 October 2013.

⁴⁰ CCR release, CCR expresses deep concerns over Canadian response to Sri Lankans fleeing human rights abuses, 11 October 2013, <http://ccrweb.ca/en/public-statement/2013-10-11>.

⁴¹ Statement by the Prime Minister of Canada, 7 October 2013, <http://pm.gc.ca/eng/news/2013/10/07/statement-prime-minister-canada>

6. Inadmissibility and criminal prosecutions

Despite the government's allegations at the time of the Sun Sea's arrivals that the passengers were terrorists and criminals, and the energy and resources devoted by the government to fighting the cases, as of July 22, 2015, only 30 of the 492 passengers had been ordered deported having been found inadmissible to Canada under the *Immigration and Refugee Protection Act*.⁴²

Members of Tamil Tigers

Canadians were repeatedly told that there were likely Tamil Tigers (labelled as terrorists) on the boat. One allegation was that these Tigers were coming to Canada to set up a local chapter.⁴³ However, after investigating the passengers, the CBSA did not even attempt to argue that the vast majority were members of the Tamil Tigers. Where they did argue membership, the claims were in some cases based only on indirect membership (for example, a journalist who worked for a publication controlled by the Tamil Tigers, a man who used his tractor to transport people and supplies to fortifications, and a woman who worked for a library funded by the Tamil Tigers).⁴⁴

Only 11 passengers have been found inadmissible based on membership in the Tamil Tigers.⁴⁵

People smugglers

A number of those on the Sun Sea as well as on the Ocean Lady have faced proceedings as people smugglers.

Some have been criminally charged under section 117 of the *Immigration and Refugee Protection Act*. This section makes it an offense to “organize, induce, aid or abet the coming into Canada” of one or more persons without the proper documents for entering Canada. In a case involving passengers on the Ocean Lady, this section of the Act was challenged as being unconstitutionally broad, as its wording could lead to prosecutions of humanitarian workers or a refugee parent with an accompanying child coming into Canada. The BC Supreme Court struck down s. 117 as overbroad in violation of the Canadian Charter of Rights and Freedoms.⁴⁶ The BC Court of Appeal reversed the decision. It was appealed to the Supreme Court which heard the case on 17 February 2015: the decision is pending.⁴⁷

Other passengers on the boats did not face criminal charges but were found inadmissible under section s. 37(1)(b) of the *Immigration and Refugee Protection Act* on the basis that they had engaged in people smuggling. One of the consequences of being inadmissible under s. 37 is that the person is barred from making a refugee

⁴² Statistics provided by the Immigration and Refugee Board. The government also argued that 18 other passengers were inadmissible, but the Immigration Division did not find them inadmissible.

⁴³ Toronto Sun, “Tiger fighters allegedly on Tamil boat: Website”, 23 August 2010. The source for the allegation was a pro-Sri Lankan government website.

⁴⁴ Hill Times, “Mass detention of 300 Tamil migrants cost \$18-million, says Canada Border Services Agency”, Tim Naumetz, 14 February 2011.

⁴⁵ According to statistics on inadmissibility findings to July 22, 2015, provided by the Immigration and Refugee Board, 11 Sun Sea passengers were found inadmissible on the basis of IRPA s. 34 (i.e. security-related inadmissibility).

⁴⁶ R. v. Appulonappa, 2013 BCSC 31 (CanLII), <http://canlii.ca/t/fvm3z>

⁴⁷ Supreme Court of Canada, Francis Anthonimuthu Appulonappa, et al. v. Her Majesty the Queen, et al. Court File No. 35958.

claim. They may have access to a Pre Removal Risk Assessment (PRRA); however, the assessment is limited to whether they face a risk of torture or cruel and unusual punishment. No decision maker will assess whether they meet the Convention Refugee definition. Even if found to meet the limited PRRA definition, they are prevented from obtaining permanent resident status and are unable to reunite with family members.⁴⁸

Those said to have engaged in people smuggling were not only the organizers or crew of the boats, but also passengers who had merely helped out during the voyage. For example, B306 had paid for passage on the Sun Sea, but while on board the ship he cooked meals for the crew and watched for other ships, in exchange for food. He said that he was sick and found the food given on the ship was inadequate, but learned that he would be given extra food if he helped out.⁴⁹

The cases involving inadmissibility on the basis of people smuggling also made their way to the Supreme Court, where the hearings were held at the same time as Appulonappa.⁵⁰

The Canadian Council for Refugees is an intervener in these cases, arguing that:

- those who, for no financial or material benefit, engage in acts that facilitate either their own or another's right to seek asylum do not engage in activity that renders them inadmissible to Canada;
- Canadian law cannot criminalize those same individuals;
- Canada's anti-smuggling regime can only exclude from Convention Refugee protection those properly excluded under the 1951 Convention Relating to the Status of Refugees; and
- poorly defined and loosely supervised 'saving' mechanisms (such as prosecutorial discretion or ministerial relief) cannot prop up legislation that otherwise violates Canada's constitutional and international legal obligations.⁵¹

The appeals are of profound concern to the CCR. In addition to the impact on refugees seeking asylum from persecution, the Court's decision will be directly felt by CCR members organizations who assist refugees. As the CCR's counsel told the court, "To be blunt, this court's decision will either give those who assist refugees seeking to come to Canada comfort in knowing that their work is protected by law, or it could have the opposite effect: it will cause refugee assistance organizations to exist in constant concern that their humanitarian actions will be misconstrued as people smuggling activities."

⁴⁸ See IRPA, ss. 101(1)(f), 112 to 115.

⁴⁹ http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/35685/FM010_Appellant_B306.pdf

⁵⁰ Supreme Court of Canada, B306 v. Minister of Public Safety and Emergency Preparedness, Court file 35685; B010 v. Minister of Citizenship and Immigration, Court file 35388; J.P., et al. v. Minister of Public Safety and Emergency Preparedness, Court file 35688.

⁵¹ http://www.scc-csc.gc.ca/WebDocuments-DocumentsWeb/35958/FM040_Intervener_Canadian-Council-for-Refugees.pdf

7. Legislative changes

21 October 2010	Tabling of Bill C-49: <i>Preventing Human Smugglers from Abusing Canada's Immigration System Act</i> (died when 2011 elections called)
2 June 2011	Speech from the Throne: "Our Government will reintroduce legislation to combat human smuggling, which can place migrants in dangerous conditions and undermine trust in Canada's immigration system." ⁵²
16 June 2011	Tabling of Bill C-4: <i>Preventing Human Smugglers from Abusing Canada's Immigration System Act</i> (same as Bill C-49)
16 February 2012	Tabling of Bill C-31, <i>Protecting Canada's Immigration System Act</i> , incorporating C-4 provisions in a broader bill.
28 June 2014	Bill C-31 receives Royal Assent.

Shortly after the arrival of the Sun Sea, in October 2010, the government introduced a bill presented as a response to the arrival of the Sun Sea and Ocean Lady (Bill C-49, *Preventing Human Smugglers from Abusing Canada's Immigration System Act*).⁵³ Although that bill did not pass, the provisions it contained were re-introduced and became law, with only minor modifications, in 2012.

Some of the changes targeted people smugglers, making prosecution easier and penalties more severe. The more controversial changes, however, affected the people being smuggled, not the smugglers. The Canadian Council for Refugees responded to the tabling of Bill C-49 with a media release stating that: "Despite the government's claims that it is targeting smugglers, the people who will suffer if this bill is passed are the people fleeing persecution, including children."⁵⁴

The provisions gave the power to the Minister of Public Safety to designate certain groups of "irregular arrivals."⁵⁵ Members of the group become "Designated Foreign Nationals" and are subjected to draconian measures including:

- Mandatory detention
- A 5-year bar on applying for permanent residence, even if they are recognized as refugees. (This also deprives them of the possibility of reuniting with spouse and children outside Canada).

⁵² <http://www.speech.gc.ca/eng/media.asp?id=1390>

⁵³ The government had been planning a legislative response before the Sun Sea arrived. Globe and Mail, "Ottawa plans new rules for boat migrants", John Ibbitson, Steven Chase, and Marten Youssef, 13 August 2010. The sub-heading explained: "Senior figures within the Conservative government are working to craft new tools that would treat boatloads of illegal immigrants arriving on Canada's shores differently from other refugee claimants."

⁵⁴ CCR, media release, "Government bill punishes refugees", 21 October 2010, <http://ccrweb.ca/en/bulletin/10/10/21>

⁵⁵ It was suggested that those designated would be people "who land on our shores in a way similar to those aboard the MV Sun Sea or the Ocean Lady as an irregular arrival". Dave MacKenzie, MP, House of Commons, 28 October 2010. In fact, however, the wording gives broad authority to the Minister to designate groups as small as two persons, arriving by air, land or sea, and to make designations long after the arrival.

The measures were clearly modelled on Australian policies of mandatory detention and Temporary Protection Visas (TPV), even though the Australian government had abolished TPVs in 2008, concluding that they did not have any deterrent effect. On the contrary, there was an increase in the number of women and children making dangerous journeys to Australia.⁵⁶ Several Australian refugee NGOs wrote to Prime Minister Harper urging him not to “replicate two of our greatest policy and legislative failures”.⁵⁷

The proposed measures were also widely condemned in Canada.⁵⁸ Major criticisms focused on:

- Violations of Charter and international rights obligations.⁵⁹
- The impact on children.
- Costs of detention and of long-term limbo.⁶⁰
- The inhumanity of the measures.

There was some softening of the detention provisions by the time the measures became law in 2012:

- Children under 16 years were exempted from mandatory detention
- A detention review was introduced after 14 days and thereafter every six months (originally there was no detention review for the first 12 months).

Retroactivity

The legislative amendments were designed to allow for the retroactive designation of the passengers of both the *Ocean Lady* and the *Sun Sea*. This would mean that they were potentially subject to the harsh new rules (except that if they were not in detention, they would not be subject to Designated Foreign Nationals detention rules).⁶¹ Fortunately, the *Ocean Lady* and *Sun Sea* arrivals have not been designated.

The only groups to have been designated by Minister of Public Safety were five groups who crossed the Canada-U.S. border into Quebec on various dates in 2012.⁶²

The CCR remains concerned about potential future designations.

⁵⁶ CCR, Bill C4 – Comments on a bill that punishes refugees, 11 November 2011,

<http://ccrweb.ca/sites/ccrweb.ca/files/c-4-brief.pdf>

⁵⁷ Asylum Seeker Resource Centre et al, Letter to Prime Minister Harper, 22 December 2011, <http://ccrweb.ca/files/letter-c4-australian-ngos.pdf>

⁵⁸ For links to voices raised against the legislation, see <http://ccrweb.ca/en/c4>. For an overview of criticisms, see CCR, Bill C4 – Comments on a bill that punishes refugees, 11 November 2011, <http://ccrweb.ca/sites/ccrweb.ca/files/c-4-brief.pdf>

⁵⁹ See for example, Canadian Bar Association, Bill C-49, Preventing Human Smugglers from Abusing Canada’s Immigration System Act, November 2010, <http://www.cba.org/CBA/submissions/pdf/10-78-eng.pdf>

⁶⁰ CCR, media release, Huge costs of government bill highlighted, <http://ccrweb.ca/en/bulletin/10/11/09>

⁶¹ C-31, section 81.

⁶² Public Safety Canada, media release, “Minister of Public Safety makes first designation of irregular arrival under *Protecting Canada's Immigration System Act*”, 5 December 2015, <http://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2012/20121205-eng.aspx>. The groups arrived on February 2, 2012; April 26, 2012; October 11, 2012; October 19, 2012; and October 23, 2012. They were designated on 6 December 2012. Although the designation was made by the Public Safety Minister, it was the Minister of Citizenship and Immigration who held the press conference to make the announcement: CBC News, Romanian human smuggling ring busted in Ontario, 5 December 2015, <http://www.cbc.ca/news/politics/romanian-human-smuggling-ring-busted-in-ontario-1.1292783>

8. Anti-smuggling measures

An important part of Canada's response to the Sun Sea was an increased priority to stopping other boats from reaching Canada. This interdiction strategy was modelled on Australian policies aimed at deterring and preventing refugees from reaching their shores.⁶³

Even before the arrival of the Sun Sea, the highest levels of government were already planning new measures to disrupt people smuggling, especially by sea. A Foreign Affairs memo noted: "This issue will continue to be of importance to PCO [Privy Council Office] and PMO [Prime Minister's Office], and, though this will largely become a domestic issue once the vessel arrives in Canada, DFAIT will be expected to play a role in implementing the international component of the proposed strategy, once approved by the PM."⁶⁴

Canadian government agencies were quick to take action, particularly Thailand, to disrupt further boat arrivals. In October 2010, more than 150 Tamil migrants were arrested by Thai authorities, reportedly with support from the Canadian government.⁶⁵ These were followed by more arrests – some of smugglers, but mostly of refugees – with support from the Canadian and Australian governments.⁶⁶

"Thai police photos of the mass arrests show men, women and children — a group similar to the Sri Lankans who were on board the Sun Sea [...] Only this group never even made it onto the ship."⁶⁷

Thailand is not a signatory to the Refugee Convention. Tamil migrants arrested are taken to the Bangkok immigration detention centre where they may remain for years, even if they are recognized as refugees. Alternatively, they face deportation back to Sri Lanka.

Conditions in the Bangkok detention centre are harsh. The National Post reported on a six- by 20-metre cell holding 140 men, "so overcrowded there is hardly room to tread". According to one detainee, "There is not enough room to sleep — even stretch our limbs freely." The detainees complained of lack of clean drinking

⁶³ Asia Pacific Foundation of Canada, "Intercepting boat arrivals: What the Australian policy model means for Canadian asylum policy", Heather L Johnson, 9 December 2010,

<http://www.asiapacific.ca/sites/default/files/filefield/australiamigrationpolicy.pdf>

⁶⁴ DFAIT internal communication related through ATIP, A-2010-02042, p. 17.

⁶⁵ A Foreign Affairs spokesperson, Alain Cacchione, declined to comment on operational issues, but confirmed that "Canada is engaged with a number of countries in the region on issues regarding migrant smuggling, including pursuing co-operation with source and transit countries". Globe and Mail, "Canada aids in Thai arrest of Tamil migrants", 11 October 2010, Colin Freeze, <http://www.theglobeandmail.com/news/politics/canada-aids-in-thai-arrest-of-tamil-migrants/article1752548/>. See also Globe and Mail, "Canada hails Thai arrest of Tamils as warning to smugglers", Colin Freeze, Oct. 29, 2010

⁶⁶ Canadian Press, "Tamils in limbo after Canadian crackdown on human smugglers in Thailand", 29 April 2012, Mike Blanchfield. According to the UNHCR, there were eight round-ups of Sri Lankans between October 2011 and the end of March 2012. National Post, On the smugglers' trail: The unlucky ones, Stewart Bell, Mar 29, 2011.

⁶⁷ National Post, On the smugglers' trail: The unlucky ones, Stewart Bell, Mar 29, 2011.

water, healthy food and proper medical facilities, and of the heat. “We don’t have any more power to bear this situation,” another detainee said.⁶⁸

Also in October 2010 the Prime Minister appointed Ward Elcock as Special Advisor on Human Smuggling and Illegal Migration.⁶⁹ There is little documentation on his activities or achievements: the reporting available online is mostly about his travel expenses.⁷⁰ In response to an Access to Information request for reports submitted by Mr Elcock from December 2014 to June 2015, the Privy Council Office reported that “no records relevant to your request were found.” In 2013 Mr Elcock’s position was extended for another two years, with \$2.6 million funding.⁷¹

The *Ocean Lady* and *Sun Sea* also captured the attention of CSIS. A “top secret” CSIS paper dated 15 February 2013 states:

“The arrivals of the *MV Ocean Lady* in 2009 and the *MV Sun Sea* in 2010 focussed the Canadian intelligence community’s attention on human smuggling. Canada is also vulnerable to terrorist travel and illegal migration threats beyond maritime human smuggling of ethnic-Tamils.”⁷²

In September 2013, CBSA reported that its contribution to the government’s efforts to prevent maritime migrant smuggling had been successful. Furthermore, CBSA took credit for a significant decrease in the total number of Sri Lankan refugee claims in Canada, compared to 2010.⁷³

⁶⁸ Ibid.

⁶⁹ <http://www.publicsafety.gc.ca/cnt/nws/nws-rlss/2011/20110616-8-eng.aspx>

⁷⁰ Privy Council Office, *Travel and Hospitality Expenses Reports*,

http://www.pco-bcp.gc.ca/di/year_list.asp?cat=3&dept=7&id=773&lang=eng. Elcock rates a mention in an article on senior civil servants with high travel expenses: “Ward Elcock billed a whopping \$15,278 to fly to four cities in Australia and New Zealand last October for two weeks of “meetings.” Elcock was travelling as the prime minister’s special adviser on human smuggling.” *Chronicle Herald*, “Sky’s the limit when it comes to bureaucrats’ air travel costs”, Dean Beeby, *The Canadian Press*, 13 February 2012, <http://thechronicleherald.ca/canada/62177-sky-s-limit-when-it-comes-bureaucrats-air-travel-costs>

⁷¹ *Hill Times*, PCO’s Elcock gets two more years in top job to help stop human smuggling, 29 April 2013, Jessica Bruno, <http://www.hilltimes.com/news/news/2013/04/29/pco%E2%80%99s-elcock-gets-two-more-years-in-top-job-to-help-stop-human-smuggling/34522>

⁷² A CSIS Perspective on “Illegal” Migration, CSIS, IA 2012-13/109, released through ATIP. Interestingly, the paper makes the point that “Applying for refugee status on or after arrival in Canada [...] is lawfully mandated and not ‘illegal.’”

⁷³ Migrant Vessel File: Human Smugglers Targeting Canada, memo to the President from Martin Bolduc, A/Vice President, Operations Branch, 5 September 2013, released through ATIP.

9. Rhetoric

As soon as the Sun Sea was reported to be heading for Canada, the passengers were presented to the Canadian public as suspected criminals or terrorists. Their coming here was characterized as an abuse of Canadian generosity, rather than the exercise of their basic right to seek asylum from persecution. On the day of the boat's arrival, Public Safety Minister Vic Toews issued a statement declaring:

“Human smuggling is a despicable crime and any attempted abuses of our nation’s generosity for financial gain are utterly unacceptable. [...] As we deal with this current situation under Canadian law, Canadian officials will look at all available options to strengthen our laws in order to address this unacceptable abuse of international law and Canadian generosity.”⁷⁴

Some in the media picked up the same themes. The most strident was an editorial in the *Ottawa Sun* which took the position that the passengers should not be called ‘migrants’, but rather “queue jumpers, scam artists, back-door home invaders, plus a terrorist or two... Truth is, none is even a bona fide refugee”.⁷⁵

In October 2010, the government sent two ministers to Vancouver to announce the tabling of Bill C-49 at the site of the Sun Sea. Minister Toews explained that the bill was “cracking down on those criminals who would abuse our generous immigration system and endanger the safety and security of Canadian communities.”⁷⁶

Critics had another view:

“No amount of invective hurled against asylum seekers, no deliberate misleading of the public with the falsehood that refugees are “queue jumpers,” should distract from the fact that Bill C-49 is an exercise in public relations, an affront to the rule of law, and an insult to Canadians.”⁷⁷

The Sun Sea continued to be exploited for public relation purposes over the following years: there were repeated press conferences held with the Sun Sea as a backdrop, a crude TV ad for the 2011 elections by the Conservative party characterizing the Sun Sea passengers as “criminals who target Canadian generosity”⁷⁸, town hall meetings, MP flyers to constituents.⁷⁹

In commenting on one of the versions of the legislative changes introduced in the wake of the Sun Sea, the Canadian Council for Refugees expressed its profound concern about the undermining of public support for refugees:

⁷⁴ Public Safety Canada, Statement by the Minister of Public Safety on the boarding of the vessel MV Sun Sea, 13 August 2010.

⁷⁵ *Ottawa Sun*, No ‘migrants’ on the Sun Sea, editorial, 17 August 2010,

<http://www.ottawasun.com/comment/editorial/2010/08/16/15043236.html>

⁷⁶ Public Safety Canada, Human Smuggling and the Abuse of Canada’s Refugee System, 21 October 2010

⁷⁷ *Toronto Star*, “Playing politics with refugees”, 3 Dec 2010, Audrey Macklin and Sean Rehaag

⁷⁸ *Vancouver Sun*, “Kenney unapologetic over ‘xenophobic’ Tory election ad”, 31 March 2011, Douglas Quan

⁷⁹ For example, MP Scott Reid sent out a flyer referencing the *Ocean Lady* and *Sun Sea* and inviting his constituents to let him know whether they agreed that Canada needs “tougher laws against foreign migrants abusing our refugee system.”

Unfortunately we are seeing in Canada a pattern of anti-refugee rhetoric, familiar to many other countries. In Australia and in Europe politicians have promoted myths and fear-mongering about refugees as a way of tapping into racist and xenophobic popular sentiments, in order to win votes. This is a short-term strategy that is destructive to society. Canada should not follow such a negative example.⁸⁰

10. Conclusion

Five years after the Sun Sea arrived, many of the passengers have been found to be refugees in need of Canada's protection. Only 11 have been determined to be members of the Tamil Tigers, despite the government's widely publicized claims. The government spent millions of dollars fighting to keep the passengers in detention, to find them inadmissible and to prevent them being recognized as refugees, arguably without making much impact on the outcomes of most of the individual cases. In fact, the government's public comments about the Sun Sea have been found to increase the passengers' risk if returned to Sri Lanka, thus contributing to them being determined to be refugees.

The men, women and children have suffered detention (in some cases for years), prolonged family separation and public condemnation. They have had to face the government contesting their claims at every step of the process. Their stories, for the most part, are unknown to the Canadian public.

At least one man has been tortured on return to Sri Lanka, and has since died in suspicious circumstances.

Canada has become a dramatically less welcoming country for refugees. Draconian laws are now on the books – laws which five years ago were considered inconceivable in Canada. Rhetorical attacks on refugees have become commonplace.

The story of the Sun Sea is not finished. Some claimants are still awaiting a decision. The Supreme Court must render a decision on cases involving passengers accused of people smuggling. Canadians can still collectively decide that we want to see refugees welcomed with respect and dignity.

⁸⁰ CCR, Brief on C-4 - comments on a brief that punishes refugees, Nov. 2011, <http://ccrweb.ca/en/brief-c-4-comments-brief-punishes-refugees>

