

# HADI AHMADI – AND THE MYTH OF THE ‘PEOPLE SMUGGLERS’ BUSINESS MODEL’

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*The case of Hadi Ahmadi is one of the highest profile prosecutions of people smuggling in Australia. Convicted in August 2010 for bringing over 500 asylum seekers to Australia, Mr Ahmadi’s case is one of only a small number of prosecutions involving an organiser of migrant smuggling ventures — unlike the hundreds of cases before Australian courts which involve Indonesian captains and crew working on migrant smuggling vessels. This article explores the case of Mr Ahmadi to shed light into the so-called ‘people smugglers’ business model’, which successive Australian Governments from both sides of politics are determined to ‘crush’. The article examines the facts of Mr Ahmadi’s offending, the criminal proceedings against him, and draws comparison to other organiser cases and to the general patterns of people smuggling prosecutions in Australia. Findings of this research cast doubt over the Government’s rhetoric and its strategies to prevent and suppress migrant smuggling.*

## I INTRODUCTION

The topic of migrant smuggling, or people smuggling as it is referred to locally,<sup>1</sup> has dominated Australian federal politics for well over a decade and remains a fiercely debated topic today. Over this period, the rhetoric employed by politicians and the media has shifted from demonising asylum seekers and labelling them as ‘queue jumpers’, to the new goal of ‘breaking the people smugglers’ business model’; a slogan that is presently repeated time and again on both sides of politics.<sup>2</sup>

In Australia, the smuggling of migrants usually involves the arrival of boatloads of asylum seekers from the Middle East and Sri Lanka who are apprehended in Australian waters near the offshore territories of Christmas Island, Ashmore Reef and Cocos (Keeling) Islands or, in lesser numbers, along the coasts of Western Australia and the Northern Territory. The vast majority of these vessels set sail

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1 The two terms are used interchangeably throughout this article, though migrant smuggling is the internationally preferred and defined term: see *Protocol against the Smuggling of Migrants by Land, Sea and Air*, opened for signature 15 December 2000, 2241 UNTS 507 (entered into force 28 January 2004) art 3 (‘*Smuggling of Migrants Protocol*’).

2 See, eg, Chris Bowen, Minister for Immigration, ‘High Court Decision’ (Press Release, 31 August 2011) <<http://www.minister.immi.gov.au/media/cb/2011/cb171159.htm>>.

from southern Indonesia with a smaller number of boats arriving directly from Sri Lanka. Often using overcrowded, unseaworthy vessels, hundreds of people have lost their lives on the dangerous journey to Australia.<sup>3</sup> In most cases, young Indonesian men, sometimes adolescents, are hired as crew to navigate the vessels to Australia. Once apprehended by Australian authorities, the crew are arrested and charged with people smuggling offences set out in Australia’s *Migration Act 1958* (Cth) and the *Criminal Code* (Cth). Several hundred such cases are presently before the courts.<sup>4</sup>

Suggestions that the persons responsible for the smuggling of migrants to Australia employ a ‘business model’ reinforces the perception that this phenomenon is a form of organised crime, a heinous activity of transnational criminal syndicates working in an illegal market worth billions of dollars.<sup>5</sup> Such vocabulary also insinuates that migrant smugglers employ a common model or method to carry out their criminal enterprise. The reference to ‘business model’ in this context emphasises the widely held view that migrant smuggling is done for the purpose of financial or material benefit, which is a central element of the definition of ‘smuggling of migrants’ in international law.<sup>6</sup> Australia’s people smuggling offences, however, contain no such reference to profit or material gain, thus raising questions about compliance with international requirements and concerns about criminalising persons who act for purely humanitarian reasons.

Despite concerted efforts to identify and investigate the persons organising the migrant smuggling ventures, very rarely have Australian law enforcement agencies been able to arrest, charge, convict or, if necessary, extradite migrant smugglers who are not travelling on the boats themselves, but who act as directors and organisers of such vessels. A report released in May 2012 noted that:

In the past three years, new laws against people smuggling, with mandatory minimum sentences, resulted in the arrests of over 493 persons. However, of those charged, only six persons were actual organisers or facilitators of the smuggling operations.<sup>7</sup>

- 3 See generally Andreas Schloenhardt, *Migrant Smuggling: Illegal Migration and Organised Crime in Australia and the Asia Pacific Region* (Martinus Nijhoff, 2003) 139; for case examples see Tony Kevin, *A Certain Maritime Incident: The Sinking of SIEV X* (Scribe, 2004); Debbie Guest, ‘Visa Provides Safety for Disaster Survivor’, *The Australian*, 7 August 2012, 6; ‘Asylum Seekers Feared Dead off Australia’, *Aljazeera* (online), 14 August 2012 <<http://www.aljazeera.com/news/asia-pacific/2012/08/201281445418470592.html>>.
- 4 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, 18 October 2011, 108 (Chris Craigie, Commonwealth Director of Public Prosecutions).
- 5 See generally G Vermeulen, Y Van Damme and W De Bondt, *Organised Crime Involvement in Trafficking in Persons and Smuggling of Migrants* (Maklu, 2010); Alexis A Aronowitz, ‘Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive It and the Organizations that Promote It’ (2001) 9 *European Journal on Criminal Policy and Research* 163–95.
- 6 See *Smuggling of Migrants Protocol* art 3.
- 7 UN General Assembly, *Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, Joy Ngozi Ezeilo — Addendum: Mission to Australia*, Human Rights Council, 20<sup>th</sup> sess, Agenda Item 3, UN Doc A/HRC/20/18/Add.1 (18 May 2012) annex (‘*Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, on Her Mission to Australia (17–30 November 2011)*’) 6 [18].

Seen by some as a ruthless criminal profiting from the human misery of his clientele, and described by others as a good Samaritan rescuing persons from persecution, one such case is that of Mr Hadi Ahmadi, also known as Abu Hassan, who was involved in organising four migrant smuggling vessels that arrived in Australia. He was later extradited from Indonesia and convicted in Australia in August 2010 for facilitating the illegal entry of 560 unlawful non-citizens. In 2011, he lost an appeal against his conviction and, at the time of writing, was awaiting deportation from Australia.

This article examines the facts of Mr Ahmadi's case, his personal background, and the criminal proceedings against him. The purpose of the article is to explore the *modi operandi* of migrant smuggling to Australia, reflect on the personal background and circumstances that led Mr Ahmadi to engage in this crime, draw comparison to other organisers of migrant smuggling ventures to Australia, and to contrast this case to other, more typical people smuggling prosecutions. This article explores the case against Mr Ahmadi in order to shed light into the so-called 'people smugglers' business model', which successive Australian Governments from both sides of politics are determined to 'crush'. It also explores concerns about the criminalisation and punishment of persons who are involved in migrant smuggling for humanitarian reasons rather than financial gain, and their ability to raise defences such as necessity, as was argued in Mr Ahmadi's case. The goal here is to enhance the contemporary understanding of migrant smuggling and the persons involved therein and, in so doing, contribute to the development of more effective, fair, and sustainable measures to prevent and suppress migrant smuggling.

Part II of this article explores the personal background of Mr Ahmadi and the facts surrounding the arrival of the four migrant smuggling vessels in which Mr Ahmadi was involved. In Part III, the article examines the criminal proceedings against Mr Ahmadi, including his initial trial and sentencing in the District Court of Western Australia and his appeal to the Western Australian Supreme Court. Part IV then compares Mr Ahmadi's case to the more typical people smuggling prosecutions in Australia and to several other high profile organisers who have been implicated in facilitating multiple unauthorised boat arrivals. This Part also highlights some key observations about Mr Ahmadi's case on which the conclusions in Part V are based.

It should be noted that this article is based exclusively on open-source material. Much of the information presented here comes from the transcript of the District Court proceedings and the reported appeal case, *Ahmadi v The Queen*.<sup>8</sup> Other people smuggling case reports and secondary sources, including government reports, news reporting, and the very limited scholarly material pertaining to this topic are referenced accordingly.

## II FACTS AND BACKGROUND

### A Background

Hadi Ahmadi was born in Iraq in 1975. His father was a prominent dissident Shi’ite Cleric who was persecuted by the regime under then President Saddam Hussein. Aged 10, Mr Ahmadi, together with his mother and nine siblings, fled to Iran, like many other Iraqis at that time. His father stayed behind in Iraq and was killed in 1992 during a failed Shi’ite uprising against the Hussein Government.<sup>9</sup>

The family lived in a refugee camp for some time, though their situation was not safe and the family feared that they could be forced by Iranian authorities to return to Iraq at any time. Mr Ahmadi later also stated that he felt Iranian security forces closely monitored them and that he felt singled out due to his albino appearance.<sup>10</sup> Despite holding an Iranian passport, Mr Ahmadi was unable to leave the country with his name on that passport, and so he instead used a false Iraqi passport to leave Iran in 1999 and make his way to Malaysia. From there he flew to Indonesia where he paid a bribe to enter the country.<sup>11</sup>

During his time in Indonesia, Mr Ahmadi made several attempts to move to Australia with the help of local migrant smugglers. His first attempt to leave from the island of Bali was made in the early part of 2000. He paid the smugglers AUD2000, but the vessel never left Indonesian waters due to engine failure.<sup>12</sup> Mr Ahmadi was subsequently detained in Lombok, a nearby island, and after his release remained in Lombok. Here, he met Mr Sayed Omeid, who was the organiser behind the second vessel that Mr Ahmadi sought to take. Mr Omeid is an alleged veteran smuggler who is wanted for his role in facilitating approximately 700 passengers to Australia. He has been linked to a number of boat departures from Indonesia and has been named as one of Australia’s most wanted migrant smugglers.<sup>13</sup> He is expected to be extradited from Indonesia in 2012 or 2013.<sup>14</sup>

Mr Ahmadi’s second attempt to come to Australia in early 2000 also failed when bad weather forced the boat to turn around.<sup>15</sup> After this second failed attempt, Mr Ahmadi was briefly detained in Jakarta by Indonesian authorities before he

9 Ibid [11].

10 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3779.

11 Ibid 3776.

12 Angie Raphael, ‘People Smuggler Gets 7.5 Years in Jail’, *The Age* (online), 24 September 2010 <<http://news.theage.com.au/breaking-news-national/people-smuggler-get-75-years-in-jail-20100924-15pug.html>>.

13 Rory Callinan and Emmy Zumaider, ‘People-Smuggler on Loose Despite Sentence’, *The Australian* (online), 20 July 2011 <<http://www.theaustralian.com.au/national-affairs/people-smuggler-on-loose-despite-sentence/story-fn59niix-1226097880013>>.

14 S Rutra, ‘Detained Iraqi Claims Lawyers Fleeced Him’, *Free Malaysia Today News* (online), 7 September 2012 <<http://www.freemalaysiatoday.com/category/nation/2012/09/07/detained-iraqi-claims-lawyers-fleeced-him/>>.

15 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3777.

applied to the United Nations High Commissioner for Refugees ('UNHCR') to obtain refugee status, which he was granted sometime in 2000.<sup>16</sup>

## **B Offending**

Between January and September 2001, Mr Ahmadi worked closely with Mr Omeid in facilitating the departure of several vessels carrying smuggled migrants from Indonesia to Australia.<sup>17</sup> Mr Ahmadi was in charge of the day-to-day organising of the passengers, including such duties as putting them on and arranging for buses, meeting with them, arranging their accommodation, and receiving money on Mr Omeid's behalf.

Mr Ahmadi was implicated in the arrival of four 'suspected illegal entry vessels' ('SIEVs'), a term used by Australian authorities, carrying a total of 911 smuggled migrants to Australia. These vessels include:

- SIEV *Flinders*, which was detected near Christmas Island on 25 March 2001 carrying 196 passengers;
- SIEV *Nullaware*, which was apprehended near Christmas Island on 22 April 2001 carrying 198 passengers;
- SIEV *Yambuk*, which was apprehended near Christmas Island on 4 August 2001 carrying 147 passengers; and
- SIEV *Conara*, which was apprehended near Christmas Island on 22 August 2001 carrying 364 passengers.

It is possible that Mr Ahmadi may have assisted Mr Omeid or other migrant smugglers operating in Indonesia at that time with several other vessels that arrived in Australia in 2001, though there are no confirmed reports on this point.

Also implicated in the arrival of SIEVs *Flinders* and *Nullaware* was Mr Hassan Ayoub (also known as Naeem Ahamad Chaudhry) who was found guilty of offences under former s 232A of the *Migration Act 1958* (Cth) on 22 November 2004 in the District Court of Western Australia. Masood Ahmed Chaudhry, the brother of Mr Ayoub, was also convicted on 7 April 2006 in relation to the *Nullaware* for offences under s 233(1)(a) of the *Migration Act 1958* (Cth) and unsuccessfully appealed against the conviction in the Supreme Court of Western Australia in 2007.<sup>18</sup>

It is not known why Mr Ahmadi ceased his migrant smuggling activities after the arrival of SIEV *Conara*, though it is most likely that the changed enforcement measures and treatment of asylum seekers, instituted in Australia in September

<sup>16</sup> Ibid.

<sup>17</sup> Ibid 3778.

<sup>18</sup> *Chaudhry v The Queen* [2007] WASCA 37 (19 February 2007).

2001 with the so-called ‘Pacific Solution’, might have made it more difficult for Mr Ahmadi to organise further vessels and bring smuggled migrants to Australia.<sup>19</sup>

### C Arrest and Extradition

After he ceased his migrant smuggling activities in 2001, Mr Ahmadi continued to live in Indonesia for several years. Court transcripts suggest that he was not involved in any other offences over the following years and that he had no further contact to the people with whom he previously worked, partly because he blamed them for his own failed quest to move to Australia.<sup>20</sup>

Indonesian and Australian authorities only became aware of Mr Ahmadi’s involvement in migrant smuggling when, several years later, one of his former co-workers turned informant, Mr Waleed Sultani, reported about Mr Ahmadi’s activities. Mr Sultani had been a commander in the Iraqi Army and as a Shi’ite Muslim suffered persecution and in 1990 deserted and fled from Iraq. Like Mr Ahmadi, Waleed Sultani eventually arrived in Indonesia where he tried to be smuggled to Australia.<sup>21</sup> He became involved in several migrant smuggling ventures after failed attempts to leave Indonesia by boats that had been organised by Mr Sayed Omeid. At the time Mr Sultani began working alongside Mr Ahmadi, he was already an informant for the Australian Federal Police (‘AFP’) in Indonesia, a role for which, as was later revealed, he received substantial benefits. In June 2010, several newspapers reported that in return for naming migrant smugglers and giving evidence at their trials, Mr Sultani received immunity from prosecution, Australian citizenship, and a cash reward of AUD250 000.<sup>22</sup>

It is interesting to note in this context that at some point Mr Ahmadi, too, was approached for information by a member of the AFP. He, however, refused to cooperate. During his trial, Mr Ahmadi alleged that (presumably sometime in 2006 or 2007) he had been approached by Federal Agent Mr Bernard Young who sought information about Mr Sayed Omeid with whom, as mentioned previously, Mr Ahmadi worked during several migrant smuggling ventures. Mr Ahmadi was promised immunity from prosecution, money, and Australian citizenship in exchange for any cooperation he would offer to the AFP. According to Mr Ahmadi, he refused to become an informant because he did not think it was right and he was fearful that Mr Omeid would hurt his family. He was quoted in the District Court proceedings saying:

- 19 For further details about the ‘Pacific Solution’, which remained in operation until November 2007, see, eg, Schloenhardt, *Migrant Smuggling*, above n 3, 84–8; Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) 89–105.
- 20 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3780–2.
- 21 ABC, ‘Former People Smuggler Testifies in Perth Court’, *PM with Mark Colvin*, 2 June 2010 (David Weber) <<http://www.abc.net.au/pm/content/2010/s2916537.htm?site=perth>>.
- 22 ‘People Smuggler Informant Wanted Revenge’, *The West Australian* (online), 2 June 2010 <<http://au.news.yahoo.com/thewest/a/-/breaking/7334585/people-smuggler-informant-wanted-revenge>>; Debbie Guest, ‘Revenge Drove Iraqi Informer’, *The Australian*, 3 June 2010, 3.

I couldn't do it in Omeid. I can't bring you Omeid. Omeid knew my house, he knew my mum. If I put him in trouble he can do something to my family, and it is wrong in my mind that I sell someone to get something. It's not right.<sup>23</sup>

Mr Ahmadi produced a letter which was allegedly written by Mr Young which read: 'Hadi, you have the chance to change your life. If you don't take it, I wish you luck in future. Regards Bernard.'<sup>24</sup> The AFP later rejected the claims made by Mr Ahmadi after an internal investigation into this matter revealed that rather than being offered a deal, Mr Ahmadi was merely asked for information as a way of obtaining intelligence.<sup>25</sup> It is not possible to independently validate either side of these allegations.

Based on information received from Mr Sultani, Mr Ahmadi was first arrested by Indonesian authorities sometime in 2007 and was subsequently deported to Iraq. He only remained in Iraq for a few months and in 2008 set out to return to Indonesia where, on 29 June 2008, he was arrested by Indonesian officials at Jakarta airport who acted on an INTERPOL Red Notice that had been issued against Mr Ahmadi.<sup>26</sup>

Soon after his arrest, the Australian Government sought Mr Ahmadi's extradition from Indonesia to face charges relating to people smuggling in Australia. For the next 10 months, Mr Ahmadi remained in custody in Indonesia without any formal charges laid against him; a fact that was later described by Chief Judge Antoinette Kennedy, who was to preside over his case in Australia, as 'appalling'.<sup>27</sup>

When Indonesian President Susilo Bambang Yudhoyono approved the extradition request on 20 April 2009, Mr Ahmadi became the first person to be extradited to Australia for people smuggling charges. Six days later he was flown to Perth where he was taken into custody by Australian authorities.<sup>28</sup>

23 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3777.

24 Cindy Wockner, 'Australian Federal Police Fishes for an Informant', *The Courier Mail* (online), 1 May 2009 <<http://www.couriermail.com.au/news/national/people-smuggler-told-cut-a-deal/story-e6freooo-1225705473287>>.

25 Geoff Thompson, 'Alleged People Smuggler Not Offered Deal: AFP', *ABC News* (online) <<http://www.abc.net.au/news/2009-06-04/alleged-people-smuggler-not-offered-deal-afp/1704064>>.

26 INTERPOL, the international police organisation, issues so-called Red Notices to seek the location and detention, arrest or restriction of movement of a person wanted by a national jurisdiction or an international tribunal for the purpose of extradition, surrender, or similar action.

27 Cortlan Bennett, 'Judge Slams People-Smuggling Trial Delay', *The Age* (online), 5 February 2010 <<http://news.theage.com.au/breaking-news-national/judge-slams-peoplesmuggling-trial-delay-20100205-nic0.html>>.

28 Bob Debus and Chris Evans, 'Extradition of Alleged People Smuggler' (Media release, 26 May 2009) <<http://www.minister.immi.gov.au/media/media-releases/2009/ce09044.htm>>; 'Alleged People Smuggler Arrested After Arriving in Perth', *The Sydney Morning Herald* (online), 27 May 2009 <<http://www.smh.com.au/world/alleged-people-smuggler-arrested-after-arriving-in-perth-20090527-bmf.html>>.

### III CRIMINAL PROCEEDINGS

#### A Charges

On 4 February 2010, Hadi Ahmadi was indicted for his involvement in the arrival of SIEVs *Flinders*, *Nullaware*, *Yambuk*, and *Conara*. The main charges against him involved offences under former s 232A of the *Migration Act 1958* (Cth) (now s 233C), Australia’s principal people smuggling offence, which was introduced in 1999. This offence provided that a person commits an offence if they

- (a) organise or facilitate the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of 5 or more people to whom subsection 42(1) applies; and
- (b) do so reckless as to whether the people had, or have, a lawful right to come to Australia.

The offence carries a maximum penalty of 20 years imprisonment.

There are several elements to s 232A. First, it must be shown that the accused engaged in ‘organising or facilitating’, the conduct element of this offence. Second, this conduct has to relate to the entry to Australia of a person ‘to whom subsection 42(1) applies’, ie that the person is a non-citizen without a valid visa. Further, it is required that this conduct relates to a group of five or more people. In short, this offence criminalises the smuggling of five or more migrants. The fault element of s 232A only requires that the accused was reckless, meaning that he or she had some awareness that the smuggled migrants may or may not be able to enter Australia lawfully.<sup>29</sup>

Of the 21 counts stated in the indictment against Mr Ahmadi, counts 1, 14, 18, and 20 involved charges under s 232A. In the alternative, he was charged for offences under s 233(1)(a) of the *Migration Act 1958* (Cth) which constitute the remaining 17 counts in the indictment.<sup>30</sup> Section 233(1)(a) contained a similar offence for taking part in bringing to Australia a non-citizen in circumstances where it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of the *Migration Act*. Unlike s 232A, however, this offence does not require proof of ‘a group of 5 or more people’ and therefore also carries a lesser penalty.

Hadi Ahmadi pleaded not guilty to all counts.

#### B Trial

Mr Ahmadi’s criminal trial commenced before Judge Stravrianou in the District Court of Western Australia on 31 May 2010. The trial lasted for 51 days; 26 days longer than originally anticipated. In the lead up to his trial, counsel for

<sup>29</sup> Cf *Criminal Code* (Cth) s 5.4.

<sup>30</sup> *Ahmadi v The Queen* (2011) 254 FLR 174, 175 [2], 176 [4].



Mr Ahmadi subpoenaed 900 files from the Department of Immigration and Citizenship ('DIAC') which his lawyers examined in the two weeks prior to 31 May 2010.<sup>31</sup>

## 1 Witness Accounts

Also prolonging the proceedings was the fact that the Commonwealth Director of Public Prosecutions announced that there were 70 potential witnesses to give evidence, including many of the passengers who arrived on the vessels which Mr Ahmadi allegedly organised.<sup>32</sup> Stavrianou DCJ found that this evidence established that Mr Ahmadi had met passengers at the airport, put them on, or arranged for them to get on to buses, met with passengers at places where they stayed, was at the shore when the vessel departed, and that he received money from passengers on behalf of Sayed Omeid.<sup>33</sup>

Among the prosecution witnesses was the informant, Waleed Sultani, who testified that he had worked with Mr Ahmadi for Sayed Omeid. Mr Sultani gave evidence that their duties were to meet prospective passengers, sign them up with Mr Omeid, and look after them. This included finding hotels, organising buses, and going with passengers to the departure points. He also said that they collected money from the passengers and sometimes Mr Ahmadi would hand the money to Mr Omeid, but that at other times he would keep it.<sup>34</sup>

Also among the persons testifying against Mr Ahmadi was another convicted Indonesian migrant smuggler whose name and identity was suppressed. This witness told the court that he saw Mr Ahmadi arrange accommodation for his clients in Jakarta, that he had helped with their departures to Australia from remote beaches, and that Mr Ahmadi had been seen working with other known smugglers in these locations.<sup>35</sup>

## 2 Defences and Justifications

Counsel for Mr Ahmadi argued that Mr Ahmadi made very little, if any, profit from his migrant smuggling activities and that he acted for humanitarian purposes and not for commercial gain. Even before his extradition from Indonesia Mr Ahmadi claimed that he possessed and earned very little money.<sup>36</sup> When

31 District Court of Western Australia, *Annual Review 2010* (2010).

32 Warwick Stanley, 'Ahmadi Trial to Hear 70 Witnesses', *The Sydney Morning Herald* (online), 25 February 2010 <<http://news.smh.com.au/breaking-news-national/ahmadi-trial-to-hear-70-witnesses-20100225-p5ri.html>>.

33 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3778.

34 'Former People Smuggler Testifies in Perth Court', above n 21.

35 Lloyd Jones, 'People Smuggler Gives Evidence in Perth', *The Age* (online), 3 June 2010 <<http://news.theage.com.au/breaking-news-national/people-smuggler-gives-evidence-in-perth-20100603-x5dp.html>>.

36 Cindy Wockner, 'Accused People Smuggler Extradited to Australia', *The Herald Sun* (online), 27 May 2009 <<http://www.heraldsun.com.au/news/more-news/accused-people-smuggler-extradited-to-australia/story-e6frf716-1225716680897>>.

asked why he committed the offences he was charged with, Mr Ahmadi said he acted out of a religious duty and that he felt an obligation to look after the refugees; other smugglers just looked at them as money while he understood how they felt.<sup>37</sup> When asked later by the Court what he had done in relation to the smuggled migrants, he said, in summary, that he had listened to them talk about their problems, found them medication, helped women take their children to the hospital, found them specific sorts of ethnic food, tried to find cheap and secure accommodation for them, and took them to the United Nations office so they could ask for help.<sup>38</sup>

The defence also argued that while Mr Ahmadi may have fulfilled the elements of the charges against him, he only committed these offences to protect his passengers from threats to their lives and safety. To this end, it was suggested during the trial that he may have acted out of necessity and that he could raise a common law defence.<sup>39</sup>

To prove that the lives of the people that Mr Ahmadi assisted were in serious danger, and that, accordingly, Mr Ahmadi acted out of necessity, counsel for Mr Ahmadi sought to demonstrate that as asylum seekers, Mr Ahmadi’s clients were not safe in Indonesia. In this context, he raised allegations of a corrupt relationship between a top Indonesian military figure, Indonesian migrant smugglers, and local police. The argument was that the smuggled migrants faced a danger of ‘irreparable evil’ if they were to remain in Indonesia, a situation which Mr Ahmadi sought to end through his migrant smuggling activities.

Stavrianou DCJ, referring to public interest reasons, suppressed the identity of the military figure and made a court order suppressing the publication of the alleged corruption.<sup>40</sup> After all of the evidence had been presented, the Judge revisited the defence of necessity and withdrew it from the jury. He found that there was no evidence upon which the jury could fail to be satisfied that the prosecution had excluded the defence.<sup>41</sup>

On 11 August 2010, after three and a half days of deliberation, the jury found Mr Ahmadi guilty of two counts under s 232A of the *Migration Act 1958* (Cth) in relation to the *Conara* and the *Flinders*. The jury found Mr Ahmadi not guilty and could not reach a verdict in respect of the charges in relation to the other two vessels.<sup>42</sup> This means he was found guilty of assisting the illegal migration of 560 asylum seekers mostly from Iraq, Iran, and Afghanistan.<sup>43</sup>

37 *Ahmadi v The Queen* (2011) 254 FLR 174, 181 [43].

38 *Ibid* [44].

39 Commonwealth Director of Public Prosecutions, *Annual Report 2009–10* (2010) 60.

40 Rory Callinan and Debbie Guest, ‘Court Suppressed People-Smuggling Link to Jakarta Brass’, *The Australian* (online), 20 September 2011 <<http://www.theaustralian.com.au/national-affairs/immigration/court-suppressed-people-smuggling-link-to-jakarta-brass/story-fn9hm1gu-1226141226482>>.

41 Commonwealth Director of Public Prosecutions, above n 39, 60–1; *Ahmadi v The Queen* (2011) 254 FLR 174, 178 [33].

42 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3775–6.

43 *Ibid* 3778.

## C Sentence

Stavrianou DCJ sentenced Mr Ahmadi to seven and a half years imprisonment, with a non-parole period of four years.<sup>44</sup> At the time of Mr Ahmadi's activities in 2001, the offence did not carry a mandatory minimum penalty which was only introduced by the *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth) for offences committed after September 2001.<sup>45</sup> Accordingly, Stavrianou DCJ had greater discretion to take into account the circumstances surrounding the commission of the offence, including Mr Ahmadi's conduct and level of involvement, as well as a consideration of Mr Ahmadi's personal circumstances, and any other aggravating or mitigating factors.<sup>46</sup>

To that end, counsel for Mr Ahmadi also asked the Court to consider his many 'unusual' personal circumstances, especially Mr Ahmadi's ill health, which included 'heart problems, very poor eyesight and "a degree" of depression'.<sup>47</sup> Counsel for Mr Ahmadi also suggested that the significant delays in the prosecution of Mr Ahmadi and the long period between his offending and his trial should mitigate his sentence. The defence argued that in the six years between his migrant smuggling activities in 2001 and his arrest in 2007, Mr Ahmadi had refrained from any offending and further migrant smuggling activity and, instead, had 'moved on with his life'.<sup>48</sup> On this point, Stavrianou DCJ referred to the decision in *Scook v The Queen*,<sup>49</sup> and recognised that delay, in combination with other relevant sentencing factors favourable to the offenders, may be mitigatory. However, Stavrianou DCJ ultimately found that the delay of Mr Ahmadi's prosecution was explained adequately, and he accepted that 'the AFP did have other, more pressing concerns; in particular, the prosecution of Hassan Ayoub and secondly the difficulties which were identified in relation to the extradition process'.<sup>50</sup>

In considering Mr Ahmadi's personal circumstances, Stavrianou DCJ had regard to his relationship with his mother, who was ageing and in poor health, and his relationship with an Indonesian woman whom he intended to marry upon his release. He also considered Mr Ahmadi's imprisonment in a foreign country, in a society and culture with which he was unfamiliar and where he was without usual family support, as a hardship. His Honour recognised that the offences were committed during an isolated time in Mr Ahmadi's life, and acknowledged that

44 Ibid 3784.

45 Commonwealth Director of Public Prosecutions, above n 39, 85.

46 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3776.

47 Angie Raphael, 'People Smuggler Pleads with Judge,' *The Sydney Morning Herald* (online), 23 September 2010 <<http://news.smh.com.au/breaking-news-national/people-smuggler-pleads-with-judge-20100923-15odc.html>>.

48 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3781.

49 (2008) 185 A Crim R 164, [30]–[33].

50 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3782.

Mr Ahmadi had not reoffended during the six-year period leading up to his arrest, and was unlikely to reoffend after serving his sentence.<sup>51</sup>

The prosecution submitted that although the offending preceded the introduction of the mandatory minimum provisions, the seriousness of Mr Ahmadi’s offending required a greater sentence than the minimum.<sup>52</sup> Stavrianou DCJ agreed that due to the seriousness of the offence and the need for general deterrence, there was no alternative but to impose a term of imprisonment in relation to Mr Ahmadi’s convictions. He argued that through Mr Ahmadi’s sentence a clear message had to be sent to like-minded persons and others engaging in, or likely to engage in, similar migrant smuggling operations that they face substantial penalties. He also noted that a high sentence would be warranted in recognition of the considerable financial costs and administrative burden involved in accommodating and processing the asylum seekers brought to Australia by Mr Ahmadi and other migrant smugglers.<sup>53</sup> To this end, Stavrianou DCJ followed similar arguments made in a range of other sentencing remarks involving people smuggling offences.<sup>54</sup> No similar consideration, however, was given to the fact that the persons brought to Australia by Mr Ahmadi (and other migrant smugglers) are indeed fleeing persecution and seeking asylum in Australia, and that the vast majority of them were later recognised as refugees in Australia.

Stavrianou DCJ did acknowledge that Mr Ahmadi was not the primary organiser, but a ‘middleman.’<sup>55</sup> He sentenced him on the basis that he was a go-between and found that an appropriate sentence for his involvement in the arrival of the *Conara* and the *Flinders* was a term of imprisonment of five years applied cumulatively. After applying the totality principle,<sup>56</sup> his Honour reduced this total sentence and concluded that the overall criminality of Mr Ahmadi’s offending would be properly reflected by a total effective sentence of seven and a half years, with a nonparole period of four years imprisonment.<sup>57</sup> This sentence was backdated to 29 June 2008, the day he was arrested at Jakarta airport.

## **D Appeal**

In June 2011, Hadi Ahmadi’s application for leave to appeal against conviction was heard in the Western Australian Supreme Court before McLure P, Buss

51 Ibid 3779–80.

52 Commonwealth Director of Public Prosecutions, ‘Submissions on Sentence’, Submission in *R v Ahmadi*, 12/2010, 17 September 2010, [7], [21]–[23].

53 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3783–4.

54 See, eg, *Cita v The Queen* (2001) 120 A Crim R 307, 313; *R v Daoed* (2005) 158 A Crim R 381, [11]; *R v Feng Lin* (2001) 119 A Crim R 194, 195 (Mason P).

55 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3783.

56 *Woods v The Queen* (1994) 14 WAR 341; *Martino v Western Australia* [2006] WASCA 78 (19 May 2006).

57 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3784.

JA, and Mazza J. The points Mr Ahmadi argued on appeal were that the trial judge erred in not leaving the defence of necessity open to the jury, and that the prosecution's frequent interruptions during the defence's closing address amounted to a miscarriage of justice.<sup>58</sup> Each point will be examined separately in the next sections.

## 1 Defence of Necessity

At the time Mr Ahmadi was involved in organising the vessels to bring smuggled migrants to Australia, Australian federal criminal law was still guided by common law since the *Criminal Code* (Cth) did not enter into operation until 15 December 2001. Accordingly, he sought to raise the defence of necessity in relation to the charges under former s 232A of the *Migration Act 1958* (Cth).

The defence of necessity — or extraordinary emergency as it is now termed in s 10.3 of the *Criminal Code* (Cth) — involves a claim by the accused that he or she was compelled to commit an offence by reason of some extraordinary emergency. The elements of the defence of necessity at common law were set out by Young CJ and King J in *R v Loughnan*:

[T]here are three elements involved in the defence of necessity: First, the criminal act or acts must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect. ...

The [second] element of imminent peril means that the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril. ... Thus if there is an interval of time between the threat and its expected execution it will be very rarely if ever that a defence of necessity can succeed.

The [third] element of proportion simply means that the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided. Put in another way, the test is: would a reasonable person in the position of the accused have considered that he had any alternative to doing what he did to avoid the peril?<sup>59</sup>

In *R v Rogers* Gleeson CJ largely followed this approach but added that it was more appropriate to treat the stated 'requirements' not as technical legal conditions that must be present before the offence was available, but merely as matters of evidence relevant to the issue of what the accused honestly believed on reasonable grounds.<sup>60</sup> The test formulated in *R v Rogers* was (1) whether the accused's conduct was a response to a threat or serious injury to the accused, and,

58 *Ahmadi v The Queen* (2011) 254 FLR 174, 178 [31]–[32].

59 [1981] VR 443, 448. Similar elements have been identified in *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480; *R v Latimer* [2001] 1 SCR 3, [28]; *R v Perka* [1984] 2 SCR 232.

60 (1996) 86 A Crim R 542, 546–7.

if so, the accused (2) honestly believed on reasonable grounds it was necessary to do what was done to avoid death or serious injury.

Counsel for Mr Ahmadi argued that Mr Ahmadi’s migrant smuggling activities served to save the passengers on his vessels from serious threats and dangers and that he genuinely believed his actions were necessary to bring his passengers to a place of safety where they would not face persecution or fear to be returned to a place of persecution. On appeal, Mr Ahmadi’s counsel argued that the defence should have been left to the jury and the trial judge’s decision not to allow the defence to be considered by the jury caused a substantial miscarriage of justice.

In his leading judgment, Buss JA referred to *Braysich v The Queen* as the recent authority for the rule that, in considering whether a defence should be left to the jury, there must be evidence which, taken at its highest in favour of the accused, could lead a reasonable jury to have a reasonable doubt that the Crown had negated each of the elements of the defence.<sup>61</sup> Buss JA then applied the three elements of the defence articulated in *R v Loughnan*.<sup>62</sup> He drew particular attention to the second element, requiring proof that the persons Mr Ahmadi was bound to protect were in a situation of imminent peril. He held that the imminent peril must be more than merely foreseeable or likely but must be ‘on the verge of transpiring and virtually certain to occur.’<sup>63</sup> In applying this standard to the circumstances of the case, Buss JA found that there was a foreseeable risk that had the passengers on the *Flinders* and *Conara* stayed in Indonesia, they might have been arrested and held in detention centres, or deported to their countries of origin. He did, however, find no evidence to suggest that Mr Ahmadi honestly believed that these circumstances were on the ‘verge of transpiring’ or were ‘virtually certain to occur’ when he committed the criminal acts.<sup>64</sup> Buss JA further held that the possibility of detention in Indonesia was not an ‘irreparable evil’ required for the defence of necessity.<sup>65</sup>

In this context, the Court also considered public policy implications and remarked ‘that the law cannot leave people free to choose for themselves which laws they will obey’ and that the law should not be disobeyed just because it is considered that the accused serves some value higher than that implicit in the law which is disobeyed.<sup>66</sup>

In conclusion, Buss JA, with whom Mazza J and McLure P agreed, held that the trial judge was correct to exclude the defence of necessity from the jury.

61 *Ahmadi v The Queen* (2011) 254 FLR 174, 179 [34], citing *Braysich v The Queen* (2011) 243 CLR 434.

62 *Ibid* 179 [36], citing *R v Loughnan* [1981] VR 443, 448–9 (Young CJ and King J).

63 *Ibid* 183 [47], quoting *R v Latimer* [2001] 1 SCR 3 [29].

64 *Ibid* 183 [49].

65 *Ibid* 183 [50].

66 *Ibid* 179 [37], quoting *R v Rogers* (1996) 86 A Crim R 542, 546 (Gleeson CJ).

## 2 Prosecution's Interruptions during Closing Address

The second ground of appeal concerned the prosecution's frequent interruptions of the defence counsel's closing address. On appeal it was argued that this constituted a substantial miscarriage of justice as it deprived the defence of the entitlement under s 145(2) of the *Criminal Procedure Act 2004* (WA) to give a closing address to the Court about the whole case.

Buss JA did acknowledge that the defence counsel had been interrupted on a number of occasions. He did not engage with all interruptions individually, but noted some interruptions had been appropriate while on other occasions the prosecution's interruptions were disrespectful, and it was found that, under a guise of being respectful, the prosecution had told the trial judge that his 'discharge of his judicial function was deficient.'<sup>67</sup> His Honour held that the prosecutor should not have interrupted the defence counsel's closing address, and he should have raised his objections during an adjournment of the proceedings.<sup>68</sup>

Mazza J further remarked that while the prosecution interrupted on 11 separate occasions, some of the interruptions were innocuous and could not conceivably give rise to a miscarriage of justice.<sup>69</sup> There were occasions when the prosecutor should have left his interruption to the end of the address or at a convenient adjournment, however, he recognised that there can be times where an immediate objection is justified.<sup>70</sup> Mazza J agreed with Buss JA, that when the interruptions were considered in the context of the counsel's address as a whole, they did not deprive Mr Ahmadi of his entitlement to have the closing address and they did not amount to a miscarriage of justice.<sup>71</sup> On this basis, Mr Ahmadi's appeal was dismissed.

## E Application for Residence and Asylum in Australia

After the failed appeal, *The Australian*, a national newspaper, reported that Mr Ahmadi would intend to apply for a protection visa following his release from prison. Although Stavrianou DCJ acknowledged counsel's comments at the trial that it would be unlikely that Mr Ahmadi would be able gain refugee status in Australia,<sup>72</sup> *The Australian* quoted a DIAC spokesperson saying that his conviction for people smuggling offences would not bar Mr Ahmadi from applying for a protection visa if he also meets the necessary health, security and character requirements.<sup>73</sup>

67 Ibid 186 [59].

68 Ibid 186 [60].

69 Ibid 188 [68].

70 Ibid 189 [73].

71 Ibid 188 [64].

72 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3780.

73 Debbie Guest, 'Jailed People-Smuggler Kingpin Wants to Stay Here', *The Australian* (online), 2 November 2011 <<http://www.theaustralian.com.au/national-affairs/immigration/jailed-people-smuggler-kingpin-wants-to-stay-here/story-fn9hm1gu-1226183012104>>.

Mr Ahmadi was released from gaol in June 2012 and then placed in the Perth Immigration Detention Centre. In August 2012, he announced that he would abandon his application for asylum in Australia and, despite fears for his personal safety, agreed to be returned to Iran.<sup>74</sup>

## **F Political Consequences and Media Attention**

The case of Mr Ahmadi was one of the first high profile people smuggling prosecutions in Australia and he was the first such offender to be extradited to Australia from Indonesia. Accordingly, this case and the personal background of Mr Ahmadi received considerable media attention and attracted extensive commentary by politicians, journalists, and the general public. Much of the attention focused on the long period that Mr Ahmadi was kept in prison in Indonesia before being extradited to Australia, his allegations about official corruption in Indonesia, and his criticism of the AFP’s involvement in his case.<sup>75</sup>

In April 2009, around the time of his extradition to Australia, the Australian TV station SBS aired a feature program in its *Dateline* series entitled ‘The Smuggler’s Trail’. This investigative piece focused substantially on the activities and background of Mr Ahmadi and also included a telephone interview between SBS reporter Mr David O’Shea and Mr Ahmadi who, at that time, was in an Indonesian gaol awaiting extradition. The interview highlighted the fact that Mr Ahmadi was kept in police custody in Indonesia for 10 months without any formal charge.<sup>76</sup>

Mr Ahmadi’s allegations about the involvement of corruption in the migrant smuggling trade also attracted much media attention.<sup>77</sup> In the SBS interview, for instance, Mr Ahmadi claimed that he was a minor player in the migrant smuggling business and that he had been targeted over the ‘real smugglers’ because he could not afford to bribe Indonesian authorities. He alleged that the most serious offenders were not investigated by law enforcement agencies, and that, if they were arrested, they would pay money to be freed. As mentioned earlier, Mr Ahmadi named an Indonesian official and other Indonesian authorities during his trial and accused them of corruption, however, Stavrianou DCJ suppressed publication of their names for public interest reasons. The media argued that these allegations, as well as allegations about a spy-deal from the AFP, would raise questions about the transparency of anti-people smuggling operations in Indonesia.<sup>78</sup>

74 Debbie Guest, ‘Smuggler Drops Bid to Stay’, *The Australian*, 17 August 2012, 4.

75 See, eg, Lindsay Murdoch, ‘AFP Asked Me to Spy, Says Alleged People Smuggler’, *The Age* (Melbourne), 11 May 2009, 3; Mark Dobb and Debbie Guest, ‘Alleged Smuggler Says Corruption Rife’, *The Australian*, 11 May 2009, 8; Debbie Guest, ‘AFP “Threatened to Put Me in a Hole”’, *The Australian*, 28 July 2010, 4; Debbie Guest, ‘AFP “Paid Boatpeople Witness”’, *The Australian*, 29 July 2010, 4; Debbie Guest, ‘Jail Risk for Iraqi who Refused to Act for AFP in Boatpeople Battle’, *The Australian*, 7 August 2010, 13.

76 SBS, ‘The Smuggler’s Trail’, *Dateline*, 10 May 2009 (David O’Shea) <<http://www.sbs.com.au/dateline/story/transcript/id/600043/n/The-Smuggler-s-Trail>>.

77 Dobb and Guest, above n 75, 8.

78 ‘The Smuggler’s Trail’, above n 76.



## IV OBSERVATIONS AND COMPARISONS

The case against Mr Ahmadi, his background and migrant smuggling activities, along with the criminal proceedings against him, is very different to the typical people smuggling prosecution in Australia, of which there are presently several hundred before the courts.<sup>79</sup> As mentioned previously, his case is one of a very small number of cases involving organisers and facilitators of migrant smuggling ventures who are not themselves on the vessels when these arrive in Australia. The following sections draw some comparisons between Mr Ahmadi's case, the typical people smuggling prosecutions, and those involving other organisers.

### A Typical People Smuggling Prosecutions in Australia

The vast number of persons charged for people smuggling offences in Australia involve the captain and crew who are found on the SIEVs when they arrive in Australian waters. The Attorney-General's Department reported that, in the period between 1 September 2008 and 22 February 2012, 228 maritime people smuggling crew had been convicted, but only 5 people smuggling organisers had been convicted over the same period.<sup>80</sup> The Australian Broadcasting Corporation ('ABC') reported that between 2008 and early June 2012, the AFP arrested 544 alleged crewmembers of which 245 had been convicted. Only 14 organisers were arrested during this period.<sup>81</sup>

As other research has shown, most of the people smuggling cases that reach Australian courts

are all remarkably similar: the offenders are Indonesian men who come from very poor families, they have only limited education, they were approached by strangers who offered them about 5 million Indonesian rupiah ('IDR') (approximately AUD 530.00) to undertake some work on a boat, and, in most cases, the mandatory minimum sentence was imposed.<sup>82</sup>

The typical profile of a person prosecuted in Australia for people smuggling under former s 232A (now s 233C) of the *Migration Act 1958* (Cth) is

that of a poor, uneducated Indonesian fisherman, farmer or labourer who, while seeking work, is approached by strangers offering a large amount of

79 Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, 18 Oct 2011, 108 (Chris Craigie, Commonwealth Director of Public Prosecutions).

80 Attorney-General's Department, Submission to the Senate Standing Committee on Legal Aid and Constitutional Affairs, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 5.

81 ABC, 'People Smuggling Claims Question Role of Authorities', 7.30, 5 June 2012 (Hayden Cooper) <<http://www.abc.net.au/7.30/content/2012/s3518945.htm>>.

82 Andreas Schloenhardt and Charles Martin, 'Prosecution and Punishment of People Smugglers in Australia 2008–11' (2012) 40 *Federal Law Review* 111, 115.

money to take a vessel to Australian territory. This observation is shared by many other commentators about people smuggling offenders generally.<sup>83</sup>

What emerges is a typical profile that accurately describes those individuals who are commonly targeted by people smuggling organisers. Poor fishermen are particularly vulnerable while out of work, and are easily tempted by the money which the organisers promise. They are targeted because of their lack of sophistication, and are easily duped into undertaking the journey while the organisers remain out of reach to Australian authorities. By the time the boats reach Australian territory, the organisers have already left. For this reason, few have been prosecuted.<sup>84</sup>

It is also noteworthy that Mr Ahmadi exercised a much greater level of control over the migrant smuggling ventures. This is in contrast to most defendants in people smuggling trials who usually only have ‘limited involvement in people smuggling organisations. They have not arranged the passengers for the journey. They have no control over the number of passengers they transport to Australia.’<sup>85</sup>

Another unique feature that distinguishes Mr Ahmadi’s case from the typical people smuggling prosecution is the lack of evidence relating to any profit motive or any substantial profit gained by Mr Ahmadi. As mentioned earlier, he denied engaging in his migrant smuggling ventures for financial gain and the criminal proceedings against him reveal nothing to suggest that Mr Ahmadi profited materially from his activities in a significant way. This is in stark contrast to the captains and crews on board the migrant vessels: they usually agree to become involved in the migrant smuggling venture to gain extra money, often because they live in poverty, are unemployed, or have no other source of income. The money offered to them by organisers such as Mr Ahmadi usually far exceeds the income they can achieve through their fishing or other activities. The migrant smuggling activities thus serve as a way to supplement their income and support

83 See, eg, Nathalie Haymann, Submission No 4 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, April 2010, 2; Project SafecomInc, Submission No 17 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 8; Sue Hoffman, Submission No 25 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 3, 6; Bassina Farbenblum et al, Migrant and Refugee Rights Project and International Refugee and Migration Law Project, University of NSW, Submission No 23 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 24; Pamela Curr, Asylum Seeker Resource Centre, Submission No 12 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 16 April 2010, 12–13. See also Michael Grewcock, ‘“Scum of the Earth”?: People-smuggling, Criminalisation and Refugees’ (2010) 19(3) *Human Rights Defender* 15; Lindsay Murdoch, ‘People-smuggling Laws Harsh on Poor Fishermen’, *The Sydney Morning Herald* (online), 15 April 2010 <<http://www.smh.com.au/national/peoplesmuggling-laws-harsh-on-poor-fishermen-20100404-rls5.html>>; Christine Jackman, ‘Caught in the Net’, *The Weekend Australian Magazine* (Sydney), 16 April 2011, 14.

84 Schloenhardt and Martin, above n 82, 126; see also J Hunyor, ‘Don’t Jail the Ferryman: The Sentencing of Indonesian People Movers’ (2001) 26 *Alternative Law Journal* 223, 225–6.

85 Schloenhardt and Martin, above n 82, 126. See also, Transcript of Proceedings, *R v Balu* (Supreme Court of the Northern Territory, SCC 21031840, Barr JA, 4 February 2011) 3; Transcript of Proceedings, *R v Suwandi* (Supreme Court of the Northern Territory, SCC 21037950, Riley CJ, 18 February 2011).

their families even if they risk being apprehended, arrested, and convicted in Australia.<sup>86</sup>

Closely connected to the lack of a clear profit motive by Mr Ahmadi is the argument presented by his defence counsel that he acted out of necessity and could rely on a defence. Similar suggestions have been made in several cases in which captains or crew of migrant smuggling vessels said that they only became involved in the venture to save people's lives and protect the smuggled migrants from persecution. For example, in the case of *Warnakulasuriya v The Queen*, the accused raised the sudden or extraordinary emergency defence under s 10.3 of the *Criminal Code* (Cth) to a charge under former s 232A of the *Migration Act 1958* (Cth) and the trial judge ruled that there was sufficient merit to leave the defence open to the jury.<sup>87</sup> Mr Warnakulasuriya was charged in relation to assisting the illegal entry to Australia of 31 Sri Lankan nationals. The evidence at trial was that he had collected money from the passengers and had used that money to purchase the vessel which was used to bring them to Australia.<sup>88</sup> Section 10.3 of the *Criminal Code* (Cth) was raised on the basis that Mr Warnakulasuriya rescued his passengers, most of them ethnic Tamils, from a situation of sudden or extraordinary emergency. Several passengers gave evidence at trial that they had feared for their safety as a result of violence that was occurring in Sri Lanka at the time.<sup>89</sup> Mr Warnakulasuriya also stated that he himself had been victim to a number of assaults in Sri Lanka and thus feared for his life when he left the country. Nevertheless, Mr Warnakulasuriya was found guilty and sentenced to five years imprisonment. In early 2012, however, he successfully appealed against his conviction on the ground that the trial judge misdirected the jury on what is a 'sudden' or 'extraordinary' emergency.<sup>90</sup>

## **B Other 'Organiser' Cases**

As mentioned earlier, the case of Hadi Ahmadi is one of a very small number of prosecutions involving migrant smugglers who organise and facilitate the journey from Indonesia or other countries to Australia but who are not themselves on the vessels when they reach Australian waters. Given the small number of cases, it is difficult, if not impossible, to make generalisations about these 'migrant smuggler masterminds'. But the following analysis of four other organiser cases reveals several significant similarities which shed some light into the way migrant smuggling to Australia is organised and operates. This analysis also calls into question the existence of a 'people smugglers' business model' to which these organisers adhere and which determines their operations. One important

86 Cf Josh Kelly, 'People Smugglers: Saviours or Criminals? A Report on 16 Convicted People Smugglers in Australia Between 2001–2006' (Report, Australian Lawyers for Human Rights, November 2010) <[www.alhr.asn.au/getfile.php?id=185](http://www.alhr.asn.au/getfile.php?id=185)>; *Cita v R* (2001) 120 A Crim R 307.

87 (2011) FLR 260 [25].

88 *Ibid* [17].

89 *Ibid* [22].

90 *Ibid* [122]–[124].

observation that crystallises is the fact that most of the organisers of migrant smuggling ventures came to Australia (or attempted to come here) as smuggled migrants and asylum seekers themselves and later decided to become involved in organising other ventures, often in order to bring their family or other people from their homeland to Australia. What makes Mr Ahmadi’s case different is that he appears to have played a less central role in organising migrant smuggling vessels than the main accused in the other organiser cases.

## 1 *Daoed*

Mr Khaleed Shnayf Daoed was convicted in Australia in June 2005 for his involvement in the organising of the SIEV X (a name assigned to the vessel by Australian authorities) in October 2001. This vessel left Indonesia carrying more than 300 smuggled migrants and capsized on the voyage to Australia, killing most of the passengers on board.<sup>91</sup> The other person implicated in this venture was Mr Abu Quassey who has been accused by several persons of organising migrant smuggling vessels in Indonesia in 2000–01 but who has not been charged or arrested for his activities. Like Hadi Ahmadi, Mr Daoed had arrived in Indonesia as a refugee after leaving Iraq for fear of persecution.

Mr Daoed was charged with two counts under former s 232A of the *Migration Act 1958* (Cth) and was later convicted of one count and acquitted of the other. It was alleged that Mr Daoed was involved ‘in all phases of a people smuggling scheme from the time when passengers were recruited to their embarkation for Australia.’<sup>92</sup> The Court found that he had ‘attend[ed] promotional meetings with prospective passengers’, negotiated prices and terms of travel, received payment, kept records of passengers and their payments, issued instructions to passengers, and assisted with transfers between accommodation, hotels and the vessel.<sup>93</sup>

On 14 July 2005, Mr Daoed was sentenced to nine years imprisonment with a non-parole period of four and a half years. In determining this sentence, Keane JA noted that SIEV X was so overcrowded with passengers when the boat left Indonesia that ‘once a passenger had been brought on board, he or she could not move about’.<sup>94</sup> These dangers would have been obvious to Mr Daoed. His Honour also noted that Mr Daoed, at least in part, was motivated by profit rather than by ‘altruistic’ intentions.<sup>95</sup>

## 2 *Al Jenabi*

A case very similar to Mr Ahmadi’s is that of Ali Hassan Abdolamir Al Jenabi who was allegedly responsible for organising four migrant smuggling vessels that

91 Cf Senate Select Committee for an Inquiry into a Certain Maritime Incident, Parliament of Australia, *A Certain Maritime Incident* (2002) 195–233.

92 *R v Daoed* (2005) 158 A Crim R 381, 386 [31] (Mackenzie J).

93 *Ibid* 382 [7].

94 *Ibid* 383 [10].

95 *Ibid* 383 [9].

brought a total of 370 asylum seekers, mostly Iraqi nationals, to Australia in 2000 and 2001.<sup>96</sup> Like Mr Ahmadi, Mr Al Jenabi was an Iraqi national who, after a failed attempt to be smuggled to Europe, escaped with his family from Iraq into neighbouring Iran where the family lived in a refugee camp for some time. After an application to obtain protection visas to migrate to Australia was rejected, he travelled to Malaysia and Indonesia with the assistance of migrant smugglers. In Indonesia, he made two unsuccessful attempts to join Australia-bound migrant smuggling vessels. As in the case of Mr Ahmadi, these vessels had been organised by Sayed Omeid. Mr Al Jenabi subsequently became involved in organising several vessels himself, partly to rival Mr Abu Quassey who was operating in Indonesia at the same time, but also to raise money to bring his family from Iran to Australia, which he eventually achieved.<sup>97</sup>

Following his extradition from Thailand to Australia, Mr Al Jenabi was charged with four counts of people smuggling under former s 232A of the *Migration Act 1958* (Cth). He pleaded guilty to — and was later convicted of — two counts. Although Mr Al Jenabi denied his role as a principal organiser, Mildren J of the Supreme Court of the Northern Territory found that he was heavily involved in the offending and had exercised a great deal of control over each operation.<sup>98</sup>

In sentencing Mr Al Jenabi, Mildren J took into account his personal circumstances and the flight and plight of his family, the fact that he, his father, and some of his brothers had been political prisoners in Iraq for several years, that they had to flee Iraq from persecution by the Hussein regime, and that the family had not found permanent protection in Iran. Mildren J found that Mr Al Jenabi was not solely motivated by profit, but also ‘by a desire to get his family to Australia’ while at the same time covering living expenses from his activities.<sup>99</sup> His Honour accepted that Mr Al Jenabi did what he could on occasion to assist others who were unable to pay him in full, and that he did show special consideration to families with children. Suggestions that his activities were largely based on humanitarian concerns for his family and fellow Iraqis were, however, dismissed. In this context, Mildren J noted that if Mr Al Jenabi had truly been motivated by humanitarian concerns, he would have assisted asylum seekers in need, and not just those who sought his assistance.<sup>100</sup> Mr Al Jenabi was sentenced to eight years imprisonment with a nonparole period of four years.<sup>101</sup>

On 15 June 2006, Mr Al Jenabi was released from prison and placed into immigration detention pending a decision on his application for a protection visa

96 These include SIEVs *Stonyville* (arrived at Ashmore Reef on 1 June 2000 carrying 36 passengers); *Outrim* (arrived at Ashmore Reef on 4 May 2001 carrying 65 passengers); *Bacala* (arrived at Ashmore Reef on 20 August 2001 carrying 225 passengers); and *Fruitgrove* (arrived at Ashmore Reef on 15 October 2000 carrying 33 passengers): *R v Al Jenabi* [2004] NTSC 44 (7 September 2004).

97 Transcript of Proceedings, *R v Al Jenabi* (Supreme Court of the Northern Territory, Mildren J, 21 September 2004).

98 Ibid.

99 *R v Al Jenabi* [2004] NTSC 44 (7 September 2004), cited in *R v Doaed* [2005] QCA 459 (McKenzie J).

100 Transcript of Proceedings, *R v Al Jenabi* (Supreme Court of the Northern Territory, Mildren J, 21 September 2004).

101 Ibid.

to remain in Australia with his family. Eighteen months later, on 17 January 2008, the Federal Magistrates Court issued an order for mandamus requiring the Minister to determine Mr Al Jenabi’s application. The Minister refused Mr Al Jenabi’s application on 7 February 2008 and released him on a bridging visa, pending removal from Australia.<sup>102</sup> As of 30 June 2012 Mr Al Jenabi still lives in Australia on a bridging visa.<sup>103</sup> A report by the Australian Human Rights Commission, released in 2011, found that the Commonwealth had breached Mr Al Jenabi’s right not to be subject to arbitrary detention by detaining him while his application was determined and recommended payment of compensation.<sup>104</sup> DIAC rejected the findings and argued that the detention was necessary while the Department worked to finalise his protection visa application, which was complicated because of his criminal history.<sup>105</sup>

### 3 Chaudhry

A case quite different from that of Messrs Ahmadi, Daoed, and Al Jenabi is that of Masood Ahmed Chaudhry, the brother of Mr Hassan Ayoub. Unlike the other organisers examined here, Mr Chaudhry was charged with two counts of people smuggling under former s 232A of the *Migration Act 1958* (Cth) in relation to only two smuggled migrants who arrived in Australia on SIEV *Nullaware* on 23 April 2001.

Evidence presented at his trial suggested that, working with his brother, Mr Chaudhry’s role in the migrant smuggling network was to arrange airline tickets in Pakistan to send people to Indonesia, where they were then met by others, including his brother, and sent to Australia by boat. It was alleged that Mr Chaudhry had been a ‘major player’ in a ‘sophisticated people smuggling operation’.<sup>106</sup> Unlike Mr Ahmadi, Mr Chaudhry, who is a Pakistani national, was not an asylum seeker but rather was involved in a number of business ventures in Japan, Thailand, and Cambodia, and he committed the migrant smuggling offences only for financial gain. On that basis, he was convicted in the District Court at Perth on 7 April 2006. An appeal against his conviction to the Supreme Court of Western Australia was unsuccessful.<sup>107</sup>

### 4 Seriban

Kurdish born Mehmet Seriban arrived from Indonesia at Ashmore Reef on 25 August 1995 on SIEV *Rosella*. He was subsequently placed in immigration detention and granted a temporary protection visa on 13 October 1995. He

102 Catherine Branson, ‘Mr Al Jenabi v Commonwealth of Australia (Department of Immigration and Citizenship)’ (Report No AusHRC 45, Australian Human Rights Commission, July 2011).

103 Jose Borghino, ‘The People Smuggler as Humane Hero, not a Villain’, *The Australian*, 30 June 2012, 24.

104 Branson, above n 102.

105 Ibid.

106 *Chaudhry v The Queen* [2007] WASCA 37 (19 February 2007) [5].

107 Ibid.

acquired Australian citizenship on 5 October 1998 and was issued an Australian passport two days later. He left Australia for Turkey on 10 October 1998 and did not return until his deportation from Indonesia on 25 March 2004.<sup>108</sup> Upon return to Turkey, he first became involved in organising and/or facilitating migrant smuggling operations when he advised some of his relatives who sought his assistance to come to Australia. He suggested they travel to Indonesia and, like himself before, then move by boat to Ashmore Reef. Mr Seriban then flew to Indonesia where he spent most of the following years.<sup>109</sup>

Mr Seriban has been accused of — and was later convicted of — a number of migrant smuggling operations between Indonesia and Australia. He was arrested in Indonesia sometime in early 2004 and deported to Sydney where he arrived on 25 March 2004 and, on the following day, was extradited to Darwin to face charges. On 27 January 2006 he was convicted of offences under former ss 232A and 233(1)(a) of the *Migration Act 1958* (Cth) in relation to the arrival of five vessels that arrived at Ashmore Reef between 30 October 1998 and 16 February 2000, carrying a total of 191 passengers mostly of Turkish background (with smaller numbers of Afghani and Iraqi nationals).<sup>110</sup>

During his time in gaol, Mr Seriban befriended Mr Petras who was kept in the same facility after his visa had been cancelled in 2004. Mehmet Seriban was released from custody on parole on 22 December 2006. Shortly thereafter he sought permission to travel to Turkey to visit his mother. The permission was granted, but after a short period in Turkey, Mr Seriban travelled to Malaysia and then Indonesia where, together with Mr Petras and at least two other men, he became involved in an operation that sought to import a commercial quantity of pseudoephedrine, a precursor chemical used in the production of amphetamine-type stimulants, from Indonesia to the Northern Territory. His parole was revoked in October 2007 and Mr Seriban was extradited to Australia in January 2008.<sup>111</sup>

Mr Seriban pleaded not guilty to this offence, but a two-week jury trial in Darwin in February and March 2009 returned a guilty verdict. On 16 March 2009, he was sentenced to a prison term of twelve years and three months, taking into account an additional two years and nine months he had to serve for the previous sentence.<sup>112</sup> A non-parole period of seven years and ten months was set.<sup>113</sup> He will be eligible for parole in January 2017.<sup>114</sup>

108 Transcript of Proceedings, *R v Mehmet Seriban* (Supreme Court of the Northern Territory, Angel CJ, 27 Jan 2006).

109 Robert Wainwright and Matthew Moore, 'Accused Smuggler Arrested at Airport', *The Age* (Melbourne) 26 March 2004, 3; Transcript of Proceedings, *R v Mehmet Seriban* (Supreme Court of the Northern Territory, Angel CJ, 27 Jan 2006).

110 DIMIA, *Fact Sheet 74a: Boat Arrival Details* (6 Oct 2004) <<http://www.immi.gov.au>>.

111 *R v Woods* (2009) 24 NTLR 77, 79 [7]–[8] (Riley J); Emily Watkins, 'Smuggler Jailed over NT Drug Plot', *Northern Territory News* (online), 17 March 2009 <[http://www.ntnews.com.au/article/2009/03/17/39565\\_ntnews.html](http://www.ntnews.com.au/article/2009/03/17/39565_ntnews.html)>.

112 *R v Woods* (2009) 24 NTLR 77, 80–1 [14].

113 *Ibid.*

114 *Ibid.*

## C Observations

While the separation between organisers, captain, and crew involved in migrant smuggling ventures may not be as clear-cut in reality as this analysis suggests, it is significant that the vast majority of prosecutions of migrant smuggling in Australia involve offenders with the most minor role in the so-called ‘people smugglers’ business model’. Cases involving the masterminds and organisers of this illicit trade are few and far between and, as has been shown, frequently involve persons who themselves were once asylum seekers and smuggled migrants fleeing persecution, hoping for a better life for themselves and their families in Australia. This phenomenon has recently been explored by Peter Munro, who found that several migrant smuggling networks in Indonesia were established by persons who arrived as smuggled migrants from Afghanistan, Iraq, Iran, Pakistan, or Sri Lanka who had sought refugee protection through UNHCR and had unsuccessfully attempted to move to Australia.<sup>115</sup> Similarly, in an interview about the conviction of Mr Ahmadi in 2010, Michael Grewcock noted that the people who assist asylum seekers in their passage to Australia ‘are often people who are travelling with them or who have protection needs of their own’.<sup>116</sup>

What distinguishes these organiser cases from those involving captains and crew is the higher level of oversight and control the organisers have and the networks within which they operate and through which they source, transfer, and disseminate their clients, ie the smuggled migrants. Their position and seniority also enables organisers to determine the fees charged, the prices paid for the vessels used, and they are able to gain substantial financial profits, regardless of whether or not they simultaneously act for humanitarian reasons and for a genuine desire to save their families and countrymen and women.

Mr Hadi Ahmadi, too, was touted as a migrant smuggling ‘kingpin’ at the time of his arrest.<sup>117</sup> The prosecution did, however, later concede that he was only a ‘third-rung’ smuggler and during sentencing Stavrianou DCJ recognised that he was a ‘middleman’ who did not operate on the ‘same level’ as ‘primary organiser’ Mr Sayed Omeid.<sup>118</sup> As mentioned previously, there were also doubts about whether Mr Ahmadi was motivated by profit and how much he actually gained from his migrant smuggling ventures.<sup>119</sup>

One of the many significant aspects of Mr Ahmadi’s case is the fact that he was the first person to be extradited from Indonesia to Australia for people smuggling charges; an offence that did not exist in Indonesian law at that time.

115 Peter Munro, ‘People Smuggling and the Resilience of Criminal Networks in Indonesia’ (2011) 6 *Journal of Policing, Intelligence and Counter Terrorism* 40, 42–3.

116 ABC, ‘Hadi Ahmadi Gets Minimum Four Years for People Smuggling’, *PM with Mark Colvin*, 24 September 2010 (David Weber) <<http://www.abc.net.au/pm/content/2010/s3021541.htm>>.

117 See, eg, Tom Allard, ‘People-Smuggling Kingpin Arrested’, *The Age* (Melbourne), 5 December 2008, 3; Tom Allard, ‘Alleged People Smuggler Handed Over to Australia’, *The Age* (Melbourne), 27 May 2009, 3; Debbie Guest, ‘Smuggling Accused to Ask for Aid’, *The Australian*, 28 May 2009, 3.

118 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3783.

119 See, eg, Guest, ‘Smuggler Drops Bid to Stay’, above n 74.



When the Indonesian President approved the extradition request, the then Prime Minister of Australia, Mr Kevin Rudd, welcomed the news as a ‘very welcome development in the fight against people smuggling ... further demonstrat[ing] the close cooperation between Australia and Indonesia in the fight against people smuggling’.<sup>120</sup> In later cases, however, the Australian Government faced further difficulties in gaining extradition from Indonesia and the extradition of at least three major migrant smugglers remained unsuccessful. Indeed, according to a news report dated 10 June 2012, since Hadi Ahmadi there have been no further extraditions for people smuggling from Indonesia to Australia.<sup>121</sup> Instead, in May 2012 Indonesian authorities deported Mr Sajjad Hussain Noor to Pakistan despite an extradition request from Australia. Mr Noor is wanted in Australia for his involvement in smuggling a group of Afghan and Iranian nationals to Australia, but Indonesian authorities ultimately considered the case against Mr Noor to be too weak.<sup>122</sup> Similarly, alleged migrant smuggler Mr Zamin Ali, also known as Haji Sakhi, was returned from Indonesia to Pakistan in January 2012 despite accusations that he had been involved in migrant smuggling activities in Indonesia for 10 years. Australia withdrew its extradition request after the Commonwealth Director of Public Prosecutions advised that there was little prospect of prosecuting him in Australia.<sup>123</sup> Mr Sayed Abbas Azad, accused of organising the arrival of 103 smuggled migrants on board SIEV 260, which was apprehended near Christmas Island on 11 August 2011, remains in custody in Indonesia despite efforts to extradite him to Australia.<sup>124</sup>

#### **D People Smuggler or Refugee Samaritan?**

The arguments presented by Mr Ahmadi and his defence team — that he acted for humanitarian reasons to help his countrymen and women, and that financial profit was not his primary motive — are not unique to this case and have been used and explored in a number of recent people smuggling trials in Australia. In the present case, Mr Ahmadi specifically ‘denied that anything he had done was for the purpose of working with people smugglers’.<sup>125</sup> He also claimed that he had assisted the passengers to Australia out of a sense of ‘religious humanitarian duty’,<sup>126</sup> and that he felt that because of his father’s religious teachings it was his obligation to look after anyone in need.<sup>127</sup>

120 Kevin Rudd, ‘Extradition of Hadi Ahmadi’ (Media Release, 21 April 2009) <<http://pandora.nla.gov.au/pan/79983/20091030-1529/www.pm.gov.au/node/5216.html>>.

121 Natalie O’Brien, ‘AFP’s Links to People Smugglers Queried’, *The Age* (online), 10 June 2012, <<http://www.theage.com.au/national/afps-links-to-people-smugglers-queried-20120609-2030v.html>>.

122 Peter Alford, ‘Jakarta Smuggler Suspect Goes Free’, *The Australian*, 1 June 2012, 3; Peter Alford, ‘Second Smuggling Network Leader Arrested’, *The Australian*, 19 October 2011, 1.

123 Peter Alford and Paul Maley, ‘“Smuggler” Nabbed at Request of A-G’, *The Australian*, 12 January 2012, 2.

124 Alford, ‘Jakarta Smuggler Suspect Goes Free’, above n 122; Alford, ‘Second Smuggling Network Leader Arrested’, above n 122.

125 *Ahmadi v The Queen* (2011) 254 FLR 174, 181 [43].

126 *Ibid* 176 [14].

127 *Ibid* 181 [43].

Australian criminal law, however, provides no concession, no element, and no defence that differentiates between those acting as unscrupulous smugglers and those motivated by humanitarian reasons. Other research papers have also noted that:

Australia’s laws are capable of — and possibly designed to — create liability for those who may smuggle migrants for humanitarian reasons. But liability does not end there. The offences may also criminalise migrants who help each other to flee to Australia.<sup>128</sup>

The Immigration Advice and Rights Centre, a non-governmental organisation, cites a recent example where a wife and child came to Australia by boat, but the husband remained in Malaysia to repay the debt owed to smugglers. It was submitted that the husband could be liable for the offence of supporting people smuggling and that, should he seek to join his family in Australia, his entry could be denied on character grounds.<sup>129</sup>

Supporting the arguments presented by the defence in Mr Ahmadi’s case is the fact that after extensive and thorough assessment of their claims, the vast majority of persons smuggled to Australia by boat have been — and continue to be — recognised as genuine refugees. To this end, defence counsel also likened Mr Ahmadi to those persons who helped Jewish refugees escape from Nazi Germany.<sup>130</sup> Similar comparisons have been drawn in relation to Mr Al Jenabi’s case.<sup>131</sup> Figures provided by Project SafeCom Inc, an Australian human rights advocacy group, show that of the 196 persons who arrived on SIEV *Flinders* in March 2001, 189 or 96.5 per cent were later granted refugee status in Australia. Similarly, of the 359 passengers onboard SIEV *Conara*, 343 persons or 95.5 per cent were recognised as refugees.<sup>132</sup> During Mr Ahmadi’s sentencing hearing, Stavrianou DCJ, with whom the prosecution agreed on this point, also confirmed that almost all of the passengers brought to Australia by Mr Ahmadi were able to gain protection visas and later apply for citizenship.<sup>133</sup>

The moral culpability of migrant smugglers who assist asylum seekers in their quest to flee from persecution to safety was also questioned in the case of *R v Nafi*, a crew-member who was prosecuted in the Supreme Court of the Northern

128 Andreas Schloenhardt, ‘Migrant Smuggling and Organised Crime in Australia’ (Research Paper, The University of Queensland, September 2011) 20 <<http://www.law.uq.edu.au/migrantsmuggling-reports>>.

129 Immigration Advice and Rights Centre, Submission No 7 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Anti-People Smuggling and Other Measures Bill 2010*, 14 April 2010, 3.

130 David Webber, *People Smuggler’s Role like ‘Helping Jews Escape’* (1 June 2010) ABC News <<http://www.abc.net.au/news/stories/2010/06/01/2915420.htm>>.

131 See, eg, Robin De Crespigny, *The People Smuggler: The True Story of Ali Al Jenabi, the ‘Oskar Schindler of Asia’* (Penguin, 2012).

132 Project SafeCom Inc, *The Case of Hadi Ahmadi: He’s Called a ‘People Smuggler’, but is He?* (2010) <<http://www.safecom.org.au/ahmadi-case.htm>>. The variation in these figures compared to those provided by the court documents is because the Courts’ figures included crew. For example, the number of passengers on board SIEV *Flinders* was 196 plus 2 captain and crew, and on board SIEV *Conara* was 359 plus 5 crew.

133 Transcript of Proceedings, *R v Ahmadi* (District Court of Western Australia, 12/2010, Stavrianou DCJ, 24 September 2010) 3778.

Territory. In this case, Kelly J held that '[i]t cannot be said that, apart from the existence of that law, there is any moral culpability in helping to transport willing passengers to a place where they want to go.'<sup>134</sup>

While it is beyond the scope of this article to investigate or question the legitimacy of Mr Ahmadi's claims and motives, it is noteworthy that the lack of any concession or exemption for 'humanitarian migrant smuggling' in Australian law is at odds with Australia's international obligation under the United Nations ('UN') *Protocol against the Smuggling of Migrants by Land, Sea and Air*.<sup>135</sup> Article 3(a) of the Protocol defines the 'smuggling of migrants' as 'the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.' The crucial element here is the 'financial or other material benefit' which reflects the profit motive that is characteristic of organised crime generally. A *Model Law* developed by the UN Office on Drugs and Crime ('UNODC') to facilitate the domestic implementation of the Protocol further notes that:

The reference in this definition to 'a financial or material benefit' was included in order to emphasize that the intention was to include the activities of organized criminal groups acting for profit, but to exclude the activities of those who provided support to migrants for humanitarian reasons or on the basis of close family ties.<sup>136</sup>

International law thus clearly constructs and defines migrant smuggling as a form of organised crime committed for profit. Specifically, international law has no application in situations that appear to be migrant smuggling but that lack the constituent purpose of financial or other material benefit. Australian law makes no such exemption and thus criminalises persons who act merely to save others and without any profit motive.

## V CONCLUSION

The case of Mr Ahmadi offers insight into the *modi operandi* of migrant smuggling to Australia and into the profile and motivation of the persons involved in this crime. The topic of migrant smuggling is one that has dominated public debate and policy in Australia for over a decade, but despite many years of contentious discussion, fiery rhetoric, controversial policy announcements, and legislative amendments there is no end in sight to the irregular migration of asylum seekers to Australia.

This article sheds some light into the complexities of migrant smuggling and the persons involved as organisers, facilitators, and as subjects of this crime. These

<sup>134</sup> Transcript of Proceedings, *R v Nafi* (Unreported, Supreme Court of the Northern Territory, SCC 21102367, Kelly J, 19 May 2011) 5.

<sup>135</sup> Opened for signature 15 December 2000, 2241 UNTS 507 (entered into force 28 January 2004).

<sup>136</sup> UNODC, *Model Law against the Smuggling of Migrants* (2010) 27.

complexities, in turn, explain why there are no simple solutions to a phenomenon that spans across continents and involves several thousand people seeking a better life abroad. Consequently, simplistic suggestions to ‘stop the boats’, turn migrant smuggling vessels back to Indonesia, and ‘break the people smugglers’ business model’ are unlikely to offer long-term solutions and may indeed prove to be counterproductive.

It has been shown that Mr Ahmadi’s case is unique in that he was not a captain or crewmember aboard a migrant smuggling vessel when it arrived in Australia, as is the case in the vast majority of people smuggling prosecutions in this country. His is one of a very small number of cases involving organisers of a migrant smuggling venture who facilitate the journey of several vessels carrying asylum seekers from Indonesia to Australia. To that end, the arrest, extradition, and prosecution of Mr Ahmadi marks a milestone in Australia’s efforts to combat migrant smuggling. Indeed, if prosecutions are to have any impact on migrant smuggling ventures to Australia, the focus must shift away from prosecuting those at the end of the chain to those higher up in the organisation who arrange for, and profit from, these ventures. The time, money and effort involved in prosecuting and gaoling hundreds of Indonesian fishermen who operate merely as captain or crew would be better invested in investigating, extraditing, and prosecuting organisers such as Mr Ahmadi who put the captains and crew to the task in the first place and who place the lives and safety of many desperate people in jeopardy.

On the other hand, the case of Mr Ahmadi demonstrates that there is a faint and blurry line between migrant smugglers who arrange the illegal voyage of smuggled migrants for profit, and those who seek to assist asylum seekers fleeing from persecution by trying to reach a place of safety. Unlike the framework established in international law, there is, at present, no recognition anywhere in Australian law that some migrant smugglers may indeed act with the best humanitarian motives and may seek no financial gain from their activities.

It is for this reason that Mr Ahmadi’s case not only casts doubt on the heinousness of the migrant smuggling trade but also raises questions about the federal offences used to prosecute people smugglers in Australia and their compliance with international law. Moreover, the case inspires critical thinking about the availability of defences, especially necessity, for persons who act solely in the best interest of asylum seekers by removing them from imminent peril to a place where they are recognised as refugees and offered protection.

It is hoped that Mr Ahmadi’s case and this analysis offer fresh and critical perspectives about the smuggling of migrants to Australia and inspires policy makers, legislators, practitioners, researchers, and the general public to work towards more durable, fair, and effective solutions to this phenomenon.